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No: 655442-1

COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON

MICHAEL WATERER,

Appellant,

vs.

ALASKA CASCADE FINANCIAL, INC.,

Respondent.

Appeal from decision and judgment of the Honorable Paris Kallas of the King County Superior Court related to the matter of Alaska Cascade Financial, Inc. v. Michael Waterer case number 08-2-23335-9

APPELLANT WATERER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
A. Introduction	1
B. Argument	3
1. No Contract For the Purchase And Sale Of Urchin Arose Because There Was No Agreement On Quantity.....	3
2. Appellant Did Not Receive and Accept The Urchin.....	17
3. Appellant Did Not Waive The Statute of Frauds.....	19
4. There Was No Contract Between Mr. Waterer and Mr. Izykowski.....	20
C. Conclusion	25

TABLE OF AUTHORITIES

Case Law

<u>Alaska Independent Fishermen's Marketing Ass'n. v. New England Fish Co.</u> , 15 Wn. App. 154, 157(1976).....	6,13,14
<u>Arnim v. Shoreline Sch. Dist. No. 412</u> , 23 Wn. App. 150, 153, (1979).....	21
<u>Barclay v. Spokane</u> , 893 Wn. 2 nd 698 (1974).....	6
<u>Bickford v. City of Seattle</u> , 104 Wn. App. 809, <i>review denied</i> , 144 Wn.2d 1019 (2001).....	20
<u>City of Everett v. Estate of Sumstad</u> , 95 Wn.2d 853 (1981).....	5, 6
<u>City of Everett v. Estate of Sumstad</u> , 26 Wn: App. 742 (1980).....	5
<u>City of Louisville v. Rockwell Mfg. Co.</u> , 482 F2nd 696 (CA6, 1973).....	8
<u>Costco Wholesale Corp. v. World Wide Licensing Corp.</u> , 78 Wn.App. 637, (1995).	6,10, 23
<u>Davis v. Bafus</u> , 3 Wash.App. 164, 167, (1970).....	22
<u>Denny's Restaurants, Inc. v. Security Union Title Ins. Co.</u> , 71 Wn. App. 194, 213-14, (1993).....	20
<u>D.R. Curtis Co. v. Manson</u> , 649 P.2d 1232 (Idaho App., 1982).....	13
<u>Dwelley v. Chesterfield</u> , 88 Wn. 2 nd 331 (1977).....	6
<u>Griffiths & Sprague Stevedoring Co. v. Bayly, Martin, & Fay, Inc.</u> , 71 Wash.2d 679, 686, (1967).....	22

<u>Janzen v. Phillips</u> , 73 Wn. 2 nd 174 (1968).....	6
<u>Janke Constr. Co. Inc. v. Vulcan Materials</u> , 386 F. Supp 687, 116 UCC Rep. 937 (DCWD Wis. 1974).....	16
<u>Lakeside Pump and Equipment, Inc. v. Austin Constr. Co.</u> , 89 Wn.2nd 839 (1978).....	4, 6, 17
<u>Leiendecker v. Aetna Indem. Co.</u> , 52 Wash. 609, 611, (1909)....	21
<u>Matsko v. Dally</u> , 49 Wn.2d 370, 373, (1956)	21
<u>Maziarski v. Bair</u> , 83 Wn. App. 835 (1996).....	20
<u>Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp.</u> , 305 F.2d 659, 662 (9th Cir. 1962).....	4
<u>Perdue Farms, Inc. v. Motts, Inc. of Miss.</u> , 459 F.Supp. 7, 16 (N.D.Miss.1978).....	6
<u>Rho Co. v. Department of Revenue</u> , 113 Wash.2d 561, (1989)...	22
<u>Tanner v. Elec. Coop v. Puget Sound Power and Light, Co.</u> , 128 Wn. 2d 656 (1996).....	24
<u>Washington Shoe Mfg. Co. v. Duke</u> , 126 Wash. 510, 516, 1923).....	5
<u>West Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc.</u> , 66 Wash.2d 513, (1965).....	4

Statutes

RCW 62A.2-201.....	6,8,14,16, 18
RCW 62A.2-204.....	,7, 9, 14, 16
RCW 62A.2-205.....	,5,7,15,16
RCW 62A.2-206.....	5,7
RCW 62A.2-207.....	5,7

Court Rules

Cr 15..... 20

Other Authorities

William Hawland, *Uniform Commercial Series*
§2-204:03 at page 66-67(1986).....8

Hawland, *Uniform Commercial Series*,
§ 2-205:05, pages 71-72 (1986).....15, 16

Karl B. Tegland, *Washington Practice:*
Civil Procedure at 384;20

2 Samuel Williston, *A Treatise on the Law on Contracts*
§ 282 at 326-27 (3d ed. 1959)..... 23

Restatement, Agency, § 320(b)..... 20,21

Restatement (Second) of Agency, §329.....21,22

A. INTRODUCTION

The issues on appeal relate to whether a contract for the purchase and sale of an unspecified quantity of sea urchin arose when Mr. Edward Izykowski telephoned Appellant Waterer at his corporate offices. The issues relate to the formation of a contract and if a contract arose, its terms, and the parties to it.

In the Respondent's Reply, the Respondent disputes the Appellant's position that no contract for the purchase and sale of urchin arose because there was never any agreement or even discussion of the quantity or number of urchins. Washington law distinguishes between preliminary negotiations and formation of a contract. RCW 62A.2-204. In the absence of the parties discussing the quantity involved, no contract arose because, as a matter of law, the parties can not have a meeting of the minds on this essential term, and there is no basis on which the court can grant relief. Pursuant to Section 2-204 of the Code, there is no contract.

The alleged contract in this case is not supported or evidenced by any writing. The absence of any writing is both a defense under the Statute of Frauds set forth in Section 2-201 and the contract formation requirements of Section 2-205. Section 2-205 specifies that when an offer and acceptance are not

contemporaneous (e.g. a classical oral contract which entails an offer of and acceptance of all essential terms including quantity) then the offer must be in writing and the terms of the writing must specify that the offer is open for a specific period of time or give assurances that it is open in the future. Under the UCC a writing is essential to a "firm offer."

To the extent a contract arose, then the quality of the urchin is material to determine if the urchin shipped by Mr. Izykowski were conforming, i.e., whether they meet the industry standards for urchin for the price claimed by him. Not all urchin are of the same quality and grade, and the prices vary accordingly. The trial court erred by not allowing any evidence as to the quality or value of the urchin. This is material to determining if it was conforming. In an action for price for commodities the seller has the duty of proving delivery of conforming goods at each pricing level.

The contract subject of this action arises from a phone call. The initial communication which is the basis of the contract in dispute was made by Mr. Izykowski to Appellant Waterer. At the time of the call Mr. Izykowski was already "familiar" with the Alaska "company" Nautilus Foods. He called its President, Appellant Waterer, at the corporate offices. Mr. Izykowski never inquired

about the full corporate name, but knew it was a company. There is no testimony in the record that Mr. Izykowski ever intended to contract with Appellant Waterer personally. Mr. Izykowski did not ship any urchin to Appellant Waterer, personally.

ARGUMENT IN REPLY

1. No Contract For the Purchase And Sale Of Urchin Arose Because There Was No Agreement On Quantity.

The thrust of Respondent's Response is that Article 2 of the Uniform Commercial Code does not require the parties to a contract to have an agreement on quantity. The Respondent assert that there is no authority that the parties agree to a quantity term except in the context of affirmative defense. The Respondent's arguments reflect the reasoning of the trial court. Both are in error and reflect a fundamental misunderstanding of the law.

The threshold question in any action for breach of contract is whether a contract arose. The Respondent's argument that a contract between Mr. Izykowski and Appellant Waterer arose ignores the requirement that the parties mutually agree to the essential terms of the contract. It is err for a court to find that there is a contract when there is no mutual agreement on the essential

terms. Lakeside Pump and Equipment, Inc. v. Austin Constr. Co., 89 Wn.2d 839 (1978); West Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc., 66 Wn.2d 513, 403 P.2d 833 (1965).

Whether there is an agreement on the essential terms is determined by examination of a party's "offer" and the other party's "acceptance." These are the "tools by which courts and contract negotiators arrive at the illusive contractual concept of a meeting of the minds." Lakeside Pump and Equipment, Inc. v. Austin Constr. Co., Id at 845. The court's consideration of a party's offer and the other's acceptance is necessary in order to determine if there is a meeting of the minds. This applies to contracts arising at common law as well as those governed by the Uniform Commercial Code. Lakeside Pump and Equipment, Inc. v. Austin Constr. Co., id.; Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp., 305 F.2d 659, 662 (9th Cir. 1962).

As discussed hereafter, the most fundamental error made by the trial court was finding that there was a contract despite the fact that the words spoken by the parties do not rise to the level of an offer, nor acceptance, nor do they reflect an intent to be bound.

Rather, they simply spoke only in the context of having an interest in doing business in the future.

With respect to the purchase and sale of goods the basic rules of contract formation are set forth in RCW 62A.2.2-204 to 2-207. Article 2 of the Uniform Commercial Code (UCC) is codified in RCW 62A.2-101 et seq. In order for a contract for the sale of goods there must be a meeting of the minds as reflected in an offer and an acceptance. A meeting of the mind occurs only if there are objective manifestations by both parties that would be understood by a reasonable person to indicate assent by each of them. These manifestations must be present at the time the contract arises. City of Everett v. Estate of Sumstad, 95 Wn.2d 853 (Wash. 1981) affirming City of Everett v. Estate of Sumstad, 26 Wn. App. 742 (1980).

The parties' outward manifestations are essential to the formation of a contract and must be gathered from their outward expressions and acts, usually the words used by the parties, and not from an unexpressed intention. Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 516, 218 P. 232 (1923). Preliminary discussions, negotiations and even price quotations do not give rise to a contract.

See e.g. Barclay v. Spokane, 893 Wn. 2nd 698 (1974). Unexpressed impressions and subjective intent are meaningless and irrelevant. Janzen v. Phillips, 73 Wn. 2nd 174 (1968); Dwelley v. Chesterfield, 88 Wn. 2nd 331 (1977); City of Everett v. Estate of Sumstad, 95 Wn.2d 853.

In a case for a breach of contract for the sale of goods, plaintiff is required to prove the terms of contract, including the quantity term, the defendant's breach, and damages. Costco Wholesale Corporation v. World Wide Licensing Corporation, Wn. App. 637 (Wn. App. Div. 1 1995) citing with approval U.C.C. § 2-201, comment 3, Perdue Farms, Inc. v. Motts, Inc. of Miss., 459 F.Supp. 7, 16 (N.D.Miss.1978).

The plaintiff has the burden of proof to establish that the parties agreed on the material terms of the contract. Lakeside Pump and Equipment, Inc. v. Austin Constr. Co., 89 Wn.2nd 839 (1978). The agreed upon terms of a contract for the sale of goods must include the quantity term Alaska Independent Fishermen's Marketing Ass'n. v. New England Fish Co., 15 Wn. App. 154, 157, 548 P.2d 348 (1976). Without a showing of quantity agreed upon by the parties a contract for the sale of goods is "not enforceable by way of action or defense." id at 157.

Respondent asserts that there is no authority for the proposition that the parties must agree upon a quantity term. As such, in the Respondent's opinion, the words "go fish" are sufficient to have a meeting of the minds and form a contract for the sale of goods. The Respondent does not elucidate whether the words "go fish" is referent to 100,000 pounds, or 10 pounds, or what quantity is denoted by those words.

The requirement that the parties must agree on the "quantity term" is founded in Section 2-204. This section does not use the word "quantity" but this word is referenced in Section 2-201. Section 2-201 precludes the enforcement of a contract beyond the "quantity" stated in writing, if the writing requirement is otherwise satisfied, beyond the quantity mutually agreed to.

Under Section 2-204 the critical test for whether a contract is formed is that the parties must agree on such terms as are sufficient for there to be a "reasonably certain basis for giving the appropriate remedy." Section 2-204(3). There are two terms which are so basic to a contract that the parties themselves must have an actual agreement and meeting of the minds on them or there can be no contract. These are the quantity term and a description of the goods themselves. Without these two fundamental terms, there is

no basis for the court to give an appropriate remedy, and the gap filler provisions of 2-205 to 2-207 are meaningless without knowing what the goods are and how many.

The absence of a quantity term is, in all cases, fatal to the formation of a contract. The quantity term is essential because no "reasonably certain basis for giving an appropriate remedy" is present or can be derived without some quantity term. William Hawland, Uniform Commercial Series §2-204:03 at page 66-67(1986). The quantity term is not necessarily a mathematically certain number. Contracts which provide for the sale of "about 10,000" bales of cotton gives the court a reasonable basis of determining a remedy, but contracts which call for "some cotton" do not. In this example, "some cotton" could mean anything from one pound to a billion tons and the court cannot reasonably construct a contract around such open terms. William Hawland, Uniform Commercial Series, Section.2-204:03, pages 66-67 (1986); See e.g., City of Louisville v. Rockwell Mfg. Co., 482 F2nd 696 (CA6, 1973).

When goods can be of varying quality, the contract must also have an adequate description of the items being sold. A

contract to purchase or sell "100 units" is too indefinite to be enforced. Likewise, an agreement to buy 100 pounds of apples at 50 cents a pounds is, by itself, too indefinite to determine whether the agreement is for 100 pounds of Red Delicious apples or 100 pounds of Golden Delicious apples, or whether they are to be grade A or B, or to determine whether the seller delivers conforming goods.

The interpretation of Section 2-204 as requiring a quantity term as a condition of contract formation is fortified by the more express language of Section 2-201. This statute serves a dual purpose: first, it specifies that a contract involving more than \$500 must be evidenced by a writing signed by the party against whom enforcement is sought, and second, it specifies that a contract, may not be enforced beyond the "quantity" stated in it. RCW 62A.2-201(1)

Applying these concepts to the present case illustrates why the trial court erred as a matter of law when she found that there was a contract based on the conversations between Mr. Izykowski and Appellant Waterer. They simply failed to discuss quantity in any context, and failed to express contractual intent to be bound. The testimony was clear that the quantity to be purchased and sold

was in fact never discussed. A closer look at the testimony is in order.

Preseason Conversations.

The initial conversation occurred on an unspecified date sometime in September or early October, 2007. This conversation was in the context of Mr. Izykowski contacting urchin processors who might be "interested" in buying his urchin. Mr. Izykowski characterized both Appellant Waterer's and his own understanding of the conversation as simply an expression of mutual "interest" to do business in the future. Mr. Izykowski's testimony was that:

Q: "What did you hear?"

A. "There is a new buyer called Nautilus Foods, who's looking for boats, possibly looking for boats. This was the information given to me, with a name and phone number."

Q. And what did you do then?

A. I phoned Nautilus Foods, introduced myself, asked to speak to Appellant Waterer. It was a secretary. She gave me him on the phone. Again, we introduced each other and I ask if he's interested in buying. The answer was yes. I asked him if he was aware of the going rate. He said yes. So we kept talking and I said that for such price I would be interested in buying- in selling the product, and this was probably the end of the first conversation, when we agreed that the going rate we could start the business for 60 cents a pound,

and then after calling him initially, he phoned me two [sic].

RP vol. 1 at 37 -38.

The parties did not discuss any specific "quantity" of urchin to be purchased or sold. (see also RP vol. 2 at 72-73). Neither party sent any confirmatory memos or writings purporting that an agreement had been reached. As experienced sellers and buyers both Mr. Izykowski and Appellant Waterer were aware and understood that sales of urchin are on open price terms based on actual quality of the urchin and the market value of its roe. No contract arose in this conversation.

Follow-up Conversations

After their initial conversation, Appellant Waterer and Mr. Izykowski spoke two more times. Again no substantive contract terms were agreed upon or discussed. In Respondent's brief, Respondent asserts that Appellant Waterer advised Mr. Izykowski to "go fish" and that these words constitute the "quantity" term. There is no evidence in the record that Appellant Waterer and Mr. Izykowski ever discussed quantity in the context of number of pounds, number of urchins, or even as all urchin harvested by Mr. Izykowski. Despite Respondent's argument the words "go fish" are not statements of quantity. No contract arose in these

conversations.

No Conversations During The Season.

Respondent concedes that Appellant Waterer and Mr. Izykowski never spoke during the urchin season. In the absence of Appellant Waterer and Mr. Izykowski speaking to each other the Respondent claims that Mr. Izykowski and Appellant Waterer reached an agreement on quantity through conversations with unidentified persons. The Respondent refers the court to Mr. Izykowski's testimony at RP volume 1 at page 41.

Mr. Izykowski testified, over Appellant's objection, that during the harvesting season in mid November he received instructions from unidentified persons on unspecified packer boats for an unspecified quantity. This is disputed. There was no testimony that Appellant Waterer authorized anyone to contract on his behalf with Mr. Izykowski, nor is there evidence of the quantity Mr. Izykowski agreed to sell or the quantity Appellant Waterer or his companies agreed to buy. Mr. Izykowski's shipment of urchin is not confirmatory of a contract unless there was in fact a prior agreement reached on that date for the quantity shipped. However, once again, there was no evidence of any agreements. Rather Mr. Izykowski simply sought to create a contract where one had not

arisen.

There is no evidence that Mr. Izykowski called Appellant Waterer, or even attempted to call Appellant Waterer to negotiate a contract for the purchase and sale of a specified quantity. An unilateral act does not create a contract that did not previously exist. D.R. Curtis Co. v. Manson, 649 P.2d 1232 (Idaho App., 1982).

The conclusion that no contract arose in the present case is dispositive of the Respondent's claim of breach of contract. In the absence of a quantity term, the court cannot award damages based on preliminary discussions of a fixed price of 60 cents a pound. Was this price for one pound, or a hundred? If the contract was only for 10,000 pounds, and Mr. Izykowski sent more, then the additional poundage was sent under an open price term. Was the price of 60 cents for only "grade A urchin" since this price is commensurate with only the highest quality? In these instances then the trial court erred by not allowing the Appellant to introduce evidence that Mr. Izykowski's urchin was of extremely low quality and that only a percentage of the total was grade A.

Assuming a contract arose in the parties' first conversation when they discussed pre season prices, then the contract is

unenforceable under Section 2-201. The absence of a writing which contains the quantity term is fatal. Alaska Independent Fishermen's Marketing Ass'n. v. New England Fish Co., id.

In Alaska Independent id. a processor's agent signed a paper with association of fisherman which designated fish prices and methods of weighing fish. This document refers to the prices which the buyer was to pay during the 1969-70 seasons for fish purchased 'under the terms and conditions of this agreement,' but omits any mention of the quantity of fish to be purchased. The processor sent a letter to fishermen which stated that it had contracts 'which include fish prices and conditions' with both WACMA and AIFMA for the 1970 season. The contract, however, did not state the quantity of fish the processor had agreed to buy.

In Alaska Independent the mere references to prices and the belief that a contract had arisen was not sufficient. Despite that the quantity was stated or implied in the context of the being the "fisherman's catch" or harvest, this did not satisfy the requirements of Section 2-201, which like Section 2-204, requires that there be agreement on quantity in the context of a reasonably certain number.

The writing requirement of Section 2-201 precludes the

enforcement of a contracts which is not evidenced by a writing. It also reflects the requirements of the UCC that a writing may be essential to prove the formation of a contract when an offer and its acceptance are not contemporaneous. Respondent totally ignores the provisions of Section 2-205 which govern contract formation requirements when the acceptance of an alleged offer is not contemporaneous.

Section 2-205 specifies that when an offer and acceptance are not contemporaneous (e.g. a classical oral contract which entails an offer of and acceptance of all essential terms including quantity) then the offer must be in writing and the terms of the writing must specify that the offer is open for a specific period of time or give assurances that it is open in the future. Under the UCC a writing is essential to a "firm offer." The statute relates to essential elements of the "offer." The statute provides:

"An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance it will be held open is not revocable for lack of consideration during the time stated or if no time is stated for a reasonable time."

William Hawkins explains the purpose and application of this statute in his well regarded treatise Hawkland Uniform Commercial Series as follows:

"It is only firm offers that contained in a "signed writing" giving assurances that they will be held open that are made effective by Section 2-205. The reason for this requirement is clear. Since the Section makes firm offers irrevocable without consideration, a safeguard is needed to insure the fact that the offeror really has made such an offer. This safeguard is provided by the requirement that the offer be put in a writing that is signed by the offeror. "

Hawkland, Uniform Commercial Series, § 2-205:05, pages 71-72 (1986).

A buyer or seller providing price quotations does not qualify as an offer nor can such be the basis of a binding contract in the future unless the offeror first executed a writing stating the offer and second the writing indicates that the offer will remain open. Janke Constr. Co. Inc. v. Vulcan Materials, 386 F. Supp 687, 116 UCC Rep. 937 (DCWD Wis. 1974).

In the present case, Appellant as a matter of law did not make a firm offer to purchase any quantity, nor is there such an offer contained in any writing, nor is there any writing or even oral testimony that the estimated price in late September/early October 2006 when Mr. Izykowski and Appellant Waterer was an assurance of what the price would be in the future. No contract arose under Sections 2-204 or 2-205, and even if it did, it is not enforceable

under Section 2-201.

2. Appellant Did Not Receive and Accept The Urchin

The Respondent asserts that the requirements of the Section 2-201 were met on the basis that Appellant Waterer received and accepted urchin from Mr. Izykowski. This raises two issues:

First, since urchin are sold live, they cannot be rejected, they cannot be sent back. A processor is required to process the urchin to avoid violating the wildlife regulations which prohibit waste. Because rejection is an impossibility in these situations, there is no acceptance, and the processing is not in conformation of a contract.

Rather, in this instance the processor which received the urchin processes the urchin, sells it, and the supplier is entitled to the sale proceeds less the costs of processing and sale. Nautilus Marine Enterprises received the subject urchin, and did not dispute this liability. Mr. Waterer did not receive the urchin, did not accept it, and received no money from it.

Second, as noted by the Supreme Court in Lakeside Pump and Equipment, Inc. v. Austin Constr. Co., id at 845: The court's query is to determine: "Did the parties agree upon the same thing

at the same time?" The emphasis is on the same thing, as well as, at the same time.

In the absence of any discussion of quantity, no contract arose, and if it did, it is not enforceable under the Section 2.201. To the extent Mr. Izykowski shipment of urchin created a contract, then the contract arose at that moment. There was no discussion of price. The price of urchin varied daily and the quality cannot be determined until processing and sale, which is exactly why the contracts between divers and processors are open price contracts.

There is no evidence that Messers. Waterer and Izykowski spoke. While Mr. Izykowski knew Mr. Waterer's phone number, Mr. Izykowski never called during the season, not once, even though Mr. Waterer was easily accessible by phone. There was no evidence at trial that Mr. Waterer and Mr. Izykowski had any communications, written or oral. In the absence of any communication of any type, there is no basis for finding that any contract arose, oral or written.

In the absence of an agreement of price made at the time of formation of the contract (if one arose at the time of shipment or

receipt), then price is open. The trial court thus erred by not allowing evidence about the quality of the urchin, or its actual value.

3. Appellant Did Not Waive The Statute of Frauds

The Respondent argues that Appellant waived the Statute of Frauds defense. The testimony at trial was that there were no writings of any type evidencing the contract. At RP vol.1 page 42 line 17-24, Mr. Izykowski testified that there were no writings evidencing any contract or any contract term. There were no written communications of any kind.

Pursuant to CR 15 (b) the pleadings are to deemed amended to conform to the issues tried. The lack of any writing evidencing any aspect of the disputed contract was raised, briefed and argued before the trial court. CR 15 (b) provides in relevant part:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Pleadings may be deemed amended under CR 15(b) to conform to issues "tried" by the parties or when "the parties acknowledge the existence of an issue during discovery and

argument on pretrial motions." Karl B. Tegland, *Washington Practice: Civil Procedure* at 384; see, e.g., Denny's Restaurants, Inc. v. Security Union Title Ins. Co., 71 Wn. App. 194, 213-14, (1993) (because claim of mutual mistake was argued by both parties at summary judgment proceedings, trial court should have allowed amendment to conform to evidence); Bickford v. City of Seattle, 104 Wn. App. 809, *review denied*, 144 Wn.2d 1019 (2001) (despite city's failure to claim right to setoff in answer, because the attorneys for both parties discussed the defense and acknowledged it would be presented to the jury, city was allowed to assert claim); Maziarski v. Bair, 83 Wn. App. 835 (1996) (where defendant requested offset for the first time after trial but before final judgment, pleadings were deemed amended based on the parties' argument on the merits and the trial judge's determination of the issue on the merits). A CR 15(b) amendment may not unfairly prejudice a party's ability to present a defense.

4. There Was No Contract Between Appellant Waterer and Mr. Izykowski

The testimony at trial did not establish that Mr. Izykowski intended to contract with Appellant Waterer personally. Mr. Izykowski knew at the time he called Appellant Waterer that

Appellant Waterer was the President of a company which was an urchin buyer. Mr. Izykowski had one of Appellant Waterer's business cards which identified him as such. (Ex. 13)

The Respondent contends that Appellant Waterer has personal liability simply because Mr. Izykowski, claimed he did not know the full corporate name of Nautilus Foods but that he was otherwise familiar with it. Respondent then relies on Matsko v. Dally, 49 Wn.2d 370, 373, (1956) (citing 2 Restatement, Agency, § 320(b)) for the proposition that an agent has liability for an undisclosed principal. This represents the analysis of the trial court. The error made by Respondent and the trial court is that the law distinguishes between the liability of an agent of an undisclosed principal, and the liability of an agent of a partially disclosed agent such as a corporation which does business under a trade name.

The cases following Matsoko v Dally, id. recognize that personal liability of an agent for an undisclosed principal arises in different factual situations and is premised on three different legal theories; (a) contractual liability of an agent arise if there is no disclosure of an agency relation; (b) tort liability if the agent misrepresents his authority; and (c) an implied warranty of authority when the principal is only partially disclosed. An agent's liability for

an implied warranty of authority is not contractual liability for performance of the contract itself.

The liability of a corporate employee, however, is predicated on an implied warranty that he has authority to act for his employer.

With the aforementioned distinctions in mind, the law in Washington is that "a person who contracts in the name of a principal that exists and has capacity to contract is not liable on the contract so long as he or she fully or partially discloses the principal and has authority to contract." Rho Co. v. Department of Revenue, 113 Wash.2d 561, 587, 782 P.2d 986 (1989); Griffiths & Sprague Stevedoring Co. v. Bayly, Martin, & Fay, Inc., 71 Wash.2d 679, 686, 430 P.2d 600 (1967); Davis v. Bafus, 3 Wash.App. 164, 167, 473 P.2d 192 (1970); Restatement (Second) of Agency § 320, 329.

The adequacy and nature of the disclosure of the principal varies depending on the circumstances. In the context of the liability of a corporate employee the issue is whether the principal has been partially or fully disclosed such that the buyer is aware that the employee is not the principal but acting in a representative capacity. If the intent is to bind the principal, then the agent does not have personal liability on the contract, but may have liability on an implied warranty of his authority if the principal denies the

agency relation or the agent's authority. See generally, Costco Wholesale Corp. v. World Wide Licensing Corp., 78 Wn. App. 637, 898 P.2d 347 (Wn. App. Div. 1 1995).

Whether it is the parties intent to bind only the principal is based on a fair interpretation of the contract and circumstances. If on a fair interpretation it appears that the intent is to bind the principal only, then the agent is not liable on the contract. Costco Wholesale Corp. v. World Wide Licensing Corp. Id. citing 2 Samuel Williston, *A Treatise on the Law on Contracts* § 282 at 326-27 (3d ed. 1959). This rule does not require the full disclosure of the full corporate name every time a employee of a corporation participates in the formation of a contract. Sales clerks, even those at Costco, do not announce the corporation's full legal name each time they ring up a sale.

A fair interpretation of the subject contract, assuming one arose, illustrates that the parties never intended for Appellant Waterer to be personally liable. The terms of contract, including identification of parties to a contract, may be discerned from: the actual language of the contract, the subject matter and objective of the contract, the factual circumstances surrounding the making of the contract, and the reasonableness of the respective

interpretations advocated by the parties and in light of existing statutes. Tanner v. Elec. Coop v. Puget Sound Power and Light Co., 128 Wn. 2d 656, 674 (1996).

The subject matter and the objective of the disputed contract are controlling as to the parties to it. Appellant Waterer does not have licenses to purchase, transport or process urchin. Nautilus Foods is duly licensed. The terms of a contract include the general law in force at the time of the formation of the contract. Arnim v. Shoreline Sch. Dist. No. 412, 23 Wn. App. 150, 153, 594 P.2d 1380 (1979); accord Leiendecker v. Aetna Indem. Co., 52 Wash. 609, 611, 101 P. 219 (1909); Given the subject matter and objective of the contract, Mr. Izykowski necessarily intended to sell to a licensed processor, which was an entity other than Appellant Waterer. Mr. Izykowski intended to sell to Nautilus Foods, which he knew to be a corporation, and not to Appellant Waterer, who Mr. Izykowski knew was an officer of that corporation.

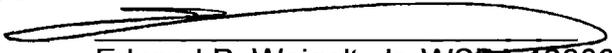
While Mr. Izykowski may not have known the full corporate name of Nautilus Foods he nonetheless knew he was not contracting with Appellant Waterer personally, and he never intended to do so. Respondent concedes in its brief at page 15: "Edward agrees he thought he was contracting with a 'company'."

The fact that Mr. Izykowski knew that Mr. Waterer was an officer of Nautilus Foods, coupled with the fact that Mr. Izykowski contacted Appellant Waterer at the corporate offices, was sufficient to impose a duty of inquiry on Mr. Izykowski if he was uncertain as to the corporate name of the contracting entity.

CONCLUSION

Mr. Izykowski and Appellant Waterer never discussed the most fundamental contract term: quantity. Without a meeting of the mind on this point, no contract arose. The trial court's conclusions that a contract arise without an agreement on quantity is error. As such Mr. Izykowski's shipment of urchin was not based on a contract. To the extent this act created a contract at that time, there was no discussion on price and such a contract is an open price contract. In any event, the parties never intended for Appellant Waterer personally to be a party to the contract. Mr. Izykowski dealt with Appellant Waterer only in his corporate capacity as of employee/officer of a company Mr. Izykowski was familiar with.

Dated 3rd day of June, 2011.


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