68374-8

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No. 68374-8-I

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

GMAC, aka ALLY FINANCIAL INC., a Delaware corporation,

Appellant,

v.

EVERETT CHEVROLET, INC., a Delaware corporation, JOHN REGGANS, and JANE DOE REGGANS,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Everett Chevrolet's ("EC") response attempts to cloud pure legal issues governing the applicability of the duty of good faith to demand obligations. Using a litany of irrelevant facts and new arguments[1] (many supported only by unpublished rulings outside this jurisdiction[2]) that were never raised in the context of the underlying summary judgment motion, EC tries to sidestep or limit the well-established precedent of *Allied*[3] and *Badgett.*[4]

Despite these distractions, EC still has not identified a "specific contract term" that was breached, nor could it do so at summary judgment. In fact, EC maintained no such requirement was necessary under *Badgett*. Although the trial court disagreed with EC on this issue, it nevertheless departed from customary and proper summary judgment procedure and denied GMAC's motion, *sua sponte* relying upon a contract term that has never been invoked by either party to this case.

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[1] RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").

[2] GMAC has filed a concurrent motion to strike the reference to these authorities as they have no value, whether precedential or persuasive.

[3] *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank of Wash.*, 10 Wn. App. 530, 518 P.2d 734, *rev. denied*, 83 Wn.2d 1013, *and cert. denied*, 419 U.S. 967 (1974).

[4] *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991).

Under the circumstances, the detailed ruling of the panel of this Court in granting discretionary review[5] should be adopted and the trial court's order denying GMAC's summary judgment motion on EC's defenses and counterclaims based upon bad faith should be reversed.[6]

> "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996). Sourakli's case against Titan on appeal depends entirely on arguments not raised below. He has not attempted to rebut the conclusions reached by our commissioner in the order granting discretionary review. We adopt our commissioner's reasoning and conclude Titan did not owe a duty to Sourakli as an agent for Mr. Lucky. We decline to consider whether Titan had a duty under the rescue doctrine or arising from its contract.

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[5] *GMAC v. Everett Chevrolet, Inc.*, No. 68374-8-1, 2012 WL 3939863 (Wash. Ct. App. Aug. 16, 2012) ("Order").

[6] EC cites the case of *Fluor Enterprises, Inc. v. Walter Construction, Ltd.*, 141 Wn. App. 761, 172 P.3d 368 (2007), for the proposition that an order granting discretionary review does not have precedential value. Not so. The Court in *Fluor* said,

> Generally the law of the case doctrine prevents a court from reconsidering the same legal issue already determined as part of a previous appeal. This court may apply a prior appellate court decision as law of the case "where justice would be best served." A commissioner's ruling becomes a final decision of this court if an aggrieved party fails to seek modification of the ruling within the time permitted by RAP 17.7. The law of the case doctrine may apply to a commissioner's ruling on finality even in the same review proceeding.

Fluor Enters., 141 Wn. App. at 771. In the instant case a panel of this Court, as opposed to a commissioner, issued the detailed Order granting discretionary review. Although this Court's Order granting discretionary review may not be a final decision, EC fails to present any meritorious arguments to persuade this panel to reach a different result.

Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017 (2009).

The case should also be remanded to a different trial judge.

II. ARGUMENT

A. EC's Highly Selective Counter-Statement of Facts Is Irrelevant and Unreliable.

At summary judgment, "the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). EC's counter-statement of facts drags in any number of non-relevant facts and fails to explain how any of these facts would change the outcome under the applicable substantive law. Moreover, EC's counter-statement often proceeds by omitting relevant facts, rendering it unreliable.[7] The relevant facts are set

[7] As just one example, when describing the alleged dispute over how and when EC was required to pay after a sale ("out of trust"), EC simply omits the fact that GMAC used *EC's own records* to establish the sale dates for vehicles. RP Vol. II 158-159 (Modrzejewski testimony). Terry Cady, EC's experienced auto dealer office manager, testified that EC's own records established the sales dates. RP Vol. I 161, 164. Linda Welch, EC's title clerk, confirmed this. RP Vol. XI 90:18-91:15, 93:16-95:4. Doug Hobbs, EC's general manager, did also. RP Vol. II 63-64. This is not surprising: EC had been a dealer with GMAC for 12 years. Moreover, until the replevin hearing, there was no evidence that EC had previously disputed sales dates (indeed, how could Mr. Reggans legitimately quarrel with EC's own records?) when Mr. Reggans first asserted that the sales dates should be different from what EC had been putting in its own financial records in the ordinary course of its business for years. RP Vol. XIII 76:1-13 (Reggans' testimony). Thus, much of the three-week replevin hearing was consumed with EC's attempts to argue that EC was never "out of trust" – a fact not relevant to GMAC's right to make demand, GMAC's consistent position throughout this case – and a dispute, really, between Mr. Reggans by himself on one side and his own dealership's records and staff on the other.

forth in GMAC's statement of facts contained in its opening brief or are included in the argument herein as needed.

B. EC's Attack on Well-Established Precedent of *Allied* and *Badgett* Is Without Merit.

1. *Allied* Applies to Demand Obligations and Is Not Limited to Simple Demand Notes.

Taking a cue from the trial court's incorrect holding, EC attempts to limit the applicability of *Allied* to "simple demand notes." EC Response Brief ("EC Br.") at pp. 21-24. This limitation ignores the underpinnings of the *Allied* decision – the UCC.[8] Like the trial court, EC cannot cite to a single case supporting this limitation. Enforcement of a demand obligation is not a "drastic" remedy. It is a long-standing, standard type of commercial financing. *See, e.g., Allied,* 10 Wn. App. 530 (a 1974 case). As set forth in GMAC's opening brief, *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998), recognized that a demand provision of GMAC's Wholesale Security Agreement is fully enforceable even though it appeared alongside another contract (a loan agreement, which is absent from this case) that contained other provisions (termination of line of credit) requiring certain events of default before becoming enforceable.[9]

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[8] The "negotiability" of a demand instrument or contract is not relevant to the duty of good faith. The RCW 62A.1-208 comment plainly provides that the duty of good faith does not apply to either "demand instruments or obligations." GMAC's Opening Brief at pp. 16-17.

[9] By comparison, GMAC's Wholesale Security Agreement with EC does not contain "default contingencies" governing either the "payable on demand"

> Thus, while GMAC was entitled to demand payment of the advances it had made pursuant to the line of credit at any time [pursuant to GMAC's Wholesale Security Agreement], it could not terminate the line of credit in the absence of one of the specific events of default enumerated in paragraph 3 of the Loan Agreement.

Id. at 1377 (emphasis added).[10] *Coffee* therefore stands as authority for enforcing a "demand obligation" under the plain language of the Wholesale Security Agreement even though other terms and conditions may affect a dealership's financing.[11] Moreover, Washington rules of contract interpretation require a court to interpret a contract in a way, if possible, that gives effect to all of the contract's provisions, and a court should avoid a construction that renders any portion of the contract meaningless. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). EC's proposed interpretation does exactly what Washington courts have cautioned against – rendering contractual provisions meaningless. Put very simply, the demand

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provision or provisions governing termination or suspension of the lending contract. Thus, the default contingencies in the Wholesale Security Agreement at issue here apply only to GMAC's exercise of its remedies against its collateral.

[10] The *Coffee* court addressed an earlier, and different, version of GMAC's Wholesale Security Agreement that expressly conditioned termination of a line of credit upon the occurrence of certain enumerated events of default, *Coffee*, 5 F. Supp. 2d at 1368, 1372-73, while recognizing the demand feature contained in the same contract was enforceable.

[11] *See also Zeno Buick-GMC, Inc. v. GMC Truck & Coach*, 844 F. Supp. 1340, 1350 (E.D. Ark. 1992), *aff'd sub nom. Zeno Buick-GMC, Inc. v. GMC Truck & Coach, a Div. of Gen. Motors Corp.*, 9 F.3d 115 (8th Cir. 1993) ("Under the circumstances of this case, that is, the default by Zeno Buick and the demand feature of the Wholesale Security Agreement, the Court concludes that GMAC's

obligations imposed upon EC in the Wholesale Security Agreement are not dependent upon, impacted by or obviated as a result of other contractual clauses. The phrase "upon demand" means exactly what it says, not the incorrect and contradictory meaning EC attempts to ascribe to it in this matter.

Further, this Court previously recognized that the Wholesale Security Agreement's demand obligation was enforceable even though it contained other payment terms in its prior unpublished opinion in connection with GMAC's first appeal[12] and in its opinion granting discretionary review.[13] Thus, this Court has already been confronted with and rejected EC's incorrect interpretation of the Wholesale Security Agreement.

2. EC's Ultra-Jurisdictional Authority Has No Preclusive Effect.

EC cites to a number of unpublished orders from courts outside

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summary judgment motion on the plaintiff's claim for breach of the duty of good faith is well taken and the same will be granted.").

[12] "The Wholesale Security Agreement requires EC to repay to GMAC the amounts GMAC advances "on demand." The Wholesale Security Agreement was amended in March 2000. The amendment did not change the "on demand" provision of the Wholesale Security Agreement. In the normal course of business, the amount EC owes GMAC is constantly shifting as EC purchases cars and repays GMAC from the sales it makes. In 2000, GMAC agreed to provide additional financing to EC under a revolving line of credit. This agreement provides terms for payments in the ordinary course of business but also allows GMAC to require full payment "on demand." *GMAC v. Everett Chevrolet, Inc.*, No. 63331-7-I, 2010 WL 4010113 (Wash. Ct. App. Oct. 11, 2010).

[13] *GMAC,* 2012 WL 3939863, at *13.

this jurisdiction and attempts (in a footnote) to argue that these orders collaterally estop GMAC from making contrary arguments. EC points out that these authorities are "conspicuously absent" from GMAC's brief and for good reason – not only do these authorities have no precedential or persuasive value, but the parties are different and EC has proffered no evidence that the facts and circumstances of those cases are identical to the matter at hand. Moreover a final judgment is required; interlocutory orders provide no basis for collateral estoppel. *Shoemaker v. City of Bremerton,* 109 Wn.2d 504, 507, 745 P.2d 858 (1987) (collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding).[14]

EC cannot establish that the issues decided in these ultra-jurisdictional cases are identical to the issues presented in the instant proceeding or that these unpublished decisions/orders represent judgments on the merits. Further, none of these opinions stand for the proposition

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[14] "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (citations omitted). A court may apply issue preclusion only if all four elements are met. *Clark v. Baines,* 150 Wn.2d 905, 913, 84 P.3d 245 (2004).

that the Wholesale Security Agreement is not a demand instrument. The ultra-jurisdictional authority cited by EC is not persuasive and does not support any collateral estoppel claim. EC's comment that "a reversal of the trial court's denial of GMAC's summary judgment motion in the present case would result in this being the only case where, based on identical contract language (drafted by GMAC), a court concluded that GMAC was entitled to summary judgment or dismissal as a matter of law"[15] is simply untrue. The court in *Zeno Buick* granted GMAC's motion for summary judgment holding that the demand feature in the Wholesale Security Agreement precluded any defense or affirmative claim based upon bad faith.[16]

3. No Inconsistency with Demand and Default.

For the first time in its response brief on appeal, EC suggests that GMAC's actions in providing a notice of default in connection with its demand for repayment are somehow inconsistent and therefore GMAC is estopped from making demand for repayment. Given the terms of the Wholesale Security Agreement, this argument is unfounded for several reasons.

First, it is well-established that the "very nature" of "demand instruments or obligations" "permits call at any time with or without

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[15] EC Br. at p. 27.

[16] *Zeno Buick,* 844 F. Supp. at 1350.

reason." GMAC's Opening Brief at pp. 15-17. Even if GMAC were mistaken that EC had defaulted on some term (*i.e.,* even if GMAC were incorrect in stating that EC was in default of its obligation to pay for vehicles "faithfully and promptly" after they were sold), that cannot prevent GMAC from calling the loan because a demand obligation permits call "at any time" "with or without reason." To adopt EC's argument is to necessarily require that GMAC have a reason to call the note (even to have the correct mental state) – a requirement directly contrary to the "very nature" of demand obligations – and require GMAC to litigate whether or not it properly made demand. This approach simply has no support in the law, and is at the heart of the trial court's erroneous refusal to enforce the demand obligation as a demand obligation. As with EC's wish to insert a "good faith" limitation on demand instruments, this unsupported proposal conflicts with the UCC and the relevant case law and should be rejected.[17]

Second, EC's new estoppel argument is unsupportable. The undisputed facts show that after GMAC's initial demand on December 15,

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[17] *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 961 F.2d 1052, 1057 (2d Cir. 1992) ("Indeed, a contrary view would discourage lenders from allowing borrowers leeway and encourage those lenders to play hardball in the face of every default, no matter how minor."); *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) ("Any attempt to add an overlay of 'just cause' . . . to the exercise of contractual privileges [based on the UCC's requirement of 'honesty in fact'] would reduce commercial certainty and breed costly litigation.").

2008, EC again sold a number of vehicles "out of trust." Four days later, on December 19 after approximately $206,000 came due to GMAC for the sale of cars by EC and EC made no arrangements to pay this amount on December 18 or 19, GMAC demanded full payment immediately from EC. RP Vol. VII 60:19-67:24; R Ex. 14.[18]

Under equitable estoppel,[19] EC must establish that GMAC took some action that EC relied upon and that EC would be damaged if GMAC changed its position.[20] There is no such evidence. There is no evidence that by providing a notice of default, GMAC represented or promised it would not concurrently demand repayment or that EC somehow relied or acted upon this promise or representation. Whether GMAC correctly or

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[18] EC has claimed that it could not pay this amount by cashier's check, as GMAC had previously required, because the big snowstorm of December 2008 had caused its bank to close early on December 18. RP Vol. VII 64:9-10. (The bank did close early that day. R Ex. 105.) But EC had known since it received the results of the audit of December 16 that payment for a number of cars would come due on December 18. R Ex. 14; RP Vol. II 33:24-38:15. Despite knowing for two days that $206,000 would come due on December 18, EC made no arrangements of any kind on either the 18th or 19th (or any day thereafter) to pay GMAC. RP Vol. VII 64:1-65:12; RP Vol. VIII 5:10-9:1.

[19] The doctrine of promissory estoppel does not apply where a contract governs. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 261 n.4, 616 P.2d 644 (1980).

[20] The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Robinson v. City of Seattle,* 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied,* 506 U.S. 1028 (1992); *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Because certainty is essential, clear and convincing evidence is required to establish estoppel. *Kramarevcky*, 122 Wn.2d at 744.

incorrectly thought EC was in default, GMAC had the right to make demand "at any time" "for no reason." Because EC had no right to contest the propriety of the demand, whether GMAC was correct or not, EC cannot show how it relied or how it would be injured if GMAC made demand for "no reason."

In short, EC's argument that GMAC asserted an alleged erroneous default in connection with its demand for repayment is of no consequence and certainly does not estop GMAC from making demand. Similarly, EC's position that GMAC somehow "manufactured" a default, without any explanation of what that means, does not make sense as there was no reason GMAC would need to "manufacture" a default in light of the "on demand" feature of the Wholesale Security Agreement.

4. Applicability and Interpretation of *Badgett*.

In an effort to retract its prior position that *Badgett* does not require identification of a breach of a specific contractual term,[21] EC finally acknowledges the applicability of *Badgett* and alleges for the first time on appeal that GMAC breached the "faithfully and promptly" provision of the Wholesale Security Agreement by noticing a default based upon EC's

[21] At the summary judgment argument, EC denied that *Badgett* required it show that any specific contract provision was breached: "The Court:[] ... I don't think you identified a contract provision that you could argue that GMAC breached ..." Mr. Beaver: "I would just simply have to say, Your Honor, I did not read that requirement out of *Badgett* ... I don't get out of that the requirement that you must cite to a specific contractual term." App. G at 31:19-21, 32:11-13.

failure to pay GMAC amounts advanced to EC upon the sale of vehicles. This argument fails for several reasons.

First, not having argued this theory to the trial court, EC cannot raise this new argument on appeal. *Sourakli*, 144 Wn. App. at 509.

Second, this newfound alleged breach ignores the additional holding that the limitation of good faith to "specific contract terms" excludes from EC's bad-faith claim GMAC's conduct authorized by the contract. *Badgett* held that "[a]s a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Badgett* 116 Wn.2d at 570. Plainly, the Wholesale Security Agreement permitted GMAC to demand payment by EC at any time for any reason without any good-faith limitation. Therefore, GMAC's exercise of bargained-for contract terms cannot form the basis for a bad-faith claim.[22]

Third, EC asserts that GMAC did not act with good faith in making demand under the "faithfully and promptly" contract provisions. But GMAC made demand under the separate and independent demand provision of the Wholesale Security Agreement – EC's agreement "upon demand to pay to GMAC the amount it advances or is obligated to

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[22] "However, this duty of fair dealing does not 'alter the terms of a written agreement.' (citation omitted). Consequently, it may not be invoked by a commercial debtor to preclude a creditor from exercising its bargained-for rights

advance." R Exs. 3, 6. There is simply no support for EC's attempt to point to different provisions of the contract other than the applicable contract terms, much like the trial court's *sua sponte* attempt to point to the "fleet sales" provision that was never invoked by GMAC.

C. EC's Attempt to Brush Aside the Trial Court's Erroneous and Speculative Ruling Regarding GMAC's Purported "Management" of EC Does Not Withstand Scrutiny.

In its response, EC takes issue with GMAC's position that the trial court erred in speculating that GMAC engaged in management or operations of the dealership, as opposed to simply engaging in the ordinary conduct of a lender enforcing its financing or proposing a restructuring of the debt.[23] EC's assertion highlights how far the trial

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under a loan agreement." *Glenfed Fin. Corp. v. Penick Corp.*, 647 A.2d 852, 857-58 (N.J. Super. Ct. App. Div. 1994).

[23] GMAC's July 31 letter proposed to restructure the terms of EC's existing financing arrangement with GMAC. "In order to continue the financing arrangement between the Dealership and GMAC and to help mitigate GMAC's credit risk, GMAC requires, at a minimum, the following ..." R Ex. 1. *Badgett* itself is a leading case for the proposition that a lender has no duty of good faith to cooperate in efforts to restructure a loan. *Badgett*, 116 Wn.2d at 570. Numerous other courts agree. *Glenfed Fin. Corp. v. Penick Corp.*, 647 A.2d 852, 857-58 (N.J. Super. Ct. App. Div. 1994); *Rosemont Gardens Funeral Chapel-Cemetery, Inc. v. Trustmark Nat'l Bank*, 330 F. Supp. 2d 801, 811 (S.D. Miss. 2004) ("A number of courts have implicitly recognized, in fact, that a duty of good faith and fair dealing does not arise even where a lender begins negotiations towards restructuring an existing loan."); *see also Price v. Wells Fargo Bank,* 261 Cal. Rptr. 735, 742 (Cal. Ct. App. 1989) (covenant of good faith and fair dealing is not breached when lender takes "hard line" on loan repayment negotiations since "[c]ontracts are enforceable at law according to their terms"); *Carney v. Shawmut Bank, N.A.*, No. 07-P-858, 2008 Mass. App. Unpub. LEXIS 458, at *9 (Mass. App. Ct. Sept. 19, 2008) ("While Shawmut was free to negotiate with Carney, it was under no obligation to do so, and was equally free to exercise the rights which it had acquired under the loan agreements.").

judge is willing to inject himself into these proceedings in favor of EC. It appears that EC is arguing that the trial court's ruling is irrelevant because, as EC argues, a lender's exercise of management or control over the borrower's business is actionable only in the context of a breach of fiduciary duty claim, and EC has not asserted such a claim against GMAC. GMAC of course agrees that EC has not asserted a breach of fiduciary duty claim. However, the trial court used this erroneous basis as a purported justification for its refusal to follow *Allied* and *Badgett*. App. B at 50:6-8. Put simply, the trial court employed a concept only relevant to a non-asserted claim in order to sidestep clear Washington law concerning demand obligations, and now EC desires to justify this misapplication of the law in order to bolster its position. The trial court's ruling was improper, and EC's position is nothing more than a transparent attempt to avoid Washington law. GMAC was merely engaged in simple enforcement of ordinary commercial loan terms to which EC agreed. This Court should disregard the trial court's improper ruling in this regard, as it cannot form the basis of a claim of bad faith.[24]

D. The Fleet Sales Amendment.

In a distorted review of the transcript of the hearing, EC asserts that the basis for the trial court's denial of GMAC's summary judgment

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[24] *See Badgett*, 116 Wn.2d at 570 ("[T]here cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a

motion did not hinge on an unnoticed provision buried in a never-before-mentioned Fleet Sales Amendment, but was based upon a violation of a provision in the Wholesale Security Agreement requiring that EC pay GMAC "faithfully and promptly." The transcript of the summary judgment proceeding does not support this assertion. In fact, none of the specific provisions of the Wholesale Security Agreement are mentioned in the trial court's ruling. The trial court based its ruling solely on a provision of the Fleet Sales Amendment[25]:

> Now, these acts identified in the Court's oral decision are actions taken per the above contract clause [referring to paragraph 8 of the Fleet Sales Amendment]. Given that these acts of bad faith are directly related to a contract provision, and the provision is not a demand or financing provision but rather is "A management of dealer control provision." This Court finds that Badgett vs. Security State Bank is not controlling in this analysis.

App. B at 55:13-19. EC does not dispute that it never argued or claimed that GMAC breached any provision of the Fleet Sales Amendment. The trial court judge invented this argument favoring EC upon which the denial of summary judgment was premised and first revealed at the conclusion of oral argument on the motion (thus denying GMAC any opportunity to respond).[26] This is yet another example of the trial court

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contract according to its terms.").

[25] The trial court asserted that "[Paragraph 8] allows GMAC to assert its control over the dealer's operation. Pursuant to this global grant of authority, GMAC took the following actions." App. B 51:3-6.

[26] App. B at 48:3-4 ("I have some prepared remarks ...").

inventing arguments never raised by EC in order to avoid the impact of Washington law on EC's erroneous claim of bad faith.

E. Alleged Abandonment of Argument Of Summary Judgment on Tortious Interference Claims

EC asserts that GMAC has abandoned any appellant review of the trial court's order insofar as it denied GMAC's motion for summary judgment with respect to EC's tortious interference claim. First, the Order Denying GMAC's Motion for Summary Judgment makes no mention of a denial of summary judgment as to EC's tortious interference claims. Second, as evident from this assertion, EC disregards the procedural history leading up to the hearing on the motion for summary judgment.

GMAC's summary judgment motion was filed November 10, 2011. App. D. Prior to this motion, EC filed an Answer, Affirmative Defenses and Counterclaims on February 23, 2009, basing its first three counterclaims and an affirmative defense of estoppel in pais and other untitled affirmative defenses on GMAC's alleged "bad faith" conduct. App. H. After the filing of GMAC's summary judgment motion, on November 29, 2011, EC filed an Answer, Affirmative Defenses and Counterclaims that asserted five counterclaims (Breach of Contract and the Covenant of Good Faith and Fair Dealing, Unfair Business Practices, Civil Conspiracy, Tortious Interference and Fraud/Negligent Misrepresentation) and various affirmative defenses, again based upon GMAC's "bad faith" conduct. *Id.* To the extent that EC's tortious

interference claim is premised upon "bad faith," GMAC asserts that the claim is subject to its summary judgment motion and this review.

F. Request for Remand to a Different Judge.

EC understandably opposes GMAC's request that this case be remanded to a different trial judge as the current trial judge has found creative, albeit legally defective, ways to avoid dismissal of EC's claims and defenses premised on bad faith. However, a different trial judge is necessary in this instance in order to preserve the appearance of fairness.

In two separate instances, the trial judge has refused to follow controlling law, instead inventing theories of liability that were never advanced or argued by EC, in denying GMAC relief. This has necessitated two discretionary review motions resulting in two pre-judgment appeals. More importantly, the trial judge has denied GMAC the appropriate procedural considerations accorded to summary judgment motions.

EC points to *Magana v. Hyundai Motor America*, 141 Wn. App. 495, 500, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570 (2009), for the proposition that the trial court should be permitted an opportunity to consider the arguments in the first instance on remand.[27]

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[27] EC is incorrect in suggesting that GMAC has never asked the trial judge to recuse himself, a point noted in *Magana*. GMAC filed such a motion early in the case. *See* the attached motion from January 2009. (A request for supplemental clerk's papers has been made to the trial court.)

But that has already occurred in this case. The trial judge had an opportunity following this Court's ruling in the first discretionary review in this case to apply *Allied* and *Badgett* in this summary judgment motion. He refused to do so, for improper reasons, as explained in this appeal.

The primary purpose of summary judgment is to avoid a useless trial. Accordingly, the non-moving party must submit "specific facts" that, if believed by a trier of fact, would support the non-moving party's legal theory. Because the issue presented on GMAC's summary judgment motion was EC's assertions of "bad faith" conduct by GMAC, and Washington law is clear that "[t]he duty [of good faith] exists only 'in relation to performance of a specific contract term,'"[28] EC was required to identify the specific contract term(s) GMAC allegedly breached.

Instead of identifying specific facts showing that a "specific contract term" had been breached, EC denied it had any obligation to do so (until the filing of its Response Brief at pp. 31-32).[29] EC has never claimed or identified any "specific contract term" that it alleged GMAC

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[28] *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004) (citations omitted) (quoting *Badgett*, 116 Wn.2d at 569-70).

[29] At the summary judgment argument, EC denied that *Badgett* required it show that any specific contract provision was breached: "The Court[:] ... I don't think you identified a contract provision that you could argue that GMAC breached ..." Mr. Beaver: "I would just simply have to say, Your Honor, I did not read that requirement out of *Badgett*." App. G at 31:14-21. "I don't get out of that the requirement that you must cite to a specific contractual term." App. G at 32:11-13.

breached in its answer, amended answer or response to GMAC's summary judgment motion.

However, the trial judge denied GMAC's motion for summary judgment upon a new legal theory never asserted by EC and that the trial court first announced after oral argument on the motion was completed. In fact, the trial court had already made up its mind before oral argument. After hearing oral argument, the trial court commenced its ruling by stating, "I have some prepared remarks ..."[30]

A trial court's role is not to make a party's arguments for it or, worse, insert its own theories or factual speculation.[31] A party is entitled to fair notice of the claims it must defend against; a party cannot raise new legal theories in response to a motion for summary judgment without amending its complaint. *Dewey v. Tacoma Sch. Dist. No. 10,* 95 Wn. App. 18, 23, 26, 974 P.2d 847 (1999).[32] The trial judge cannot inject new legal theories post-argument.

Moreover, the trial court's new theory – that GMAC breached a provision of the Wholesale Security Agreement for "delayed payment privilege" for "fleet sales" – lacked any support in the record, and

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[30] App. B at 48.

[31] *See G&M, Inc. v. Huffman,* 170 A.2d 239, 240 (D.C. 1961) ("[I]t was manifestly improper for the trial court *sua sponte* and arbitrarily to have injected a new theory of recovery into the proceedings.").

therefore it is not surprising that EC never raised it.[33] At no point has EC identified any facts showing that there were any "fleet sales" or that GMAC purported to act under the Fleet Sales Amendment. The trial court cannot randomly pluck an unutilized term out of the contract, apply it far beyond its stated purpose and thereby create an issue of fact.

The trial court's ruling was an unsupported assertion that GMAC had acted pursuant to the "Fleet Sales" Amendment:

> In *Allied*, Peoples Bank just loaned money. But in the instant case, GMAC went beyond the financing function into areas of management or operations. It claimed the authority to do so pursuant to the following contract term [identifying paragraph 8 of the Fleet Sales Amendment].

App. B at 50:6-22 (emphasis added). The trial court also asserted that "[I]t [paragraph 8 of the Fleet Sales Amendment] allows GMAC to assert its control over the dealer's operation. Pursuant to this global grant of

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[32] *Olson v. Siverling*, 52 Wn. App. 221, 758 P.2d 991 (1988) (legal theories not raised in a timely fashion before the trial court will not be considered for the first time on appeal).

[33] A claim that EC made any fleet sales or that GMAC asserted a right to act under the fleet sales provision was never raised in over three years by Defendant in its original or amended answers and counterclaims, in its written response to the summary judgment motion or in oral argument to the trial court. App. G, H, I. There is good reason that the issue was never raised as the Fleet Sales Amendment addressed situations where EC made sales of multiple vehicles ("fleet sales") outside its ordinary course of business. In such situations, the agreement allowed GMAC to maintain its security interest in the vehicles sold and to be paid directly by EC's customer. GMAC's authority under paragraph 8 of the Fleet Sales Amendment was strictly limited to these out-of-the-ordinary-course-of-business transactions. R Ex. 7.

authority, GMAC took the following actions."[34] App. B at 51:3-6 (emphasis added). But no evidence has ever been submitted that GMAC "claimed the authority" to act under the Fleet Sales Amendment or took any actions "pursuant to this global grant of authority." In short, the centerpiece of the trial judge's ruling is an invented pretense.

If the nonmoving party may not rely on speculation, on argumentative assertions that unresolved factual issues remain or on having its affidavits considered at face value,[35] then certainly the trial court acting *sua sponte* cannot premise its ruling on its own argumentative assertion based upon events that never occurred. Unfortunately, this is the second time in this case that a legal theory favoring EC, never pled or suggested by EC, has been injected into the case by the trial judge and used as a basis for the trial court's rulings.[36]

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[34] Not only was the provision in the Fleet Sales Amendment never invoked by GMAC, the cited provision was not a "global grant of authority" because by its own plain terms it applied only with respect to fleet sales.

[35] *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[36] In 2009, the trial judge asserted an argument favoring EC that EC had not asserted and based part of his replevin ruling on speculation. In the 2009 replevin proceedings the trial court introduced its "false targets" theory (App. J at pp. 8-9, 17) in an extended cross-examination of a GMAC witness by the trial judge himself. RP Vol. IX 131-146. (GMAC does not dispute a trial court's right to question a witness. However, it is manifestly improper to introduce new theories favoring one party through such questioning.) In short, the trial court speculated that GMAC withheld material information related to GMAC's proposed loan modification, and speculated that GMAC knew that even if EC met its loan modification demands, EC could not meet an undisclosed 3-1 debt equity ratio and GMAC would then default EC anyway. But this was pure speculation by the trial judge about what GMAC would do if EC had met

Given that this improper manner of conducting the case has been adopted by the trial court in two instances, GMAC has every reason to fear that any trial or other future proceedings will likewise be conducted in a similar manner. This fear is bolstered by the trial judge's final comments: "[S]o that's the way I see it. And I've seen it that way for a while."[37] GMAC cannot prepare for trial under such a regime and will be trying the case "in the dark" not knowing what new theory or speculation the trial judge will inject into the case. But given the trial court's repeated refusal to apply *Allied* and *Badgett*, GMAC does know that the controlling law will *not* be applied.

Under these circumstances, a different trial judge is appropriate and necessary to preserve the appearance of fairness.

III. CONCLUSION

For the foregoing reasons, the trial court's order denying GMAC's motion for summary judgment should be reversed and this case should be remanded to a different trial court judge for further proceedings.

GMAC's demands because Mr. Reggans never agreed to a personal guaranty, and EC never infused an additional $800,000 of working capital into the business. The events necessary to support the argument never occurred. Then, as now, the trial judge devised an argument favoring EC not originally asserted by EC and based it upon speculation, not "specific facts."

[37] App. B at 56:25-57:1.

DATED this 29th day of May 2013.

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By _____

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document, **APPELLANT'S REPLY BRIEF**, to be served on the following counsel of record by PDF/EMAIL and by U. S. Mail:

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Teresa Bitseff, Legal Secretary
STOEL RIVES LLP

FID 2/12/09

IN THE SUPERIOR COURT OF WASHINGTON
COUNTY OF SHOHOMISH

GMAC, A Delaware Corporation PLAINTIFF, vs. **EVERETT CHEVROLET**, a Delaware corporation; and **JOHN REGGANS and CARMEN REGGANS** and their marital community DEFENDANTS.	No. 08-2-10683-5 **MOTION FOR CHANGE OF JUDGES**

COMES NOW Plaintiff, GMAC, (hereinafter "GMAC"), by and through its attorneys Adorno Yoss Caley Dehkhoda & Qadri and moves this court for a change of judge under RCW 4.12.050, based on the subjoined affidavit attached.

I. STATEMENT OF FACTS

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Bellevue, WA 98005
(425) 869-4040 Fax (425) 869-4050

On February 10, 2009, Judge Lucas on his own authority assigned himself to this matter. Prior to February 10, 2009, there was no judge assigned to this matter.

II. STATEMENT OF ISSUE

1. Should the Court grant the Plaintiff's Motion for change of judge under RCW 4.12.050 when it is timely?

III. EVIDENCE RELIED UPON

Pleadings case file

Affidavit of Dianna J. Caley

IV. LEGAL AUTHORITY

RCW 4.12.050 states:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before **the judge presiding has made any order or ruling involving discretion...**

RCW 4.12.050(*emphasis added*). A party in a superior court proceeding is entitled to one change of judge upon timely filing of an affidavit of prejudice. *See State v. Dennison*, 115

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Wn.2d 609, 619, 801 P.2d 193 (1990). An affidavit of prejudice is timely filed "before the judge presiding has made any order or ruling involving discretion. *See Dennison*, 115 Wn.2d at 619. The court in *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027 (1989), noted:

> Such a motion and affidavit seasonably filed presents no question of fact or discretion. Prejudice is deemd to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action.

LaMon v. Butler, 112 Wn.2d 193, 202, 770 P.2d 1027 (1989)(*quaoting State v. Dixon*, 74 Wn.2d 700 , 702, 446 P.2d 329 (1968)). Here, Judge Lucas, on his own authority, assigned himself to this matter on February 10, 2009. Prior to that date there was no judge assigned to this matter. As of February 10, 2009, till the present Judge Lucas, as the assigned judge, has made no order or ruling involving discretion. Because Judge Lucas has not made any order or ruling since his assignment to this matter this motion is timely and therefore should be granted.

V. CONCLUSION

For the aforementioned reasons the Plaintiff, GMAC, respectfully asks this Court to grant its Order to Change Judge.

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VI. ORDER

A proposed order granting the relief requested accompanies this motion.

DATED this 11th day of February, 2009.

Adorno Yoss Caley Dehkhoda & Qadri

Dianna J. Caley, WSBA No.: 23413
Attorney for Plaintiff GMAC

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