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Division II  
State of Washington  
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No. 53900-4-II

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IN THE COURTS OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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PHIL LARSON,

Appellant,

vs.

JARRITOS, INC. AND TIPP ENTERPRISES, INC.,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## REPLY BRIEF OF APPELLANT

Appellant Phil Larson (“Appellant”) replies to the response brief filed by Respondents Jarritos, Inc. and Tipp Enterprises, Inc. (“Respondents”) as follows:

### ARGUMENT

1. **Respondents' citation to an unpublished case violates GR 14.1 and should be stricken.**

GR 14.1 sets forth the court rules regarding citation to unpublished opinions. Per GR 14.1(a), “(u)npublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.”

This rule is further emphasized on the Washington Courts website, on a page entitled BACKGROUND INFORMATION ABOUT WASHINGTON STATE'S APPELLATE COURT OPINIONS stating that “(t)he Court of Appeals issues an unpublished opinion when the judges determine that the case lacks sufficient precedential value for full publication, usually because the case addresses already settled points of

law. Under GR 14.1 and RCW 2.06.040, these unpublished opinions cannot be cited as precedential authority.”

See Washington Courts website at <https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.page&pgname=opinionBackground>.

Respondents' citation to the Padilla case on page 11-12 of the response brief should be stricken and disregarded by this Court. Not only is the Padilla case unpublished and many years prior to March 1, 2013, but it is also contrary to the binding precedent for products liability suits established by the Washington Supreme Court in North Coast Air v. Grumman Corp., 111 Wn.2d 315, 759 P.2d 405 (1988).

2. **AR(2) issue has already been decided by this Court.**

During the pendency of the instant appeal, this Court decided the AR(2) issue in *Appellant's favor* in a separate case.

Specifically, in Nat'l Parks Conserv. Ass'n v. Dep't of Ecology, 12 Wn. App. 2d 977, 460 P.3d 1107 (2020), this Court concluded that “(i)t is axiomatic that a court clerk's discretionary action cannot strip a superior court of jurisdiction. A court either has jurisdiction or it does not. ... Therefore, we conclude that the filing of a form required by AR 2 does not impose a jurisdictional requirement.”

For the reasons set forth in the Brief of Appellant, Judge Lanese

erred in ruling that the filing of the Case Information Cover Sheet was a necessary prerequisite to jurisdiction.

3. **Statute of limitations is a jurisdictional issue that can be raised at any time in the litigation.**

A defense involving a statutory limitation period is jurisdictional and may be raised for the first time on appeal under RAP 2.5(a). State v. Ansell, 36 Wn. App. 492, 675 P.2d 614 (1984).

By using the term "may," RAP 2.5(a) is written in discretionary, rather than mandatory, terms. State v. Ford, 137 Wn.2d 472, 477, 484-85, 973 P.2d 452 (1999). In addition to its discretionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal.

As the Washington State Supreme Court stated in Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 465 P.2d 657 (1970):

Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case ... should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

The same principle drove the decision in Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). There, the defendant in a suit for

negligent investigation succeeded in getting a damage award overturned with an argument newly raised on appeal. The argument was based on a recent Supreme Court decision that plaintiffs cannot maintain an action for negligent investigation of child abuse when the negligence does not result in a harmful placement decision. Allowing the new argument, the court reaffirmed its previous statements that a new issue can be raised on appeal when the question raised affects the right to maintain an action. Roberson, 156 Wn.2d at 40.

In their response brief, Respondents appear to confuse knowledge of the injury itself with knowledge of all facts necessary to maintain an action under RCW 7.72. This is contradicted by the holding in Orear v. Int'l Paint Co., 59 Wn. App. 249, 796 P.2d 759 (1991) which found that “knowledge or imputed knowledge of a particular defendant's identity is necessary for the plaintiff's cause of action against that defendant to accrue”. The *Orear* court continued:

A person injured by a defective product simply cannot be said to have discovered the cause of injury in a legally enforceable sense until he or she discovers who manufactured or supplied the product or is otherwise responsible for the injury. ... Thus, the justification for the discovery rule as applied to unknown injury applies with equal force to unknown defendants.

...

We conclude that the statutes of limitations applicable to Orear's cause of action against Seaport did not begin to run until he knew or with reasonable diligence should have known that Seaport may have been a responsible party. On this record, whether Orear should have discovered Seaport's identity as a potentially responsible party prior to 1988 is an issue of fact that precludes summary judgment.

Ibid.

In the instant case, Appellant properly pleaded all statutory elements for the filing of a product liability claim under RCW 7.72 before the trial court. Accordingly, the appropriate statute of limitations applicable to product liability claims should be considered by this Court on appeal (whether or not directly addressed before the trial court).

4. **Tolling under RCW 4.16 is not required in this case.**

Appellant declines to submit further argument on the issue of tolling, because tolling under RCW 4.16 is not required to establish a timely lawsuit here.

The summons and complaint in this case were timely filed in Thurston County Superior Court and timely served on all defendants (including Respondents).

Should any extension of the 3-year statute of limitations be required, such extension is already available to Appellant under RCW 7.72.060 as he was unaware of the identity of the soft drink manufacturer until some time after the injury.

**CONCLUSION**

Based on the foregoing and the Brief of Appellant, the two erroneous Thurston County Superior Court orders dismissing Respondents should be REVERSED.

RESPECTFULLY SUBMITTED this 28th day of September, 2020.

LOMBINO MARTINO, P.S.

By: 

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**LOMBINO MARTINO, P.S.**

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**Transmittal Information**

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