

Court of Appeals No. 62276-5-I

King Cty. Superior Court No. 06-2-10777-2 KNT

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

NORM'S TRUCK AND EQUIPMENT, INC.,

Respondent,

v.

**JOSEPH G. PILLING AND LISA B. PILLING,
dba JOSEPH PILLING ENTERPRISES,**

Appellants.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

Appeal from the August 22, 2008, Judgment
and Order of the King County Superior Court,
The Honorable Bruce E. Heller, Presiding

APPELLANTS' REPLY AND MOTION TO STRIKE

Francois L. Fischer
FISCHER LAW OFFICES
Attorneys for Appellants

200 Winslow Way West, Suite 300
Bainbridge Island, Washington 981110-4931
(206) 780-8555; Fax: (206) 780-8533
E-mail: Franc@wans.net

ORIGINAL

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I. MOTION TO STRIKE

At Issue No. 7 in the Brief of Respondent, pages 25-29 & Appendix A-1, respondent Norm's Truck and Equipment (hereafter "Norm's") asks this Court to overturn Findings of Fact and Conclusions of Law, Finding No. XV, entered by the superior court on June 16, 2008, CP 309, and instead to apparently enter Findings of Fact XV set forth in a set of draft Findings of Fact and Conclusions of Law issued in January, 2008. Those draft findings and conclusions were never signed by the superior court judge, were never filed in the record of this case by the superior court, and are not part of the Clerk's Papers before this Court. Accordingly, appellants (hereafter "Pillings") move to strike this portion of the Brief of Respondent and its Appendix A-1 from this appeal.

Norm's never filed a cross-appeal from the decision of the superior court, neither from the judgment nor from the findings of fact and conclusions of law. RAP 5.1(d). As such, Norm's does not have the proper authority or standing to ask an appeals court to review and overturn the Findings of Fact and Conclusions of Law entered in this case by the superior court. RAP 5.2(f) states that any party, other than an appellant, who "wants relief from the decision [of the superior court] must file a notice of appeal or notice for discretionary review with the trial court" Having failed to do so, Norm's may not obtain relief from any decision of the trial court, including the Findings of Fact.

Even if this Court were to disregard its own rules and allow Norm's challenge to the Findings of Fact and Conclusions of Law,

reversing those findings in favor of draft findings which are neither signed nor part of the record would be highly unusual, to say the least. RAP 9.1 states that the record on review consists of reports of proceedings, clerk's papers, exhibits and certified administrative records. The draft findings and conclusions submitted as part of Norm's appendix are not a part of these records and have no place in this appeal.

Alternatively, there is plenty of evidence to sustain the trial court's Finding of Fact XV. The trailer vendor's agent who delivered the second trailer testified that there were parts delivered in the tub of that trailer. See Brief of Appellant, pp. 6-7. Mr. Pilling testified that there were parts in the tub when he received the trailer, contrary to Norm's agent, Kevin Bilbrey that he had inspected the tubs of both trailers and found no parts in them at all. *Id.* Mr. Pillings testimony that he had found parts in the trailer was confirmed by Trial Exhibit 7, the invoice for the replace parts, which showed the purchase of some parts, but installation and painting of the "ram," or hydraulic tube which had been delivered with the other parts by the vendor.

Findings of fact are only reviewed by the court of appeals to determine if they are supported by substantial evidence. Since early in this state's history, courts of appeal have used the same standards to review the findings in a bench trial as they do a jury verdict. *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 573, 343 P.2d 183 (Wash. 1959). Challenges to the sufficiency of the evidence supporting a verdict can only be sustained when it is clear that there is no substantial evidence to support the verdict.

Lamborn v. Phillips Pacific Chemical Corp., 89 Wn.2d 701, 575 P.2d 215

(1978). As stated in *Kirk v. Washington State University*,

an appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence on the record, or shocks the conscience of the court, or appears to have resulted from passion or prejudice.

109 Wn.2d 448, 464, 746 P.2d 285 (1987), *citing*, *Bingaman v. Grays*

Harbor Community Hospital, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

As noted in *Sec. State Bank v. Klasey*, 67 Wn.2d 430, 433, 407 P.2d 983

(1965):

The trial judge was in a position to confront the witnesses, and to observe their conduct and demeanor. He was presented with two versions of the facts. He rejected one and accepted the other. There is substantial evidence to support his choice. It cannot be disturbed here. [citations omitted]

The same is equally true in this case. The court made its finding on the loss of the trailer parts, and this finding may not be second guessed by the appellate court.¹

II. ADDITIONAL ARGUMENT

A. The Account-Styled Defense Does Not Apply to this Case.

Norm's re-raises, at pp 8-9 of its brief, its argument that the

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If the Court is inclined to allow the respondent's challenge to Finding XV, appellants ask the Court to allow supplemental briefing so that they may challenge Findings XII through XIV, CP 307-309, as well, pertaining to their claims for breach of contract for using the wrong paint and failure to paint stripes. While the appellants are absolutely positive that the trial court's findings on these issues are flat-out wrong, they recognize that there is evidence going both ways and, accordingly, have not challenged these findings in this appeal. However, they would do so if the Court deems the respondent's issue and argument for review of Finding XV is proper.

Pillings could not stop payment on their check or otherwise get relief from Norm's second invoice because they had paid it, per *Northwest Motors v. James*, 118 Wn.2d 294, 822 P.2d 280 (1992). This issue was directly addressed by *Toyota of Puyallup, Inc. v. Tracy*, 63 Wn. App. 346, 818 P.2d 1122 (1991), *rev. denied*, 130 Wn.2d 1020, 928 P.2d 415 (1996), where the court ruled that the account-stated defense did not apply to service disputes where the customer found out about the defective performance after the invoice was paid. *Id.*, 63 Wn. App. at 352-353. The superior court originally ruled that the Pillings were justified in stopping payment on their check "based on the loss of trailer parts which Defendants discovered after they issued the check for the second trailer." Conclusion of Law 3, CP 210. While contained in a conclusion of law, the statement is clearly a factual finding and justifies stopping payment on the Pilling's check, regardless of the account-stated defense. Furthermore, there is no evidence from which one could conclude that the Pillings knew about the lost parts before they wrote their check and sent it to Norm's with the driver who picked up the second trailer. RP1 115; RP1 53, ll. 10-14.²

If the Court of Appeals reverses the superior court's legal conclusion that the Pilling's claim for lost parts is barred by the economic-loss rule, the original Findings of Fact and Conclusions of Law establish that the Pillings were warranted as a matter of fact and law to stop

² See, Brief of Appellant, p. 3, fn. 1, and Appendix 1, specifying the appellants' designation for the reports of proceedings, which respondents declined to use. RP1 is the transcript of the trial, dated December 19, 2007

payment on their check.

B. There Was Clearly a Bailment of Trailer Parts Under the Parties Contract.

While admitting that it had a bailment duty to hold and return the Pillings' trailer, Brief of Respondent, p. 16, Norm's continues to illogically argue that there was no agreement to hold and return the trailer's parts, as if not doing so might be reasonable under any characterization of a services agreement involving work on a customer's property in the servicer's possession. Norm's owner admitted that it removed and reinstalled parts during the painting process, RP1 27, ll. 11-17, and expected to return the trailers with the same parts it had when it arrived. RP1 50, ll. 19-22. There is obviously a remedy for customers when this fails to happen, per *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 593 P.2d 1308 (1979).³

Norm's further claims that there was no agreement, or discussion regarding an agreement, to return or be responsible for the lost trailer parts. Brief of Respondent, pp. 10-11. Under the Uniform Commercial Code ("UCC"), when terms of a contract are left out or not explicitly stated, the contract does not fail or leave a party without remedies. RCW 62A.2-204(3) states

(3) Even though one or more terms are left open, a contract

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Mieske also disposes of Norm's argument, at Issue No. 5 of their brief, pp. 21-24, that there is no UCC remedy for breach of bailment under a services contract. On the contrary, the *Mieske* case expressly found that the UCC applied to the commercial contract in that case and allowed a remedy for the property lost by the business.

for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

The principal way the UCC deals with omitted or unclear terms is resort to other sources to obtain the missing terms, such as the “course of dealing or usage of trade (RCW 62A.1-205) or by course of performance (RCW 62A.2-208).” RCW 62A.2-202(a). If Norm’s agents’ admissions that they reinstalled, and expected to return, parts with trailers (*see* above) were not enough to admit a duty to do so as a course of dealing, then their own invoice’s language under which they might have attempted to exclude liability for such losses shows that they understood their receipt and work on their customers’ vehicles to create an implied warranty to do so, a warranty for which they would be liable if not expressly excluded. Trial Exhibit 9 (Brief of Appellant, Appendix 4: “I hereby authorize the above repair work to be done . . . Thereto you will not be held responsible for loss or damage to vehicle or articles left in the vehicle in case of fire, theft . . .”). This shows that there was an implied agreement regarding the contractual bailment of the customers’ vehicles, and the Pillings’ trailers, upon which a remedy would lie for breach, unless expressly excluded.

C. Knowledge of Parts Is Not Required in a Bailment for Vehicles Under a Commercial Services Contract .

Norm’s errs in arguing that it’s alleged lack of knowledge of the parts in the trailer tub prevents it from being liable for those part’s loss. Brief of Respondent, p. 16. Norm’s relies on *Theobald v. Satterthwaite*, 30 Wn.2d 92, 190 P.2d 714 (1948), but that case turned on the lack of

knowledge of the bailment as a whole. The court there noted that the alleged bailor did not know about, or accept, a coat stolen from its waiting area, distinguishing *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. 5 (article of clothing taken off and set down in front of store employees).⁴ None of the cases cited by plaintiff distinguish between the bailment of an entire piece of equipment and subjective knowledge of its parts.

D. The Economic-Loss Rule Does Not Bar the Pillings' Claims.

The authorities and evidence cited in Section B of this Reply, *supra*, apply as well to Norm's argument that the economic-loss rule prevents the Pillings from asserting a remedy, or recovering damages, for their lost trailer parts. Brief of Respondent, pp. 16-21. On the contrary, since the UCC implies necessary contractual terms when left out of commercial contracts, using course of dealing and usage of trade, proper application of the economic-loss rule should recognize that the bailment in this case was an essential part of the parties' contract and a contractual duty. *See, also*, Brief of Appellant, § IV.E, pp. 19-24. Whether one

³ Moreover, Plaintiff errs in claiming that the *Theobald* case holds that "knowledge" of the bailed article is the deciding factor. On the contrary, the case held, 30 Wn.2d at 95:

"However, we think there is another and better ground upon which the appellant must prevail. That is that there was no change of possession or delivery in this case. In defining bailment, 6 Am. Jur. 140 says: "In its broadest sense it has been said to include any delivery of personal property in trust for a lawful purpose." While we are not inclined to view the element of delivery in any technical sense, still we think there can be no delivery unless there is a change of possession of an article from one person to another.

characterizes the remedy as a breach of contract or a breach of UCC warranty, the fact remains that the Pillings had a contractual right to get their trailer back painted and intact, with all of the parts with which it had been delivered. There is nothing in the economic-loss rule which bars a remedy for breach of such a bailment, whether termed a breach of UCC-implied terms of a contract or a breach of implied UCC warranty.

III. CONCLUSION

For the reasons stated above, the Pillings respectfully submit that the Court of Appeals must reverse the judgment and conclusions of the superior court and remand this case for entry of the original findings of fact and conclusions of law. If the Court remands this case for entry of the original findings and conclusions, the Court should also remand the question of attorney fees as well, since the determination of the right to fees will change if the Pillings were entitled to stop payment on their check.

RESPECTFULLY SUBMITTED this 27th day of August, 2009.

FISCHER LAW OFFICES



Francois L. Fischer

WSBA # 11021

Attorney for Appellants Pilling

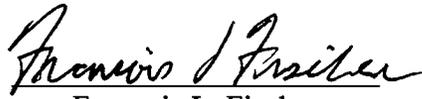
DECLARATION OF SERVICE

The undersigned, being over the age of 18 and not a party to this action, certifies that on August 28, 2009, I sent by first class mail, postage prepaid, correctly addressed as shown, a true and correct copy of the above Reply Brief and motion to Strike to the parties/attorneys/persons listed below:

Brian Russell
Attorney at Law
17820 1st Ave S., Ste 102
Normand Park, WA 98148

I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON THAT
THE FOREGOING IS TRUE AND CORRECT.

Dated this 28th day of August, 2009, at Bainbridge Island, Washington.


Francois L. Fischer