NO. 71894-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FRANKLIN LACY,

Appellant,

v.

RICHARD RASMUSSEN, BETTY J. RASMUSSEN, owners, RASMUSSEN WIRE ROPE & RIGGING CO., RASMUSSEN EQUIPMENT CO., BILL JOOST, LANDMANN WIRE PRODUCTS, WEISNER, INC., WEISNER STEEL PRODUCTS, INC., and Unknown Chang Doe Shackle Manufacturing,

Respondents.

BRIEF OF RESPONDENTS WEISNER, INC., WEISNER STEEL PRODUCTS, INC. AND LANDMANN WIRE ROPE PRODUCTS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes (Continued):

Other Authorities:

I. INTRODUCTION

Defendants-Respondents Weisner, Inc. and Weisner Steel Products, Inc. (collectively "Weisner") and Landmann Wire Rope Products, Inc. ("Landmann") respectfully submit this joint Respondents' Brief. Respondents Weisner and Landmann request that the Court affirm the Superior Court's orders of dismissal of all claims against them by Plaintiff-Appellant Franklin Lacy.

Mr. Lacy originally filed this action in San Juan County Superior Court on August 11, 2010. His complaint names Richard Rasmussen, Rasmussen Wire Rope & Rigging Co., Rasmussen Equipment Co., Bill Joost (collectively "Rasmussen defendants") and "Chang Doe Shackle Manufacturing Co." as defendants. Mr. Lacy's claims arise out of his purchase of stainless steel shackles from the Rasmussen defendants. He claims that the shackles were defective. In his complaint, Mr. Lacy alleges claims of misrepresentation, breach of implied warranty, negligence, and various other allegations.

On August 26, 2011, the trial court granted Mr. Lacy leave to amend his complaint to join additional defendants, including Respondents Weisner and Landmann. In January 2012, Respondents Weisner and Landmann each received a copy of what purported to be a summons and complaint. Weisner and Landmann each filed motions to dismiss based on the following grounds: (1) statutory preemption under the Washington Product Liability Act (WPLA); (2) Mr. Lacy's lack of contractual privity; and (3) the statute of limitations. The superior court granted the motions

to dismiss on June 15, 2012. The court's orders dismissing all of Mr. Lacy's claims against Respondents Weisner and Landmann should be affirmed. Respondents Weisner and Landmann also request an award of attorneys fees incurred in connection with this appeal pursuant to RAP 18.9.

II. STATEMENT OF ISSUES RE ASSIGNMENTS OF ERROR

Dismissal of claims against Weisner and Landmann (Assignment of Error 6). The only assignment of error applicable to Respondents Weisner and Landmann involves the superior court's orders dismissing Mr. Lacy's claims against them. The court correctly determined that Mr. Lacy's claims against Weisner and Landmann were barred by the statute of limitations. Dismissal was also proper because all of Mr. Lacy's claims are preempted by the Washington Product Liability Act (WPLA). Also, Mr. Lacy's lack of contractual privity with Weisner or Landmann is fatal to his claims for breach of implied warranty, making dismissal proper on this basis as well.

III. STATEMENT OF THE CASE

Mr. Lacy filed his original complaint in San Juan Superior Court on August 11, 2010. CP 4-10. The complaint names Richard Rasmussen, Rasmussen Wire Rope & Rigging Co., Rasmussen Equipment Co., Bill Joost, and "Chang Doe Shackle Manufacturing Co." as defendants. *Id.* Mr. Lacy's claims arise out of his purchase of stainless steel shackles from the Rasmussen defendants. *Id.* "Chang Doe Shackle Manufacturing Co." is a fictitious named entity, ostensibly representing the manufacturer of the

shackles, who Mr. Lacy contends is an unknown Chinese entity. CP 5, ¶ 2. In his complaint, Mr. Lacy alleges that these products were purchased from the Rasmussen defendants from "approximately" May 1995 through August 2008. CP 6, ¶ 3. He claims that the shackles were defective because they would deteriorate in salt water. *Id.* In his complaint, Mr. Lacy alleges causes of action based on misrepresentation, breach of implied warranty, and negligence. CP 4-10. The complaint also contains various other allegations which are not legally recognized causes of action. *Id.*

On August 26, 2011, the trial court granted Mr. Lacy's motion to join additional defendants, including Weisner and Landmann. CP 97. In his motion for leave to amend, Mr. Lacy's stated reason for joining Weisner and Landmann was that they were in the "chain of ownership and purchase" of the shackles. CP 92. Mr. Lacy does not contend that either Weisner or Landmann manufactured the shackles and maintains that they were made by an unknown company in China. *Id.* In fact, Mr. Lacy's complaint is devoid of any specific allegations as to why he contends Weisner or Landmann are subject to liability. CP 4-10.

The pleadings that purport to be the summons and complaint joining Weisner and Landmann as defendants were signed on January 19, 2012. CP 121; CP 129. The complaint alleges that Landmann is located in Burlingame, California and that Weisner is located in Orinda, California. CP 123, ¶ 2. However, the complaint does not contain any substantive allegations directed to either Landmann or Weisner. CP 122-

129. The summons used by Mr. Lacy is not in the form required by Civil Rule 4(b)(2). See CP 119-121.

On May 7, 2012, defendants Weisner and Landmann each filed motions to dismiss plaintiff's complaint pursuant to CR 12(b)(6). CP 99-105; CP 98; CP 833-842. Weisner and Landmann's motions to dismiss were based on the following arguments: (1) that Mr. Lacy's claims were statutorily preempted by the Washington Product Liability Act (WPLA); (2) Mr. Lacy's lack of contractual privity; and (3) the statute of limitations. *Id.* At the time Weisner and Landmann filed their respective motions to dismiss, Mr. Lacy had not actually filed his amended complaint with the court. He filed an ammended [sic] complaint on May 21, 2012. CP 136-143. He then filed another pleading, entitled "expanded amended complaint" on May 24, 2012. CP 148-156. On May, 25, 2012, Mr. Lacy filed a motion to "approve the expanded amended complaint." CP 168-170.

On June 15, 2012, the superior court granted Weisner and Landmann's motions to dismiss. CP 413-415; CP 416-418. The Honorable Donald E. Eaton granted the motions to dismiss based on his finding that Mr. Lacy's claims against these defendants were barred by the statute of limitations. June 15, 2012 Verbatim Report of Proceedings (RP), 2556-2559. In light of the court's rulings, Mr. Lacy's motion to "approve the expanded amended complaint" was stricken as moot. CP 419-421; June 15, 2012 RP 2559-2560.

IV. ARGUMENT

A. The superior court properly dismissed plaintiff's claims against Weisner and Landmann as barred by the statute of limitations.

This Court reviews an order of dismissal based on CR 12(b)(6) *de novo*. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007). Mr. Lacy's complaint alleges that he purchased stainless steel shackles between May 1995 and August 2008 and that in August 2008 he discovered that these products were defective. CP 6-8. His cause of action accrued in August 2008. On August 26, 2011, he was given leave to file an amended complaint to join Weisner and Landmann as additional defendants in the case. However, he did not serve these defendants until January 2012. He did not actually file his amended complaint until May 21, 2012, after Weisner and Landmann filed their motions to dismiss.

Mr. Lacy has also not properly served either Weisner or Landmann. The "summons" he utilized was not in conformance with Civil Rule 4(b). The summons document does not contain the title of the cause or the name of the court in which the action was filed as required by CR 4(b)(1)(i). CP 133-135. The document is also not in the form prescribed by CR 4(b)(2). *Id.* The summons is also improper because it directs these defendants to appear in 20 days even though both Weisner and Landmann were personally served in California. *See* RCW 4.28.180 (summons served out of state requires party to appear within 60 days). The fact that Mr. Lacy chose to bring his case *pro se* did not relieve him

from the obligation of properly commencing this action within the limitations period. *Westberg v. All-Purpose Structures, Inc.,* 86 Wn. App. 405, 411, 936 P.2d 1175 (1997) (*pro se* litigants bound by the same rules of procedure and substantive law as attorneys).

Any potential claim Mr. Lacy could conceivably have against Weisner or Landmann related to the stainless steel shackles would be subject to a three year statute of limitations. This is because any claim he might have would be governed by the Washington Product Liability Act (WPLA) based on the statute's preemption of common law causes of action. RCW 7.72.010(4). Claims under the WPLA are subject to a three year statute of limitations. RCW 7.72.060. Mr. Lacy's claims accrued in August 2008 and he was given leave to amend to join Weisner and Landmann as defendants in August 2011. He inexplicably waited to do so until January 2012, when he served them with an improper summons and complaint. Because he did not properly commence this action against Weisner or Landmann within the applicable limitations period, the superior court was correct in its determination that his claims were time barred.

B. The superior court also properly dismissed Mr. Lacy's claims against Weisner and Landmann because all of his claims are preempted by the WPLA.

The trial court's decision may be affirmed based on any ground supported in the record. *Washington Federation of State Employees v. State Dept. of General Admin.*, 152 Wn. App. 368, 378, 216 P.3d 1061

(2009). Weisner and Landmann's motions to dismiss were based on the independent grounds that the claims asserted by Mr. Lacy were preempted under the Washington Product Liability Act (WPLA). CP 99-105; 833-842. The complaint did not allege a claim under the WPLA. This alone required that it be dismissed.

In Washington, nearly all common law tort-based causes of action based on harm caused by a defective product are preempted by the WPLA. RCW 7.72.010. The WPLA establishes a single, statutory "product liability claim" which is defined as follows:

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

RCW 7.72.010(4).

The Washington Supreme Court has unambiguously held that the WPLA "means nothing if it does not preempt common law product liability remedies." *Washington Water Power Co. v. Graybar Electric Co.*, 112 Wn.2d 847, 853, 774 P.2d 1199 (1989). The court held that the "[c]lear statutory language and corroborative legislative history **leave no doubt** about the WPLA's preemptive purpose." *Id.* (emphasis added); *see*

also Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, 122 Wn.2d 299, 322-23, 858 P.2d 1054 (1993) (WPLA supplants previously existing common law remedies).

Mr. Lacy's claims of misrepresentation, breach of implied warranty, negligence are each expressly preempted by RCW 7.72.010(4). The statute's preemptive effect applies equally to the various other allegations in his complaint. *Id.* The complaint did not allege any claim under the WPLA. CP 4-10. It also did not contain any claim under any of the statute's exceptions for fraud, intentionally caused harm, or the Consumer Protection Act (RCW 19.86). *Id.* Because all of the causes of action alleged are preempted, Mr. Lacy's complaint was properly dismissed.

C. The superior court also properly dismissed Mr. Lacy's claims based on his lack of privity with Weisner or Landmann.

Weisner and Landmann's motions to dismiss were also based on Mr. Lacy's lack of contractual privity with them. CP 99-105; 833-842. This separate reason precludes any claim for breach of implied warranty.

A claim under the WPLA may be based on breach of implied warranty. RCW 7.72.030(2). To support such a claim, privity of contract is required. *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204, 211, 66 P.3d 625 (2003); *Thongchoom v. Graco,* 117 Wn. App. 299, 307, 71 P.3d 213 (2003), *review denied,* 151 Wn.2d 1002, 87 P.3d 1185 (2004). Mr. Lacy did not have any contractual relationship with Weisner or Landmann. He does not claim to have purchased anything from

Weisner or Landmann or that he had any contact or dealings of any kind with either of these parties. Because there was no contractual privity, Mr. Lacy's implied warranty claims were properly dismissed by the trial court.

Mr. Lacy's claims against Weisner and Landmann for misrepresentation are similarly precluded. In his complaint, he alleges that he dealt only with Bill Joost in connection with the shackles he purchased from the Rasmussen defendants. CP 6, ¶ 3. These dealings form the basis of his allegations of misrepresentation. *Id.* He did not have any dealings with Weisner or Landmann and does not allege the existence of any misrepresentation made to him by either of these parties. In fact, there are no substantive allegations in the complaint directed to Weisner or Landmann to support Mr. Lacy's contention that these parties are subject to liability under any legal theory. Because he had no contract or dealings with Weisner or Landmann, Mr. Lacy fails to state a viable claim against these defendants.

D. Respondents Weisner and Landmann request an award of attorneys fees and costs pursuant to RAP 18.9.

A party may request attorneys fees and costs as sanctions for the filing of a frivolous appeal. RAP 18.9(a). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that the appeal is so devoid of merit that there is no possibility of reversal. *Advocates for Responsible Development v. Western Washington*

Growth Management Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

The rules of procedure and substantive law apply equally to Mr. Lacy regardless of his status as a *pro se* litigant. *Westberg,* 86 Wn. App. at 411. As discussed above, Washington law is clear beyond any dispute that Mr. Lacy has no viable claim against Respondents Weisner or Landmann under the theories alleged in his complaint. Mr. Lacy has also insisted on pursuing his misrepresentation and other claims against Weisner and Landmann despite being fully aware that he never had any dealings with either of these parties. For these reasons, Respondents Weisner and Landmann respectfully request that they be awarded their attorneys fees and costs incurred in connection with this appeal.

V. CONCLUSION

For the foregoing reasons, Respondents Weisner and Landmann respectfully request that the Court affirm the Superior Court's orders dismissing Mr. Lacy's claims against them.

DATED this 5th day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, I caused to be served true and correct copies of the foregoing on the following as indicated below:

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Dated February 5, 2015, at Seattle, Washington.

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