

No. 37153-7-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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Donald R. Earl,

Plaintiff-Appellant,

v.

Menu Foods Income Fund and  
The Kroger Co.,

Defendants-Respondents.

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DIVISION II  
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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

Defendants-Respondents Menu Foods Income Fund (“Menu Foods”) and The Kroger Company (“Kroger”) (collectively, “Respondents”) respectfully submit this Respondents’ Brief. Respondents request that the Court dismiss the appeal, or, alternatively, affirm the challenged decisions of the Superior Court in all respects.

This case is on appeal from several interlocutory decisions of the Superior Court for one reason: Plaintiff-Appellant Donald R. Earl refuses to accept the basic and well-established principle of Washington law that the statutory product liability claim created by the Washington Products Liability Act, RCW 7.72.010 *et seq.* (the “Act”), provides the exclusive remedy for most product-related harms and preempts common law product liability claims. That basic principle of law is the reason that the Superior Court properly dismissed the common law product liability claims contained in the original Complaint, and that it rejected Appellant’s attempt to reassert those claims in his Amended Complaint. Rather than taking the third chance offered to him by the Superior Court and filing a

second amended complaint that asserts only a statutory product liability claim and makes clear the legal theories on which that claim is based against both Menu Foods and Kroger, Appellant instead improperly appealed to this Court a number of the Superior Court's interlocutory decisions. Fully four of Appellant's nine assignments of error (1, 7, 8 and 9) relate directly to Appellant's refusal to acknowledge the Act's preemptive effect.

Because there is no final judgment in this case and the challenged decisions of the Superior Court do not prevent Appellant from filing a second amended complaint that asserts statutory product liability claims against Menu Foods and Kroger, there is no appealable decision within the meaning of Rule of Appellate Procedure ("RAP") 2.2, and the Court should dismiss the appeal.

The Superior Court's decisions to date do not, as Appellant claims, bar Appellant from asserting product liability claims in a second amended complaint or make it futile to proceed in the Superior Court. The Superior Court has barred Appellant only from asserting any *common law* product liability claims in a second amended complaint. Although the Superior Court has also held that

Appellant cannot state a product liability claim against Menu Foods based on a breach of warranty theory, Appellant is not barred from pleading a statutory product liability claim against Menu Foods that is not based on breach of warranty. Nor is Appellant precluded from asserting a proper statutory product liability claim against Kroger. In fact, the Superior Court has specifically instructed Appellant what he needs to do to state a viable statutory product liability claim against Respondents.

If the Court decides to reach the merits of the appeal, it should affirm.

First, the Superior Court properly dismissed Appellant's common law product liability claims with prejudice (assignments of error 1, 7, 8 and 9). As a preliminary matter, the Superior Court's October 12, 2007 Order granting Menu Foods' Motion to Dismiss the original Complaint was not designated in Appellant's Notice of Appeal, and it is not properly before this Court on appeal. In any event, the Superior Court correctly dismissed Appellant's common law claims with prejudice because they are preempted by the statutory product liability claim provided by the Act.

Second, Appellant claims that the Superior Court erred when it denied his Motion for Reconsideration of the Superior Court's dismissal of his common law fraud claim with prejudice (assignment of error 2). Because Appellant made no showing (indeed, he did not even argue) that his purported "new evidence" would permit him to plead a viable fraud claim that satisfies the pleading requirements of Civil Rule 9(b), the Superior Court did not abuse its discretion by denying Appellant's Motion for Reconsideration.

Third, Appellant claims that Respondents waived the right to challenge the sufficiency of the Amended Complaint because Respondents' Rule 12 motions directed at the Amended Complaint were based on grounds not raised in connection with the original Complaint (assignment of error 6). But no Civil Rule or other principle of law prevents a defendant from filing a new Rule 12 motion against an amended complaint that contains different claims and allegations than the original complaint. Appellant's argument is therefore meritless.

Fourth, Appellant argues that the Superior Court should have granted his request for sanctions against Respondents based on their

filing of new Rule 12 motions directed at the Amended Complaint (assignment of error 3). But Appellant has not identified any conceivable basis for imposing sanctions — indeed, the Superior Court *granted* the very motions that Appellant believes Respondents should be sanctioned for filing. Moreover, even if the Superior Court had not granted Respondents' motions, the mere filing of an unsuccessful motion is not itself sanctionable, and the Superior Court did not abuse its discretion when it denied Appellant's sanctions request.

Fifth, Appellant asserts that the Superior Court erred when it held that he cannot maintain a product liability claim for breach of implied warranty against Menu Foods (assignment of error 5). A plaintiff can maintain a statutory product liability claim against a manufacturer on the theory of breach of implied warranty only where the plaintiff is in privity of contract with the defendant. Because it is undisputed that Appellant was not in privity with Menu Foods, he cannot pursue claims against it under an implied warranty theory.

Sixth, Appellant asserts that the Superior Court erred when it held that he cannot maintain a product liability claim on a breach of express warranty theory against Menu Foods (assignment of error 4). Appellant argues that the Amended Complaint states a claim against Menu Foods based on breach of express warranty because the Amended Complaint contains the conclusory allegation that “Defendants” made express warranties to him. But that general allegation is not itself sufficient to state a claim. Appellant specifically alleges that Kroger, not Menu Foods, marketed and sold the pet food that he claims to have purchased under Kroger’s own private label. While Appellant identifies several purported express warranties on the cans of food he purchased, Appellant does not attribute those alleged warranties to Menu Foods. Indeed, the Amended Complaint pleads the opposite. Appellant has not alleged any express warranty made by Menu Foods, and, accordingly, Appellant cannot state a product liability claim against Menu Foods based on breach of express warranty.

The Superior Court’s rulings in this case have not, as Appellant dramatically protests, put the case in a state of “disarray.”

*See* Brief of Appellant, at 1. The Superior Court's interlocutory decisions have focused the proceedings, narrowed the scope of the claims at issue, and given Appellant an unmistakably clear road map of how to assert statutory product liability claims against Menu Foods and Kroger. Any "disarray" that exists is solely a result of Appellant's refusal to follow that road map. The Court should dismiss the appeal as improvidently granted, or, alternatively, affirm the decisions of the Superior Court in their entirety, with costs against Appellant.

## **II. STATEMENT OF THE CASE**

Plaintiff-Appellant Donald R. Earl filed this action 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. Appellant's original Complaint asserted claims against Menu Foods and Kroger based on fraud and a number of common law product liability theories. Clerk's Papers ("CP") 1-21. On October 1, 2007, Menu Foods filed a Motion to Dismiss the Complaint because nearly all of Appellant's claims are preempted by the Act and because

Appellant did not (and could not) plead his fraud claims with sufficient particularity to satisfy Civil Rule 9(b). CP 22-55. The Superior Court granted Menu Foods' Motion to Dismiss after a hearing on October 12, 2007, and it gave Appellant 10 days to file an amended complaint asserting *statutory* product liability claims. CP 56-57.

On October 22, 2007, Appellant moved for partial reconsideration of the Superior Court's October 12 Order, asserting that he had some newly discovered evidence. CP 105-109. Appellant did not argue that his purported new evidence would allow him to plead a viable fraud claim against Respondents; rather, Appellant simply stated that he was concerned that the Superior Court's decision could preclude him from alleging a viable fraud claim at some unspecified later date. CP 107. The Superior Court denied Appellant's Motion for Reconsideration on November 9, 2007. CP 113-114.

Appellant filed his Amended Complaint on October 16, 2007. CP 59-104. Appellant filed a Motion for Default Judgment on October 30, 2007. CP 110-112. Appellant's Motion for Default

Judgment was originally set for hearing on November 9, 2007. Pursuant to Jefferson County Local Civil Rule 7.5, Respondents requested a one-week continuance of the hearing on Appellant's Motion for Default Judgment. The Superior Court granted a continuance on November 9, 2007. CP 234-235. Menu Foods responded to the Amended Complaint (and to Appellant's Motion for Default Judgment) on November 15, 2007 by filing its Motion (1) for a More Definite Statement and (2) to Dismiss in Part. CP 119-144. Kroger responded to the Amended Complaint (and to Appellant's Motion for Default Judgment) on November 15, 2007 by filing its Motion for More Definite Statement.<sup>1</sup> CP 115-118. The Superior Court accordingly denied Appellant's Motion for Default Judgment at a hearing on November 30, 2007. CP 237-238. Plaintiff filed another Motion for Reconsideration, which the Superior Court denied on January 11, 2008.

In their motions, Menu Foods and Kroger asserted that, although Appellant's Amended Complaint purports to assert

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<sup>1</sup> Menu Foods' Motion (1) for a More Definite Statement and (2) to Dismiss in Part and Kroger's Motion for More Definite Statement are sometimes collectively referred to as Respondents' "Motions for a More Definite Statement."

statutory product liability claims under the Act, the Amended Complaint is so vague and ambiguous that they could not reasonably frame responsive pleadings. Respondents also asserted that the Amended Complaint improperly reasserts the common law product liability claims previously dismissed from Appellant's original Complaint. Menu Foods further argued that the allegations of the Amended Complaint do not state a statutory product liability claim against Menu Foods based on breach of express or implied warranty as a matter of law. Appellant 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 (the "Motion to Strike and for Sanctions"). CP 145-191.

After a hearing on December 21, 2007, the Superior Court granted Respondents' motions, denied Appellant's motion and gave Appellant 20 days in which to file an amended pleading that clearly identifies the legal theories upon which Appellant seeks relief under the Act and omits all previously dismissed claims. CP 218-220, 221-222.

Near the close of the December 21 hearing, the Superior Court expressly instructed Appellant on how to assert coherent and viable statutory product liability claims against Respondents in a 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]. That's it. And that's all you've got.

\* \* \* \*

And he's right. You don't have the express or implied warranty against Menu Foods. You may well have it against Kroger. Divide it up, Menu Foods, this is the cause of action against you based on the statute. Kroger, this is the cause of action against you based on that statute.

Transcript of December 21, 2007 Hearing, at 16-18.

Rather than filing a second amended complaint that complies with the Superior Court's December 21, 2007 Orders, Appellant filed a Notice of Appeal in the Superior Court. CP 224-238. In it, Appellant sought to appeal: (A) the Superior Court's November 9,

2007 Order denying Appellant's Motion for Reconsideration;<sup>2</sup> (B) the Superior Court's November 9, 2007 Order continuing the hearing date on Appellant's Motion for Default Judgment; (C) the Superior Court's November 30, 2007 Order denying Appellant's Motion for Default Judgment;<sup>3</sup> and (D) the Superior Court's December 21, 2007 Orders granting Menu Foods' Motion (1) for a More Definite Statement and (2) to Dismiss in Part and Kroger's Motion for More Definite Statement, and denying Appellant's Motion to Strike and for Sanctions.

On January 8, 2008, this Court wrote to the parties and informed them that it was "questionable" whether Appellant is entitled to appeal as of right under RAP 2.2. The Court directed Menu Foods and Kroger to submit a written response. On January 23, 2008, Menu Foods and Kroger filed a joint Statement Concerning Appealability, in which they argued that none of the interlocutory decisions that Appellant sought to appeal is appealable as of right. On January 25, 2008, the Commissioner issued an order

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<sup>2</sup> In his Notice of Appeal, Appellant incorrectly states that the Superior Court denied his Motion for Reconsideration on November 7, 2007. CP 224.

<sup>3</sup> In his Notice of Appeal, Appellant incorrectly states that the Superior Court denied his Motion for Default Judgment on November 16, 2007. CP 224.

stating that Appellant is entitled to appeal as of right under RAP 2.2(a)(3).

### III. ARGUMENT

The fundamental fallacy that forms the basis of Appellant's appeal to this Court is Appellant's profoundly mistaken belief that the Superior Court's decisions prevent him from asserting *any* product liability claims against Menu Foods and Kroger, thereby making this interlocutory appeal necessary. Appellant's claim is completely belied by the record before this Court. The Court should reject Appellant's argument and dismiss this appeal as improvidently granted. In the alternative, the Court should affirm the Superior Court's rulings that Appellant cannot assert preempted common law product liability claims against Respondents in this lawsuit.

Appellant's subsidiary assignments of error, which challenge the Superior Court's denial of Appellant's Motion for Reconsideration of the dismissal of his fraud claim (number 2); its decision to grant Respondents' Motions for a More Definite Statement (number 6); its denial of Appellant's Motion to Strike and for Sanctions (number 3); and the Superior Court's decision that

Appellant cannot pursue a product liability claim against Menu Foods based on a theory of breach of express warranty (number 4) or implied warranty (number 5), are also meritless. To the extent that this Court believes these subsidiary issues should be reviewed, the Court should affirm the Superior Court in all respects.

**A. The Appeal was Improvidently Granted.**

The appealability of decisions of the Superior Court is governed by RAP 2.2. RAP 2.2(a) provides generally that only final judgments and a limited class of other Superior Court decisions are subject to appeal. It is undisputed that there has been no final judgment in this action to date. In the January 25, 2008 Order, the Commissioner determined that Appellant is entitled to maintain this appeal under RAP 2.2(a)(3), which permits appeal of “[a] written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.”

The Commissioner erred by determining that Appellant is presently entitled to appeal as of right, and the Court should dismiss the appeal. *See* RAP 2.5(a) (“A party or the court may raise at any

time the question of appellate court jurisdiction.”); *Oscar’s, Inc. v. Wash. State Liquor Control Bd.*, 101 Wn. App. 498, 501-02 & n.3, 3 P.3d 813 (2000). None of the Superior Court’s orders that Appellant seeks to have this Court review, either individually or collectively, determines the outcome of this case or discontinues Appellant’s action.<sup>4</sup> Washington courts consider the effect of a decision or order to determine whether it is appealable. *Munden v. Hazelrigg*, 105 Wn.2d 39, 44, 711 P.2d 295 (1985) (“[B]oth this court and the Court of Appeals have looked to the *effect* of an order of dismissal to determine its appealability.”). Washington law is clear that decisions that merely strike or dismiss pleadings without prejudice to repleading are nonappealable, interlocutory orders. *See id.* at 43-44 (dismissal without prejudice to filing new action not appealable);

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<sup>4</sup> In addition, RAP 2.2(a)(3) by its terms applies only to a “written decision.” Two of the orders that Appellant designated in his Notice of Appeal — the November 9, 2007 Order continuing the hearing on Appellant’s default motion and the November 30, 2007 Order denying Appellant’s default motion — were delivered orally without an accompanying written order. Accordingly, those orders cannot be appealed under RAP 2.2(a)(3). Moreover, because a notice of appeal must be filed within 30 days after entry of the decision being appealed, *see* RAP 5.2(a), Appellant’s December 24, 2007 Notice of Appeal was untimely with respect to the November 9, 2007 Order denying Appellant’s Motion for Reconsideration and the November 9, 2007 Order continuing the hearing date on Appellant’s Motion for Default Judgment.

*McFerran v. Sanwick*, 61 Wn.2d 123, 125, 377 P.2d 405 (1962) (order striking complaint as sham and false not appealable because “it neither dismisses the suit nor enters a judgment for the defendant”); *In re Dependency of A.G.*, 127 Wn. App. 801, 808, 112 P.3d 588 (2005) (dismissal without prejudice of State’s petition to terminate parental rights not appealable under RAP 2.2(a)(3) because there was no bar to subsequent petition by the State).

In this case, none of the orders that Appellant seeks to appeal prevents him from continuing to pursue this action in the Superior Court. Although the Superior Court’s rulings to date have properly narrowed the scope of the action and limited the claims that Appellant can pursue against Menu Foods and Kroger, the Superior Court’s December 21, 2007 Orders allow Appellant to file a second amended complaint that asserts permissible statutory product liability claims under the Act against Menu Foods and Kroger.

Appellant argues that the Superior Court’s decisions have put him in a “Catch-22” of sorts and have prevented him from asserting *any* product liability claims against Menu Foods and Kroger, thus making it futile to proceed in the Superior Court. Appellant is

wrong. The Superior Court has not prevented Appellant from pursuing any proper product liability claims. The Superior Court has held that: (i) Appellant cannot pursue *common law* product liability claims against Menu Foods and Kroger, because such claims are preempted by the Act; and (ii) Appellant can assert statutory product liability claims against Menu Foods and Kroger, but he must file a complaint that provides Respondents with a clear statement of the legal theories upon which he seeks relief under the Act (and, as against Menu Foods, Appellant cannot pursue a statutory product liability claim based on breach of warranty). The Superior Court thus has not prevented Appellant from asserting a viable product liability claim. If Appellant believes that it would be futile for him to file a second amended complaint, however, then the appropriate procedure to obtain immediate review is for Appellant to stand on his previous pleadings, have the Superior Court enter a judgment of dismissal with prejudice, and then appeal that judgment to this Court. *See McFerran*, 61 Wn.2d at 125 (“To obtain review of an order sustaining a motion to strike a complaint, the proper procedure is to elect to stand upon the complaint and suffer a final judgment of

dismissal.’”) (quoting 13 Cyclopaedia of Federal Procedure § 57.81 (3d ed. 1952)).

Because the Superior Court has not yet issued a decision that effectively determines or discontinues Appellant’s lawsuit or that is otherwise appealable under RAP 2.2, Appellant is not presently entitled to appeal, and the Court should dismiss the appeal.

**B. The Superior Court Properly Dismissed Appellant’s Common Law Product Liability Claims.**

Of the nine assignments of error that Appellant identifies in his brief on appeal, four (assignments of error 1, 7, 8 and 9) relate directly to Appellant’s mistaken beliefs that the Act does not preempt common law product liability claims and that the Superior Court should not have dismissed those claims. Appellant’s arguments are, however, based on a profound misunderstanding of the Act and the Superior Court’s rulings concerning his product liability claims. In addition, one of them (assignment of error 1) is not even properly before the Court on appeal.

1. The Superior Court's October 12, 2007 Order Dismissing Appellant's Common Law Product Liability Claims is not Properly Before the Court.

Because Appellant did not challenge the Superior Court's October 12, 2007 Order dismissing his common law product liability claims in his Notice of Appeal, the October 12 Order is not properly before the Court.

RAP 2.4(a) provides that the Court of Appeals will review on appeal only "the decision or parts of the decision designated in the notice of appeal." Appellant did not designate the Superior Court's October 12 Order dismissing the original Complaint as a decision to be reviewed in his Notice of Appeal.<sup>5</sup> Appellant's Notice of Appeal is very specific and seeks review of only: (A) the Superior Court's November 9, 2007 Order denying reconsideration of the dismissal of Appellant's fraud claim with prejudice; (B) the Superior Court's November 9, 2007 decision to continue by one week the hearing date on Appellant's Motion for Default Judgment; (C) the Superior Court's November 30, 2007 denial of Appellant's Motion for

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<sup>5</sup> In addition, Appellant's December 24, 2007 Notice of Appeal is untimely with respect to the Superior Court's October 12 Order. *See* RAP 5.2(a) (notice of appeal must be filed within 30 days of the decision to be reviewed).

Default Judgment; and (D) the Superior Court's December 21, 2007 Orders granting Kroger's Motion for More Definite Statement and Menu Foods' Motion (1) for a More Definite Statement and (2) to Dismiss in Part, and denying Appellant's Motion to Strike and for Sanctions.<sup>6</sup> CP 224. Because Appellant has never sought review of the Superior Court's October 12 Order, it is not properly before the Court on this appeal.<sup>7</sup>

2. The Washington Products Liability Act Preempts Common Law Product Liability Claims.

If the Court nevertheless elects to review the Superior Court's October 12 Order dismissing Appellant's common law product liability claims, the Court should affirm, because the statutory product liability claim created by the Act clearly preempts Appellant's common law claims.

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<sup>6</sup> Appellant does not press his challenges to the Superior Court's denial of his Motion for Default Judgment in his appellate brief, and any arguments relating to the default motion are therefore waived. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failure to argue assignment of error in opening brief waives assignment of error); *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 297, 78 P.3d 177 (2003) (failure to raise argument in opening brief waives argument).

<sup>7</sup> Nor does the limited exception in RAP 2.4(b) for rulings that "prejudicially affect" the decision designated in the notice of appeal apply. Although Appellant designated the Superior Court's November 9 Order denying Appellant's Motion for Reconsideration of the October 12 Order on the issue of whether his fraud claim should have been dismissed with or without prejudice, the decision on Appellant's narrow Motion for Reconsideration is completely independent of the Court's October 12 Order dismissing Appellant's common law product liability claims.

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).

In his original Complaint, Appellant asserted a number of common law product liability claims — fraudulent concealment,<sup>8</sup> negligent misrepresentation, negligence, common law product liability based on failure to warn, common law product liability based on defect in manufacture, breach of implied warranty, and unjust enrichment — against Menu Foods and Kroger. The Superior Court dismissed those common law claims with prejudice because they are all preempted by the Act. On appeal, Appellant continues to argue that the Act does not preempt common law product-related claims, but instead expressly preserves and permits such claims. Appellant attempts to draw a novel and wholly unsupported distinction between common law “claims” and common law “remedies” in order to save his common law claims, asserting that the Act preempts only common law remedies, and not common law

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<sup>8</sup> Appellant’s fraudulent concealment claim was also dismissed by the Superior Court for the additional and independent reason, which is not at issue on this appeal, that Appellant did not plead fraud with the particularity required by Civil Rule 9(b).

claims. See Brief of Appellant, at 1-2, 10. Appellant's arguments are completely foreclosed by settled Washington law.

It is well-established under Washington law that the Act, and the statutory "product liability claim"<sup>9</sup> that it created, preempt and replace virtually all common law claims for product-related harms. See RCW 7.72.010 *et seq.*<sup>10</sup> In *Washington Water Power Co. v.*

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<sup>9</sup> The Act clearly sets out the legal theories on which a plaintiff may pursue a product liability claim against a manufacturer or a product seller. RCW 7.72.030 provides that a statutory product liability claim may be brought against a product manufacturer based on (i) negligence in failing to give adequate warnings or instructions; (ii) negligence in product design; (iii) strict liability for manufacturing or construction defects; and/or (iv) breach of express or implied warranty. RCW 7.72.030; *see also Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 850-51, 774 P.2d 1199 (1989) ("Manufacturers are liable for negligence in product design or in the provision of warnings concerning potential hazards. Manufacturers also are strictly liable for unsafe product conditions resulting from construction defects and breaches of warranties.").

With some exceptions, a statutory product liability claim can ordinarily be brought against a product seller based on the seller's (i) negligence; (ii) breach of express warranty; and/or (iii) intentional misrepresentation. RCW 7.72.040; *see also Wash. Water Power Co.*, 112 Wn.2d at 851 (stating that product sellers generally "bear liability for negligence, breach of express warranty and misrepresentation").

<sup>10</sup> The Act's expansive definition of the term "product liability claim" itself makes it abundantly clear that the statutory cause of action was intended to *replace* common law product claims:

'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 is 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 or action under the consumer protection act, chapter 19.86 RCW.

*Graybar Electric Co.*, the Washington Supreme Court analyzed the Act and held that it completely preempts the type of common law product-related claims that Appellant has asserted in this lawsuit. *See* 112 Wn.2d 847, 853, 774 P.2d 1199 (1989) (“[T]he [Act] means nothing if it does not preempt common law product liability remedies.”). The court explained:

To be sure, the Legislature might have stated its intent to preempt common law product liability claims more certainly than it has in the [Act] — for example, by means of an express preemption clause. The absence of such a clause does not defeat the case for preemption, however. Clear statutory language and corroborative legislative history leave no doubt about the [Act’s] preemptive purpose.

*Id.* (citations omitted). Later cases are equally clear about the Act’s preemptive force. *See, e.g., Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 323, 858 P.2d 1054 (1993) (“As we explained in *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wash.2d 847, 850-55, 774 P.2d 1199, 779 P.2d 697 (1989), the [Act] preempts traditional common law remedies for product-related harms.”); *Laisure-Radke v. Par Pharm., Inc.*, 426 F. Supp. 2d 1163, 1168 (W.D. Wash. 2006) (““Since this present cause of action

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RCW 7.72.010(4) (emphasis added).

is predicated upon failure to warn by a product manufacturer, any negligence cause of action therefor is now preempted by the [Act]. Therefore, this product liability claim cannot be maintained on a common law negligence theory.”) (quoting *Fisons Corp.*, 122 Wn.2d at 323).<sup>11</sup>

Because the Washington Supreme Court has clearly held that the common law claims in Appellant’s original Complaint are preempted by the statutory product liability claim provided under the Act, the Superior Court correctly dismissed those claims.<sup>12</sup>

3. The Superior Court Dismissed Appellant’s Common Law Product Liability Claims With Prejudice at the October 12, 2007 Hearing.

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<sup>11</sup> There is simply no basis for Appellant’s claim that there is a distinction between preemption of common law “claims” or “causes of action,” and common law “remedies.” The Act itself defines the statutory product liability claim to encompass “any *claim or action* previously based on” common law product liability theories. RCW 7.72.010(4) (emphasis added.) In addition, in the cases discussing the Act’s preemptive force, the Washington Supreme Court has used the terms “claims,” “causes of action” and “remedies” interchangeably. Compare, e.g., *Washington Water Power Co.*, 112 Wn.2d at 853 (“[T]he Legislature might have stated its intent to preempt common law product liability *claims* more certainly than it has in the WPLA . . . .”) (emphasis added), *with id.* (“[T]he WPLA means nothing if it does not preempt common law product liability *remedies*.”) (emphasis added); *Fisons Corp.*, 122 Wn.2d at 322 (“After the enactment of the PLA, such a [common law negligence] *claim* is not viable in a products case.”) (emphasis added), *with id.* at 323 (“Since this present cause of action is predicated on a failure to warn by a product manufacturer, any negligence *cause of action* therefor is now preempted by the PLA.”) (emphasis added), *and id.* (“[T]he PLA preempts traditional common law *remedies* for product-related harms.”) (emphasis added).

<sup>12</sup> These basic principles also dispose entirely of Appellant’s assignments of error 7 (that the Superior Court erred by ordering that Appellant exclude the already-dismissed common law claims from any second amended complaint) and 9 (that the Superior Court erred in interpreting precedent applying the Act).

In assignment of error 8, Appellant appears to be arguing (as he argued before the Superior Court in his Motion to Strike and for Sanctions) that the Superior Court did not actually intend to dismiss Appellant's common law product liability claims at the October 12 hearing, and that the Court erroneously signed Menu Foods' proposed order containing such language.

The Superior Court already considered and rejected Appellant's argument at the December 21, 2007, hearing, however, thus making it clear that the Superior Court did, in fact, intend to dismiss those claims with prejudice. *See* Transcript of December 21, 2007 Hearing, at 19-20. In light of the Superior Court's December 21 ruling, Appellant offers no plausible argument for why the text of the October 12 Order, which unambiguously dismisses *all* of the claims in Appellant's original Complaint with prejudice, should not control. More important, the transcript of the October 12 hearing belies Appellant's claim. The Superior Court expressly stated at the October 12 hearing that it intended to dismiss all of Appellant's *common law* product liability claims, but would allow Appellant to amend the complaint to pursue a *statutory* product

liability claim. *E.g.*, Transcript of October 12, 2007 Hearing, at 23 (“You’ve pled a bunch of *common law theories that have to be dismissed*. I’ll allow you to amend to assert the appropriate statutory basis for products liability.”) (emphasis added). Assignment of error 8 should therefore also be rejected.

**C. Appellant Did Not Establish any Basis for Reconsideration of the Superior Court’s Dismissal of His Fraud Claim.**

In its October 12, 2007 Order, the Superior Court also dismissed Appellant’s common law fraud claim against Respondents with prejudice because Appellant did not plead fraud with the requisite particularity to satisfy the pleading requirements of Civil Rule 9(b),<sup>13</sup> and because Appellant could not, consistent with the dictates of Rule 11, amend his fraud claim to allege the facts necessary to satisfy Rule 9(b). CP 56-57.

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<sup>13</sup> Civil Rule 9(b) requires that, “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

Appellant moved for reconsideration, citing newly discovered evidence, on October 22, 2007. In the Motion for Reconsideration, Appellant did not challenge the Superior Court's dismissal of his fraud claim for failure to comply with Rule 9(b); rather, Appellant simply asserted that his "new evidence" made dismissal without prejudice appropriate. CP 105-107. The Superior Court denied the motion for reconsideration on November 9, 2007. CP 113-114.

The Superior Court's denial of a motion for reconsideration is reviewed only for abuse of discretion. *See In re Estate of Peterson*, 102 Wn. App. 456, 462, 9 P.3d 845 (2000) ("We review a trial court's denial of a motion for reconsideration for abuse of discretion."). In addition, this Court can affirm the Superior Court's decision on any ground that is supported by the record. *See Skinner v. Holgate*, 141 Wn. App. 840, 849, 173 P.3d 300 (2007).<sup>14</sup>

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<sup>14</sup> The Superior Court denied the Motion for Reconsideration on the ground that "the Washington State Products Liability Act is the sole basis for plaintiff's lawsuit against these defendants. All claims of the plaintiff can be brought under the provisions of that Act. The procedures and remedies provided in that Act provide potential for complete relief to plaintiff and preclude actions based on common law theories . . . ." CP 113. Respondents acknowledge that the Act does not preempt common law fraud claims. *See* RCW 7.72.010(4) (excluding fraud claims from definition of "product liability claim"). The Court should nevertheless affirm the Superior Court's November 9 Order because Appellant has made no showing that he was entitled to reconsideration under Civil Rule 59(a)(4).

Reconsideration of a decision on the basis of newly discovered evidence under Civil Rule 59(a)(4) is appropriate only where, at a minimum, consideration of the “new evidence” would have changed the outcome of the motion. *See Peterson v. Koester*, 122 Wn. App. 351, 362-63, 92 P.3d 780 (2004) (reconsideration on the basis of newly discovered evidence requires showing that, *inter alia*, new evidence “will probably change the result of the trial”; affirming denial of reconsideration where new evidence would not have changed outcome);<sup>15</sup> *see also Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 140-41, 937 P.2d 154 (1997) (affirming denial of motion for reconsideration where party made “no showing that the ‘new’ evidence would have altered the trial court’s decision”).

Appellant’s “new evidence” in support of his Motion for Reconsideration consisted of a toxicology report (CP 109) that Appellant claimed showed that some pet food that was subject to a voluntary recall by Menu Foods in March 2007 (pet food that was manufactured *months after* the pet food that Appellant alleges

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<sup>15</sup> A party seeking reconsideration under Rule 59(a)(4) must also show that the new evidence was not, and could not have been, discovered earlier, is material, and is not merely cumulative or impeaching. *See Peterson*, 122 Wn. App. at 362. Appellant also has not made the necessary showing on those additional elements.

harmed his cat) contained toxins that he alleges were also found in the food that he fed to his cat. CP 105-106. Appellant claims that evidence is significant because it shows that statements Menu Foods made to the public concerning the March 2007 recall (which occurred *months after* Appellant alleges his cat was harmed) were false. CP 105-106.

Even accepting Appellant's interpretation of his purported new evidence, however, that evidence could not support reconsideration under Rule 59(a)(4) for the simple reason that it could not have had any effect on the Superior Court's decision to dismiss Appellant's fraud claim with prejudice. Indeed, Appellant has never actually claimed that this new evidence would have affected the outcome of Menu Foods' Motion to Dismiss; rather, Appellant argued only that he was "concerned" that the Court's decision could preclude "potentially viable" claims at some indeterminate date in the future. CP 105-107. Moreover, as Menu Foods argued in its Motion to Dismiss, no statement made by Menu Foods in connection with its March 2007 voluntary recall — whether true or false — could support Appellant's fraud claim as a

matter of law. Appellant's cat allegedly died months before the recall, and Appellant cannot establish that he justifiably relied on any statements made months after his purchases of the product at issue in this lawsuit.

Appellant's claim that he *might* be able to assert a viable fraud claim at some point in the future simply reveals Appellant's real motive — to use the discovery process on his other claims to gain information that might someday permit him to assert a legally viable fraud claim. Rule 9(b), however, requires that a plaintiff alleging fraud provide a factual basis for the claim *before* proceeding to discovery. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001)<sup>16</sup> (“Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the

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<sup>16</sup> Federal cases applying provisions of the Federal Rules of Civil Procedure that are similar to Washington's Civil Rules provide highly persuasive authority. *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998); *Sanderson v. Univ. Village*, 98 Wn. App. 403, 410, 989 P.2d 587 (1999).

parties and society enormous social and economic costs absent some factual basis.”) (alteration in original) (internal quotation marks omitted).

Because Appellant did not establish that he satisfied any of the requirements for reconsideration under Rule 59(a)(4), the Court should affirm the Superior Court’s November 9 Order denying his Motion for Reconsideration.

**D. The Superior Court Properly Granted Respondents’ Motions for a More Definite Statement and Properly Denied Appellant’s Request for Sanctions.**

Appellant argues (in assignment of error 6) that the Superior Court erred when it granted Respondents’ Motions for a More Definite Statement. Appellant claims that Civil Rule 12(g), which provides that a party should consolidate available Rule 12 defenses into a single motion, bars a subsequent Rule 12 motion directed at an amended pleading. Appellant also asserts (in assignment of error 3) that the Superior Court should have sanctioned Menu Foods and Kroger for filing their Motions for a More Definite Statement. Because Rule 12(g) does not prevent a defendant from filing a new Rule 12 motion against an amended complaint that contains new

allegations and new claims, the Superior Court correctly found that Respondents' motions were proper and that Appellant's request for sanctions was unwarranted.

The decision to grant a motion for a more definite statement under Civil Rule 12(e) is committed to the sound discretion of the Superior Court. *See McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996) (“[T]he judge may, in his discretion, in response to a motion for more definite statement under Federal Rule of Civil Procedure 12(e), require such detail as may be appropriate in the particular case, and may dismiss the complaint if his order is violated.”).

The Superior Court properly exercised its discretion in this case to order Appellant to provide a more definite statement. After the Superior Court dismissed all of Appellant's common law claims with prejudice, Appellant filed his Amended Complaint, which purported to bring a claim for relief under the Act, but was internally inconsistent and was entirely unclear as to what legal theories Appellant was pursuing, as well as which theories were asserted against Menu Foods and which against Kroger. For example,

although the Amended Complaint invokes, at various points, nearly every conceivable legal theory for relief under the Act,<sup>17</sup> the summary of claims in the Amended Complaint lists only a subset of those claims (there was, for example, no mention of design defect) and includes other claims, such as freestanding claims for negligence and negligent misrepresentation, that Appellant cannot pursue against Menu Foods and Kroger. CP 70-71. Moreover, the Amended Complaint appears to improperly reassert claims that the Superior Court had already dismissed with prejudice. CP 68.

Accordingly, Menu Foods and Kroger each moved for a more definite statement pursuant to Rule 12(e). (As discussed *infra*, Menu Foods additionally moved to dismiss in part, because, to the extent that it purports to bring claims based on breach of express or implied warranty, the Amended Complaint does not state a claim against Menu Foods.) The Superior Court granted Respondents' motions on December 21, 2007. Given the inconsistent and confused nature of

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<sup>17</sup> See CP 69 (design defect); CP 66 (failure to warn); CP 66 (construction defect); CP 67-68 (breach of express warranty); CP 67-68 (breach of implied warranty).

the allegations in the Amended Complaint, the Superior Court properly ordered Appellant to provide a more definite statement.

Appellant's argument that Civil Rule 12(g) barred Respondents from filing Rule 12 motions against the Amended Complaint is meritless. Rule 12(g) provides that available defenses should be consolidated into a single motion, but that rule does not prevent a defendant from filing a new Rule 12 motion challenging the sufficiency of an amended complaint after all of the claims in the original Complaint were dismissed with prejudice. *See, e.g., Ryan v. Shawnee Mission U.S.D.* 512, 416 F. Supp. 2d 1090, 1094 n.2 (D. Kan. 2006) ("Although defendants' current motion is a second Rule 12(b)(6) motion, defendants' first Rule 12(b)(6) motion was directed at plaintiff's original complaint whereas the current motion is directed at plaintiff's first amended complaint. Because defendant's current Rule 12(b)(6) motion is the first such motion with respect to plaintiff's first amended complaint, the rules barring subsequent Rule 12(b)(6) motions are not implicated here."). Respondents' motions were properly before the Superior Court, and the Court should therefore reject assignment of error 6.

In addition, Appellant's claim that he is entitled to sanctions is frivolous. An award of sanctions under Civil Rule 11 based on the filing of a motion is appropriate only if the moving party carries its burden of showing that "the motion was both baseless and signed without reasonable inquiry." *Eugster v. City of Spokane*, 110 Wn. App. 212, 232, 39 P.3d 380 (2002). The Superior Court's decision whether to award sanctions is reviewable only for abuse of discretion. *Id.*

Appellant's sanctions claim fails for at least three reasons. First, Appellant failed to give Respondents the required advance notice of his intent to seek sanctions. *See Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994) ("Without such [advance] notice, CR 11 sanctions are unwarranted."). Second, as explained above, Respondents' motions were properly before the Superior Court — indeed, the Superior Court **granted** the motions in their entirety. Third, even if Respondents' motions had not been granted, Appellant has utterly failed to make the necessary showing that the motions were interposed for some improper purpose or were otherwise in

violation of Rule 11. Accordingly, the Superior Court did not abuse its discretion by denying Appellant's request for sanctions.

**E. The Superior Court Correctly Held that Appellant Cannot Pursue Claims against Menu Foods based on Breach of Implied Warranty.**

In assignment of error 5, Appellant contends that the Superior Court erred when it found that Appellant cannot state a statutory product liability claim based on breach of implied warranty against Menu Foods. As the Superior Court correctly held, however, Appellant's implied warranty claim fails as a matter of law because Appellant was not in privity with Menu Foods.

The Superior Court's dismissal of Appellant's implied warranty claim is reviewed *de novo*. See *Atchison*, 161 Wn.2d at 376.

The Act expressly allows a plaintiff to pursue a product liability claim predicated on a breach of implied warranty theory. See RCW 7.72.030(2). The statute permits a plaintiff to recover under the Act for breach of implied warranty, however, *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”); RCW 7.72.030(2)(c) (“Whether or not a product conforms to an implied warranty created under Title 62A RCW *shall be determined under that title.*”) (emphasis added). 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 of contract 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) (“Contractual privity between buyer and seller traditionally has been required before a plaintiff may maintain [a breach of implied warranty] action under the Code.”).

Thus, although the Act does not, as a general matter, require privity of contract as a precondition to bringing a statutory product liability claim, because the Act incorporates wholesale the UCC’s

requirements for breach of implied warranty, privity is required for an implied warranty claim under the Act. *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); *see also* 16 David K. DeWolf & Keller W. Allen, *Washington Practice Series: Tort Law and Practice* § 16.18 (stating that whether an implied warranty claim exists under product liability statute is “determined by reference to the Uniform Commercial Code” and is therefore “presumably subject to the usual restrictions and disclaimers applicable in commercial cases”).

In this case, Appellant alleges he bought the pet food from Kroger; Appellant does not (and cannot) allege that he had a contractual relationship or was otherwise in privity with Menu Foods, and he therefore cannot recover from Menu Foods for breach of implied warranty as a matter of law. Appellant’s arguments in his appeal brief, which concern the *disclaimer* of implied warranties —

an issue that is completely distinct from the requirement of *privity* — are simply irrelevant. Accordingly, the Court should affirm the Superior Court’s dismissal of Appellant’s implied warranty claim against Menu Foods.

**F. The Superior Court Correctly Held that Appellant Cannot Pursue Claims against Menu Foods based on Breach of Express Warranty.**

Finally, Appellant argues in assignment of error 4 that the Superior Court erred by holding the Amended Complaint did not state a product liability claim against Menu Foods predicated on a breach of express warranty. Because the allegations of the Amended Complaint make it clear that Appellant does not allege that Menu Foods made *any* express warranties to him, the Superior Court properly held that Appellant could not state a claim based on breach of express warranty against Menu Foods.

The Superior Court’s dismissal of Appellant’s express warranty claim is reviewed *de novo*. See *Atchison*, 161 Wn.2d at 376.

A product manufacturer may be subject to liability under the Act 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). The Act provides that "[a] product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue." RCW 7.72.030(2)(b).

Appellant's attempt to bring a product liability claim against Menu Foods predicated on breach of express warranty fails for the simple reason that Appellant did not allege that Menu Foods made any express warranties about the pet food that Appellant purchased. Indeed, Appellant alleged the contrary. In his Amended Complaint, Appellant alleged that certain statements on the cans of pet food that he purchased created express warranties. *See* CP 65. Appellant also alleged, however, that the pet food he purchased was marketed and sold by Kroger "as its own product under the 'Pet Pride' label." CP 60, 67. Appellant did not attribute the purported express warranties on the pet food that he purchased to Menu Foods, nor did he identify any other alleged express warranties allegedly made by Menu Foods. Absent some allegation that attributes an express warranty to Menu

Foods, there can, of course, be no breach of express warranty claim against Menu Foods.

Appellant asserts in his brief on appeal that the Amended Complaint states a claim against Menu Foods based on breach of express warranty because it contains a conclusory allegation that “Defendants” made express warranties. That allegation is insufficient, especially in light of appellant’s allegation that only Kroger provided any writing (*i.e.*, labeling — under Kroger’s “own product . . . label.” CP 760, 67). Although Rule 8(a) requires only a “plain statement of the claim showing that the pleader is entitled to relief,” CR 8(a), that standard “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 165 L. Ed. 2d 929 (2007). Thus, to state a claim, a complaint must, at a minimum, contain allegations of fact sufficient “to raise a right to relief above the speculative level.” *Id.* Moreover, Appellant’s factual allegations — (i) that the alleged express warranties were printed on the cans of pet food that he purchased; and (ii) that Kroger, not Menu Foods, marketed and sold the pet food

he purchased under Kroger's own private label — affirmatively show that Appellant has not alleged that Menu Foods made any express warranty to him.

Finally, Appellant's reliance on Civil Rule 8(e)(2) is misplaced. Rule 8(e)(2) permits a plaintiff to plead claims hypothetically or in the alternative. *See* CR 8(e)(2). But the fatal flaw in Appellant's attempt to assert an express warranty claim against Menu Foods is not just that the allegations of the Amended Complaint are inconsistent; as explained above, it is that Appellant's conclusory allegation that "Defendants" made express warranties is insufficient on its own to state a claim, while Appellant's specific allegations make it clear that Appellant does not attribute any express warranty to Menu Foods.

Accordingly, the Superior Court correctly dismissed with prejudice the portion of Appellant's product liability claim that sought recovery from Menu Foods predicated on breach of express warranty.

#### IV. CONCLUSION

For all of the foregoing reasons, Respondents Menu Foods Income Fund and The Kroger Company respectfully request that the Court dismiss the appeal, or, in the alternative, affirm the decisions of the Superior Court in all respects and award costs against Appellant pursuant to RAP 14.2 and 14.3.

Respectfully submitted this 17th day of March, 2008.

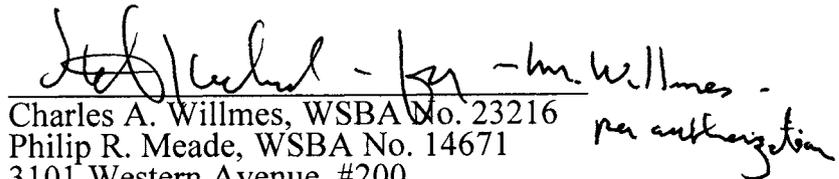
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COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

Donald R. Earl, )  
)  
Plaintiff-Appellant, ) No. 37153-7-II  
)  
v. ) CERTIFICATE OF  
) SERVICE  
)  
Menu Foods Income Fund and )  
The Kroger Co., )  
)  
Defendants-Respondents. )  
\_\_\_\_\_ )

I, Bradley T. Meissner, certify that on the 17th day of March,  
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served on Appellant Donald R. Earl in the manner indicated below:

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