

No. 37153-7-II

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

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY W DEPUTY

Donald R. Earl (appellant)

v.

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

APPELLANT'S REPLY BRIEF

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1. APPEALABILITY

A large portion of the response by Menu Foods and Kroger appears to address a settled matter. The appealability question was first raised by this court in a letter dated January 8, 2008. All parties were allowed time to respond, and did in fact respond. This court rejected the Defendants' arguments on January 25, 2008, which are the same arguments the Defendants attempt to re-raise 54 days later in an untimely filed Response. If the Defendants believed the Commissioner's decision was in error, the procedure under RAP 17.7 is to file a motion to modify the ruling within 30 days of the decision. The Defendants did not do so.

Black's Law Dictionary defines "dismissal with prejudice" as "barring the right to bring or maintain an action on the same claim or cause"

All other arguments aside, it is indisputable Earl's claims 4 through 7 in the original complaint for failure to warn, defect in manufacture, breach of express warranty and breach of implied warranty are statutory causes of action under the Washington Product Liability Act. It is also indisputable that case law allows negligence, which is Count 3 in the original complaint, as a product liability cause of action (CP 13-19). In, *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, P.2d 1054, the

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court ruled: "In a product liability claim, liability can be predicated on negligence"

The Defendants later argued those causes of action had been dismissed with prejudice. It should be noted that nothing before the trial court on October 12, 2007, or in any order relevant to that proceeding, made any reference to dismissing claims against Kroger (CP 56-57). It was at the December 21, 2007 hearing the trial court adopted the view it was in no way bound to honor oral rulings on the record, that all claims had been dismissed with prejudice, and then signed an order barring Earl from pleading any previously dismissed causes of action against either Defendant. The Defendants' argument Earl could have filed a second amended complaint under those circumstances is preposterous. The trial court is already on the record as having refused to honor such arrangements, after Earl filed his first amended complaint according to the trial court's instructions. As of the December 21, 2007 hearing, all claims and causes of action, against all defendants, had been dismissed by the trial court with prejudice, making the decision appealable as a matter of right, on all issues interlocutory with the decisions entered on that date.

2. FRAUDULENT CONCEALMENT

The Defendants on page 26 of the response address the issue of the

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fraudulent concealment claim. There are a number of issues here, which all add up to manifest abuse of discretion. First, Earl asked to be allowed to re-plead the fraudulent concealment claim in an amended complaint. Our courts have, in general, automatically viewed denial of such a request as abuse of discretion.

Second, the trial court based that dismissal on the unsupported assumption Earl did not possess sufficient facts to support a fraud claim. Even assuming the original complaint was deficient in that regard, which is questionable, facts are something Earl has in abundance. Earl would not have included a claim of fraud in the complaint if it were not for the fact the sum result of his research indicates a claim of fraud is warranted. The problem isn't a matter not of having enough facts to support the claim, it's a matter of trying to decide which facts to exclude to keep a claim to a manageable length.

On page 30 of Defendants' Response, the Defendants take issue with the fact it would be necessary to amend the complaint at a later date to reformulate the fraud claim. The situation could not be otherwise. The trial court ordered Earl to file an amended complaint within 10 days, and threatened Earl with sanctions if the fraud claim was included.

Some facts which may be alleged with certainty:

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Menu Foods had profits of \$13 million in 2004. All its profits were distributed to shareholders, leaving it with no cash cushion going into 2005. As a result of rising costs, Menu Foods suffered massive losses on the order of \$55 million in 2005. Menu Foods was in serious financial trouble. With huge losses and no cash cushion, Menu Foods was highly motivated to return the company to profitability any way it could. With continuing, mounting price pressure on its raw materials going into 2006, Menu Foods miraculously turned the previous year's \$55 million loss into a \$6 million profit. Nothing in Menu Foods' financial filings fully accounts for what amounts to nearly a 20% increase in profit margins, in what Menu Foods readily concedes was under unusually bearish market conditions.

One sample of pet food Earl had tested showed the food had been spiked with cyanuric acid, a cheap source of non-protein nitrogen, which may be used to falsify apparent protein content. Using cyanuric acid, the entire protein content in a can of cat food could be faked for less than a cent. No sources of gluten or grain content appear on the product label list of ingredients.

According to Menu Foods' financial filings, Menu Foods customers cut orders for poisoned pet food by a staggering 56% in the fourth quarter of 2006, months before the recall was announced. (CP 5-6)

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Menu Foods made numerous, and ever changing, public statements related to the March 2007 recall, which cumulatively amounted to an ongoing effort to conceal information from the public. Menu Foods claims it bought massive quantities of wheat flour, with visible chunks of melamine in it, without suspicion it might not be real wheat gluten. The idea a prudent, sophisticated buyer would fail to examine its purchases is not plausible.

Menu Foods claimed no one in the pet food industry could have guessed how melamine ended up in pet food. In Asia, in 2004, there was a massive pet food recall, involving US companies, resulting from pet food contaminated with melamine. The recall eventually resulted in a class action filed in US District Court. It is impossible to believe professionals in the pet food industry were unaware of the situation.

Menu Foods publicly blamed pet deaths on melamine in gravy style pet food, while conducting a silent and unofficial recall of pet food such as that purchased by Earl, which contained cyanuric acid and acetaminophen.

In sworn testimony before Congress, Menu Foods admitted the recall was forced on it due to pressure from Iams, resulting from a flood of consumer complaints. Early on, Menu Foods claimed the recall, which it estimated would cost the company on the order of \$50 million, was the

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result of two complaints, out of an "abundance of caution". Not only is that not plausible, Menu Foods' subsequent statements before Congress show it was knowingly false.

Available evidence indicates in the absence of pressure from Iams, and in spite of a known clear and present danger to pets, Menu Foods would not have announced a recall.

Statements made to the media by the FDA acknowledges many of the consumer complaints involved pet food not subject to the recall.

As stated in Earl's complaints, melamine is known to be virtually nontoxic (CP 5), and alone could not possibly account for pet deaths estimated to be on the order of 250,000 pets. This fact was recently confirmed in a study conducted by UC Davis, which showed when cyanuric acid was added to pet food contaminated with melamine, the combination was extraordinarily toxic to cats, while either alone was nontoxic.

The newly discovered evidence Earl provided the trial court on reconsideration was, as Earl argued in the motion, an important puzzle piece in the body of evidence already in Earl's possession. It shows that in known cases of pet food poisonings, the toxin responsible was other than melamine, or in addition to melamine. The analysis of the food was performed on a composite of three varieties of pet food, manufactured by

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Menu Foods, which was subject to the recall, showing at least one of the three varieties was contaminated with acetaminophen. It is worth noting here that in documents submitted to three different courts, which purport to be a complete list of all recalled pet food, one of the three samples making up the composite testing positive for acetaminophen is not included on the list supplied by Menu Foods.

The pet owner, who supplied the pet food samples tested, offered to make the samples available to Menu Foods for its own testing. Menu Foods did not accept the offer, instead substituting library samples of unknown provenance. When these library samples were sent to another lab, a lab with no known experience in testing pet food for acetaminophen, Menu Foods announced there was no cause for concern related to acetaminophen contamination.

The recalled samples, which tested positive for acetaminophen, were manufactured 6 months after the acetaminophen positive sample Earl had tested, indicating the problem existed for a substantial period of time.

According to statements released by Menu Foods, Menu Foods is currently under investigation by the US Attorney's Office for criminal violations of the Food, Drug and Cosmetics Act. Manufacturers are largely immune from criminal prosecution under the Act except in situations where

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violations of the act involve concealment from the public of known issues.

The above is a small sampling of the evidence Earl has available to support a claim for fraudulent concealment. Furthermore, Washington law recognizes fraud, by its nature, is an act of concealment, which may not always be immediately discovered. The trial court's ruling to dismiss the claim over perceived pleading defects, with prejudice, places the trial court in the position of a seer of future events. Under the provisions of RCW 4.16.080(4):

"An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud"

The trial court's refusal to modify the ruling to without prejudice was contrary to law and an abuse of the trial court's discretion.

3. SANCTIONS AND NOTICE

On page 35 of the Response, the Defendants raise the question of informal notice of intent to seek sanctions for Rule 11 violations, as previously raised before the trial court. These issues were addressed on pages 4-6 of Earl's Supplemental Brief (CP 214-216). Briefly, the opinion expressed in Biggs v. Vail does not create a loophole exempting Rule 11 violations from sanctions, but provides for a trial court to give consideration of the timeliness of notice to the opposing party in the course

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of formulating appropriate sanctions. Additionally, the Federal rules differ materially from Washington State rules on that point, and have been amended to create a formal notification process since the decision in Biggs v. Vail.

4. TIMELY APPEAL OF FRAUDULENT CONCEALMENT CLAIM

On page 15 of the Response, the Defendants raise the question if appeal of the trial court's November 9, 2007 order denying reconsideration of the fraud claim was timely filed. First, Earl was not entitled to appeal as a matter of right at that time, as not all issues against all defendants had been decided. Second, scheduling irregularities of the trial court ran out the 30 day clock. The judge assigned to the case, was not scheduled to hear civil motions until three weeks after the November 9, 2007 hearing. The hearing which effectively discontinued the action was scheduled to be heard on December 7, 2007, still within 30 days of notice of entry of the order. Late in the afternoon on December 6, 2007, Earl received a call from the court to notify him an administrative continuance was in effect, as a result of the judge being unavailable to hear civil motions until December 21, 2007. RAP 18.8 allows for the extension of time in extraordinary circumstances. These circumstances are extraordinary. With the trial court's apparent assurance in the November 9, 2007 order that Earl's remaining

claims would be allowed to proceed apace, against both Defendants, with potential for full recovery of damages, it seemed imprudent and unnecessary to engage in the time consuming process of review if it could reasonably be avoided. Furthermore, Earl reasonably believed any potentially adverse decision, which would make recourse to review necessary, would occur well within the 30 day time frame. That this was not the case was completely outside Earl's control. The judge assigned to the case was unavailable to hear civil motions for 6 weeks. Third, as stated previously, the decisions are interlocutory in nature and are properly before this court on review as being part and parcel of the decisions which effectively determined the action.

5. IMPLIED WARRANTY

Menu Foods places undue reliance on *Thongchoom v. Graco Children's Prods., Inc.*, 117 Win. App. 299, 307-308, P. 3d 214. A reading of that case shows the suit was clearly without merit, and the defense was based on factors largely outside interpretations of implied warranty claims under the Washington Product Liability Act. The application of commercial contract law to consumer products was tacked onto the decision almost as an afterthought, without discussion. That decision is in conflict with relevant precedent set in other cases, as well as the plain language of

applicable statutes under both Washington and Federal law.

In pertinent part, 15 USC, § 2310 reads as follows:

"(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims (1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a **supplier**, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief; (A) in any court of competent jurisdiction in any State or the District of Columbia;" (emphasis added)

A **supplier** is defined under 15 USC, § 2301 as:

"(4) The term "**supplier**" means any person engaged in the business of making a consumer product directly **or indirectly** available to consumers." (emphasis added)

The plain language of the US Code clearly bars a privity defense in consumer product actions by the inclusion of the "indirectly available" provision.

Under 15 USC, § 2311, state laws do not supercede the Federal law except to the extent state law: "affords protection to consumers greater than the requirements of this chapter"

The sole application of RCW 62A to the Washington Product Liability Act is on product **conformance**. RCW 7.72.030(2)(c), in pertinent part reads:

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

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The Washington Product Liability Act creates a free standing cause of action against a manufacturer for breach of implied warranty on consumer products, which may be maintained independently of breach of express warranty claims. The plain language of the Washington Product Liability Act is irrefutably clear on that point. If an implied warranty exists, and a product does not conform to the implied warranty, the manufacturer is liable, and, under certain circumstances, as defined under the Washington Product Liability Act, a retailer is equally liable.

An implied warranty of fitness for a particular purposes is created under RCW 62A.2-315 as follows:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

Under RCW 62A.2-103(d) a:

""Seller" means a person who sells or contracts to sell goods."

Menu Foods sells pet food and has reason to know buyers rely on Menu Foods' skill to furnish suitable goods. An implied warranty exists.

Under RCW 7.72.010(1) a:

"Product seller" means any person or entity that is engaged in the business of selling products, **whether the sale is for resale**, or for use or

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consumption. The term includes a **manufacturer**, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products." (emphasis added)

Poisoned pet food is not fit for its intended purpose. Poisoned pet food does not **conform** to an implied warranty of fitness for its intended use under the provisions of RCW 62A.2-315. The trial court abused its discretion in dismissing Earl's implied warranty claim against Menu Foods, as the decision is contrary to both State and Federal law.

Washington's Uniform Commercial Code does not recognize any cause of action against a manufacturer not in privity with a buyer. This action is NOT brought under the provisions of the Uniform Commercial Code. An attempt to apply the Uniform Commercial Code to product liability actions would defeat the primary legislative intent of consumer protection statutes, which is to recognize manufacturers have a duty to the consuming public to only offer safe products, and that manufacturers are liable to consumers when they fail in that duty.

6. EXPRESS WARRANTY

Menu Foods argues at page 40 of the response that Earl's factual contention Kroger's marketing of pet food manufactured by Menu Foods under its own brand, somehow relieves Menu Foods of express warranty claims. It does not. It is the factual contention required under RCW

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7.72.040(2)(e) to bring a product liability action against the Kroger defendant. Under Washington State law, the product seller has the same liability as a manufacturer if the product seller markets the product under its own trade name. In pertinent part, the statute reads:

"(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if... (e) The product was marketed under a trade name or brand name of the product seller."

Under the law, all claims against Menu Foods are shared jointly by Kroger. Earl cites the warranties made, and attributes the warranties to both defendants. The single defense Menu Foods would have against the claim is a showing it does not warrant the pet food, and that all statements as to quality, ingredients and testing are solely attributable to Kroger. Menu Foods has most carefully avoided that defense, presumably because that defense is not available to Menu Foods.

15 USC, § 2302 (a)(1) of the US Code requires warrantors to provide: "The clear identification of the names and addresses of the warrantors." However, the law makes an exception for products costing less than \$5, such as the pet food in this case. The exception reads: "The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than \$5."

Under 21 USC, Chapter 9, § 343(e)(1), another loophole is created,

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which further relieves manufacturers from being named on a product label. The US Code requires the label to show one of the following: "the name and place of business of the manufacturer, packer, or distributor". By naming a distributor, the manufacturer may avoid being named on the product label, which is the case here, and is standard practice throughout the US on consumer products. The two code provisions combine to create a loophole where manufacturer warranties, although clearly stated, do not identify the manufacturer making the warranty. Menu Foods does not dispute it warrants the products in question, but is rather playing a game of "blindman's bluff" in an attempt to see the claim dismissed prior to discovery.

In *Gammon v. Clark Equipment*, 38 Wn. App. 274, 686 P.2d 1102, the court writes:

"The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *UNITED STATES v. PROCTER & GAMBLE CO.*, 356 U.S. 677, 682, 2 L. Ed. 2d 1077, 78 S. Ct. 983 (1958). The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *HICKMAN v. TAYLOR*, 329 U.S. 495, 501, 91 L. Ed. 451, 67 S. Ct. 385 (1947)."

In *Tellevick v. 31641 W. Rutherford St.*, 102 Wn. 2d 68, the court ruled:

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"A trial court's refusal to permit time for discovery is reviewed under the abuse of discretion standard. Discretion is abused when the trial court does not allow the nonmoving party adequate opportunity to acquire discovery which could raise a material factual issue."

Earl properly claims the product is warranted, cites the warranties, properly attributes the warranties jointly to both defendants - as is allowed under Washington law - and claims the warranties were breached. The trial court's conclusion an express warranty claim may only be assessed against Kroger is arbitrary, and is not based on fact or law. Menu Foods does not dispute it warrants the product, and the fact Menu Foods warrants the product is not privileged. As warrantor disclosure is in fact required on more expensive items, it is within permissible discovery.

Here again, the trial court places itself in the fortune telling business in attempting to second guess what may eventually be proved at trial. On a CR 12(b)(6) motion, a trial court's discretion is severely limited to determining if a bar to relief exists. The determination must be based on the presumption factual allegations in the complaint are true, or that no set of facts exist to support the claim, or that an insuperable bar to relief exists as a matter of law. The trial court did not have a factual or legal basis on which to determine Menu Foods does not warrant the pet food, nor did Menu Foods provide such a basis. The burden of proof was on Menu Foods in making the motion and all Menu Foods offered in defense of the

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3 motion was false statements and frivolous rhetoric about labels. (12/21/07
4 RP pages 9-14)

5 At the top of page 15 (RP 12/21/07) the trial court concluded,
6 "Menu Foods didn't make the warranty. They didn't label it."

7 There was no basis for that conclusion. Menu Foods refers to itself
8 as a "private label" manufacturer. The reference is to private brands or
9 trademarks owned by other entities, as opposed to using its own brand or
10 trademark on the products it manufactures. It doesn't have anything to do
11 with paper stickers on the products.

12 **7. CITATION VIOLATIONS UNDER GR 14.1(b)**

13 On page 34 of the Response, the Defendants cite Ryan v. Shawnee
14 Mission U.S.D. 512, 416 F. Supp. 2d 1090 1094 n.2 (D. Kan. 2006), at
15 page 30, Bly-Magee v. California, 236 F. 3d 1014 (9th Cir. 2001) and on
16 page 23, Laisure-Radke v. Par Pharm, Inc., 426 F. Supp. 2d 1163 (W.D.
17 Wash. 2006), all in violation of GR 14.1(b). Menu Foods counsel, Stelman
18 Keehnel, has been lawless through the course of litigation in regard to
19 citing unpublished opinion in violation of the rule. Earl has sent Mr.
20 Keehnel repeated informal requests by e-mail to cease the practice, and
21 formally objected to such citations on the record (CP 211). The cases
22 mentioned above are non-precedential opinion from 2006 or earlier.

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Citation to non-precedential opinion issued prior to January 1, 2007 is prohibited under the Federal Rules.

Federal Rule of Appellate Procedure 32.1(a) provides as follows:

"(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as unpublished, not for publication, non-precedential, not precedent, or the like; and (ii) issued on or after January 1, 2007."

GR 14.1(b) provides as follows:

"A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, *only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.* The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." (emphasis added)

In addition to the fact the Defendants did not provide the required copies, these citations are prohibited under Washington State Court Rules. Mr. Keehnel's scofflaw approach to litigation should not be tolerated and the improperly cited opinions should not be considered. There is an abundance of unpublished opinion Earl could cite in support of his case. It is unreasonable Earl should be disadvantaged through abiding by the rules, where the opposing parties operate as if the rules don't exist.

8. CIVIL RULE 12(g) VIOLATIONS AND SANCTIONS

On page 11 of the Response, the Defendants cite the trial

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court's opinion on separate statements. At page 15 of the December 21, 2007 hearing transcript, the trial court ruled:

"I'm going to hand you a copy of 7.72.030 that shows... the only basis of liability for Menu Foods. And, I'll hand you 7.72.040 that shows the only basis of liability possible for Kroger.... Kroger is not the same as Menu Foods."

As RCW 7.72.040(2)(e), which is cited in both the complaint and amended complaint (CP 8 and 67), causes Kroger to have the same liability as a manufacturer through using its own brand/trademark on the product, there is no logical reason to make a distinction between the two. The trial court erred in concluding the defendants are not subject to the same causes of action under the law. This is essentially the only basis the Defendants offered as an excuse to ask for more definite statements.

The Defendants argue the filing of an amended complaint opens it up to fresh CR 12 motions. The only authority the Defendants offer in support of the argument is non-precedential, without so much as a copy of the decision on which the context could be determined. While the argument new causes of action may be subject to new Rule 12 motions may have merit, it certainly does not in regard to existing issues. CR 12(g) provides as follows:

"Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and *then*

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

In French v. Gabriel 57 Wn. App. 217, 788 P.2d 569, the court states: "the primary purpose of CR 12(g) is to prevent successive rounds of pretrial motions"

Additional guidance is provided in Kahclamat v. Yakima County 31 Wn. App. 464, 643 P.2d 453, which states:

"When, however, a rule 12(b) defense or objection is raised by motion prior to pleading or in conjunction with the responsive pleading, as here, a failure to join all other 12(b) defenses or objections which were then available to the defendant results in a waiver of the omitted defenses or objections."

"On the face of it, if due diligence had been used, the grounds for the... motion would have been as obvious to the defendant at the time it was served as it was the following year when the motion was made. Consequently, defendant waived its objections... when it did not join those objections with its motion to dismiss."

"The civil rules of procedure were not designed to permit a defendant to make repeated motions attacking a pleading..."

In Butler v. Joy, 116 Wn. App. 291, the court ruled: "When a motion under CR 12 is made, all defenses *then available* to the movant must be joined in the motion." (emphasis added)

In Lybbert v. Grant County, 141 Wn.2d 29, the court discusses the

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doctrine of waiver as follows:

"We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1. If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised."

"We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed."

The Defendants' argument it is procedurally proper to repeatedly attack existing issues in an endless merry-go-round of Rule 12 motions, in order to delay, and force one amended complaint after another, is clearly without merit. Had the trial court not condoned such abuse, and instead issued the requested sanctions, this matter would be either nearly ready for trial, or the trial completed, instead of being bogged down in burdensome litigation; litigation which would have been avoided through discretion exercised in a fair, just and reasonable manner, consistent with rule and law.

Dated: March 31, 2008.
Respectfully submitted by:



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

Dated: March 31, 2008
Respectfully submitted by:

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

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