

NO. 41890-8-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DONALD R. EARL,

Plaintiff-Appellant,

vs.

MENU FOODS INCOME FUND and THE KROGER CO.,

Defendants-Respondents.

BRIEF OF RESPONDENTS
MENU FOODS INCOME FUND AND THE KROGER CO.

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I. INTRODUCTION

Defendants-Respondents Menu Foods Income Fund (“Menu Foods”) and The Kroger Co. (“Kroger”) (collectively, “Respondents”) respectfully submit this Respondents’ Brief. Respondents request that the Court affirm the challenged rulings of the Superior Court and affirm the Superior Court’s judgment in favor of Respondents and against Plaintiff-Appellant Donald R. Earl.

Mr. Earl filed this product liability lawsuit in Jefferson County Superior Court against Menu Foods and Kroger in July 2007, claiming that his cat died as a result of eating pet food manufactured by Menu Foods and marketed and sold under Kroger’s private label, which pet food Mr. Earl alleged was contaminated with acetaminophen and cyanuric acid. In January 2011, three-and-a-half years later, the Superior Court granted summary judgment in favor of Menu Foods and Kroger on all of Mr. Earl’s claims in this lawsuit, on the ground that Mr. Earl had failed to come forward with any *admissible evidence* to create a genuine issue of material fact as to whether the pet food that Mr. Earl purchased could have caused his pet’s death. In addition, the Superior Court also ruled, in the alternative, that even if Mr. Earl had presented some admissible evidence of causation to survive summary judgment, Mr. Earl’s damages should he prevail at trial would be limited to the market value of his pet — \$100.

Mr. Earl now appeals the Superior Court's summary judgment rulings, as well as a litany of other orders entered by the Superior Court (many of which were already the subject of one or more of Mr. Earl's five unsuccessful attempts to seek interlocutory appellate review in this case from this Court and the Supreme Court).

As summarized below and explained at greater length in the Argument section of this brief, each of Mr. Earl's thirteen assignments of error is meritless. This Court should affirm the Superior Court's judgment in its entirety.

Dismissal of Warranty Claims against Menu Foods
(Assignment of Error 1). Mr. Earl argues that the Superior Court erred by dismissing his breach of warranty claims against Menu Foods, pursuant to CR 12(b)(6). But Mr. Earl's arguments concerning his warranty claims are moot. Even if the Amended Complaint had stated a breach of warranty claim against Menu Foods, that claim would have been dismissed on summary judgment — just as Mr. Earl's breach of warranty claims against Kroger were dismissed on summary judgment — for lack of causation.

Moreover, Mr. Earl did not, and cannot, allege that he was in privity with Menu Foods, which is a necessary element of any claim for breach of implied warranty under Washington law. In addition, Mr. Earl

never alleged any express warranty attributed to Menu Foods, and the allegations of his Amended Complaint were fundamentally inconsistent with any claim for breach of express warranty against Menu Foods. Accordingly, the Superior Court properly dismissed Mr. Earl's breach of warranty claims against Menu Foods.

The Superior Court's February 15, 2008 Discovery Order (Assignments of Error 2 and 4).¹ Mr. Earl contends that the Superior Court erred by entering an order that permitted Menu Foods to dispose of unorganized, returned pet food products that were related to a voluntary recall and that were both irrelevant to, and wholly unnecessary for discovery in, this lawsuit. Mr. Earl's arguments on that issue have already been rejected at every level of the Washington court system, and Mr. Earl's conclusory arguments that the order violated his constitutional rights are meritless. The Superior Court's February 15, 2008 Order was not an abuse of discretion.

The Superior Court's Attorneys' Fee Award (Assignment of Error 3). In October 2008, pursuant to CR 37(a)(4), the Superior Court ordered Mr. Earl to pay Menu Foods \$4,491.09 in attorneys' fees and expenses incurred in responding to Mr. Earl's motion to compel discovery, which was a frivolous attempt to relitigate discovery issues that had

¹ For the Court's convenience, throughout this brief, Respondents have addressed related and overlapping assignments of error together where appropriate.

already been resolved by the Superior Court's February 15, 2008 Order. Mr. Earl asserts on appeal that the Superior Court lacked authority to issue its attorneys' fee award. But Mr. Earl's argument ignores the indisputable facts that he filed a motion to compel discovery, the motion was denied, and the Superior Court found that Mr. Earl's motion had no reasonable basis in fact or law. The Superior Court therefore plainly had authority to award attorneys' fees under CR 37(a)(4).

Mr. Earl's Claims of Bias and Mr. Earl's Motion to Recuse (Assignments of Error 5 and 6). Mr. Earl vaguely asserts that Judge Verser supposedly was biased against Mr. Earl in his rulings and should have recused himself from this lawsuit. Mr. Earl's charges are baseless. The record establishes that Judge Verser treated all parties fairly and respectfully throughout the course of this litigation. Judge Verser's rulings did not deprive Mr. Earl of due process, nor would they cause any reasonable person to question Judge Verser's impartiality.

Mr. Earl's Motion for Sanctions (Assignment of Error 7). Mr. Earl argues that the Superior Court should have sanctioned Menu Foods' counsel for speaking with a representative of ExperTox, Inc. ("ExperTox") without Mr. Earl being present. But, as the Superior Court ruled, and as Mr. Earl admits, ExperTox was never engaged by Mr. Earl as an expert witness or a consulting expert in this lawsuit. Counsel for Menu

Foods was therefore free to communicate directly with ExperTox, and the Superior Court did not abuse its discretion by denying Mr. Earl's motion for sanctions.

The Superior Court's March 8, 2010 Discovery Order (Assignment of Error 8). Mr. Earl asserts that the Superior Court abused its discretion by ordering that the parties would be permitted to have an expert witness attend destructive product testing conducted by other parties. Courts regularly order that opposing party experts be permitted to observe product testing, however, and Mr. Earl never established (or even suggested) that the Court's order somehow actually prevented him from finding a qualified person to test product samples in connection with this lawsuit. Accordingly, Mr. Earl's argument fails.

The Superior Court's Summary Judgment Ruling (Assignments of Error 9, 10, 11, 12, and 13). Mr. Earl appeals a number of evidentiary and other rulings relating to Respondents' summary judgment motion. Each of those arguments is meritless.

First, the Superior Court did not abuse its discretion by denying Mr. Earl's motion to strike the expert declaration of Dr. Jeffery Hall. The Superior Court correctly ruled that CR 56(e) does not require an expert witness to attach to his or her declaration every document considered in forming his or her expert opinion, and Respondents ultimately provided all

such documents to Mr. Earl in any event.

Second, the Superior Court did not abuse its discretion by refusing to consider Mr. Earl's proffered scientific evidence on toxicology. The Superior Court properly found that Mr. Earl is not qualified to offer expert scientific testimony (a ruling Mr. Earl does not challenge on appeal). In addition, the various articles and web pages that Mr. Earl filed with the Superior Court are not independently admissible and, absent qualified expert testimony, could not create an issue of fact concerning causation.

Third, this Court can also affirm the Superior Court's grant of summary judgment for the additional and independent reason that there is no genuine issue of material fact as to whether the pet food Mr. Earl purchased was contaminated (*i.e.*, whether there was any product defect). The only evidence of product defect that Mr. Earl submitted in opposition to Respondents' summary judgment motion was several unauthenticated reports of product test results submitted without a proper foundation. Despite its recognition that Mr. Earl had not authenticated the reports or laid a proper foundation to show their admissibility, the Superior Court nevertheless considered the reports for purposes of Respondents' summary judgment motion — a ruling the Superior Court later expressly acknowledged was “perhaps in error.” But for the Superior Court's erroneous decision to consider those reports, Respondents would have

been entitled to summary judgment on that issue as well.

Fourth, the Superior Court also correctly granted Respondents' alternative request for partial summary judgment on the issue of damages. Respondents submitted competent, admissible evidence showing that there is a market value for cats like Mr. Earl's, and the Superior Court correctly found that Mr. Earl's conclusory assertions that his cat had no market value were insufficient to create an issue of material fact.

In sum, all of Mr. Earl's assignments of error are wholly meritless. The Superior Court properly granted summary judgment in favor of Respondents, and this Court should affirm the Superior Court's judgment in all respects.

II. STATEMENT OF THE CASE

A. Mr. Earl's Original Complaint.

A significant number of lawsuits were filed against Menu Foods and other pet food manufacturers and retailers related to a voluntary recall of certain pet food products initiated in March 2007. Over 100 such cases were consolidated in a multidistrict litigation (the "MDL Proceeding") before the United States District Court for the District of New Jersey.

Mr. Earl filed this lawsuit in Jefferson County Superior Court against Menu Foods and Kroger in July 2007, claiming that his cat died as a result of eating allegedly contaminated pet food manufactured by Menu

Foods and marketed and sold under Kroger's private label. Clerk's Papers ("CP") 1-21. As Mr. Earl has repeatedly admitted, his lawsuit does not concern pet food that was subject to the March 2007 voluntary recall. *E.g.*, CP 5, 62, 400. The pet food that Mr. Earl alleged harmed his cat was manufactured long before the pet food that was subject to the recall.

Mr. Earl's original Complaint asserted claims against Menu Foods and Kroger based on fraud and a number of common law product liability theories. CP 1-21. On October 1, 2007, Menu Foods filed a Motion to Dismiss the original Complaint because nearly all of Mr. Earl's claims were preempted by the Washington Product Liability Act (the "WPLA") and because Mr. Earl did not (and could not) plead his fraud claims with sufficient particularity to satisfy CR 9(b). CP 22-55. The Superior Court granted Menu Foods' Motion to Dismiss after a hearing on October 12, 2007, and it gave Mr. Earl 10 days to file an amended complaint asserting statutory product liability claims. CP 56-57.

B. Mr. Earl's Amended Complaint.

Mr. Earl filed his Amended Complaint on October 16, 2007. CP 59-102. Menu Foods responded to the Amended Complaint on November 15, 2007 by filing a Motion (1) for a More Definite Statement and (2) to Dismiss in Part. CP 113-142. Kroger responded to the Amended Complaint on November 15, 2007 by filing its Motion for More

Definite Statement. CP 113-116.

As relevant here, Menu Foods argued that the allegations of Mr. Earl's Amended Complaint did not, as a matter of law, state a statutory product liability claim against Menu Foods based on breach of express or implied warranty. CP 123-126. Mr. Earl responded by filing his Motion to Strike Defendant Kroger's Definitive [sic] Statement Motion, Defendant Menu Foods' Definitive [sic] Statement and CR 12(b)(6) Motions, and for Sanctions. CP 143-189.

After a hearing on December 21, 2007, the Superior Court granted Respondents' motions, denied Mr. Earl's motion, and gave Mr. Earl 20 days in which to file an amended pleading that clearly identified the legal theories upon which he sought relief under the WPLA and omitted all previously dismissed claims. CP 216-218, 219-220. As discussed below, Mr. Earl ultimately filed his Second Amended Complaint in March 2009.

After the December 21, 2007 hearing, Mr. Earl immediately sought to appeal several of the Superior Court's orders. In an unpublished opinion dated July 29, 2008, a panel of this Court ruled that the Superior Court orders that Mr. Earl sought to appeal were not appealable and remanded the case to the Superior Court for further proceedings. *See Earl v. Menu Foods Income Fund*, Case No. 37153-7-II. The Supreme Court subsequently denied Mr. Earl's request for discretionary review. *See Earl*

v. Menu Foods Income Fund, Case No. 82080-5 (Wash.).

C. The Superior Court's February 15, 2008 Order.

After the March 2007 voluntary recall, Menu Foods began storing vast amounts of recall-related pet food product falling into three categories: (1) "Organized Recalled Product," consisting of recalled pet food product that either never left Menu Foods' possession or was returned to Menu Foods in an organized manner; (2) unprocessed, perishable raw wheat gluten ("Raw Wheat Gluten"); and (3) product (including recalled pet food, pet food not subject to the recall, and non-pet food products) that was returned to Menu Foods in a haphazard manner, in containers of various types (such as trash cans, cardboard boxes and drums), and containing broken or punctured cans, bags and pouches of pet food, which was not inventoried due to the significant costs (over \$3.8 million) that would be incurred ("Unorganized Inventory"). CP 248, 252-255.

On December 18, 2007, the court presiding over the MDL Proceeding issued an Order (the "MDL Order") approving of a sampling and retrieval plan devised by Menu Foods' expert, Dr. George P. McCabe, under which Menu Foods retained a statistically representative sample of the Organized Recalled Product and Raw Wheat Gluten to satisfy the discovery and testing needs of all parties. *See* CP 250-251. The MDL

Order permitted Menu Foods to dispose of the Unorganized Inventory, which Dr. McCabe opined could not be validly sampled unless it was first inventoried. CP 252-255.

Although the product subject to the MDL Order was not relevant or necessary to this lawsuit, out of an abundance of caution, Menu Foods filed a motion seeking the Superior Court's approval of an order identical to the MDL Order in this lawsuit (the "Product Retention Motion"). CP 239-268. The Superior Court granted the Product Retention Motion on February 15, 2008 (the "February 15, 2008 Order"). CP 271-276. The February 15, 2008 Order is substantively identical to the MDL Order. In granting Menu Foods' Product Retention Motion, the Superior Court cited four grounds that supported its decision: (1) that Mr. Earl already possessed samples of the pet food relevant to this lawsuit; (2) that Menu Foods also possessed, and was retaining, samples of the pet food relevant to this lawsuit; (3) that the product subject to the MDL Order was irrelevant and unnecessary to this lawsuit, particularly in light of the facts that Mr. Earl and Menu Foods both already possessed samples of the pet food relevant to Mr. Earl's claims and the burden and expense that Menu Foods would incur to inventory and continue to store the product; and (4) comity to the federal district court's MDL Order. *See* Feb. 15, 2008 Report of Proceedings ("RP") 14-16, 20, 24-26.

Mr. Earl immediately sought discretionary review of the Superior Court's February 15, 2008 Order. This Court denied discretionary review (*see Earl v. Menu Foods Income Fund*, Case No. 37376-9-II), and Mr. Earl then sought discretionary review in the Supreme Court. The Supreme Court also denied discretionary review. *See Earl v. Menu Foods Income Fund*, No. 81674-3 (Wash.).

D. The Superior Court's Imposition of Discovery Sanctions against Mr. Earl.

On August 11, 2008, Mr. Earl filed with the Superior Court Plaintiff's CR 60(b) Motion to Vacate Product Retention Order Entered on 2/15/08 (the "Motion to Vacate") and Plaintiff's CR 26(b) Motion to Produce Discovery (the "Motion to Compel"). CP 277-305. The Superior Court denied Mr. Earl's Motion to Compel and Motion to Vacate after a hearing on August 22, 2008.² Based on the Superior Court's denial of Mr. Earl's Motion to Compel, Menu Foods requested, pursuant to CR 37(a)(4),³ that the Superior Court order Mr. Earl to pay its reasonable attorneys' fees and expenses incurred in responding to the Motion to

² Mr. Earl unsuccessfully sought direct, discretionary review of the Superior Court's August 22, 2008 ruling in the Washington Supreme Court. *See Earl v. Menu Foods Income Fund*, No. 82048-1 (Wash.).

³ Although Plaintiff's Motion to Compel was incorrectly styled as a "CR 26(b) Motion to Produce Discovery," Plaintiff in fact sought an order compelling discovery under CR 37. *See* CR 37(a) ("A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court . . . in the county where the action is pending, for an order compelling discovery . . .").

Compel. CP 354-363. On October 13, 2008, the Superior Court granted Menu Foods' motion and awarded Menu Foods attorneys' fees and expenses in the amount of \$4,491.09 (the "October 13, 2008 Order"). CP 382-385. The Superior Court explained that, because the issues Mr. Earl raised in his Motion to Compel had already been decided against him at every level of the Washington court system, his Motion to Compel could not be considered substantially justified, and Menu Foods was entitled to an award of attorneys' fees:

The award of attorneys' fees is mandated by CR 37(a)(4) as [Mr. Earl's] motion was not justified in any manner either factually or legally. The award is designed only to reimburse defendant for having to go to extraordinary lengths to respond to totally unnecessary and irrelevant discovery motions which **have been decided adversely to Mr. Earl by this court, the federal courts, and all of the appellate courts in the State of Washington.**

CP 384.

Mr. Earl sought direct, discretionary review of the Superior Court's Attorneys' Fees Order. The Supreme Court denied review, with the Supreme Court commissioner stating that Mr. Earl's filings were "legally frivolous" and presented "nothing even minimally resembling a basis for review by the court." *See Ruling Denying Review, Earl v. Menu Foods Income Fund*, Case No. 82465-7 (Wash. Feb. 10, 2009).

E. Mr. Earl's Second Amended Complaint.

Mr. Earl filed his Second Amended Complaint on March 13, 2009. CP 398-407. As relevant here, the Second Amended Complaint included a claim for damages against Menu Foods and Kroger in the amount of \$180,000, representing the alleged cost of creating a genetic clone of Mr. Earl's cat. CP 401, 407.

On March 26, 2009, Menu Foods moved to dismiss, *inter alia*, Petitioner's "clone" theory of damages, arguing that Washington law does not permit an aggrieved pet owner to recover damages based on the alleged cost of cloning a pet animal. CP 420-434. Kroger filed a similar motion. CP 449-451.

After a hearing on April 10, 2009, the Superior Court Commissioner granted the motions to dismiss. CP 507-508, 511-512. The Superior Court ruled both that the *type* of damages available (as distinct from the *amount* of damages) is a question of law capable of resolution on a motion to dismiss, and that the alleged cost of cloning a pet animal is not a permissible type of damages recoverable under Washington law. Apr. 10, 2009 RP 25-29. Mr. Earl unsuccessfully moved to vacate the April 10, 2009 order. CP 513-520. Mr. Earl then sought discretionary review of the Superior Court's denial of his motion to vacate the April 10, 2009 order. This Court denied discretionary review. *See Earl v.*

Menu Foods Income Fund, Case No. 39452-9-II.

F. Mr. Earl's Motion to Disqualify Judge Verser.

On June 29, 2009, Mr. Earl filed Plaintiff's Motion to Remove Judge Verser for Cause Shown (the "Recusal Motion"), which requested that Judge Verser recuse himself based on Mr. Earl's assertions that Judge Verser had shown a pattern of bias against him. CP 521-532. The Court denied the Recusal Motion in July 2009.

G. The Parties' Discovery Disputes concerning Product Testing.

In late 2009 and early 2010, the parties became involved in several discovery disputes, including over the appropriate procedure for discovery and testing of certain unopened retained samples in Menu Foods' possession of the same pet food that Mr. Earl purchased, from the same manufacturing dates as the pet food that Mr. Earl purchased. After a hearing on the parties' cross-motions to compel and for a protective order, on March 8, 2010, the Court entered an Order Granting in part and Denying in part Plaintiff's Motion to Compel and Defendants' Motions for Protective Orders (the "March 8, 2010 Order"). CP 686-688. In relevant part, the March 8, 2010 Order: (1) directed that the parties were to have certain unopened product samples in Menu Foods' possession opened and divided by a third-party laboratory; and (2) provided that "[t]he parties

shall be permitted to have an expert attend and observe product testing carried out by any other party in connection with this lawsuit.” CP 687.

After the entry of the Superior Court’s March 8, 2010 Order, the parties engaged in a series of communications to arrange for the division and testing of certain product samples. During those communications, Mr. Earl stated that he intended to have his portion of the product samples sent directly to ExperTox to be tested. Supplemental Clerk’s Papers (“Supp. CP”) 1684.

On April 14, 2010, counsel for Menu Foods sent Mr. Earl an email requesting a conference call with ExperTox to, *inter alia*, request a copy of all protocols that ExperTox intended to use in connection with testing any products in this lawsuit. Supp. CP 1684. In response, Mr. Earl suggested that Menu Foods should instead email ExperTox directly with any questions, and either copy Mr. Earl on the email or forward any responses to him. Supp. CP 1684. On April 21, 2010, counsel for Menu Foods sent an email to an ExperTox customer service email address provided by Mr. Earl, requesting that ExperTox voluntarily provide him with a copy of all testing protocols that ExperTox would follow in connection with such tests. Supp. CP 1690.

On April 23, 2010, counsel for Menu Foods received a voice message from Dr. Ernest Lykissa, the Vice President, Scientific Director,

and Lead Scientist at ExperTox. Supp. CP 1679. Counsel for Menu Foods returned Dr. Lykissa's call and spoke with him during the afternoon of April 23, 2010. Supp. CP 1679-1680. At the outset of the conversation, counsel for Menu Foods first asked Dr. Lykissa whether ExperTox had been retained by Mr. Earl as an expert witness in connection with this lawsuit, or whether it had consulted with Mr. Earl about serving as an expert witness in this lawsuit. Supp. CP 1679-1680. Dr. Lykissa responded that ExperTox had not been retained by Mr. Earl as an expert witness, that ExperTox had not consulted with Mr. Earl about serving as an expert witness in this lawsuit, and that ExperTox would not act as an expert witness in this lawsuit if it was asked to do so. CP 731-734. Dr. Lykissa also stated that ExperTox did not intend to conduct any tests of product samples in connection with this lawsuit, that it did not want to be involved in this lawsuit in any way, and that ExperTox would return any product samples sent to it for testing in connection with this lawsuit. CP 731-734.

Because Mr. Earl intended to have product samples sent directly to ExperTox for testing, counsel for Menu Foods decided, as a matter of courtesy, to inform Mr. Earl of Dr. Lykissa's statements. Supp. CP 1681. On April 26, 2010, counsel for Menu Foods sent an email to Mr. Earl and counsel for Kroger concerning his April 23, 2010 conversation with Dr.

Lykissa. Supp. CP 1681-1682. In that email, counsel made clear that, before speaking with Dr. Lykissa, counsel had first confirmed with Dr. Lykissa that ExperTox had not been retained by Mr. Earl as an expert witness, and that ExperTox had not consulted with Mr. Earl about serving as an expert witness in this lawsuit. Supp. CP 1681-1682, 1692.

On May 12, 2010, Mr. Earl filed “Plaintiff’s Motion for Sanctions against Bradley T. Meissner and DLA Piper for Discovery Violations and Professional Misconduct” (the “Sanctions Motion”). CP 689-699. Mr. Earl argued that Menu Foods’ counsel’s conversation with Dr. Lykissa amounted to improper *ex parte* contact with Mr. Earl’s expert witness. Menu Foods opposed the Sanctions Motion and argued, among other things, that counsel’s conversation with Dr. Lykissa was entirely proper because ExperTox had never, in fact, been engaged by Mr. Earl as an expert witness or a consulting expert. CP 715-730. After a hearing on May 21, 2010, the Superior Court denied Mr. Earl’s Sanctions Motion. On June 17, 2010, the Superior Court denied Mr. Earl’s motion for reconsideration, and the Court’s order included the express finding that “ExperTox, Inc. is not, and was not, engaged as an expert witness or a consulting expert for Plaintiff in this lawsuit.” CP 749-750.

H. Respondents’ Summary Judgment Motion.

On December 17, 2010, Respondents filed a joint Motion for

Summary Judgment (the “Summary Judgment Motion”) seeking dismissal of all of Mr. Earl’s claims against them with prejudice. CP 751-768. Respondents asserted that they were entitled to summary judgment for two, independent reasons: (1) because there was no genuine issue of material fact concerning whether there was any product defect (*i.e.*, whether the pet food that plaintiff purchased was contaminated); and (2) because there was no genuine issue of material fact concerning whether any such defect caused Mr. Earl’s pet’s injuries. CP 761-764. Respondents also asserted that, in the alternative, they were entitled to summary judgment limiting Mr. Earl’s damages for the loss of his pet to the market value of the animal. CP 765-766.

In support of the Summary Judgment Motion, Respondents submitted the Declaration of Dr. Robert H. Poppenga, section head of Toxicology at the California Animal Health & Food Safety Laboratory System at the University of California, Davis (“UC Davis”). CP 785-808. Dr. Poppenga’s declaration explained that, in both 2007 and 2010, UC Davis tested multiple samples of the same pet foods that Mr. Earl claimed injured his cat for melamine and related compounds, including cyanuric acid, and for acetaminophen, and that the test results were all negative. CP 785-787.

Respondents also submitted the expert declaration of Dr. Jeffery O.

Hall, D.V.M., Ph.D, a full Professor in the Department of Animal, Dairy, and Veterinary Sciences, Utah Veterinary Diagnostic Laboratory, at Utah State University. CP 809-844. Based on his review of records relating to the case, his review of the relevant scientific literature, and his over 23 years of diagnostic veterinary toxicology experience and training, Dr. Hall opined that, even assuming that the pet food Mr. Earl purchased and fed to his cat was contaminated with acetaminophen and cyanuric acid in the amounts supposedly detected by ExperTox, there was no scientifically credible evidence that such contamination could have played any causative role in Mr. Earl's cat's death. CP 810-811. Among other reasons, Dr. Hall explained that the amount of acetaminophen reportedly detected in the pet food was over 1,000 times lower than the minimal reported toxic dose in cats, and the amount of cyanuric acid reportedly detected in the pet food was over 100 times lower than the minimal reported toxic dose in cats. CP 810-811.

Finally, Respondents submitted the Declaration of Shell-ey Van Cleave, a long-time pet store owner in Port Angeles, Washington. CP 845-847. Ms. Van Cleave opined that there is a market in Western Washington for cats of the same variety as Mr. Earl's cat, and that the market value of such cats ranges from \$30 to \$100. CP 845-847.

Mr. Earl filed a motion to strike the declarations submitted by

Respondents in support of the Summary Judgment Motion (the “Motion to Strike”). CP 1180-1190. As relevant to the issues raised by Mr. Earl on this appeal, Mr. Earl moved to strike Dr. Hall’s declaration on the ground that Dr. Hall did not attach to his declaration all of the scientific literature and other materials that he considered in forming his expert opinion. Respondents opposed Mr. Earl’s Motion to Strike, and Respondents also submitted a supplemental declaration from Dr. Hall that attached the documents about which Mr. Earl had complained. CP 1312-1499.

In response to the Summary Judgment Motion, Mr. Earl submitted his own declaration attaching lab reports from ExperTox that Mr. Earl claimed showed that the pet food he purchased was contaminated. CP 848-849. Mr. Earl also argued, based upon his own opinion and on a variety of articles and web pages that he filed with the Superior Court, that there was a genuine issue of material fact as to whether the pet food that he purchased caused his cat’s death. CP 848-854. Finally, Mr. Earl also argued that summary judgment on damages was inappropriate, because his cat was unique and bonded exclusively to him and therefore had no market value. CP 852-853.

After a hearing on January 14, 2011, the Superior Court denied Mr. Earl’s Motion to Strike and granted Respondents’ Summary Judgment Motion. In denying Mr. Earl’s Motion to Strike, the Superior Court ruled

that an expert witness is not required to attach to his or her declaration every document considered in forming his or her expert opinion. Jan. 14, 2011 RP 19-20. With respect to the Summary Judgment Motion, the Superior Court ruled: (1) that Respondents had met their initial burden of showing their entitlement to summary judgment (Jan. 14, 2011 RP 33); (2) that the Superior Court would consider the ExperTox reports that Mr. Earl filed in opposition to the Summary Judgment Motion, despite the fact that the ExperTox reports were not authenticated and Mr. Earl had not provided an appropriate foundation for their admissibility (Jan. 14, 2011 RP 24); (3) that Mr. Earl had not submitted any admissible evidence to create an issue of material fact on the issue of causation (Jan. 14, 2011 RP 33-36); and (4) that Mr. Earl's statements that his cat was unique and bonded only to him did not create an issue of fact as to whether there was a market value for Mr. Earl's cat (Jan. 14, 2011 RP 36).

Based on those rulings, the Superior Court granted summary judgment in favor of Respondents dismissing all of Mr. Earl's claims for lack of causation and, in the alternative, held that Mr. Earl's damages for the loss of his cat would be limited to the fair market value of the cat, \$100. Jan. 14, 2011 RP 36.

Mr. Earl sought reconsideration, which the Superior Court denied in a written opinion dated February 9, 2011. CP 1607-1610. In that

opinion, the Court expressly noted that its decision to consider the ExperTox report submitted by Mr. Earl in connection with the Summary Judgment Motion was “perhaps in error.” CP 1608.

The Superior Court entered its final judgment in favor of Respondents on February 4, 2011. CP 1604-1606.

III. ARGUMENT

A. **The Superior Court Properly Dismissed Mr. Earl’s Warranty Claims against Menu Foods (Assignment of Error 1).**

This Court reviews an order dismissing claims pursuant to Rule 12(b)(6) *de novo*. See *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007).

Mr. Earl asserts that the Superior Court erred in dismissing his claims for breach of implied and express warranty against Menu Foods because Menu Foods supposedly later admitted in discovery responses that it provided information for the alleged warranties on the pet food that he purchased. See Appellant’s Brief at 27-28.

Mr. Earl’s argument fails. As a preliminary matter, Mr. Earl’s arguments about the dismissal of his breach of warranty claims are moot, because any such claim would necessarily have been dismissed on summary judgment — just as Mr. Earl’s claims for breach of express and implied warranty against Kroger were — for lack of causation. Like Mr.

Earl's other claims under the WPLA, a plaintiff asserting a claim for breach of warranty must show that the defendant's actions caused his claimed injury. *See* RCW 7.72.030-040. Accordingly, Mr. Earl's failure to show any issue of fact concerning whether Respondents caused his pet's injuries is also fatal to any breach of warranty claim. *See Wash. Fed'n of State Employees v. State Dep't of Gen. Admin.*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009) (court may affirm trial court decision on any ground supported by the record).

In any event, the Superior Court properly concluded that the allegations of Mr. Earl's Amended Complaint did not state a claim against Menu Foods for breach of implied or express warranty, and Menu Foods' later discovery responses do not alter that conclusion.

First, although the WPLA does not, as a general matter, require privity of contract as a precondition to a product liability suit, ***privity is required in order to state a claim for breach of implied warranty*** under the statute. The WPLA permits a plaintiff to recover under the Act for breach of implied warranty ***only*** if such recovery would be permitted under Article 2 of the Uniform Commercial Code (the "UCC"), as adopted in Washington, RCW Title 62A. *See* RCW 7.72.030(2) (providing cause of action where product "did not conform . . . to the implied warranties under Title 62A RCW," and stating that "whether or not a product

conforms to an implied warranty created under Title 62A RCW shall be determined under that title”). Washington law is clear that a plaintiff cannot sue for breach of implied warranty under Article 2 of the UCC unless the plaintiff is in privity with the defendant. *See Tex Enters., Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204, 211, 66 P.3d 625 (2003) (“[A]llowing implied warranties to arise without reliance on an underlying contract is inconsistent with both the plain language of RCW 62A.2-314 and -315 and this court’s prior approach to implied warranties.”); *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 151, 727 P.2d 655 (1986).

Because the WPLA incorporates wholesale the UCC’s requirements for breach of implied warranty, privity is required for an implied warranty claim under the statute. *See Thongchoom v. Graco Children’s Prods., Inc.*, 117 Wn. App. 299, 307-08, 71 P.3d 214 (2003) (dismissing claim under the Act predicated on breach of implied warranty because of lack of privity; “contractual privity between the buyer and seller must exist before a plaintiff may maintain an action for a breach of warranty”), *review denied*, 151 Wn.2d 1002, 87 P.3d 1185 (2004).

Mr. Earl has never alleged or asserted that he was in privity with Menu Foods, and the Superior Court therefore correctly dismissed his implied warranty claim.

Second, the Superior Court correctly dismissed Mr. Earl's express warranty claim against Menu Foods, because the Amended Complaint did not attribute any express warranty to Menu Foods and the allegations of the Amended Complaint were inconsistent with any claim of an express warranty by Menu Foods. A product manufacturer may be subject to liability under the WPLA if "the product was . . . not reasonably safe because it did not conform to *the manufacturer's express warranty*." RCW 7.72.030(2) (emphasis added). Mr. Earl's claim for breach of express warranty was premised entirely on his allegation that certain statements on the cans of pet food that he purchased created express warranties. CP 65. The Amended Complaint did not, however, allege that any statement on the cans of pet food that he purchased was attributed to the manufacturer, Menu Foods, and Mr. Earl further expressly alleged that the pet food he purchased was marketed and sold by Kroger "as its own product under the 'Pet Pride' label." CP 60. The allegations of Mr. Earl's Amended Complaint thus foreclosed any express warranty having been made by Menu Foods, and the Superior Court properly dismissed Mr. Earl's express warranty claim.

Moreover, Menu Foods' discovery responses are simply irrelevant to whether Mr. Earl's Amended Complaint *sufficiently alleged* a cause of action against Menu Foods, and, in any event, nothing in those responses

undermines the Superior Court's ruling or suggests any basis for an express warranty claim against Menu Foods. That Menu Foods provided information to Kroger that was then included on the label of a product sold by Kroger under its own private label does not create an express warranty of the manufacturer to a consumer.

B. The Superior Court's February 15, 2008 Order Granting Menu Foods' Product Retention Motion Was a Proper Exercise of the Court's Discretion to Regulate Discovery (Assignments of Error 2 and 3).

Pretrial discovery orders, including protective orders, are reviewed for "manifest abuse of discretion." *Gillett v. Conner*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). "The abuse of discretion standard . . . recognizes that deference is owed to the judicial actor who is better positioned than another to decide the issue in question." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (internal quotation marks omitted). Further, in determining whether a trial court has abused its discretion in making a discovery ruling, our appellate courts recognize that a trial court "has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery." *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900 (2008); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 519, 20 P.3d 447 (2001) ("a trial court has wide

discretion in ordering pretrial discovery”). To constitute an abuse of discretion, a trial court’s order must be “manifestly unreasonable or based on untenable grounds.” *Gillett*, 132 Wn. App. at 822; *Hertog v. City of Seattle*, 88 Wn. App. 41, 47, 943 P.2d 1153 (1997) (“Abuse is ‘discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’”).

Mr. Earl argues that the Superior Court’s February 15, 2008 Order permitting Menu Foods to dispose of excess pet food inventory should be reversed because it violates the doctrine of separation of powers and it violates Mr. Earl’s due process rights.⁴ *See* Appellant’s Brief at 29-31.

Mr. Earl’s arguments on appeal are simply a variation on the same arguments that Mr. Earl has previously (and unsuccessfully) made time and again concerning the Superior Court’s February 15, 2008 Order, and they should be rejected. The Superior Court’s February 15, 2008 Order was a prudent exercise of the Superior Court’s broad discretion to manage the discovery process in the cases before it, and Mr. Earl cannot show that the Superior Court abused its discretion in entering the February 15, 2008 Order. Mr. Earl’s conclusory arguments that the February 15, 2008 Order violates the separation of powers doctrine and Mr. Earl’s due process

⁴ Although Mr. Earl claims a due process violation, the authority he cites concerns the right of access to the courts under Article I, section 10 of the Washington constitution. *See* Appellant’s Brief at 30.

rights (*see* Appellant’s Brief at 29-31) are utterly frivolous. As a preliminary matter, both of those arguments rely entirely on a faulty factual predicate — Mr. Earl’s assertion that the unorganized pet food product that was the subject of the February 15, 2008 Order was relevant and necessary for discovery in this lawsuit — that was rejected by the Superior Court and that was repeatedly rejected by this Court and the Supreme Court in connection with Mr. Earl’s attempts to challenge the February 15, 2008 Order through discretionary review.

In any event, however, the Superior Court did not explicitly or implicitly take on any legislative or executive function by entering an order to govern the parties’ discovery obligations in a case before it, and the February 15, 2008 Order thus presents no separation of powers issue.⁵ Nor does the Superior Court’s denial of particular discovery pursuant to CR 26 implicate due process or impinge on Mr. Earl’s right of access to the courts. *See Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780-82, 819 P.2d 370 (1991) (constitutional right of access to the courts includes “the right to discovery authorized by the civil rules, subject to the limitations contained therein”; right of access “must be exercised within the broader framework of the law as expressed in statutes, cases, and court

⁵ None of the separation of powers cases cited by Mr. Earl in his opening brief involved the civil discovery process, and those cases are simply irrelevant to the issues on this appeal.

rules”).

C. The Superior Court Did Not Abuse Its Discretion in Ordering Mr. Earl to Pay Menu Foods’ Attorneys’ Fees (Assignment of Error 4).

The Superior Court’s decision to award attorneys’ fees under CR 37(a)(4) is subject to review only for abuse of discretion, *i.e.*, whether it is “manifestly unreasonable or based on untenable grounds.” *Eugster v. City of Spokane*, 121 Wn. App. 799, 814, 91 P.3d 117 (2004), *review denied*, 153 Wn.2d 1012, 106 P.3d 762 (2005).

Mr. Earl asserts that the Superior Court lacked authority to order him to pay Menu Foods \$4,491.09 in attorneys’ fees pursuant to CR 37(a)(4) in connection with his August 11, 2008 Motion to Compel. Mr. Earl argues that his Motion to Compel was “conditioned on” the Superior Court first granting his Motion to Vacate the February 15, 2008 Order, and that any sanctions could be imposed only under CR 11, not under CR 37(a)(4). *See* Appellant’s Brief at 31-32.

Mr. Earl’s arguments are meritless. CR 37(a)(4) provides that where a court denies a motion to compel

the court *shall*, after opportunity for hearing, *require the moving party . . . to pay the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees*, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

CR 37(a)(4) (emphasis added). Mr. Earl indisputably filed his Motion to Compel seeking to require Menu Foods to produce discovery, nothing in Mr. Earl's Motion to Compel stated that it was somehow contingent upon the Superior's Court's ruling on any other motion, and Menu Foods was forced to incur substantial fees and expenses responding to the Motion to Compel. The Superior Court plainly had authority to award attorneys' fees under CR 37(a)(4), it applied the correct legal standard in considering Menu Foods' request for attorneys' fees, and the Court properly concluded that it was required to award fees under CR 37(a)(4) because Mr. Earl's Motion to Compel had no reasonable basis in law or fact. *See* CP 382-385. The Superior Court therefore did not abuse its discretion by ordering Mr. Earl to pay Menu Foods' attorneys' fees in connection with Mr. Earl's Motion to Compel.

D. The Superior Court's Procedural Rulings Did Not Violate Mr. Earl's Due Process Rights, and Judge Verser Did Not Err in Declining to Recuse Himself (Assignments of Error 5 and 6).

A trial court's decision on whether to grant a motion to recuse is reviewed only for abuse of discretion. *See State v. Perala*, 132 Wn. App. 98, 111, 130 P.3d 852 (2006).

Mr. Earl argues both that the Superior Court deprived him of due process by condoning supposed rule violations by Respondents' counsel and that Judge Verser should have recused himself from this lawsuit

because his conduct would cause a reasonable observer to question his impartiality. *See* Appellant’s Brief at 32-34. Mr. Earl’s claims of unfair treatment by Judge Verser appear to be predicated entirely on certain rulings that Judge Verser made against Mr. Earl in this lawsuit and on certain in-court comments to which Mr. Earl took offense.

Under Washington law, a judge should disqualify himself or herself from presiding over a lawsuit only where the judge “is biased against a party or his or her impartiality may reasonably be questioned.” *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009); *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). There is a strong presumption that a trial court conducts its proceedings “regularly and properly without bias or prejudice.” *Meredith*, 148 Wn. App. at 903. A party seeking to rebut that presumption bears the burden of coming forward with specific evidence of actual or potential bias. *Id.*; *Dominguez*, 81 Wn. App. at 329; *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). If, and only if, the party claiming bias meets its burden of coming forward with actual evidence of bias, the court then considers whether a reasonable, disinterested observer would conclude that all parties had been treated in fair and impartial manner. *Dominguez*, 81 Wn. App. at 330; *In re Marriage of Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002).

In this case, Mr. Earl has never shown, and cannot show, that the Superior Court rulings he complains of were incorrect, much less that those rulings amount to evidence of bias by the Superior Court or that a reasonable observer would question Judge Verser's impartiality.⁶ See *Davis*, 152 Wn.2d at 692 ("Judicial rulings alone almost never constitute a valid showing of bias."). Nor do any of the in-court statements about which Mr. Earl complained in his Recusal Motion amount to evidence of bias. See *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) ("[J]udicial remarks during the course of [a proceeding] that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.").

Mr. Earl's complaint about supposed rule violations is also meritless. Many of the supposed rule violations that Mr. Earl vaguely

⁶ Mr. Earl also includes in his Statement of the Case an allegation that Judge Verser supposedly altered the record of a hearing to omit reference to his directive to Mr. Earl that he confine portions of his Second Amended Complaint to three pages. See Appellant's Brief at 14. But the transcript of the December 21, 2007 hearing belies that wild allegation, as it specifically includes Judge Verser's directive concerning the length of Mr. Earl's Second Amended Complaint:

[Y]ou'll have a cause of action section against Menu Foods, a cause of action section against Kroger. Those won't be any longer than three pages, each. You can't go over three pages. Just keep it very simple. Just cite the basis for liability under those statutes [RCW 7.72.030 and 7.72.040]. And that's all.

Dec. 21, 2007 RP 16.

references appear to relate to Superior Court rulings that Mr. Earl is already challenging on this appeal, and Mr. Earl's arguments about those rulings fail for the reasons discussed elsewhere in this brief. Mr. Earl also asserts that Respondents' counsel violated GR 14.1 by supposedly citing to "unpublished" decisions. As Menu Foods explained when Mr. Earl raised this same issue in the Superior Court, however, the federal district court decisions that Mr. Earl has claimed cannot be cited under GR 14.1 were not designated as "unpublished" decisions, and Menu Foods' citation of those decisions in any event complied with GR 14.1 *E.g.*, CP 458-461. Moreover, Mr. Earl has wholly failed to show how he could have been prejudiced as a result of Menu Foods' citation of those cases.

The Superior Court managed this lawsuit in a fair and impartial manner. Mr. Earl's conclusory accusations of unfairness and misconduct do not establish any violation of due process or any basis for Judge Verser's recusal.

E. The Superior Court Did Not Abuse Its Discretion by Denying Mr. Earl's Motion for Sanctions (Assignment of Error 7).

In his assignment of error 7, Mr. Earl claims, quoting an out-of-context statement from the Superior Court, that the Superior Court committed "legal error" by ruling that CR 26 does not prohibit opposing counsel from contacting and speaking with another party's expert witness.

Mr. Earl also claims that that determination is subject to *de novo* review. See Appellant's Brief at 34-35.

But Mr. Earl fundamentally misstates the primary basis of the Superior Court's ruling — its factual determination that ExperTox was not, and never had been, Mr. Earl's expert witness. The Superior Court's order denying Mr. Earl's motion for reconsideration makes that point clear:

The Court finds that ExperTox, Inc. is not, and was not, engaged as an expert witness or a consulting expert for Plaintiff in this lawsuit. Under the circumstances, counsel for Menu Foods did not violate CR 26 by speaking directly with Dr. Ernest Lykissa of ExperTox.

CP 749 (emphasis added). Accordingly, to establish that the Superior Court erred in denying his Motion for Sanctions, Mr. Earl must first show that the Superior Court's dispositive ***factual finding*** that ExperTox had never been engaged by Mr. Earl as an expert witness or a consulting expert was error. That factual finding is subject to review only for abuse of discretion. See, e.g., *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (although questions of law reviewed *de novo*, decision whether to impose discovery sanctions reviewed for clear abuse of discretion, including whether facts found by trial court are supported by the record).

Mr. Earl does not even attempt to show that the Superior Court's

factual determination that ExperTox was not engaged by Mr. Earl as an expert witness was error — indeed, in his opening brief, Mr. Earl again concedes that he never engaged ExperTox as an expert. *See* Appellant’s Brief at 20. That failure alone requires the Court to reject Mr. Earl’s assignment of error 7. In any event, however, there is ample factual evidence in the record to support the Superior Court’s determination that ExperTox was never engaged by Mr. Earl as an expert witness or a consulting expert, including: (1) Mr. Earl’s own admission in his Sanctions Motion that he had not engaged ExperTox as an expert witness (CP 690), (2) Mr. Earl’s failure to disclose ExperTox as an expert witness in his discovery responses (CP 1681, 1701-1706), and (3) Dr. Lykissa’s own statements that ExperTox had never been engaged by Mr. Earl as an expert witness. CP 731-734.

Finally, Mr. Earl’s reliance on *In re Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996), is wholly misplaced. In *Firestorm*, there was simply no dispute that the person interviewed by plaintiffs’ counsel had been retained as an expert witness by defense counsel. *See id.* at 137 (“Because neither party disputes the fact that Buske was an expert who acquired facts and developed opinions in anticipation of litigation arising out of the 1991 firestorm, CR 26(b)(5) is the specific provision at issue here.”). In this case, by contrast, the Superior Court expressly determined that ExperTox

had not been engaged by Mr. Earl as an expert. CP 749. Accordingly, *Firestorm* is simply inapposite.

The Superior Court did not abuse its discretion in finding that Mr. Earl never engaged ExperTox as an expert witness or a consulting expert in this case, and the Court should therefore reject Mr. Earl's assignment of error 7.

F. The Superior Court Did Not Abuse Its Discretion in Permitting Opposing Experts to Attend Product Testing (Assignment Of Error 8).

The Superior Court's March 8, 2010 Order concerning the discovery and testing of product samples is subject to review for abuse of discretion. *See Gillett*, 132 Wn. App. at 822.

Mr. Earl argues that the Superior Court abused its discretion by supposedly ordering that "all testing of pet food samples must be conducted in the presence of opposing party experts." Appellant's Brief at 35. Mr. Earl asserts that the Superior Court's order placed "impossibly burdensome and unnecessary conditions on testing," because *if* a laboratory refused to allow third-parties to observe product testing, it would "effectively bar[] developing the evidence for use at trial." *Id.* at 35-36.

Mr. Earl's argument fails for three reasons. First, courts regularly order that representatives of opposing parties should be permitted to

observe destructive testing conducted by another party, and a trial court does not abuse its discretion in so ordering. *See, e.g., Mirchandani v. Home Depot, U.S.A., Inc.*, 235 F.R.D. 611, 617 (D. Md. 2006); *Sarver v. Barrett Ace Hardware, Inc.*, 349 N.E.2d 28 (Ill. 1976).

Second, Mr. Earl misstates the Superior Court's March 8, 2010 Order. The March 8, 2010 Order did not require that an opposing expert be present for all product testing. Rather, the order provided that the parties would be "permitted to have an expert attend and observe product testing" done by another party (CP 687), meaning that a laboratory would be asked to permit observers only if another party actually requested that it be permitted to observe product testing. As neither Menu Foods nor Kroger thereafter made such a request of Mr. Earl, Mr. Earl could not possibly have been prejudiced by the Court's March 8, 2010 Order.

Third, Mr. Earl has never presented any evidence that the Superior Court's March 8, 2010 Order in fact caused him any prejudice or prevented him from testing any products. Mr. Earl instead offers only his own speculation that a party might be burdened *if* a laboratory declined to permit third parties to observe testing. *See* Appellant's Brief at 35-36. But Mr. Earl's unsupported speculation about the hypothetical potential for prejudice is manifestly insufficient to show that the Superior Court abused its discretion in entering its March 8, 2010 Order.

G. The Superior Court Properly Granted Respondents' Summary Judgment Motion.

1. The Superior Court Did Not Abuse Its Discretion in Denying Mr. Earl's Motion to Strike Dr. Hall's Declaration (Assignment of Error 9).

This Court "review[s] evidentiary decisions, including those related to summary judgment, for abuse of discretion." *See Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002).

Mr. Earl argues that the Superior Court should have stricken Dr. Hall's declaration in support of Respondents' Summary Judgment Motion because Dr. Hall did not attach to the declaration all of the documents that he considered (*i.e.*, published journal articles, documents filed in the Superior Court, and other documents produced to Respondents by Mr. Earl) in reaching his expert opinion. *See Appellant's Brief* at 37-38. Mr. Earl asserts that he was prejudiced by that alleged failure because he was not given an opportunity to review the information that formed the basis for Dr. Hall's opinion. *See id.* at 37-38. Mr. Earl also appears to argue that it is improper for a trial court to consider an expert's opinion in support of a motion for summary judgment. *See id.* at 42.

The Superior Court did not abuse its discretion by considering Dr. Hall's declaration. As the Superior Court correctly determined, CR 56(e) does not require that an expert witness attach to his declaration every

document considered in forming his opinion. *See, e.g., M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166 (4th Cir. 1992) (“[A]n affidavit that states facts on which the expert bases an opinion satisfies Fed. R. Civ. P. 56(e) even though the expert does not attach the data supporting the facts.”); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (same).⁷ Accordingly, the Superior Court did not abuse its discretion in considering Dr. Hall’s declaration.

Even if CR 56(e) did require Dr. Hall to attach the journal articles, pleadings, and other documents he considered in forming his opinion, the Superior Court still did not abuse its discretion in considering Dr. Hall’s declaration, because Dr. Hall filed and served those documents in a supplemental declaration. CP 1312-1499, 1608-1609. *See* CR 56(e) (“The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.”).

Mr. Earl’s assertion that he did not have the opportunity to review the scholarly articles considered by Dr. Hall or to depose Dr. Hall is also meritless. Dr. Hall listed all of the articles he considered in forming his opinion at the conclusion of the expert report filed with his declaration (CP 842-843). Moreover, Mr. Earl admits that Menu Foods disclosed Dr.

⁷ The version of Federal Rule of Civil Procedure 56 in effect until December 1, 2010 contained the same requirements as CR 56(e).

Hall as an expert witness in March 2010 (CP 1239), yet Mr. Earl never made any attempt to depose him. Mr. Earl's additional argument that expert opinion cannot be considered in support of a summary judgment motion is frivolous and finds no support in any of the authorities that he cites.

Finally, Mr. Earl's repeated assertions that the Superior Court gave too much "weight" to Dr. Hall's declaration⁸ simply reflect Mr. Earl's misunderstanding of the basis of the Superior Court's decision. The Superior Court's grant of summary judgment was based not on any "weight" given to Dr. Hall's declaration. Rather, the Superior Court properly granted summary judgment based on Mr. Earl's failure to come forward with *any admissible evidence* to create an issue of material fact on the question of causation. Jan. 14, 2011 RP 33-36; CP 1608-1609.

2. The Superior Court Did Not Abuse Its Discretion by Refusing to Consider Mr. Earl's Purported Scientific Evidence (Assignments of Error 10, 12, and 13).

Mr. Earl asserts that the Superior Court erred by refusing to consider the various scientific articles and web page printouts that he submitted with his opposition to Respondents' Summary Judgment Motion. *See* Appellant's Brief at 42-44, 46-49. Mr. Earl appears to make three arguments: (1) that once authenticated, "learned treatises" are

⁸ *See* Appellant's Brief at 38 (asserting that Superior Court gave Dr. Hall's declaration "100% weight"); *id.* at 41 (same); *id.* at 42 ("case deciding weight").

admissible and may be read into evidence irrespective of whether they have been relied upon by an expert witness (*Id.* at 43); (2) that the scholarly articles that Mr. Earl relied on are admissible under ER 803(a)(17)'s hearsay exception for market reports and commercial publications (*Id.* at 48); and (3) that the Superior Court erroneously ruled that documents obtained from the internet are not admissible. *Id.* at 46-49. Notably, Mr. Earl **does not** challenge on appeal the Superior Court's dispositive conclusions that Mr. Earl is not qualified to offer an expert opinion on issues relating to veterinary toxicology (Jan. 14, 2011 RP 33-36; CP 1608-1610), and that Mr. Earl did not establish a proper foundation for the admissibility of any of the articles that he attempted to rely on. CP 1608-1609.

Mr. Earl's misguided arguments betray his fundamental misunderstanding of basic evidentiary rules, and none establishes that the Superior Court abused its discretion in refusing to consider the articles and web pages submitted by Mr. Earl.

First, Mr. Earl's argument that learned treatises are admissible under ER 803(18) irrespective of whether they are offered in connection with expert testimony is belied by the plain language of the rule, which makes clear that learned treatises are excepted from the hearsay rule **only** in connection with expert testimony. *See* ER 803(a)(18) (providing

hearsay exception for statements in learned treatises “[t]o the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination”); *Miller v. Peterson*, 42 Wn. App. 822, 828, 714 P.2d 695 (1986) (“Under ER 803(a)(18) statements contained in published treatises and pamphlets on the subject of medicine, if established as authority, ***are made exceptions to the hearsay rule when used in cross or direct examination of an expert witness.***”) (emphasis added). Mr. Earl cites to *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980), but *Wyman*, which discussed a court’s authority to take judicial notice of “legislative facts,” simply does not address ER 803(a)(18) or the admissibility of learned treatises.

Second, Mr. Earl’s argument that scholarly articles are admissible under ER 803(a)(17) is also meritless. ER 803(a)(17) excepts from the hearsay rule “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” Mr. Earl offers no authority, for there is none, to support his assertion that a journal article could be considered a market quotation, tabulation, list, directory, or published compilation. Accordingly, the Superior Court did not err by not admitting Mr. Earl’s proffered scientific evidence under ER 803(a)(17).

Third, contrary to Mr. Earl’s argument, the Superior Court did not

rule that documents obtained from the internet cannot be admissible evidence. Rather, the Superior Court ruled, correctly, that articles and other materials obtained from the internet are not admissible as evidence *without a proper foundation*, which Mr. Earl had failed to provide. CP 1608-1609. Mr. Earl's failure to challenge that finding on this appeal is itself fatal to his evidentiary arguments.

3. Summary Judgment Was Required for the Additional and Independent Reason that Mr. Earl Presented No Admissible Evidence of a Product Defect.

Although the Court need not reach the issue, this Court may also affirm the Superior Court's grant of summary judgment dismissing all of Mr. Earl's claims for the additional and independent reason that Mr. Earl did not submit any admissible evidence to create a genuine issue of material fact concerning whether the pet food he purchased was, in fact, defective. *See Wash. Fed'n of State Employees*, 152 Wn. App. at 378 (court may affirm trial court decision on any ground supported by the record).⁹

At the hearing on Respondents' Summary Judgment Motions, the

⁹ In addition, because Respondents are not seeking affirmative relief, they were not required to file a cross-notice of appeal in order to preserve their argument that the Superior Court erred in considering Mr. Earl's ExperTox reports in connection with the Summary Judgment Motion. *See, e.g., McGowan v. State*, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002) ("Because the State prevailed, it was not required to cross-appeal.... The State is entitled to argue any grounds in support of the superior court's order that are supported by the record."); *State v. McNally*, 125 Wn. App. 854, 863, 106 P.3d 794 (2005) (party not seeking affirmative relief from appellate court may urge alternate grounds for affirmance supported by the record without filing cross-appeal).

Superior Court ruled that it would consider the ExperTox reports attached to Mr. Earl's declaration. Jan. 14, 2011 RP 24. Respondents noted their objection to that ruling, but conceded that if the Court considered the ExperTox reports, they would create an issue of fact concerning whether the pet food that Mr. Earl purchased was contaminated with acetaminophen and cyanuric acid. Jan. 14, 2011 RP 28. In its February 9, 2011 order denying Mr. Earl's motion for reconsideration, the Superior Court acknowledged that its decision to consider the ExperTox report was "perhaps in error." CP 1608.

The Superior Court's decision to consider the ExperTox report was, in fact, error, and the Court should affirm the Superior Court's grant of summary judgment for the independent reason that Mr. Earl provided no admissible evidence of a product defect. As Respondents argued below, Mr. Earl's ExperTox reports were inadmissible because Mr. Earl failed to properly authenticate the reports and failed to establish a proper foundation for their admissibility.

To be admissible, a document must be properly authenticated, such as through testimony by a person with personal knowledge that the document in question is what it purports to be. *See* ER 901; *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998) ("[T]he court should consider only admissible evidence in a motion for summary

judgment. Authentication or identification of a document is a condition precedent to admissibility.”) (internal citation omitted). Rather than submitting the reports with the declaration of a witness with personal knowledge (as defendants did with the UC Davis reports and the declaration of Dr. Poppenga), Mr. Earl simply, and improperly, attached the ExperTox reports to his own declaration. *See Burmeister*, 92 Wn. App. at 364-68 (holding that trial court erred by refusing to strike as inadmissible police report attached to counsel’s declaration on summary judgment motion). Because Mr. Earl has not provided any declaration or affidavit from ExperTox to authenticate the reports, they are inadmissible. *See, e.g., State v. Devries*, 149 Wn.2d 842, 847, 72 P.3d 748 (2003) (error to admit improperly authenticated urine test into evidence); *Wagers v. Goodwin*, 92 Wn. App. 876, 883, 964 P.2d 1214 (1998) (improperly authenticated letter inadmissible).

In addition, because Mr. Earl is not a qualified expert witness, and because Mr. Earl lacks personal knowledge of ExperTox’s testing procedures, Mr. Earl also could not lay the necessary foundation for the admission of the ExperTox reports. *See, e.g., State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006) (for scientific evidence to be admissible, “[b]oth the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the

scientific community”).

Because Mr. Earl failed to submit his purported ExperTox reports in admissible form, the Superior Court abused its discretion by considering them. Because Mr. Earl submitted no other evidence on the issue of a product defect, the Superior Court should have granted Respondents’ summary judgment motion for the additional and independent reason that there was no genuine issue of material fact concerning whether the pet food that Mr. Earl purchased was contaminated.

4. The Superior Court Correctly Determined that Mr. Earl’s Damages Would Be Limited to the Market Value of His Cat (Assignment of Error 11).

The Court reviews the decision to grant summary judgment *de novo*. See, eg. *Annechino v. Worthy*, 162 Wn. App. 138, 252 P.3d 415 (2011).

Mr. Earl argues that the Superior Court’s alternative ruling that Mr. Earl’s damages for the loss of his cat would be limited to the market value of his cat — \$100 — violated his right to a jury trial under Article I, section 21 of the Washington constitution, because damages are a question of fact reserved to the jury. See Appellant’s Brief at 44-46.

As a preliminary matter, because the Superior Court’s ruling limiting Mr. Earl’s potential damages to \$100 was only an alternative

holding, if the Court affirms the Superior Court's grant of summary judgment on the issue of liability, the Court need not reach Mr. Earl's assignment of error 11. In the event the Court reaches this issue, however, the Court should affirm the Superior Court's ruling limiting Mr. Earl's damages to the market value of his cat.

It is well-settled that a court's decision to grant summary judgment where there are no issues of material fact does not violate the right to trial by jury. *See LaMon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989) ("When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial."). In addition, although an owner of property is permitted to testify to its value, that right is not absolute, and such testimony may be excluded where the owner calculates value based on an improper method. *See Port of Seattle v. Equitable Cap. Group, Inc.*, 127 Wn.2d 202, 211-13, 898 P.2d 275 (1995).

In *Sherman v. Kissinger*, 146 Wn. App. 855, 873-74, 195 P.3d 539 (2008), the Washington Court of Appeals clearly articulated the permissible measure of damages under Washington law for the injury or death of a pet animal:

[T]he measure of damages is the value of the property destroyed or damaged. This is its market value. . . . If the property does not have a market value . . . the measure of damages is the cost to replace or reproduce the article. If it

cannot be reproduced or replaced, then its value to the owner may be considered in fixing damages.

Id. at 871 (quotation marks omitted). Washington law does not permit a pet owner to recover damages for emotional distress or damages to compensate for the loss of the bond between the plaintiff and his or her pet. *Id.* at 873.

In this case, Respondents carried their summary judgment burden by submitting admissible expert evidence — the declaration of Ms. Van Cleave — to show the market value for Mr. Earl’s cat. CP 845-847. In response, Mr. Earl provided only generic, conclusory assertions that his cat did not have a market value, accompanied by his opinion that the replacement value of the cat is \$180,000, the cost of a genetic clone. CP 1248-1295. Because Mr. Earl’s declaration did not include any evidence of objective facts that would tend to show that his cat was unmarketable, the Superior Court correctly determined that Mr. Earl’s declaration was simply insufficient to create an issue of fact as to whether Mr. Earl’s cat had a market value or as to what that market value is. Accordingly, the Superior Court correctly limited Mr. Earl’s potential damages to \$100, the market value identified by Respondents’ expert.

IV. CONCLUSION

For all of the foregoing reasons, Respondents Menu Foods Income Fund and the Kroger Co. respectfully request that the Court affirm the Superior Court's judgment in all respects.

Respectfully submitted this 9th day of August, 2011.

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CERTIFICATE OF SERVICE

I, Bradley T. Meissner, certify that on the 9th day of August, 2011, I caused a true and correct copy of the Brief of Respondent Menu Foods Income Fund to be served on Plaintiff-Appellant Donald R. Earl and counsel for Defendant-Respondent The Kroger Co. in the manner(s) indicated below:

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