

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

No. 71894-1

FRANKLIN R. LACY
Plaintiff-Appellant

v.

RICHARD RASMUSSEN, BETTY J. RASMUSSEN, RASMUSSEN WIRE
ROPE & RIGGING, CO., RASMUSSEN EQUIPMENT CO., BILL JOOST,
LANDMANN WIRE PRODUCTS, WEISNER, INC., WEISNER STEEL
PRODUCTS, INC.

Defendants-Respondents.

On Appeal from San Juan Superior Court, Cause No. 10-2-05171-7

RESPONDENTS RICHARD RASMUSSEN, BETTY J. RASMUSSEN,
RASMUSSEN WIRE ROPE & RIGGING, CO., RASMUSSEN EQUIPMENT
CO. AND BILL JOOST'S RESPONSE BRIEF

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2016 FEB -5 11:11:50
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INTRODUCTION

This case involves an individual, Franklin Lacy ("Lacy"), who purchased stainless steel shackles to be used in his patented dock system. Although Lacy designed the system in 1992 and built it in 1996 and never earned a dime on the systems, he has sued a number of individuals related to Rasmussen Wire Rope & Rigging for \$20 million.

However, the majority of claims are not viable and/or time barred. The Court dismissed all claims prior to 2008 because they were not filed within the three year time frame for torts provided by RCW § 4.16.080(b), or the four year time frame provided for under the Uniform Commercial Code, RCW § 62A.2-725 (1). The Court also dismissed the tort claims arising after 2008 under the independent duty doctrine. The Court dismissed the 2008 consequential damage claims for lost profits because consequential damages are not allowed under the contract and because Lacy failed to present any admissible evidence of consequential damages.

After the Court dismissed these claims, Lacy moved to have the balance of his claims dismissed with prejudice. The Rasmussen Defendants were subsequently awarded their attorneys' fees pursuant to the contract between the parties. Final judgment was entered on December 19, 2014.

Lacy is acting pro se in this matter and his arguments are difficult to follow. For this reason, defendants Richard Rasmussen, Betty J. Rasmussen, Rasmussen Wire Rope & Rigging, Co., Rasmussen

Equipment Co., and Bill Joost (collectively "Rasmussen Defendants") will respond to the issues raised in cohesive and organized form that differs from the issues presented by plaintiff and follows the orders being appealed.

ISSUES ON APPEAL

Issue #1: Are Lacy's breach of contract claims barred for sales occurring more than four years before Lacy filed the complaint?

Answer: Yes. Lacy was aware that the shackles were failing but made no effort to determine the cause of the failure.

Issue #2: Are Lacy's consequential damage claims barred by the language of the contract?

Answer: Yes. The language of the contract clearly bars consequential damage claims.

Issue #3: Are Lacy's tort claims barred for incidents occurring more than three years before Lacy filed the complaint?

Answer: Yes. Lacy had notice of the failure and damages and, therefore, his claims are barred.

Issue #4: Are Lacy's tort claims related to the 2008 dock system failure precluded by the Independent Duty Doctrine?

Answer: Yes. The Rasmussen Defendants owed Lacy no independent duty beyond that contained in the sales contract that the shackles would last for a certain period of time in salt water.

Issue #5: Were Lacy's consequential damage claims properly dismissed because he produced no admissible evidence to support those claims?

Answer: Yes. Lacy's claims are purely speculative and should be dismissed.

Issue #6: Do the Rasmussen Defendants have a fiduciary relationship with Lacy?

Answer: No. The Rasmussen Defendants are sellers involved in an arm's length business transaction.

Issue #7: Are the Rasmussen Defendants entitled to their attorneys' fees?

Answer: Yes. The contract clearly provides for attorneys' fees to the prevailing party.

STATEMENT OF THE CASE

Rasmussen Wire Rope & Rigging, Inc. ("Rasmussen Wire Rope") shares offices with Rasmussen Equipment Company, but the lines of business it operates differ significantly. Rasmussen Wire Rope sells wire rope, rigging, shackles and other supplies used in the marine construction and lumber industries. [Clerk's Papers ("CP") 982, Declaration of Donald K. McLean, Exhibit A –Deposition of Richard Rasmussen, p. 7, lines 7-24].

In February of 1991, Lacy patented a dock system. [CP 987, Declaration of Donald K. McLean, Exhibit B – Deposition of Franklin Lacy, p.29, lines 4-5].

In May of 1995, Lacy contacted Rasmussen Wire Rope & Rigging to purchase material for his dock system. He was put in contact with Bill Joost. [CP 988, Lacy Dep., p. 56, lines 8-15]. Lacy purchased double

braided nylon line and hot-dipped galvanized shackles for use in his dock system. [CP 988-989, Lacy Dep., p. 56, line 20 to p. 57, line 10].

The first time that Lacy purchased from Rasmussen Wire Rope & Rigging he was aware that the purchase was subject to the terms and conditions on the reverse side of the invoice. [CP, 1015, Lacy Dep. p.129, line 8 to 21]. Lacy read the terms and conditions. Id.

The back of the invoice contains the following language:

...

11. Law/Jurisdiction: This contract and performance, hereunder, shall be governed and interpreted as follows: (1) if this Invoice originates through Seller's Washington office, Washington law shall apply and the parties agree that with respect to any litigation arising out of this agreement or performance under it, the federal and/or state courts located in Seattle, Washington shall have exclusive jurisdiction; or (2) if this invoice originated through Seller's Louisiana office, Louisiana law shall apply and the parties agree that with respect to any litigation arising out of this agreement or performance under it, the federal and/or state courts located in New Orleans, Louisiana shall have exclusive jurisdiction. The prevailing party in any suit or proceeding shall be entitled to recover reasonable legal fees and costs. In addition, the parties agree that Purchaser will reimburse Seller for any costs or expenses incurred by Seller in collecting the contract purchase price, or any part thereof, including, but not limited to reasonable legal fees, fees of a collection or investigating agent and litigation expenses. Without prejudice to any other rights that Seller may have against Purchaser, if the equipment is supplied or furnished to a vessel, Seller shall have the right to enforce a maritime lien against the vessel and its appurtenances in any forum in which the vessel may be found.

12. Consequential damages: Except as provided herein, neither party shall be responsible to the other for consequential or special damages, regardless of the cause thereof and whether resulting from delay, neglect or otherwise

[CP 1018, 1020 Lacy Dep. p. 218, line 9 to line 23, Exhibit 62].

Lacy built his dock system in 1996. [CP 990, Lacy Dep. p 68, lines 2-15]. The dock system consisted of five separate floats. Id. Between 1991 and 2008, Lacy would spend between March and September in Friday Harbor. He would spend the rest of his time in Hawaii. [CP 985, Lacy Dep., p. 24, line 15 to p. 25, line 1].

In the summer of 2002, Lacy switched from the galvanized shackles to the stainless steel shackles. [CP 991 Lacy Dep., p.80, line 20 to p. 81, line 12].

In 2003, the dock system failed. [CP 993, Lacy Dep., p. 82, lines 12 to 24]. Lacy determined that the cause of the failure was problems with the stainless steel shackles. [CP 995-96, Lacy Dep., p. 87 line 14 to p. 89, line 8]. There was no damage to anything other than the dock components. [CP 994, Lacy Dep. p. 85, lines 11-13]. Lacy replaced the stainless steel shackles and reinstalled his dock system. [CP 997, p. 89, line 18 to 25].

In 2004, the dock system failed again. This time the failure damaged the dock system, piling and the ramp. [CP 998, Lacy Dep., p.91, line 3 to p. 92, line 4.] In addition one of the breakwaters was damaged. After the 2004 incident, Lacy only put four sections of the dock system back into the water. [CP 1000 Lacy Dep. p.95, lines 13-23].

The dock started failing again either around Christmas of 2004 or March of 2005. [CP 1001-02 Lacy Dep. p.99, line 22 to p. 100, line 6]. Shortly after he noticed the dock system starting to let loose, one of the sections ended up on the rocks. In his effort to rescue the section, Lacy

injured his knee. [CP 1003-05 Lacy Dep., p. 101, line 20 to p. 103, line 8]. After the 2005 incident, Lacy did not rebuild his dock. Instead, he left the four sections on the beach. [CP 1006-07 Lacy Dep., p. 109, line 19 to p. 110, line 2]. One section remained in the water.

In the summer of 2006, the stainless steel shackles failed, but the remaining dock section rotated in place but was not damaged. [CP 1008 Lacy Dep., p. 114, line 14 to 24]. The same thing happened in the summer of 2007, the shackles failed but the dock system remained in place because of the extra lines Lacy had installed. When he left for Hawaii in 2007, he tied additional lines to the remaining dock section to prevent it from failing catastrophically. As a result, when Lacy returned in the Summer of 2008, he discovered that a stainless steel shackle had dissolved in the salt water. [CP 1009-10 Lacy Dep., p. 119, line 15 to p. 120, line 10].

As a result of the incident with the one stainless steel shackle, Lacy soaked his remaining shackles in Puget Sound seawater. Within 9 months, the shackles had dissolved. [CP 1011-12 Lacy Dep. p. 121, line 10 to p. 122, line 2].

Lacy also purchased additional shackles from Rasmussen Wire Rope and Rigging in 2008. These shackles remained intact from 2008 until the summer of 2013 when they started deteriorating. There was no instantaneous failure of the shackles. [CP 1012-13 Lacy Dep., p. 122, line 6 to p. 123, line 9].

A review of the invoices produced in this case shows that between 2002 and 2007, Lacy purchased Type 304 Stainless Steel Shackles. [CP 1021-041, Declaration of Donald K. McLean, Exhibit C – Declaration of Bill Joost, Exhibit 1]. In 2008, Lacy purchased type 316 Stainless Steel shackles. [CP 1023].

The type 316 stainless steel shackles lasted between 2008 and 2013. [CP 1014-15 Lacy Dep., p.128, line 25 to p. 129, line 5]. The shackles purchased in 2008 clearly have the country of origin imprinted on them. [CP 1016-17 Lacy Dep., p. 137, line 7 to line 18].

In August of 2010, the plaintiff filed a lawsuit against Rasmussen Wire Rope & Rigging, Rasmussen Equipment Company, Bill Joost, Richard and Jane Doe Rasmussen. [CP 4-10]. The complaint alleges damages arising from failure of the shackles.

In August of 2011, the plaintiff filed a motion to add the manufacturers of the shackles to the lawsuit. The Rasmussen Defendants did not object. The Court granted the motion on August 26, 2011 [CP 95].

However, no amended complaint was ever filed with the court and it is unclear whether the manufacturers were ever properly served. The claims against the manufacturers were dismissed by order on June 15, 2012. [CP 413-418]. The basis for the dismissal was that Lacy did not file a claim until expiration of the statute of limitations and because the contract claims were preempted by Washington Product Liability Act.

On March 31, 2014, the court granted Rasmussen Defendants' motion for partial summary judgment dismissing the majority of plaintiffs' claims. [CP 1514-16]. The Court ruled as follows:

1. Franklin Lacy ("Lacy") claims related to items purchased from Rasmussen Wire Rope & Rigging, Inc. ("Rasmussen") prior to August 11, 2006 are time barred.
2. Lacy's claim for consequential damages are precluded by the terms and conditions of the sales contract;
3. Lacy's claims for consequential damages and lost profits are dismissed because Lacy cannot produce any admissible evidence supporting these claims;
4. Lacy's tort claims for events occurring prior to August 11, 2007 are time barred;
5. Lacy's tort claims for damages related to the 2008 failure of his dock system are barred by the Independent Duty Doctrine because Lacy only suffered economic loss and the dock did not fail suddenly and dangerously; and
6. Rasmussen Wire Rope & Rigging, Inc., Richard Rasmussen, Betty Rasmussen Bill Joost and, Rasmussen Equipment Company do not owe Lacy a fiduciary duty.

[CP 1515].

The Court, however, allowed Lacy to amend his complaint to issue claims under the Consumer Protection Act and any other issues that were not resolved by the Court's Order. [CP 1517-18]. Instead of amending the complaint or otherwise litigating the outstanding issues, Lacy filed a motion for summary judgment seeking to dismiss the balance

of his claims with prejudice. [CP 1757-1771]. The Court granted this motion dismissing all of plaintiff's claims with prejudice. [CP 1805-06].

On August 15, 2014, the Court issued an order granting Rasmussen Defendants' their attorneys' fees based on the clear language of the contract between Rasmussen Wire Rope and Lacy. [CP 2118-19]. An amended Notice of Appeal was filed arguably appealing this order. [CP 2170-2184].

On November 18, 2014, the Court granted Rasmussen's Motion to Quantify Attorneys' Fees. [Exhibit B to Appellants' Brief]. No notice of appeal was filed from this order. This order is not at issue in this appeal.

On December 19, 2014, the Court entered final judgment. [Exhibit E to Appellant's Brief]. No notice of appeal has been taken from the final judgment.

ARGUMENT

A. Summary of Argument.

The relationship between Lacy and the Rasmussen Defendants is governed by the terms and conditions on the reverse side of the invoices that Lacy thoroughly read prior to purchasing equipment from Rasmussen Wire Rope & Rigging, Inc. in 1996.

Lacy purchased the shackles at issue in this case between 2002 and 2007. The shackles first failed in 2003, but Lacy did not file a lawsuit until 2010. The relevant statute of limitations for sales contracts under the UCC is four years. RCW § 62A.2-725 (1) The claims related to sales prior to August of 2006 are time barred. Because Lacy was aware that the

shackles were failing, he cannot claim that the statute of limitations should be tolled until he was aware of the exact reason for the failure.

Likewise, Lacy's tort claims are barred by the relevant statute of limitations, RCW § 7.72.060(3) or RCW § 4.16.080(b). This statute of limitations is three years and all of Lacy's claims for failures prior to August of 2007 must be dismissed.

Because both the tort claims and the contract claims are dismissed, the only issue are the claims related to the 2008 dock system failure. Lacy, however, cannot maintain a tort based cause of action because under the independent duty doctrine, there was no sudden and dangerous failure of the shackles.

Furthermore, all claims for consequential damages must fail because they are barred by the contract and because Lacy has submitted no admissible evidence to support any such damages.

The Rasmussen Defendants do not have a fiduciary relationship with Lacy.

Finally, Rasmussen Defendants are entitled to their attorneys' fees pursuant to the terms of the contract.

B. The Court can only consider the evidence before the trial court when it issued its orders.

In reviewing an order granting a motion for summary judgment, the Court of Appeals should engage in the same inquiry as the trial court. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 26, 109 P.3d 805 (2005). In the present case, there is an issue as to what the

record should be for the appeal because Mr. Lacy would raise new issues with every pleading he filed. The Court of Appeals, however, should only consider the evidence that was before the trial court as it decided each motion. Shellenbarger v. Brigman, 101 Wash. App. 339, 345, 3 P.3d 211, 214 (2000)(holding that before deciding the merits the Court should determine what evidence the trial court considered). See also Felsman v. Kessler, 2 Wash. App. 493, 497-98, 468 P.2d 691, 694 (1970)(holding that the parties can submit additional evidence up to the point the Court renders its order on the motion).

In his response to the Rasmussen Defendants' Motion the Attorneys Fees, Lacy argued for the first time that he wrote on the contract that "The terms and conditions do not apply to these goods being purchased. My signature on any purchases in the future will only affirm that quantities of goods ordered and nothing else. This was affirmed by Bill Joost of Rasmussen." [CP 1809-10]. Although as discussed supra this does not raise an issue of material fact because it is directly contradicted by his earlier sworn testimony, the Court should not consider it when reviewing the order on motion for summary judgment dismissing plaintiff's claims for consequential damages under the contract.

C. The action based on the sale of the shackles prior to 2007 is time barred.

A contract for the sales of goods is governed by Article 2 of Uniform Commercial Code as enacted by the Washington State legislature. The UCC contains a four year statute of limitations. Under

the statute, a purchaser of goods must commence litigation "within four years after the cause of action has accrued." RCW § 62A.2-725 (1).

Unless there is an express warranty as to future performance, a cause of action accrues when the goods are tendered for delivery. RCW §62A.2-725 (1). Holbrook, Inc. v. Link-Belt Const. Equip. Co., 103 Wash. App. 279, 284, 12 P.3d 638, 641 (Wash. Ct. App. 2000). In the present case, there was no warranty of future performance.

The lawsuit was commenced on August 11, 2010. [CP 1-10] The cause of action is barred as to all sales prior to August 11, 2006. The Court correctly dismissed all of the claims for breach sales contract for sales that occurred prior to August 11, 2006.

In his appeal brief, Lacy argues that the statute of limitations should not commence until he knew the reason that the shackles were failing in 2009. This argument ignores the fact that Lacy was aware that that the shackles were failing as early as 2003. [CP 995-96, Lacy Dep., p. 87 line 14 to p. 89, line 8]. Lacy's argument is also based on a misapprehension of the law.

The UCC specifically provides that the statute of limitations commences "regardless of the party's lack of knowledge of the breach." RCW § 62A.2-725 (2). Holbrook, Inc. v. Link-Belt Const. Equip. Co., 103 Wash. App. 279, 283, 12 P.3d 638, 641 (2000). See also 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wash. 2d 566, 146 P.3d 423 (2006)(holding that except for established exceptions the discovery rule does not apply to breach of contract claims); Kinney v. Cook, 150 Wash.

App. 187, 194, 208 P.3d 1, 4 (2009)(refusing to extend the discovery rule beyond the latent defect exception enunciated in 1000 Virginia). Lacy's arguments that the discovery rule should apply, therefore, should be rejected.

Although not articulated in his brief and, therefore, not an issue on appeal, Lacy cannot prevail on any fraudulent concealment defense. To prevail on a fraudulent concealment claims, Lacy must prove that Rasmussen concealed information from him. Lacy must also show that he was unaware of the information and that he was reasonably diligent in his efforts to discover such information. Giraud v. Quincy Farm & Chem., 102 Wash. App. 443, 455, 6 P.3d 104, 111 (Wash. Ct. App. 2000).

The facts of Giraud are illustrative of the application of the fraudulent concealment doctrine. In Giraud, the defendant allegedly applied herbicide to potato plants in the spring of 1994. The plants began to show signs of decay and Giraud asked the defendant about the herbicide. The defendant allegedly informed Giraud that he would have a normal harvest. However, when the potatoes were harvested they were deformed. Giraud sued defendant more than four years after the harvest and argued that fraudulent concealment prevented the statute of limitations from running. The court disagreed finding that when Giraud had notice of the problem with the potatoes, due diligence required him to determine the cause of the problems.

In the present case, Lacy cannot prove that he was reasonably diligent in his efforts to discover what problems the shackles had. As

early as 2003, Lacy was aware the shackles were failing [CP 995-96], but made no efforts to determine why they were failing. Lacy could have easily soaked the shackles in water and discovered any problems well before August 11, 2006. [CP 1011-12 Lacy Dep. p. 121, line 10 to p. 122, line 2].

Lacy does cite unreported decision Verd v. Bossertd¹, 179 Wash. App. 1042 (2014) in support of his position that the statute of limitations does not commence running until the plaintiff learns the cause of the loss. Notwithstanding these arguments, Verde stands for the proposition that the discovery rule only applies if the plaintiff can establish that through the use of due diligence plaintiff could not discover his cause of action. As discussed previously Lacy did not use due diligence to discover the reason the shackles were failing.

Lacy also cites Architectonics Const. Mgmt., Inc. v. Khorram, 111 Wash. App. 725, 45 P.3d 1142 (2002) for the principal that the discovery rule applies in contract cases. Lacy, however, fails to acknowledge that Architectonics was clarified in 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wash. 2d 566, 590, 146 P.3d 423, 435 (2006). In 1000 Virginia, the Washington State Supreme Court expanded the discovery rule to latent construction defect cases where the plaintiff

¹ Rasmussen Defendants note that Verd should not be cited to pursuant App. GR 14.1 However, given Lacy's pro se status and scarcity of case law in the appeal brief, decided to respond to Lacy's arguments. Rasmussen defendants cannot find any reference to a hydraulic log loader in the case.

used due diligence to discover the defect. As discussed earlier, Washington courts have refused to extend the 1000 Virginia beyond latent construction defect cases. Furthermore, Lacy was aware the shackles were failing in 2003, [CP 995-96] and, therefore, the problems could not be characterized as latent.

A review of the invoices shows that only the following invoices were after 2006:

July 25, 2007:	Invoice 181890:	12 Anchor Shackles
August 11, 2008:	Invoice 186814:	30 Anchor Shackles
September 15, 2008:	Invoice 186814:	No Shackles
July 14, 2009:	Invoice 190259:	No Shackles

[CP 1023-41].

In August of 2008, Lacy determined that the shackles failed because of corrosion and purchased a different style shackle. [CP 1011-12 Lacy Dep. p. 121, line 10 to p. 122, line 2] Although the Court would have allowed them to proceed, Lacy has dismissed any cause of action related to the 2007 and 2008 shackle purchase. [CP 1805-06]. If the Court affirms dismissal of the previous sales on a statute of limitations, theory, then the Court should affirm the dismissal of claims arising from the sale of the shackles.

D. The statute of limitations prevents Lacy from suing in tort for claims prior to 2008.

Although Lacy does not explicitly argue in his appeal brief that the three year statute of limitations applies to his claims against Rasmussen defendants, he has appealed the Court order dismissing the claims prior to 2008 for causes of action in tort.

The tort claims are governed by Washington Product Liability Act, RCW 7.72.010. As the product seller, Rasmussen Wire Rope & Rigging, Inc. has limited liability to the purchaser and Lacy must show Rasmussen breached a duty outlined in RCW 7.72.040(1). Although it is unclear whether actions against the seller would apply the statute of limitations provided in RCW 7.72.060(3) or the general tort statute of limitations RCW § 4.16.080(b), it is immaterial because both statutes have a three year time frame.

In his deposition, Franklin Lacy explained that the damage to his knee occurred when the dock system failed in 2005 which he claims eventually led to his knee being replaced. [CP 1003-05 Lacy Dep., p. 101, line 20 to p. 103, line 8]. Lacy also claims that there was property damage in 2003 [CP 994, Lacy Dep. p. 85, lines 11-13], 2004 [CP 998, Lacy Dep., p.91, line 3 to p. 92, line 4], and 2005 [CP 1006-07 Lacy Dep., p. 109, line 19 to p. 110, line 2] when the shackles failed. Because this tort occurred more than three years before Lacy filed his cause of action on August 11, 2010, the claims for bodily injury and property damage are time barred.

Lacy argues that the statute of limitations should not start running until he was certain how shackle were failing. Under the discovery rule, "the limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively prove the tortious conduct has occurred." Beard v. King Cnty., 76 Wash. App. 863, 868, 889 P.2d 501, 504 (1995). The key consideration under the discovery rule is the

factual, not the legal, basis for the cause of action. Allen v. State, 118 Wash. 2d 753, 758, 826 P.2d 200, 203 (1992). See also Gevaart v. Metco Const., Inc., 111 Wash. 2d 499, 502, 760 P.2d 348, 350 (1988)(holding that cause of action accrues when plaintiff is injured and knows the cause of the injury regardless of knowledge of defect).

The undisputed evidence shows that plaintiff was aware that the shackles were failing and was aware that failing shackles were causing damage as early as 2003. [CP 995-96, Lacy Dep., p. 87 line 14 to p. 89, line 8]. Lacy could have sent the shackles to a metallurgist or could have conducted his saltwater test which would have shown the problems with the shackles. Instead, Lacy attempted numerous other solutions which failed to disclose the extent of problems with the shackles. Under the circumstances, his tort claims are barred for torts occurring prior to August 11, 2007. The fact that he did not discover the exact reason why the shackles were failing until 2008 [CP 1009-10 Lacy Dep., p. 119, line 15 to p. 120, line 10] does not toll the statute of limitations. His tort claims are barred.

Furthermore, the plaintiff must prove that he used due diligence to invoke the discovery rule. Giraud, 102 Wash. App. at 449-50. Lacy's deposition shows that through the use of due diligence Lacy should have discovered the problems with the shackles of which he now complains. Lacy was injured in 2005. [CP 1003-05 Lacy Dep., p. 101, line 20 to p. 103, line 8]. Lacy explained in his deposition that he was aware that the shackles were failing as early as 2003. [CP 995-96, Lacy Dep., p. 87 line

14 to p. 89, line 8] If Lacy had undertaken the steps he took in 2008, he would have discovered that the shackles were deteriorating in salt water within six months of the incident and well before August of 2007.

Lacy cites Holbrook for the proposition that the statute of limitations does not commence until the plaintiff discovers the exact cause of the failure. The Holbrook court, however, explicitly rejected the position that Lacy argues. In response to an argument that the statute should be tolled until the plaintiff was certain as to the cause, the Court of Appeals wrote:

That Holbrook did not confirm this belief until May 1993 did not toll the running of the three-year limitations period. Holbrook cites no authority to support his proposition that a claimant discovers the cause of the harm only when he or she is “absolutely certain” of the cause. And we decline Holbrook’s implicit invitation to adopt such a rule judicially, because to do so would negate the statute’s constructive discovery component, which the Legislature included

Holbrook, 103 Wash. App. at 292.

Lacy’s tort claims for the failures prior to 2008 are time barred because they occurred more than three years prior to filing of this cause of action. The order of the trial court should be affirmed accordingly.

E. Lacy cannot recover consequential damages related to his purchase of the 2007 shackles.

Lacy alleges the shackles failed in 2008 and that Lacy needed to replace the shackles. However, the dock system did not release and Lacy just needed to replace the shackles. [CP 1009-10 Lacy Dep., p. 119, line 15 to p. 120, line 10]. In the event, Lacy is able to prevail on a breach of

express or implied warranty theory, he would be able to recover these costs of the replacement of the shackles. However, to the extent that he is claiming lost profits or other consequential damages he cannot recover.

The contract between Lacy and Rasmussen provides at paragraph 12:

Consequential damages: Except as provided herein, neither party shall be responsible to the other for consequential or special damages, regardless of the cause thereof and whether resulting from delay, neglect or otherwise

[CP 1020].

In the commercial context, consequential damage limitations are prima facie enforceable, and the burden of establishing unconscionability is on the party challenging its enforcement. M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash. 2d 568, 585-86, 998 P.2d 305 (2000)(citing American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wash.2d 217, 222, 797 P.2d 477 (1990)). To void the consequential damage limitation, the burdened party must show that the contract was either substantively unconscionable or procedurally unconscionable. Id. If there is no threshold showing on the issue, the Court may resolve the issue on summary judgment. Id. (citing Nelson v. McGoldrick, 127 Wash.2d 124, 132–33, 896 P.2d 1258 (1995)). In the present case, there are no facts which would justify not enforcing the consequential damages limitation.

Substantial unconscionability focuses on the fairness of the limitation and where the limitation is one-sided or over-bearing. Nelson, 127 Wash.2d at 131, 896 P.2d 1258 (quoting Schroeder v. Fageol Motors,

Inc., 86 Wash. 2d 256, 260, 544 P.2d 20 (1975)). "Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention, 16 Wash.App. 439, 444, 556 P.2d 552 (1976)). It is unclear whether consequential damage limitations can ever be substantively unconscionable in a commercial context. Mortenson, 140 Wash.2d at 585.

In Tacoma Boatbuilding Co. v. Delta Fishing Co., 28 U.C.C. Rep. Serv. 26, 35 (W.D.Wash.1980), the court explained that a consequential damage limitation is risk allocation device that allocates risk in a commercial context and it is completely reasonable to allocate risk of consequential damages associated with a product to the purchaser.

In the present case, it is completely reasonable to disclaim consequential damages relating to relatively inexpensive stainless steel shackle. The stainless steel shackle cost \$33.60. [CP 1039]. The claimed consequential damages are in excess of \$20 million. [CP 10]. Allocating the risk of consequential damages from the supplier of an inexpensive part to the designer of a dock system cannot be substantively unconscionable.

In contrast, procedural unconscionability exists if there is unfairness in the contracting process. As the Washington State Supreme court explained:

Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including " '[t]he manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the

contract,' and whether 'the important terms [were] hidden in a maze of fine print....' ”

Mortenson, 140 Wash.2d at 588(quoting Nelson, 127 Wash.2d at 131).

In the present case, Lacy fully read the terms and conditions in 1996 and was aware that his purchase was subject to the terms on the reverse side. [CP 1015, Lacy Dep. p.129, line 8 to 21]. Lacy read the terms and conditions. Id. In his deposition he explained:

[w]hen I first bought goods from Bill Joost, it said clearly on the bottom as it says here, "Subject to the conditions set forth on the reverse side," and I always read reverse sides. Even if I am renting a car, I read the reverse side.

Id. He also explained:

And I thoroughly read the contract at the time bills first presented to me for signature, and I didn't sign it until I had read it.

[CP 1018, Lacy Dep., p. 218, lines 14-15]. The terms and conditions are readable in all of the exhibits presented with the motion for summary judgment. [CP 1020]. There was no evidence submitted in response to the motion for summary judgment showing that the order was unreadable.

Lacy also argues that because the contract uses the term equipment rather than goods, it is not applicable to his purchase of shackles. However, the Rasmussen defendants are not relying on the term "equipment" because the prohibition against consequential damages does not refer to either "equipment" or "goods."

Likewise, the use of the terms "Purchaser" and "Seller" defeat Lacy's argument that the contract only applies to rental agreements. Paragraph 10 explains that the contract is integrated and represents "the

entire understanding of the parties." The use of parol evidence, therefore, is limited and "the writing may be supplemented or replaced by consistent terms or agreements shown by a preponderance of the evidence." Lopez v. Reynoso, 129 Wash.App. 165, 118 P.3d 398, 401–03 (2005).

Admissible extrinsic evidence does *not* include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.

Go2Net, Inc. v. C I Host, Inc., 115 Wash. App. 73, 84, 60 P.3d 1245, 1251 (2003)(quoting Bort v. Parker, 110 Wash. App. 561, 574, 42 P.3d 980, 988 (2002)). Because the invoice was for a sale specifically stating that it was subject to the terms and conditions set forth on the reverse side referencing a sale, parol evidence cannot transform it into a rental agreement inapplicable to the present dispute.

Finally, Lacy argues that the change of the term equipment to goods somehow renders the consequential damage limitation procedurally unconscionable. Although Rasmussen disagrees that the change is material, Rasmussen specifically avoided the issue by relying solely on a contractual provision regarding consequential damages that refers to neither equipment nor goods.

Lacy admitted that the sale was subject to the terms and conditions on the reverse side Lacy thoroughly read the terms which explicitly provide that consequential damages are unavailable. Under the circumstances, the terms cannot be procedurally unconscionable.

F. The consequential damages claims should be dismissed because Lacy has produced no admissible evidence regarding the existence of lost profits.

Finally, even if there is an issue of material fact as to the unconscionability of the consequential damage limitation, Lacy cannot prove any lost profits or consequential damages from the failure of the 2007 shackles or the 2008 failure. Damages must be supported by evidence that provides a reasonable basis and cannot be based on mere speculation, guess work or wishful thinking. Fed. Signal Corp. v. Safety Factors, Inc., 125 Wash. 2d 413, 443, 886 P.2d 172, 188 (1994)(applying rule under sales contract). See also Gasland Co., Inc. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 713, 257 P.2d 784 (1953); Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty., 164 Wash. App. 641, 664, 266 P.3d 229, 240 (2011); Shinn v. Thrust IV, Inc., 56 Wn.App. 827, 840, 786 P.2d 285 (1990).

Lacy never marketed the dock system or otherwise attempted to profit from his patent. Lacy has never earned any money for any of his inventions [CP 1017, Lacy Dep. p. 176, lines 23-24]. Lacy only has wishful thinking to justify an award of lost profits. Under the law this is not sufficient and the Court should dismiss the claims for lost profits and consequential damages and whether they arise in contract or tort.

G. The Independent Duty Doctrine Bars Any Claims In Tort Related To The 2008 Failure.

In 2008, the shackles failed again but the floating dock remained in place and did not suffer any physical damage because Lacy had taken the necessary steps to prevent any sudden calamitous failure. [CP 1010-11,

Lacy Dep. P 120, line 20 to p. 121, line 1]. Under the Independent Duty Doctrine, a party cannot recover in tort unless there exists a duty sounding in tort independent of the contract between the parties. Eastwood v. Horse Harbor Found., Inc., 170 Wash. 2d 380, 405, 241 P.3d 1256, 1270 (2010). One of the classic examples for the application of the independent duty doctrine is in the product liability/product sale area. See Eastwood, 170 Wash.2d at 392-93 (discussing the origin of the economic loss rule); Id. at 406-07 (Chambers J., concurring) (explaining that the Washington Supreme Court has applied the independent duty doctrine in case involving product liability). Under the independent duty doctrine, therefore, a seller or manufacturer do not have an independent duty that a product will function in a specific manner.

Under the independent duty doctrine, however, Washington law allows tort claims to proceed if the mode of failure creates a significant risk of loss to other property or bodily injury. Washington applies the "sudden and dangerous" test and the "more evaluative approach" to determine whether significant risk exists. Washington Water Power Co. v. Graybar Elec. Co., 112 Wash.2d 847, 853, 774 P.2d 1199 (1989), Touchet Valley Grain Growers, Inc. v. OPP & Seibold General Construction, 119 Wash.2d 334, 351-55, 831 P.2d 724 (1992). The "sudden and dangerous" test allows tort recovery if there is a sudden and dangerous failure. Id. at 351. The "more evaluative approach" requires examination of other factors such as the nature of the defect, the type of risk and the manner of injury. Id.

In the present case, there was no significant risk of damage to other property or of bodily injury in 2008. [CP 1010]. Lacy was aware that the shackles were failing and took steps to prevent catastrophic failure if it did. [CP 1009-10]. The shackles did not fail at once, but would fail gradually due to corrosion to the point one of the shackles would release. Not all of the shackles would fail at once and an observer would note the dock system beginning to drift before any final failure. In 2008, the shackles failed, but the dock did not release; there was no property damage and no bodily injury [CP 1010-1011]. There was no significant risk of damage and, therefore, Lacy cannot recover in tort.

In his brief, Lacy argues that application of the "sudden and dangerous test" or the "more evaluative approach" requires an analysis of possible failure modes and situations. Lacy then concocts a failure that would have been sudden and dangerous posing significant risk to persons.

Lacy, however, offers no support for his argument. Furthermore, his argument is not supported by common sense or logic. All failure modes can be dangerous if they occur under concocted circumstances. Applying the Lacy test which would swallow up the Independent Duty Doctrine in its own exception. Instead, application of the Independent Duty doctrine requires the Court to analyze the facts and circumstances of the actual failure to determine if there is an actual risk of property damage or significant property damage.

In the present case, the 2008 failure was a non-event because Lacy took the steps necessary to hold the dock in place in face of the known

failure of the shackles. Under the circumstances, the independent duty doctrine prevents Lacy from bringing a claim in tort for the 2008 shackle failure.

H. Rasmussen Does Not Have A Fiduciary Relationship With Lacy.

Lacy argues that Rasmussen had a fiduciary relationship with him. However, fiduciary relationships only grow out of defined relationships where the agent has direction and/or control over the financial affairs of the principal. Fiduciary relationships are created in employer-employee, attorney-client and trustee-beneficiary situations. "As a general rule, participants in a business transaction deal at arm's length and do not enter into a fiduciary relationship." Annechino v. Worthy, 162 Wash. App. 138, 143, 252 P.3d 415, 417 (2011) aff'd, 175 Wash. 2d 630, 290 P.3d 126 (2012). In order to establish a fiduciary relationship between seller and buyer, Lacy would need to allege extraordinary circumstances.

Again without support, Lacy argues that giving credit card information creates a fiduciary relationship. If that was the case, then a fiduciary relationship would be created with every credit card transaction. Furthermore, under Washington law, a bank-customer relationship is generally not a fiduciary relationship. Id. at 142-48. If a bank generally does not have a fiduciary relationship, then a person who merely holds credit card information in due course of its business of payment of debt cannot have a fiduciary relationship with its customer.

The other circumstance that Lacy points to justify a fiduciary relationship is that he explained to the salesman what he intended the

shackles for and that the salesman recommended the shackles at issue in this case. This circumstance is not extraordinary and is specifically covered in the Uniform Commercial Code which provides an implied warranty of fitness for a particular purpose. RCW § 62A.2-315.

Because there is no extraordinary circumstances in the present that supports the imposition of a fiduciary duty, the Court should affirm the trial court's ruling that the Rasmussen Defendants do not owe Lacy a fiduciary duty.

I. The Rasmussen Defendants are entitled to their attorneys' fees.

Under the terms of the contract which were contained on the reverse side of the invoices Rasmussen Wire Rope & Rigging is entitled to its attorneys' fees and costs. [CP 1020].

The agreement between Rasmussen Wire Rope & Rigging, Co. and Franklin Lacy is a contract for the sale of goods and is governed by article 2 the Uniform Commercial Code, RCW 62A.2. Formation is generally governed by RCW § 62A.2-206. In the present case, there was offer and acceptance by shipping the goods or otherwise holding the goods for pick up. There is a valid contract of sale between the parties. The only issue is whether the terms and conditions on the reverse side of the invoice became terms of contract.

Lacy picked up the initial goods and signed the contract and agreed to be bound by the terms on the back of the contract. As he explained in his deposition:

I inspected the goods myself, and they looked pretty. They were all chromed. But this is not my contract. **My contract is what I read and signed initially** that you never informed got changed, and it was the same way repeatedly until you sent me front pages reproduced.

It says on the front pages that you reproduced, **"Subject to the terms on the back," but I assumed that's the old contract you had me -- shown and explained, too, and I read thoroughly.**

[CP 1893, Lacy Dep., p. 132, lines 2-10](**emphasis added**). Lacy's unequivocal testimony under oath is that the terms on the reverse side of the invoice that he signed after thoroughly reading became the contract between the parties. Furthermore, copies of the terms and conditions were provided to Lacy with each delivery of goods. [CP 1889 Declaration of Donald K. McLean, Exhibit B -- Declaration of Bill Joost].

Lacy argues that the terms and conditions are difficult to read. However, in his deposition, Lacy admits that he thoroughly read the terms and conditions before signing. [CP 1893]. The readability of the terms on copies is, therefore, immaterial.

Lacy also argues that the contract refers to equipment and he purchased goods not equipment. Although the Rasmussen disagrees with the concept that the items purchased by Lacy are not equipment within the meaning of the contract, that is an issue of fact. However, the issue is immaterial and does not prevent the Court from ruling on the motion for summary judgment.

The contract that Lacy agrees governs the relationship between parties provides:

11. Law/Jurisdiction: This contract and performance, hereunder, shall be governed and interpreted as follows: (1) if this Invoice originates through Seller's Washington office, Washington law shall apply and the parties agree that with respect to any litigation arising out of this agreement or performance under it, the federal and/or state courts located in Seattle, Washington shall have exclusive jurisdiction; or (2) if this invoice originated through Seller's Louisiana office, Louisiana law shall apply and the parties agree that with respect to any litigation arising out of this agreement or performance under it, the federal and/or state courts located in New Orleans, Louisiana shall have exclusive jurisdiction. **The prevailing party in any suit or proceeding shall be entitled to recover reasonable legal fees and costs.** In addition, the parties agree that Purchaser will reimburse Seller for any costs or expenses incurred by Seller in collecting the contract purchase price, or any part thereof, including, but not limited to reasonable legal fees, fees of a collection or investigating agent and litigation expenses. Without prejudice to any other rights that Seller may have against Purchaser, if the equipment is supplied or furnished to a vessel, Seller shall have the right to enforce a maritime lien against the vessel and its appurtenances in any forum in which the vessel may be found.

(**emphasis added**). [CP 1018, 1020 Lacy Dep. p. 218, line 9 to line 23, Exhibit 62]. The language of the contract is clear the prevailing party is entitled to attorneys' fees. The section does not use the term equipment and, therefore, Lacy's arguments that he purchased goods not equipment is immaterial to an award of attorneys' fees.

Finally, Lacy argues that on the initial contract he wrote that he was not agreeing to the terms and conditions and that he was only agreeing as to number and price. Rasmussen disagrees with this assertion. [CP 1889, Declaration of Bill Joost]. Although a factual disagreement

would normally be sufficient to create an issue of fact precluding summary judgment, it does not in the present case.

A party cannot use a declaration to create an issue of material fact when clear answers indicate that there is no issue of material fact. Marshall v. AC & S Inc., 56 Wash. App. 181, 185, 782 P.2d 1107, 1109 (1989). In his deposition, Lacy repeatedly explained that he fully read the terms and conditions and then signed the document. [CP 1018, Lacy Dep., p. 218, line 14-23]. He claimed that his contract was the one that he signed when he initially received goods from Rasmussen. [CP, 1893, p. 132, lines 2-10]. He never testified that when he signed the contract, he noted an objection to the terms and conditions on the back. Under the rule enunciated in Marshall, Lacy cannot create an issue of material fact by contradicting his deposition in his response.

The clear language of the contract between Lacy and Rasmussen Wire Rope & Rigging Co. provides that the prevailing party is entitled to attorneys' fees and costs. In his deposition, Lacy admitted that the invoice was the contract between the parties. The Rasmussen defendants are the prevailing parties and, therefore, are entitled to attorneys' fees. The Court should affirm the Court order awarding attorneys' fees.

J. Other issues cited by Lacy does not justify reversal.

Lacy cites Thomas v. Bombardier Recreational Products, Inc., 682 F. Supp. 2d 1297, 1301 (M.D. Fla. 2010) for the principal that federal mandated warning labels were missing from the shackles. Although the Rasmussen Defendants disagree that warning labels were necessary, the

issue is immaterial to a statute of limitations defense. The non-existence of warning labels were readily apparent when the shackles were delivered which, therefore, again proves that Lacy failed to use due diligence to determine why the shackles failed.

Lacy also spends a sufficient amount of time arguing that the Rasmussen Defendants masterminded his failure to serve defendants Landmann Wire Products, Weisner, Inc., and Weisner Steel Products, Inc. This argument ignores the fact that Lacy was aware of their identities on May 15, 2011, but did not move to amend his complaint until August 2011 and did not serve these defendants until January 2012. [CP 121]. Under the circumstances, Lacy did not move with any diligence to serve these defendants within the statute of limitations.

Lacy argues that he was unaware that Rasmussen Defendants were claiming attorneys' fees in this case. Lacy, however, did not raise this issue in his response to the motion for attorneys' fees. [CP 1807-1817] or in his motion to reconsider [CP 2236-2257]. This argument is not presented until Lacy's Response against Motion to Quantify Fees. [CP 2656-73]. By not raising this argument until after the attorneys' fees have been awarded, the argument is waived. More importantly, however, Lacy specifically was aware of the attorneys' fees clause in the contract and referenced it in his demand letter of March 19, 2011 suggesting Rasmussen pay to avoid the costs of litigation. [CP 2675].

Finally, Lacy spends a significant amount of his brief complaining about the Superior Court Judge. A review of the transcripts of the

hearings show the Judge attempting to steer Lacy to the relevant issues with considerable patience. [CP 2530- 2655]. However, regardless of the characterization of the trial court's conduct, the issue is immaterial because the Court of Appeals will review the record de novo.

K. Lacy dismissed his viable claims.

The Court's Order granting the Rasmussen Defendants' motion for partial summary judgment did not dispose of the case. The order merely dismissed plaintiff's claims relating to the sale of the shackles prior to 2007 and for the shackle failures prior to 2008. The Court dismissed the claims for consequential damages for the 2008 failure pursuant to the contract and because Lacy presented no evidence of any consequential damages. Lacy was still able to proceed for all actual damages related to the 2008 shackle failure as well as any other claims not dismissed.

Furthermore, the trial court granted Lacy's motion to amend complaint allowing Lacy to bring claims pursuant to the Consumer Protection Act. However, Lacy subsequently dismissed his remaining claims with prejudice. [CP 1805-06]. If the Court affirms the trial court's grant of partial summary judgment, then all of Lacy's claims are dismissed with prejudice.

CONCLUSION

This case involves an inventor who purchased stainless steel shackles from Rasmussen. When he initially purchased the shackles in 1996, he reviewed an invoice containing terms and conditions. In 2003, 2004, 2005 and 2006, the shackles failed to hold his patented dock system

in place. Lacy was aware that the shackles failed, but made no effort to determine why they failed. Under the circumstances, his claims for breach of the sales contract under Article 2 of the UCC are time barred for all sales prior to 2007.

Likewise, his claims for tort must also fail. When Lacy injured his knee while attempting to repair the dock system in 2003, he was aware that it was the shackles that failed. Due diligence required him to determine the cause of the shackle failure and his tort claims are also time barred.

Lacy's claims for lost profits related to the 2008 failure must be dismissed because Lacy can offer no evidence to prove the damages beyond speculation. Likewise, Lacy cannot recover consequential damages because they are barred by the contract and because the "independent duty doctrine" prevents him recovering in tort.

Finally, the contract provides that the prevailing party is entitled to its attorneys' fees. Because the Rasmussen Defendants are the prevailing party, they are entitled to their attorneys' fees.

The Court should affirm the trial court's order granting the Rasmussen Defendants' motion for partial summary judgment and award attorneys' fees on appeal.

DATED: February 4, 2015.

BAUER MOYNIHAN & JOHNSON LLP

A handwritten signature in black ink, appearing to read "Donald K. McLean". The signature is fluid and cursive, with the first name "Donald" and last name "McLean" clearly distinguishable.

Donald K. McLean, WSBA No. 24158
Attorneys for Richard Rasmussen, Betty J.
Rasmussen, Rasmussen Wire Rope & Rigging, Co.,
Rasmussen Equipment Co. and Bill Joost

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on February 5, 2015, I caused to be served in the manner indicated a true and accurate copy of the foregoing document upon the following:

Court of Appeals, Div. 1	<input type="checkbox"/> By US Mail
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Seattle, WA 98101	<input type="checkbox"/> By E-mail

Pro Se Plaintiff:

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