



Amended pursuant to Supreme Court Civil Rule 6-1(1)(a)(i)
Original Filed on September 6, 2013

Court File No. S-136688
Vancouver Registry

In the Supreme Court of British Columbia

Between

Natalie Bickert

Plaintiff

and

Whirlpool Corporation, Sears Holdings Management Corporation, Sears Roebuck and Co., Inc., Sears Canada Inc., Whirlpool Canada Co. and Whirlpool Canada LP

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

Overview

1. The Plaintiff brings this action on her own behalf, and on behalf of a proposed class.
2. The Defendants are the designers, manufacturers, distributors and vendors of dishwashers sold under the brand names “Whirlpool”, “KitchenAid” and “Kenmore”, hereinafter, the “Dishwashers”.
3. The Dishwashers contain a dangerous defect. Put simply, the product is a fire hazard. Each Dishwasher is equipped with an electronic control board. This control board has an unreasonable propensity to over-heat. This may cause the dishwasher to emit smoke, fumes, sparks and flames. The resultant smoke and fire may cause harm to life and property.
4. The Defendants have known about this product defect for years, and yet have failed to take appropriate corrective action, including warning consumers, recalling or repairing the product.
5. The Defendants’ conduct in the design and marketing of the Dishwashers was negligent, and in breach of the *Business Practices and Consumer Protection Act* and the *Sale of Goods Act*.

Parties

6. The Plaintiff is a resident of Kelowna, British Columbia.

7. The proposed definition of the class is as follows:

“All persons in British Columbia and elsewhere in Canada who purchased or otherwise acquired a Whirlpool, KitchenAid or Kenmore branded dishwasher after July 1, 2003.”

8. The Defendant, Whirlpool Corporation, is incorporated in the United States with a principal office at 1209 Orange St., Wilmington, Delaware, 19802.

9. The Defendant, Whirlpool Canada Co., is an extraprovincial company registered in British Columbia with an address for service at 1200 Waterfront Centre, 200 Burrard Street, P.O. Box 48600, Vancouver, British Columbia, V7X 1T2.

10. The Defendant, Whirlpool Canada LP, is an extraprovincial limited partnership registered in British Columbia with an address for service at 1200 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia, V6C 3E6.

11. The Defendant, Sears Holding Management Corporation, is incorporated in the United States with an address for service at 208 So LaSalle St., Suite 814, Chicago, Illinois, 60604.

12. The Defendant, Sears Roebuck and Co., Inc., is incorporated in the United States with an address for service at 208 So LaSalle St., Suite 814, Chicago, Illinois, 60604.

13. The Defendant, Sears Canada Inc., is an extraprovincial company registered in British Columbia with an address for service at 290 Yonge Street, Suite 700, Toronto, Ontario, M5B 2C3.

14. The Defendants are joint tortfeasors. They each participated in the design, manufacturer, distribution, and sale of the Dishwashers in British Columbia. They each knew or ought to have known of dangerous defects in the Dishwashers. They each owed

a duty of care to the Plaintiff and class members, and they each could have taken reasonable steps to prevented harm to the Plaintiff and class members, including issuing a warning about the defect, recalling the product, repairing, correcting or avoiding the defect.

The Plaintiff

15. Ms. Bickert purchased a new Dishwasher valued at approximately \$1000. On or about December 11, 2012, during a normal wash cycle, the electronic control board overheated, and burst into flames. Smoke erupted from the Dishwasher, and filled Ms. Bickert's house.

16. The resulting fire and smoke caused personal injury to Ms. Bickert including:

- (a) Carbon monoxide poisoning with hospitalization;
- (b) Lung and respiratory system damage;
- (c) Post traumatic stress; and
- (d) Such further and other particulars as may be proven at trial.

17. The resulting fire and smoke caused property damage to the Plaintiff including:

- (a) Damage to the kitchen and other areas of Ms. Bickert's home;
- (b) Damage to the drywall, paint and other interior surfaces;
- (c) Damage to the contents of Ms. Bickert's home;
- (d) Destruction of the Dishwasher; and
- (e) Such further and other particulars as may be proven at trial.

18. As a result of the damage to her residence, Natalie Bickert had to live elsewhere and she incurred significant living expenses and other expenses related to the property damage to the residence and contents.

19. As a result of her injuries, Natalie Bickert has experienced pain and suffering and loss of enjoyment of the amenities of life and has been forced to undergo and will continue in the future to require lengthy and painful therapy for her rehabilitation, including medical treatments and physiotherapy.

20. As a result of her injuries, Ms. Bickert has incurred and will continue to incur out-of-pocket expenses, hospital expenses, costs for past and future care, and special damages as will be proven at the trial of this action.

21. As a result of her injuries, Ms. Bickert has suffered and will continue to suffer loss of income as a result of being unable and restricted in her ability to work in her ordinary occupation, in such amount as will be proven at the trial of this action.

22. Ms. Bickert had to purchase a replacement dishwasher for \$1,072.43 and suffered financial losses caused by their Dishwasher's failure.

Part 2: RELIEF SOUGHT

23. The Plaintiff claims, on her own behalf and on behalf of the class, as follows:
- (a) an order certifying this action as a class proceeding and appointing her as representative plaintiff under the *Class Proceedings Act*;
 - (b) general damages and special damages;
 - (c) punitive damages;
 - (d) pre-judgment interest;

- (e) statutory remedies under ss.171 and 172 of the *Business Practices and Consumer Protection Act*, including:
- (i) declaratory relief under s.172(1)(a);
 - (ii) an injunction under s.172(1)(b), including an injunction requiring the Defendants to recall or repair the Dishwashers;
 - (iii) a restoration order under s.172(3)(a), including an order that the Defendants issue refunds for the whole or part of the costs of the Dishwashers;
 - (iv) an advertising order under s.172(3)(c), including an order that the Defendants be required to publish warnings of the risks of the Dishwashers to consumers;
- (f) Statutory remedies under s.56 of the *Sales of Goods Act* for breach of an implied warranty;
- (g) recovery of health care costs incurred by the Ministry of Health Services on their behalf pursuant to the *Health Care Cost Recovery Act*, S.B.C. 2008, c.27, and comparable legislation in the other provinces and territories;
- (h) costs; and
- (i) such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

Negligence

24. The electronic control board, or circuit board (hereinafter the “Electronic Control Board”), performs all of the major control functions of the Dishwashers. It enables the

consumer to operate the Dishwashers and select cycle preferences. The Electronic Control Board also monitors basic functions of the dishwasher.

25. At the time of their sale, each Dishwasher contained a dangerous defect that caused or could cause the Electronic Control Board to overheat, smoke, ignite and combust. The defect prevents the Dishwashers from being used as intended during their useful lives and creates a substantial and unreasonable risk of property damage, personal injury and death. In addition to the unreasonable risk of fire posed by these defective Dishwashers, smoke and fumes, containing harmful gases, vapors and particulate matter can quickly permeate an entire house.

26. The Defendants designed, manufactured, marketed, advertised, distributed, warranted, sold or offered repair services for the Dishwashers to the Plaintiff and the class. In conjunction with each sale, Defendants marketed, advertised and warranted that each Dishwasher was of merchantable quality, fit for the ordinary purpose for which dishwashers are used, free from defects in materials and workmanship and would not pose a danger to consumers.

27. The design defect arises at or near the terminal connection between the wiring from the heating element and the console control area including the Electronic Control Board.

28. The defective design of the Dishwashers, causes degradation of the Electronic Control Board over time, which in turn causes the terminal connection to get extremely hot, causing the circuit board, wire insulation or other nearby parts of the circuit board assembly to melt or combust. Moreover, due to the defective design of the Dishwashers, there is a likelihood that the heat, flames or sparks can cause further combustion of material and exit the Dishwashers and create a serious risk of setting fire to nearby objects such as woodwork, kitchen counters, cabinetry, dishtowels, items of clothing and any other flammable material above or in the vicinity of the Dishwashers.

29. The Defendants owed a duty of care to the Plaintiff and the Class as the

Defendants are in a superior position to know the truth about the quality and nature of the Dishwashers and possess superior knowledge of the defect based on prerelease testing, numerous consumer complaints and warranty claims relating to the Dishwashers, testing done in response to those complaints, replacement part sales data, aggregate data from Dishwasher dealers, and other sources.

30. The Defendant Whirlpool owed a duty to the Plaintiff and the Class to design, manufacture and produce, and all Defendants owed the Plaintiff and the Class a duty to test, inspect, market, distribute, sell and service, the Dishwashers with reasonable care and in a workmanlike fashion, and had a duty to protect them from foreseeable and unreasonable risk of harm.

31. The Defendants knew or should have known that the Dishwashers they designed, manufactured, produced, tested, inspected, marketed, distributed, sold and/or serviced, in ordinary and foreseeable use, would fail to perform as intended.

32. The Defendants knew or should have known that the Dishwashers created an unreasonable risk of catastrophic property damage, personal injury and death.

33. Due to their superior knowledge of the defect in the Dishwashers, Defendants had a duty to disclose to the public, including the Plaintiff and the Class, the defective nature of the Dishwashers. Defendants further had a duty not to put defective products on the market.

34. The control panels of the Dishwashers have all either experienced combustion or are at real risk of combustion originating at or near the heating element terminal connection on the Electronic Control Board.

35. The Defendants owed a duty of care to the Plaintiff and the class and breached that duty, particular of which include:

(a) The Defendants knew that the Dishwashers needed to be recalled due to the Electronic Control Board problem.

- (b) The Dishwashers were not safe for ordinary and intended use;
- (c) The Defendants failed to provide the Plaintiff and the class either directly or indirectly, with adequate and sufficient warning regarding the known or foreseeable risks and dangers inherent in the Dishwashers;
- (d) The Dishwashers contained a material design defect and were not reasonably safe due to such defect;
- (e) The design, methods of manufacture and testing of the Dishwashers did not conform to generally recognized and prevailing standards or the state of the art in existence at the time the design was made and the Dishwashers were manufactured; and
- (f) At the time the Dishwashers left the Defendants' control, the foreseeable risks associated with the Dishwashers' design exceeded the benefits associated with that design;
- (g) The Defendants knew, or should have known, that the Dishwashers were defective in design, not fit for their ordinary and intended use, would become useless or significantly diminish in value before the end of their reasonably expected useful lives, did not perform in accordance with the advertisements, marketing materials and warranties disseminated by the Defendants nor in accordance with the reasonable expectations of ordinary customers and that the advertisements and marketing materials for the Dishwashers were likely to mislead and deceive a reasonable consumer;
- (h) The Defendants failed to exercise reasonable care concerning the design, development, manufacture, production, testing, inspection, marketing, sale and/or

servicing of the Dishwashers by, among other things, as to the Defendant Whirlpool, failing to design and manufacture the Dishwashers in a manner to ensure that under normal intended usage, electrical failure would not occur; and as to all Defendants, failing to warn or to warn adequately and sufficiently, either directly or indirectly, the foreseeable users of the defective nature of the Dishwashers; and failing to represent accurately to the Plaintiff and the Class, whether directly or indirectly, that the Dishwashers posed an unreasonable safety risk.

(i) Defendants did not implement a plan to address the defect and instead manufactured, distributed and/or sold subsequent models of the Dishwasher containing the same defect;

(j) Despite the Dishwashers' inherent and dangerous defect described herein, compounded by numerous customer complaints that the Defendants received about the Dishwashers, by Whirlpool's testing done in response to those complaints, replacement part sales data, data from Dishwasher dealers, and other sources, Defendants continuously failed to disclose the existence of this design defect to public consumers;

(k) The Defendants never informed any purchaser of the existence of this design defect at the time of sale or thereafter, nor did Defendants disclose that warranty or the recommended post-warranty repairs would not cure or rectify the defect and would, at best, only delay its impact and postpone failure in the Dishwashers. The Defendants have never issued a recall of the Dishwashers despite the serious fire hazard, or offered to replace the defective Dishwashers with defect-free components or a defect-free replacement;

(l) Defendants knew that reasonable consumers were unaware of the latent dangerous defect, and that they reasonably expected the Dishwashers to clean

without effectively without putting users' property and lives at risk, expected the Defendants to disclose any defects that would prevent the Dishwashers from performing their expected function throughout their useful lives or that would seriously threaten consumers' personal welfare, and that such disclosure would affect consumers' decisions whether to purchase the Dishwashers.

(m) As a result of Defendants' misrepresentations and omissions in their marketing and advertising, consumers believed that the Dishwashers would operate without defects and consumers purchased Whirlpool, KitchenAid and Kenmore Dishwashers.

(n) The Defendants placed a dangerous and hazardous product into the stream of commerce, thereby causing an unreasonable danger and creating an unreasonable threat to the lives and property of consumers and the Defendants had exclusive possession of this knowledge.

(o) Despite this knowledge, the Defendants at all times failed to disclose or concealed material information from the Plaintiff and the Class in the course of the Defendants' marketing, advertising and sale of the Dishwashers;

(p) The Defendants have failed to remove the Dishwashers from the marketplace or take adequate remedial action. To the contrary, the Defendants sold and serviced the Dishwashers even though Defendants knew, or should have known that the Dishwashers were defectively designed and at risk of failing prematurely in a catastrophic and dangerous manner, depriving the Plaintiffs of the ability to use the Dishwashers for their intended purpose during their useful lives, and causing property damage, personal injury or a risk of death.

36. The defect described herein manifests itself during the expected useful life of the Dishwashers and is substantially likely to prevent the Dishwashers from being used as

intended during their expected useful life, and poses significant risks to individuals' lives and property.

37. This design defect necessitated and will to necessitate replacement of or costly repairs to the Dishwashers.

38. In purchasing a Dishwasher, a reasonable consumer would expect it to operate in accordance with, and be useable for, its intended purpose not pose a serious safety risk. No consumer would expect their Dishwasher to be a threat to their safety or the safety of their family or property.

39. Due to the defective design leading to combustion of their Electronic Control Boards, the Dishwashers failed or are substantially certain to fail during their expected useful lives, within or outside applicable warranty periods.

40. The Defendants had actual knowledge, before they placed the Dishwashers in the stream of commerce, that they contained a defect that would cause the electrical system to fail and the Electronic Control Board to overheat, resulting in heat or smoke or fire damage to the Dishwashers and surrounding area, and creating an unreasonable risk of property damage, personal injury and death.

41. The existence of the design defect incorporated into the manufacture of the Dishwashers is a material fact reasonable purchasers would have considered in deciding whether to purchase a Dishwasher and had the consumers been aware of the design defect, consumers would not have purchased the Dishwasher.

42. Many Dishwashers across Canada have overheated and combusted, and those still in service are at risk of and likely to do so as well due to their dangerous defective design as referred herein.

43. The Plaintiff, class members and reasonable consumers would not have purchased these Dishwashers had they known of the defect.

44. The design defect renders the Dishwashers unfit for their intended purpose and not of merchantable quality, and breached Defendants' duty to the Plaintiff and the class.

45. As a result of the Defendants' negligence, the Plaintiff and class members are entitled to damages at common law.

Business Practices and Consumer Protection Act

46. The Plaintiff repeats the material facts in regards to the negligence claim with respect to this statutory claim.

47. The Plaintiff and class members who purchased the Dishwashers in British Columbia are "consumers" within the meaning of s.1 of the *Business Practices and Consumer Protection Act* ("*Consumer Protection Act*".)

48. The Dishwashers are "goods" within the meaning of s.1 of the *Consumer Protection Act*.

49. The Defendants are "suppliers" within the meaning of s.1 of the *Consumer Protection Act*. In the course of their business, they supplied, offered, advertised or promoted the sale of the Dishwashers in British Columbia.

50. The purchase of the Dishwashers by the Plaintiff, and by class members within the province, is a "consumer transaction" within the meaning of s.1 of the *Consumer Protection Act*.

51. The Defendants breached s.4 of the *Consumer Protection Act* by engaging in deceptive acts or practices in the sale of the Dishwashers. They represented the Dishwashers as safe when the product was unsafe. The particulars of such breach include the following:

- (a) a representation that the Dishwashers were of a particular standard or quality when they were not, contrary to s.4(3)(a)(ii); and

(b) the failure to state a material fact where that omission is misleading, contrary to s.4(3)(b)(vi).

52. As of a result of the Defendants breaches of the *Consumer Protection Act*, the Plaintiff and class members who purchased the Dishwashers in British Columbia are entitled to statutory remedies under s.171 and 172 of the *Consumer Protection Act*.

Sales of Goods Act

53. The Plaintiff repeats the material facts in regards to the negligence claim with respect to this statutory claim.

54. The Plaintiff, and class members who purchased the Dishwashers in British Columbia, are “buyers” within the meaning of s.1 of the *Sales of Goods Act*.

55. The Defendants are “sellers” within the meaning of s.1 of the *Sale of Goods Act*.

56. The Dishwashers are “goods” within the meaning of s.1 of the *Sale of Goods Act*.

57. The Dishwashers have an implied warranty for quality and fitness for purposes pursuant to s.18 of the *Sale of Goods Act*.

58. The Defendants breached this implied warranty. Purchasers of the Dishwashers may reasonably expect that the Dishwashers were safe. This product was not safe.

59. As a result of this breach of implied warranty, the Plaintiff and class members who purchased the Dishwashers in British Columbia are entitled to statutory remedies under s.56 of the *Sale of Goods Act*.

Punitive Damages

60. The Defendants failure to recall or repair the Dishwashers was reckless, arrogant, callous and showed a marked disregard for public safety such that an award of punitive damages is required.

Court Jurisdiction and Proceedings Transfer Act

61. There is a real and substantial connection between the claims in this action and British Columbia. This action involves a tort committed in British Columbia and concerns business carried on in British Columbia.

Plaintiffs' address for service: c/o Klein Lyons
400 - 1385 West 8th Avenue
Vancouver, BC V6H 3V9

Fax number address for service (if any): (604) 874-7180

E-mail address for service (if any):

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street
Vancouver, BC V6Z 2E1

Date: September 16, 2013



Signature of
[] plaintiff [x] lawyer for plaintiffs

David A. Klein
Klein Lyons, Barristers & Solicitors

Richard J. Mallett
James H. Brown & Associates

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

- (ii) all other documents to which the party intends to refer at trial,
and
- (b) serve the list on all parties of record.

ENDORSEMENT FOR SERVICE OUTSIDE BRITISH COLUMBIA

The plaintiff claims the right to serve this Notice of Civil Claim on the defendant outside British Columbia on the ground that this proceeding concerns a tort committed in British Columbia pursuant to Rule 4-5(2) of the Supreme Court Civil Rules and section 10(g) of the *Court Jurisdiction and Proceedings Transfer Act*, R.S.B.C. 2003, Chapter 28, and amendments thereto.

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This action concerns a dangerously defective product. It asserts claims in negligence and under the *Business Practices and Consumer Protection Act* and the *Sale of Goods Act*.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters

- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

1. *Class Proceedings Act*, R.S.B.C. 1996, c. 50.
2. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2
3. *Sale of Goods Act*, R.S.B.C. 1996, c. 410
4. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c.28
5. *Health Care Cost Recovery Act*, S.B.C. 2008, c.27,