CASE NO. 16-35023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT and DANELLE BLANGERES,
Plaintiffs-Appellants
v.
UNITED STATES SEAMLESS, INC., KBP COIL COATERS, INC., KAYCAN LTD.
Defendants-Respondents

ON APPEAL FROM THE ORDER GRANTING JUDGMENT FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
The Honorable Stanley A. Bastian, Judge
Case No. 2:13-cv-00260 (SAB)

APPELLANTS' OPENING BRIEF

AUDET & PARTNERS, LLP
Michael McShane
S. Clinton Woods
711 Van Ness Avenue, Suite 500
San Francisco California 94102-3275
Tel.: 415.568.2555
Fax: 415.568.2556

Attorneys for Plaintiffs-Appellants Robert and Danelle Blangeres

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I. INTRODUCTION

Plaintiffs and Appellants Robert and Danelle Blangeres ("Plaintiffs") submit this opening brief in support of their appeal of the Order of the District Court below entered December 10, 2015 ("Order"), which granted the Joint Motion for Summary Judgment submitted by Defendants United States Seamless, Inc. ("US Seamless"), K.B.P. Coil Coaters, Inc. ("KBP"), and Kaycan Ltd. ("Kaycan") (collectively "Defendants"). The District Court's Order improperly dismissed Plaintiffs' claims despite the existence of several genuine issues of material fact.

The Defendants designed, manufactured, and sold steel siding ("Siding") that they advertised as "durable" and backed by a Lifetime Warranty. Defendants made no effort whatsoever to test whether the Siding was actually durable before offering the Lifetime Warranty; rather they simply copied their warranty directly from a competitor. The Siding turned out to be not remotely durable; the painted coating began to peel within ten years after installation. After they learned that the Siding was defective, Defendants disclaimed their obligations under the Lifetime Warranty and engaged in a concerted effort to deny warranty claims based on technicalities.

Plaintiffs purchased Defendants' Siding and had it professionally installed on their home. They did so in reliance on Defendants' representations that the Siding was durable and that any problems that developed would be fixed, as

promised in the Lifetime Warranty. After Defendants refused to honor their Lifetime Warranty, Plaintiffs brought this action on behalf of themselves and a proposed class of consumers harmed by Defendants' sale of defective siding and refusal to honor the Lifetime Warranty.

Instead of establishing that there are no disputed issues of material fact, the Order simply ignores Plaintiffs' proffered facts which establish the myriad of genuine disputed facts at issue. Plaintiffs accordingly request that this Court reverse the lower court's Order granting summary judgment.

II. JURISDICTIONAL STATEMENT

Plaintiffs appeal from the District Court's Order of December 10, 2015, granting summary judgment on Plaintiffs' claims for breach of express warranty, breach of implied warranty, breach of contract, fraudulent concealment, intentional misrepresentation, negligence, unjust enrichment, and violations of the Washington Consumer Protection Act. The Order granting summary judgment is a final judgment under 28 U.S.C. § 1291. *See* Excerpts From The Record ("ER") 8-17.

A Notice of Appeal was filed on January 7, 2016. ER 2-6.

III. STATEMENT OF ISSUES

A. Improper Grant of Summary Judgment As To Plaintiffs' Express Warranty and Contract Claims:

Did the District Court improperly grant summary judgment based on Plaintiffs' express warranty and contract claims by finding that no reasonable jury

could hold that Defendants waived the enforcement of the registration requirement for their warranties?

B. Improper Grant of Summary Judgment As To Plaintiffs' Implied Warranty Claim:

Did the District Court improperly grant summary judgment based on Plaintiffs' implied warranty and contract claims by improperly relying on dicta which conflicts with relevant statutory law?

C. Improper Grant of Summary Judgment As To Plaintiffs' Tort Claims:

Did the District Court improperly grant summary judgment based on a finding that a reasonable jury cannot find that Defendants were aware of the defects in their products when they made representations to the contrary?

D. Improper Denial of Summary Judgment As To Plaintiffs' Claim For Violations of Washington's Consumer Protection Act:

Did the District Court improperly grant summary judgment based on Plaintiffs' claims for violations of Washington's Consumer Protection Act on the basis that Defendant has not engaged in any unfair or deceptive act as a matter of law?[1]

[1] In briefing and argument below, Plaintiffs contended that North Dakota law, not Washington law, should apply to Plaintiffs' warranty and tort claims. The District Court disagreed, applying Washington law to all of Plaintiffs' claims. Order at 5-6. However, the court expressly did not reach the question of whether North Dakota law (or the laws of any other jurisdiction) applied to the eventual question of class certification. For the narrow purposes of the instant motion for summary

IV. STATEMENT OF THE CASE

A. Procedural History

The District Court granted Defendants' Joint Motion for Summary Judgment as to all of Plaintiffs' claims. The District Court held that:

> In this case, Plaintiffs' failure to return the warranty registration card relieved Defendants' obligations under the express warranty. Had they returned the card and followed the procedures for a claim, the record supports the conclusion that Defendants would have honored the warranty. Plaintiffs have not shown that Defendants engaged in deceptive acts, nor made any material misrepresentations upon which they relied. Consequently, summary judgment is appropriate on all of Plaintiffs' claims.
>
> At the hearing, Defendants indicated that if Plaintiffs' claims are dismissed, the class action must be dismissed as well, as there would be no proper class representative. Plaintiffs did not dispute this premise.

ER 17.

B. Factual Background

US Seamless' business is selling seamless steel siding coil. ER 189-193. US Seamless contracted with KBP Coil Coaters, Inc. ("KBP") to purchase certain minimum quantities of painted steel siding coil for a period of ten years. *Id.* From 1992 to 2003, KBP manufactured and supplied painted steel coil exclusively to US

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judgment on Plaintiffs' individual claims, Plaintiffs concede that any differences between Washington law and North Dakota law are unlikely to be material. However, Plaintiffs expressly reserve the argument, not decided upon by the District Court, that North Dakota and/or the laws of other jurisdictions may apply to the question of class certification in the instant matter.

Seamless and US Seamless purchased painted steel coil exclusively from KBP. ER 195.

Although KBP was to provide a warranty for the Siding, US Seamless asked Kaycan Ltd. ("Kaycan"), a company affiliated with KBP, to put its name on the warranty for marketing purposes. ER 208. US Seamless provided Kaycan with a copy of a competitor's warranty and asked Kaycan to copy it, which Kaycan did. ER 205-206. The Lifetime Warranty states that "United States Seamless Siding is warranted by the coil manufacturer, KAYCAN LTD (KAYCAN)." ER 214.

US Seamless marketed the painted Siding as durable. ER 692 ("With steel siding from United States Seamless you get the strength of steel and the durability afforded by a tough PVC coating. Because of its toughness and heat resistance, it is guaranteed not to rust, crack, blister, chip, peel or flake."). US Seamless represented that it offered "The Best Warranties In The Business." ER 230 ("There is one thing wrong with most siding warranties … they're full of holes"); ER 229 ("United States Seamless Is So Confident In Their Products and Installations, They Offer The Best Warranties In The Business!").

US Seamless did not test the coil to determine whether it would rust, crack, blister, chip, peel or flake. ER 196-202. US Seamless performed no testing on coated steel coil before selling it to consumers with a Lifetime Warranty. *Id.*; *see also*, ER 666 (confirming testing done only on aluminum coil, not steel). US

Seamless assumed it was buying a quality product based on Kaycan's warranty—despite knowing that Kaycan had simply copied the warranty from one of US Seamless' competitors. *Id.*; ER 205-206.

Despite US Seamless' representations, the Siding does not last a "Lifetime." Expert Eric P. Guyer analyzed a sample of Plaintiffs' Siding and determined that "[t]he combination of coating material choice and embossing led to more rapid degradation and cracking with UV exposure." ER 556. Moisture penetration then led to "degradation of coating adhesion." *Id.* Hundreds of home owners have filed warranty claims describing peeling, chipped, and flaking siding. ER 223-228, 234, 279-295, 298-311, 314-328, 329-330, 664. Defendants have known about problems with the Siding's performance since at least 1993. ER 494-497.

Defendants have denied many warranty claims. KBP's Director of North American operations, Tom Roper, disparaged customers who made claims under Defendants' Lifetime Warranty as sharing "a profound sense of entitlement that they are owed forever" and wrote that he had "been invalidating [claims] on technicalities." ER 223-228. Roper admits his tactics "piss[] people off" and "[a] few of them inevitably come back to bite us." ER 338. However, "[t]he others keep money in our pockets." *Id.*

Defendants maintain they do not honor warranty claims unless the claimant completed a warranty registration card and mailed it to US Seamless within 30

days after installation. However, the facts indicate that US Seamless routinely permitted claimants to complete their warranty cards at the time of filing a warranty claim, often specifically instructing claimants to "backdate" the form as if it were filled out at the time the Siding was installed. ER 223-228, 234, 279-295, 298-311, 314-328, 329-330. For example, in 2005, US Seamless received a claim for Siding originally installed on October 18, 1995. ER 355-371. Nearly ten years after the required submission date, US Seamless directed the consumer to fill out and submit the registration card:

> Please sign as "owner," fill out survey as if it was 1995 and return to me with pictures and measurements. For example, take picture of the entire house from a few angles, then pictures of affected walls with approx. size of affected walls and which direction. You can e-mail me the pictures if you want: billb@westernproducts.com. Please mail the signed warranty to my home (so it doesn't get date stamped).

ER 365. US Seamless took similar action in response to a warranty claim filed in 2004 for Siding installed ten year years prior, in 1994:

> I am enclosing a warranty registration for Ken Ducharme. Please fill out completely, sign and have Ken sign. Remember to do this exactly as you would have back in 1995 when the job was installed. Then mail to me at [home address]. This way it won't get "date" stamped.

ER 448. (Emphasis in original). *See also*, ER 432 (permitting claimant to backdate warranty registration where Siding was installed on October 30, 1994, and stating in a claim file note on August 31, 2004: "Asked her why she never mailed in

warranty as required…. Told her to sign warranty and mail to my home- I will slip it into warranty file. She will send it.").

KBP also allowed consumers to submit the warranty registration years after installation. For instance, in 2008, a customer submitted a warranty claim to KBP for Siding installed in 2003, and concurrently submitted her warranty registration card. ER 465-469. Tom Roper, KBP's Director of North American Operations, accepted the warranty card and approved the claim. ER 464. Likewise, in December 2009, KBP denied a consumer's claim for Siding installed on November 9, 1995 because KBP did not have a warranty registration on file and because the warranty was not timely registered. ER 234, 246 (note written by Tom Roper on December 8, 2009). Shortly thereafter, KBP received the warranty card from US Seamless, and approved the claim. ER 234, 238, 240 ("1/27/10 - Approved for refinishing. Warranty card received from Matt Ludwig. Tom.").

Defendants also routinely paid claims without requiring a warranty registration card. On October 5, 2001, KBP authorized a claim for refinishing Siding installed in June 1995. ER 389-391. However, KBP had no warranty registration card on file. ER 390 (identified by coil numbers and sales contract). Similarly, on July 18, 2012, KBP approved at least three warranty claims for Siding installed in April 2000, August 1995, and October 1998, respectively, where the consumers had not submitted registration cards. ER 285, 288 (no

registration card on file); ER 302-306 (same); ER 318-322 (same). KBP's approval of these claims demonstrates its blatant disregard of the Lifetime Warranty's registration requirement. ER 215.

Such examples are not isolated instances. Mr. and Mrs. Blangeres presented evidence that of the approximately 741 warranty claims Defendants paid, approximately 100 were paid without a warranty registration card on file. ER 225-226 (stating 151 claims had been paid without a registration card); ER 118 (correcting that number to 100). KBP acknowledged that "exceptions have been made" to the warranty registration requirement. ER 223-224. KBP communicated its policy of approving warranty claims without warranty registration to consumers and contractors. According to Mr. Roper "KBP wants to help, and only denies claims when they are not supported…. [E]ven though neither Matt nor I have a record of this warranty on file, we don't deny a claim solely on that basis." ER 329-330 (corresponding with customer regarding warranty claim).

Furthermore, both US Seamless and KBP lost warranty cards that were submitted by consumers—KBP in a fire that occurred at its facility in 2002 and US Seamless when it moved its main office. ER 331-332 (indicating KBP did not have pre-2002 warranty cards in its files); ER 334 (stating "we are not sure, but fear, that when we moved to our new office a few years ago there may have been a few warranties in the 'to be filed basket' that didn't make the journey").

Plaintiffs Robert and Danelle Blangeres paid approximately $20,000 for the Siding installed on their home in 1999. ER 520. Plaintiffs relied on statements that US Seamless made through television advertisements that referenced the US Seamless name and the lifetime Warranty. ER 499-501. Plaintiffs further relied on representations regarding the strength and durability of the Siding when making the purchase. *Id*.; *see also*, ER 518-519 (Mrs. Blangeres believed a lifetime warranty meant the Siding would not have to be repainted).

By 2011, the coating on the Siding was peeling off on various sections of their house. ER 510-511. Mr. Blangeres called US Seamless. ER 506-507. US Seamless told Mr. Blangeres there was nothing they could do for him because the franchisee had never sent in his warranty card. *Id*.

V. SUMMARY OF ARGUMENT

The District Court improperly granted summary judgment based on a finding that no genuine issue of material fact existed as to whether Defendants had waived the right to enforce the Lifetime Warranty's registration requirement by repeatedly and consistently honoring claims of consumers who had not completed registration cards. The District Court's Order granting summary judgment dismissing Plaintiffs' claims for breach of implied warranty should be reversed because the Court should reconsider prior dicta stating that an implied warranty

cannot by its nature incorporate explicit statements related to product performance. Furthermore, the District Court was in error dismissing Plaintiffs' misrepresentation and Consumer Protection Act claims because Defendants' statements are actionable under prevailing law.

VI. ARGUMENT

A. The Order Granting Summary Judgment As To Plaintiffs' Claims Was Reversible Error.

1. Standard of Review on Appeal of Grant of Motion for Summary Judgment

An order granting a motion for summary judgment is reviewed *de novo*. *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013). The Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the District Court properly applied the relevant substantive law. *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). The party seeking summary judgment has the burden to identify those parts of the record that indicate the absence of a genuine issue of material fact. Once the moving party has made this showing, the nonmoving party must designate "by affidavits, depositions, answers to interrogatories, or admissions on file" specific facts showing there is a genuine issue of material fact." *Arpin v. Santa Clara Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). A fact is "genuine" when the evidence is such that "a

reasonable jury could return a verdict for the nonmoving party." *Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

Defendants have not met their burden. Considering all facts and reasonable inferences in the light most favorable to Plaintiffs, there are significant disputed issues of material fact. Accordingly, the District Court's grant of summary judgment was reversible error.

2. The District Court Erred in Dismissing Plaintiffs' Breach Of Express Warranty Claim on Summary Judgment Because Genuine Issues of Material Fact Exist as to Whether Defendants Waived the Right to Enforce the Warranty Registration Requirement.

The District Court erred by dismissing Plaintiffs' breach of express warranty claim on summary judgment. An issue of fact exists regarding whether Defendants waived the right to enforce the Lifetime Warranty's registration requirement by repeatedly and consistently honoring claims of consumers who had not completed registration cards. Defendants' failure to enforce the Lifetime Warranty's registration provision constitutes an implied waiver of any right to enforce the registration card requirement. The District Court erred in holding that it did not.

"A waiver is the intentional and voluntary relinquishment of a known right" and may be express or implied. *Jones v. Best*, 134 Wn.2d 232, 241 (1998), *as corrected* (Feb. 20, 1998) (citing *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954)). An implied waiver, such as the one before this Court, arises "where one party has

pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it." *Bowman*, 44 Wn.2d at 670 (quoting *Kessinger v. Anderson*, 31 Wn.2d 157, 168 (1948)). It is well established under Washington law that "[w]hether there has been a waiver is a question for the trier of the facts." *Bowman*, 44 Wn.2d at 670; *see also, Michel v. Melgren*, 70 Wn. App. 373, 379 (1993) (reversing trial court's grant of summary judgment on waiver issue and finding that issues of material fact existed as to whether the land owners waived their lien rights); *Suydam v. Reed Stenhouse of Washington, Inc.*, 820 F.2d 1506 (9th Cir. 1987) (reversing district court's grant of summary judgment because issue of fact existed on waiver issue); *Deacy v. Coll. Life Ins. Co. of Am.*, 25 Wn. App. 419, 424 (1980) (reversing grant of summary judgment on waiver issue and finding that a trier of fact could infer waiver from the facts presented).

Under Washington law, a seller waives its rights to enforce an expressed policy or contractual right where its conduct is inconsistent with that policy. *See, e.g., Am. Sheet Metal Works, Inc. v. Haynes*, 67 Wn.2d 153 (1965) (finding that the defendant waived the written approval requirement under the contract by directing and permitting the plaintiff to perform extra work); *Bowman*, 44 Wn.2d 667 (payment of nine months of rent and balance of the purchase price, refinance of

contract, and acceptance of deed constituted waiver of any rights purchasers might have had arising from purchase transaction).

In *American Sheet Metal Works*, the parties' contract required American Sheet Metal to obtain Haynes's written approval for performance of extra work. *Id.* at 158. On appeal, Haynes argued that American Sheet Metal was precluded from receiving compensation for the additional work performed because it failed to obtain written approval. *Id.* The court disagreed, holding Haynes waived the written approval requirement through his conduct when he "authorized, permitted, and directed" American Sheet Metal to perform the extra work. *Id.* at 159. Because Haynes's conduct was inconsistent with the contractual provision, he waived the right to enforce that provision.

Here, Mr. and Mrs. Blangeres submitted substantial evidence that Defendants engaged in conduct drastically inconsistent with the Lifetime Warranty's purported warranty registration requirement. US Seamless routinely permitted claimants to complete their warranty cards at the time of filing a warranty claim, specifically instructing claimants to fill out the form as if at the time their Siding was installed. ER 223-228, 234, 279-295, 298-311, 314-328, 329-330. For example, in 2005, US Seamless received a claim for Siding originally installed on October 18, 1995. ER 355-371. Nearly ten years after the

required submission date, US Seamless directed the consumer to fill out and submit the registration card:

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KBP continues to honor warranties without a registration card on file as long as it has "credible evidence" that the coil was manufactured by KBP, such as coil lot numbers, original invoices, or copies of checks. *See* ER 223-228, 285, 288 (no registration card on file); ER 302-306 (same); ER 318-322 (same). While KBP has acknowledged that other evidence could be sufficient to prove that KBP was the coil manufacturer, whether KBP accepts evidence from a claimant as proof of purchase depends exclusively on the subjective judgment of the KBP personnel reviewing the claim. ER 227-228[2].

[2] Mr. Roper testified, "We require the warranty registration card. However, failing that, it's subject to judgment. If it looks credible to me -- and sometimes this takes the form of coil lot numbers. In some cases United States Seamless or their franchisee has been able to supply us with coil lot numbers, and -- that were used at an address, at a homeowner's address. In another case, and I don't remember which Seamless franchisee it is, but they have in their item number on their invoicing, they have KSC, which indicates that the coil that they are invoicing was

At oral argument, Defendants argued that Mr. and Mrs. Blangeres could not assert waiver, because no evidence existed that Mr. and Mrs. Blangeres relied on Defendants' failure to enforce their own warranty registry requirement. Defendants' argument is contrary to Washington law. The party asserting waiver is not required to show reliance. *Weitzman v. Bergstrom*, 75 Wn.2d 693, 699 (1969) (citation omitted) (explaining that "reliance is not a requirement" of waiver); *Schuster v. Prestige Senior Mgmt., L.L.C.*, --- F.3d ---, No. 33242-0-III, 2016 WL 1700415, at *7 (Wn. App. Apr. 28, 2016) (citation omitted) ("Waiver requires no reliance."). Rather, waiver is an equitable doctrine that focuses on the conduct of the party who is claimed to have waived a right. *Weitzman*, 75 Wn. at 699; *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 339–40 (1989). Washington courts have repeatedly distinguished between the doctrines of waiver and estoppel and explained that while estoppel requires reliance, waiver does not. The Washington Supreme Court explains:

> Case law indicates that courts often tend to consider issues of waiver and estoppel interchangeably. The different focus of each, however, requires separate analysis. Waiver requires that the insurers voluntarily and intentionally relinquished a known right or that their conduct 'warrants an inference of the relinquishment of such

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purchased from K.B.P. So those are two examples. And there could be others, but it's not a guarantee that we'll accept that. We're looking for proof that it's our coil. If we have that proof and warranty card, it's pretty easy." ER 227-228.

> right.'….Voluntarily implies a choice, a conscious decision to relinquish a right…. A person must know that certain conduct has the effect of relinquishing a right….The focus for waiver, then, is on the insurer, not on the insured…. Equitable estoppel focuses on the insured's justifiable reliance.

Saunders, 113 Wn.2d at 339–40. *See also Bowman*, 44 Wn.2d 670 (explaining the distinct elements of waiver and estoppel); *Buchanan v. Switzerland Gen. Ins. Co.*, 76 Wn.2d 100, 108 (1969) (same); *Schuster*, 2016 WL 1700415, at *7 ("In contrast to waiver, estoppel involves some element of reliance or prejudice on the part of the party asserting estoppel.")

Here, Plaintiff submitted substantial evidence that Defendants failed to enforce their own warranty registration requirement. Such evidence is sufficient to raise a genuine issue of material fact regarding waiver. *See Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361 (2008) ("Whether a waiver has occurred is a question of fact, unless reasonable minds could reach but one conclusion."). Whether or not Mr. and Mrs. Blangeres were aware of Defendants' conduct is irrelevant. The district court erred by not reserving this issue for the jury. *Michel*, 70 Wn. App. at 375 ("All facts are viewed in a light most favorable to the nonmoving party.").

3. The District Court erred in finding that plaintiff's claim for implied warranty was time-barred.

In issuing the Order and granting summary judgment on Plaintiffs' breach of implied warranty claim, the District Court relied solely on the notion that the claim was time-barred under Washington law. Relying on dicta out of this Court's decision in *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1550-51 (9th Cir. 1994), the District Cort held that an "implied warranty can never meet the explicitness requirement for future performance warranties." ER 14. Though this reasoning has been routinely adopted in several jurisdictions, neither the Ninth Circuit's decision in *Western Recreational Vehicles*, nor any other decision considering the issue has addressed the apparent inconsistency between that rule and the definition of merchantability under the statute.[3] In fact, no decision considering the issue has gone any farther in its explanation than simply defining the terms *implied* and *explicit* to draw the "logical" conclusion that the terms are inconsistent with each other. *See, e.g. GM v. Tate*, 257 Ark. 347, 352 (1974); *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 169 Cal.App.4th 116, 134 (2008) (collecting cases making same finding); *Kelleher v. Marvin Lumber & Cedar Co.,* 152 N.H. 813, 827-828 (2006); *Duncan Place Owners Association v. Danze, Inc.*, 2015 WL 5445024, at *8 (N.D. Ill. 2015).

[3] It appears that the only decision from a Washington state court to confront the issue addressed it in a footnote where the plaintiff "seem[ed] to recognize that implied warranties, by their very nature, never explicitly extend to future performance." *See Holbrook, Inc. v. Link-Belt Const. Equipment Co.,* 103 Wn. App. 279, 284 (2000).

This oversimplified reasoning, however, is incomplete because it fails to incorporate the possibility that express affirmations of fact or promises relating to the future performance of the goods are permitted by the definition of "merchantability" under Rev. Code Wash. § 62A.2-314. In Washington, to determine whether there was a breach of the implied warranty of merchantability, "the test is whether the goods are merchantable under Rev. Code Wash. § 62A.2-314." *Schuster Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413 (1994). According to Rev. Code Wash. § 62A.2-314(2):

> Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which goods are used; and
> (d) run, within the variations permitted by agreement, of even kind, quality, and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.

Rev. Code Wash. § 62A.2-314(2).

"This list 'does not purport to exhaust the meaning of merchantable nor to negate any of its attributes not specifically mentioned in the test of the statute, but arising by usage of trade or through case law.'" *Federal Signal Corp.*, 125 Wn.2d at 426. Determining merchantability will depend on the particular facts of the case. *Id.* at 427 (citing *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25

Wash.App. 90, 94 (1979)). Washington courts have looked to factors such as the usage in the trade, the price actually paid as compared to the standard price, the characteristics of similar goods manufactured by others, government standards and regulations regarding such a good, and express statements included on the product's packaging and within the product's owner's manual to evaluate merchantability. *See Id.* at 427; *see also Hertzog v. WEBTV Networks, Inc.*, 112 Wn. App. 1043 (2002). Court's generally use a reasonable standard to determine whether the requirements of merchantability have been met. *Federal Signal Corp.*, 125 Wn. App.2d at 426 (citation omitted). If a product's description included explicit affirmations of fact or promises relating to the product's future performance, those statements should reasonably be considered when evaluating merchantability.

The statute of limitations for a breach of implied warranty in Washington is four years after the cause of action accrues. Rev. Code Wash. § 62A.2-725(1). A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. Rev. Code Wash. § 62A.2-725(2). A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. *Id.* Nothing in the statute explicitly

limits its application to applicable sections of the Commercial Code defining express warranties, and nothing in the statute explicitly excludes its application to implied warranties. Washington courts have interpreted the future performance exception to require an explicit promise or guarantee of future performance of the goods that is clear, unambiguous, and unequivocal. *See Cent. Wash. Refrigeration, Inc. v. Barbee*, 81 Wn. App. 212, 225 (1996) (no warranty of future performance where manufacturers representations did not refer to a specific future time; rather, they were equivalent to a warranty that the equipment would perform at the time of delivery as specified), *rev'd on other grounds*, 133 Wn.2d 509 (1997). Here, Defendants made several explicit marketing representations that referred to future performance, for example saying that the Siding was durable and long lasting when, in fact, it was neither. ER 692 ("With steel siding from United States Seamless you get the strength of steel and the durability afforded by a tough PVC coating. Because of its toughness and heat resistance, it is guaranteed not to rust, crack, blister, chip, peel or flake."). US Seamless represented that it offered "The Best Warranties In The Business." ER 230 ("There is one thing wrong with most siding warranties … they're full of holes"); ER 229 ("United States Seamless Is So Confident In Their Products and Installations, They Offer The Best Warranties In The Business!"). Defendants' explicit advertising and marketing materials included

with the product made clear that the merchantability of Defendants' goods extends to future performance of the goods.

Furthermore, the policy consideration protecting merchants from being forever liable for any goods which they sold is still met. Section 2-725 was adopted to "[take] sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period." Rev. Code Wash. § 62A.2-725 U.C.C. cmt. (Purposes). Section 2-725 provides "a time when [a merchant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared." *Cent. Washington Refrigeration, Inc.*, 133 Wn.2d at 521 (Guy, J., dissenting) (citing Paul J. Wilkinson, Comment, *An Ind. Run Around the U.C.C.: The Use (or Abuse?) of Indemnity*, 20 Pepperdine L. Rev. 1407, 1412 (1993) (quoting *Developments in the Law, Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950))). These comments illustrate the U.C.C.'s goal to establish an across-the-board governing law for all commercial sales transactions that adequately addresses fairness and bargained for risk. *Cent. Washington Refrigeration, Inc.*, 133 Wn.2d at 521 (Guy, J., dissenting). The requirement that the warranty explicitly and specifically

extend to future performance of the goods remains unchanged, and a seller is not prejudiced if the manufacturer is already on notice that the merchantability of the goods sold has been extended to future performance. For these reasons, Plaintiffs respectfully request this Court to ignore the unreasoned dicta of *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.* and find that an implied warranty of merchantability incorporates the merchant's explicit statements regarding the quality and future performance of the goods delivered.

4. The District Court Erred in Dismissing Plaintiffs' Fraudulent Concealment Claims Because a Genuine Issue of Material Fact Exists As to Whether Defendants Were Aware Of, And Fraudulently Concealed, Material Information.

The District Court granted the motion for summary judgment with respect to Plaintiffs' fraudulent concealment claims,[4] holding simply that the "1993 letter that Plaintiffs rely upon does not establish that Defendants knew there would be problems with peeling and cracking of the Siding on customers' houses." ER 15. Correspondingly, the District Court found that the first warranty claim was made in

[4] Fraudulent concealment exists (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser. *Alejandre v. Bull*, 159 Wash. 2d 674, 689, 153 P.3d 864, 872 (2007).

December 1999, which is after the date that Plaintiffs first purchased their Siding. ER 15-16.

In essence, the District Court concluded that Plaintiffs had not established Defendants' knowledge of the defects. However, the Court ignored the record evidence creating, at a minimum, a genuine factual dispute as to whether Defendants knew of the defect. Defendants distributed marketing materials describing the Siding as "durable" and "guarantee[ing]" that it would not "rust, crack, blister, chip, peel or flake." ER 692. Defendants distributed these materials to franchisees despite *knowing KBP had no previous experience applying paint to steel and without testing or verifying the product to see whether it was true*. ER 196-202, 205-206, 666. Not only that, Defendants distributed these materials despite the fact that *Defendants were receiving "more customer claims than [US Seamless] could absorb" in 1993*. ER 225, 494-497 (Emphasis added). The Order does not make clear why the Court disregarded the 1993 letter, and doing so was an error since the letter serves as evidence that Defendants continued to market the Siding as having qualities that, in light of the number of claims they were receiving, it did not have. As demonstrated, Defendants possessed actual knowledge of the defects. *Burbo v. Harley C. Douglass, Inc*., 125 Wn. App. 684, 698 (2005) (the question is what the offender's actual and subjective knowledge of

the defect is). "Knowledge" can be proven by circumstantial evidence. *Nauroth v. Spokane County*, 121 Wn. App. 389, 393 (2004).

5. The District Court Erred in Dismissing Plaintiffs' Misrepresentation Claims Because a Genuine Issue of Material Fact Exists as to Whether Defendants Made Numerous Material Misrepresentations On Which Plaintiffs Detrimentally Relied.

Next, without any factual or legal analysis, the Court held that a reasonable jury would not find Defendants' misrepresentations to be material, or that Plaintiffs relied on the misrepresentations to their detriment, and for those reasons granted summary judgment with respect to Plaintiffs' misrepresentation claims.[5] Order at 9. The evidence, however, shows exactly the opposite.

Defendants engaged in a widespread marketing campaign through which they misrepresented and concealed the quality of the Siding, claiming that it was durable and long lasting when, in fact, it was neither. ER 213-215 (Siding would last "Lifetime."); ER 692 (marketed the painted steel coil Siding as durable); ("With steel siding from United States Seamless you get the strength of steel and

[5] The nine prongs of intentional misrepresentation are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the representation; and (9) damages suffered by the plaintiff. *Carlile v. Harbour Homes, Inc*., 147 Wash. App. 193, 204-05, 194 P.3d 280, 285 (2008).

the durability afforded by a tough PVC coating. Because of its toughness and heat resistance, it is guaranteed not to rust, crack, blister, chip, peel or flake."). Actually, Defendants were aware of problems with the Siding as early as 1993. *See* ER 494-497 (Defendant was aware of the problems in 1993); (receiving "more customer claims than [US Seamless] could absorb" in 1993); ER 223-228 (Defendant employee admitted that he invalidated [claims] on technicalities).

Defendants made additional misrepresentations including that the Lifetime Warranty lists Kaycan as the coil manufacturer when it is not. ER 204-210, 214. The Lifetime Warranty also states that US Seamless Steel Siding "is warranted" by Kaycan when, according to Kaycan, KBP provided the warranty. *Id*. Kaycan's president admitted that these false statements were made for "marketing" purposes. ER 208. The Lifetime Warranty also erroneously states that registration of the warranty was "mandatory" when, in reality, Defendants routinely honored warranty claims without the warranty registration. *See, e.g.,* ER 223-228, 285, 288 (no registration card on file); ER 302-306 (same); ER 318-322 (same). Finally, a genuine issue of material fact exists with respect to whether Defendants intended the warranty to last a "Lifetime" inasmuch as Defendants invalidated warranty claims on technicalities in order to save the company money. ER 223-228.

Defendants' statements were material. "A misrepresentation is material if it involves a fact that is relevant to a claim or the investigation of a claim" and

whether the parties making the representation "attached importance to the fact misrepresented." *Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 354-55 (2009), as amended (Jan. 6, 2010). Where a representation is made "recklessly and carelessly without knowing for certain whether it was true or false," the knowledge requirement for intentional misrepresentation is satisfied. *Holland Furnace Co. v. Korth*, 43 Wn.2d 618, 623 (1953). Here, Defendants' misrepresentations are material. They address the characteristics of the Siding and of the warranty that applies to the Siding and these are the precise features which consumers, including the Plaintiffs, considered in determining which Siding to purchase.

This evidence describes a generalized course of conduct by Defendants to actively misrepresent and conceal material information regarding the quality of the Siding through a broadly based marketing campaign upon which Plaintiffs relied. Plaintiffs relied on statements that US Seamless made through television advertisements that referenced the US Seamless name and the lifetime Warranty. ER 499-501. Plaintiffs further relied on representations regarding the strength and durability of the Siding when making the purchase. *Id.*; *see also* ER 518-519 (Plaintiffs paid approximately $20,000 for the Siding installed on their home in 1999); *Id.* (Mrs. Blangeres believed a lifetime warranty meant the Siding would not have to be repainted). As such, reliance is satisfied. "[R]ecipient of an intentional misrepresentation may justifiably rely on that representation without

investigating and the reliance is still justified." *Harrison Mem'l Hosp. v. Dep't of Nat. Res*., 107 Wn. App. 1007 (2001); *see also* Restatement (Second) of Torts sec. 540; *Beadles v. ReconTrust Co*., No. CV-12-00378-JLQ, 2012 WL 4904461, at *3 (E.D. Wash. Oct. 15, 2012) (Plaintiff's claim was sufficient to state a claim because it asserted that he was supplied with materials during his interactions with defendant, that were false, and relied on the information to his detriment).

At bare minimum, a jury could reasonably conclude that Plaintiffs would not have purchased the Siding had they known that it was defective and would fail prematurely. The District Court erred in granting summary judgment on the intentional misrepresentation claim.

6. The Washington Product Liability Act Does Not Subsume Plaintiffs' Negligence And Unjust Enrichment Claims.

Providing no analysis, and citing one case, *Macias v. Saberhagen Holdings, Inc*., 175 Wn.2d 402 (2012), the District Court ruled that the Washington Product Liability Act, Rev. Code Wash. § 7.72.030 ("WPLA"), subsumes Plaintiffs' negligence and unjust enrichment claims. Order at 9.

The ruling ignores that Plaintiffs' claims are not rooted in harm to the Siding alone. *See Fagg v. Bartells Asbestos Settlement Trust*, 184 Wn. App. 804, 812 (2014) (WPLA only subsumes (i.e., a negligence claim) where the claim is product based). To the contrary, Plaintiffs' harms are premised upon the omission of

material information about the Siding that Defendants were legally obligated to disclose—namely, the failure to inform consumers that the Siding would prematurely fail shortly after application, the failure to honor warranties, and the wrongful refusal to pay for resulting expenses. ER 196-202, 666. (Defendants distributed these materials to franchisees despite knowing KBP had no previous experience applying paint to steel and without testing or verifying the product to see whether it was true); ER 494-497 (Defendants were receiving "more customer claims than [US Seamless] could absorb" in 1993). In addition to seeking costs for repairing damages and ascertainable losses, Plaintiffs seek injunctive relief requiring Defendants to modify their warranty claims process to uniformly provide relief in accordance with their obligations under the law. Class Action Complaint, p. 11. Further, where a claim sounds in intentionally caused harm, as here, the WPLA does not control. Rev. Code Wash. § 7.72.010(4)-7.72.010(6) (the term 'harm' does not include direct or consequential economic loss); *see also Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wn. App. 493 (1986) (enrichment may "be obtained when appropriate regardless of the existence of" a statutorily provided remedy.). Thus, inasmuch as Plaintiffs seek relief other than damages to the Siding alone, the District Court failed to consider the whole of Plaintiffs' claims and its holding that the negligence and unjust enrichment claims are subsumed the WPLA should be reversed.

7. The Court Should Reverse the District Court's Order Granting Summary Judgment on Plaintiffs' Consumer Protection Act Claims

The District Court improperly and summarily entered judgment on Plaintiffs' CPA claims. The Order simply states that "Plaintiff has not shown that any Defendant engaged in an unfair or deceptive act." ER 16. Although it is impossible to discern the District Court's underlying reasoning and basis for making this conclusion, this Court should nonetheless reverse the District Court's Order based on the reasons enumerated below.

Applying the governing standard that "[a]ll reasonable inferences must be drawn in the nonmoving party's favor…," there were genuine issues of fact concerning whether Defendants engaged in an "unfair or deceptive act." *Craig v. M & O Agencies, Inc*., 496 F.3d 1047, 1053 (9th Cir. 2007). The "[Washington] Supreme Court has stated that '[d]eception exists 'if there is a representation, omission or practice that is likely to mislead' a reasonable consumer.'" *Rush v. Blackburn*, 190 Wash. App. 945, 963, 361 P.3d 217, 225 (2015). "'[A]n act or practice can be unfair without being deceptive.'" *Id.*

Here, Plaintiffs' statement of facts included business practices by Defendants that were unfair and deceptive since they were misleading and, at the very least, had a "capacity to deceive." *See Blair v. Nw. Tr. Servs., Inc.,* No. 32816-3-III, 2016 WL 1063753, at *4 (Wash. Ct. App. Mar. 17, 2016) (finding

actions unfair or deceptive when they have the "capacity to deceive"). For instance, Defendants knew that the Siding was defective yet continued to sell the siding with misleading representations as to the durability, including offering a lifetime warranty. ("US Seamless business records show that US Seamless President Mike Bullinger wrote a letter to Kaycan/KBP President Lionel Dubrofsky on June 23, 1993, informing him that US Seamless was receiving more customer claims than it could absorb in 1993. ER 494-497. On June 28, 1993, Mr. Dubrofsky stated that he received the letter. *Id*.

Mr. Blangeres has alleged that the siding is defectively designed and manufactured. ER 130. Plaintiffs' expert has confirmed this is the case. ER 556. As a result of the defective manufacturing process, the Siding has "a historical 10 year service life." ER 662. KBP's Director of North American Operations, Tom Roper, noted KBP's "displeasure" with this service life. Plaintiffs also complain that Defendants have failed to honor their Lifetime Warranty. ER 131.

Whether Defendants knew that the Siding was defective and not durable or even truly warranted for a lifetime is a genuine issue of a material fact in this case. *See Taladay v. Metro. Grp. Prop. & Cas. Ins. Co.*, No. C14-1290-JPD, 2016 WL 541398, at *3 (W.D. Wash. Feb. 11, 2016) ("An issue of fact is 'genuine' if it constitutes evidence with which 'a reasonable jury could return a verdict for the nonmoving party.'[] That genuine issue of fact is 'material' if it 'might affect the

outcome of the suit under the governing law.'"). Specifically, whether Defendants were aware of the Siding's defective nature is a factual issue material to the determination of whether they violated the CPA. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 75 (2007) ("[K]nowing failure to reveal something of material importance is 'deceptive' within the CPA."); *Polygon Nw. Co. LLC v. Louisiana-Pac. Corp.*, No. C11-620 MJP, 2012 WL 2504873, at *6 (W.D. Wash. June 28, 2012) (holding it was premature to dismiss a CPA claim on the record before the court and acknowledging that: "Under the CPA, a seller may be liable when it fails to disclose a material fact, even if the circumstances do not establish fraudulent concealment."). The District Court's Order was completely silent on the existence of this factual dispute despite that this factual issue speaks directly to whether a violation of the CPA occurred under Washington law.

Likewise, there is a disputed factual issue concerning the warranty claims procedures by Defendants. Plaintiffs dispute that Defendants require a receipt of the warranty registration from every consumer making a warranty claim. If true, there would be evidence that Defendants engaged in unfair business practices with consumers and also deceptive practices in denying claims based on a lack of a warranty registration card on file. *See, e.g.* ER 223-228 (Defendant employee admitted that he invalidated [claims] on technicalities). Again, the District Court's

Order did not acknowledge this factual dispute in granting summary judgment on the CPA claims.

For the reasons set forth above, the District Court erred in granting summary judgment on the CPA claims. Plaintiffs respectfully request this Court reverse the District Court's Order and vacate the judgment as to the CPA claims.[6]

VII. CONCLUSION

The District Court's Order granting summary judgment as to Plaintiffs' warranty, misrepresentation, and CPA claims was in error on the law and facts, and should be reversed. Accordingly, Plaintiffs respectfully request that the Court

[6] In the alternative, Plaintiffs seek remand with instructions to the District Court to issue a new order that includes a statement of reasons for granting summary judgment on the CPA claims. *See Sunset Drive Corp. v. City of Redlands*, 282 F. App'x 609, 610 (9th Cir. 2008) ("We have held that although Federal Rule of Civil Procedure 52(a) relieves a district court from the obligation to make findings of fact and conclusions of law when granting a motion for summary judgment, the rule "does not relieve a court of the burden of stating its reasons somewhere in the record when its underlying holdings would otherwise be ambiguous or inascertainable [] "Appellate review is a particularly difficult process when there is nothing to review," and a summary judgment order that fails to disclose the court's reasons runs contrary to the interests of judicial economy and increases the danger that litigants will perceive the judicial process to be arbitrary and capricious. "Accordingly, this court has held that when multiple grounds are presented by the movant and the reasons for the district court's decision are not otherwise clear from the record, it may vacate a summary judgment and remand for a statement of reasons.") (citations omitted).

reverse the Order granting summary judgment, and remand for further proceedings.

Dated: May 18, 2016

/s/ S. Clinton Woods

S. Clinton Woods
Michael McShane
AUDET & PARTNERS, LLP
711 Van Ness, Suite 500
San Francisco, California 94102
Telephone: (415) 568-2555
Facsimile: (415) 568-2556
Email: cwoods@audetlaw.com
Email: mmcshane@audetlaw.com

Beth E. Terrell, WSBA #26759
Jennifer Rust Murray, WSBA #36983
Erika L. Nusser, WSBA #40854
Maria Hoisington,
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 350-3528
Email: bterrell@tmdwlaw.com
Email: jmurray@tmdwlaw.com
Email: enusser@tmdwlaw.com

Charles J. LaDuca,
Brendan S. Thompson,

Bonnie Prober,
Michael J. Flannery,
CUNEO GILBERT & LADUCA, LLP
8120 Woodmont Avenue, Ste. 810
Bethesda, Maryland 20814
Telephone: (202) 789-3960
Facsimile: (202) 789-1813
Email: charles@cuneolaw.com
Email: brendant@cuneolaw.com
Email: bprober@cuneolaw.com
Email: mflannery@cuneolaw.com

Robert K. Shelquist
Rebecca A. Peterson
LOCKRIDGE GRINDAL NAUEN, PLLP
100 Washington Avenue South, Suite 2200
Minneapolis, Minnesota 55401
Telephone: (612) 339-6900
Facsimile: (612) 339-0981
Email: rkshelquist@locklaw.com
Email: rapeterson@locklaw.com

Gary E. Mason
WHITFIELD BRYSON & MASON LLP
1625 Massachusetts Ave, NW, Suite 605
Washington, DC 20036
Telephone: (202) 429-2290

Facsimile: (202) 429-2294
Email: gmason@wbmllp.com

Charles Schaffer
Michael McBride
LEVIN, FISHBEIN, SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106-3697
Telephone: (215) 592-1500
Facsimile: (215) 592-4663
Email: cschaffer@lfsblaw.com

Attorneys for Plaintiffs-Appellants Robert and Danelle Blangeres

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants states that they are unaware of any related cases pending in the Ninth Circuit.

Dated: May 18, 2016

/s/ S. Clinton Woods

S. Clinton Woods
AUDET & PARTNERS, LLP

Attorneys for Plaintiffs-Appellants
Robert and Danelle Blangeres

CORPORATE DISCLOSURE STATMENT

Neither one of the Appellants is a corporate entity.

Dated: May 18, 2016

/s/ S. Clinton Woods

S. Clinton Woods
AUDET & PARTNERS, LLP

Attorneys for Plaintiffs-Appellants
Robert and Danelle Blangeres

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Attorney for ROBERT and DANELLE BLANGERES

Date May 18, 2016

ADDENDUM TO BRIEF

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*** Statutes current through the 2015 3rd Special Session ***
and the 2015 election (2016 c 1 and 2)

Title 62A Uniform Commercial Code
Article 2 Sales
Part 7 Remedies

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 62A.2-725 (2016)

62A.2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Title becomes effective.

HISTORY: 1965 ex.s. c 157 § 2-725.

*** Statutes current through the 2015 3rd Special Session ***
and the 2015 election (2016 c 1 and 2)

Title 62A Uniform Commercial Code
Article 2 Sales
Part 3 General Obligation and Construction of Contract

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 62A.2-314 (2016)

62A.2-314. Implied warranty: Merchantability; usage of trade.

(1) Unless excluded or modified (*RCW 62A.2-316*), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (*RCW 62A.2-316*) other implied warranties may arise from course of dealing or usage of trade.

HISTORY: 1965 ex.s. c 157 § 2-314. Cf. former RCW 63.04.160(2); 1925 ex.s. c 142 § 15; RRS § 5836-15.

*** Statutes current through the 2015 3rd Special Session ***
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Title 62A Uniform Commercial Code
Article 2 Sales
Part 3 General Obligation and Construction of Contract

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 62A.2-316 (2016)

62A.2-316. Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (*RCW 62A.2-202*) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2) of this section:

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he or she desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him or her;

(c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade; and

(d) In sales of livestock, including but not limited to, horses, mules, cattle, sheep, swine, goats, poultry, and rabbits, there are no implied warranties as defined in this article that the livestock are free from sickness or disease: PROVIDED, That the seller has complied with all state and federal laws and regulations that apply to animal health and disease, and the seller is not guilty of fraud, deceit, or misrepresentation.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section and the provisions of *RCW 62A.2-719*, as now or hereafter amended, in any case where goods are purchased primarily for personal, family, or household use and not for commercial or business use, disclaimers of the warranty of merchantability or fitness for particular purpose shall not be effective to limit the liability of merchant sellers except insofar as the disclaimer sets forth with particularity the qualities and characteristics which are not being warranted. Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (*RCW 62A.2-718* and *RCW 62A.2-719*).

HISTORY: 2013 c 23 § 134; 1982 c 199 § 1; 1974 ex.s. c 180 § 1; 1974 ex.s. c 78 § 1; 1965 ex.s. c 157 § 2-316. Subd. (3)(b) cf. former RCW 63.04.160(3); 1925 ex.s. c 142 § 15; RRS § 5836-15. Subd. (3)(c) cf. former RCW 63.04.720; 1925 ex.s. c 142 § 71; RRS § 5836-71.

*** Statutes current through the 2015 3rd Special Session ***
and the 2015 election (2016 c 1 and 2)

Title 7 Special Proceedings and Actions
Chapter 7.72 Product Liability Actions

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 7.72.030 (2016)

7.72.030. Liability of manufacturer.

(1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product: PROVIDED, That a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

(c) A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties

under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) 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.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW shall be determined under that title.

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

HISTORY: 1988 c 94 § 1; 1981 c 27 § 4.

*** Statutes current through the 2015 3rd Special Session ***
and the 2015 election (2016 c 1 and 2)

Title 19 Business Regulations -- Miscellaneous
Chapter 19.86 Unfair Business Practices -- Consumer Protection

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 19.86.020 (2016)

19.86.020. Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

HISTORY: 1961 c 216 § 2.

CERTIFICATE OF SERVICE

I, S. Clinton Woods, declare that I am over the age of eighteen (18) and not a party to the entitled action. My business address is Audet & Partners, LLP, which is located at 711 Van Ness Avenue, Suite 500, San Francisco, California 94102-3275.

On May 18, 2016, I caused to be filed the following:

APPELLANTS' OPENING BRIEF

with the Clerk of the Court of the 9th Circuit Court of Appeals, using the official Court Electronic Document Filing System which served copies on all interested parties registered for electronic filing.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

/s/ S. Clinton Woods

S. Clinton Woods