

No. 67519-2
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GRANT NORWITZ and JUSTINE NORWITZ,

Appellants,

v.

MITSUBISHI MOTORS NORTH AMERICA, INC., a
California Corporation, and the CAREY COMPANY, a
Washington Corporation,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Mitsubishi and Carey do not dispute that they represented to the Norwitzes that repairs to their Mitsubishi Montero were covered by warranty. Nor do they dispute that the Norwitzes consented to repairs to their vehicle in reliance on the representation that the repairs were covered. Nor do they dispute that the vehicle was taken apart and left in pieces. Nor did they seek to strike the expert Declaration of Grant Norwitz, which categorically refutes Mitsubishi's inaccurate claim that the engine in the Norwitzes' vehicle failed due to lack of oil and is thereby excluded from warranty coverage.

Mitsubishi and Carey nevertheless claim that the Norwitzes have no cause of action whatsoever and that judgment was properly entered *against* the Norwitzes for nearly \$13,000 for "storage" of the disassembled pieces of their vehicle. There is no legal support for this claim. Under the law, the Norwitzes are entitled at a minimum to damages

incurred because they consented to repairs in reliance on Mitsubishi's representation that all repairs would be covered by warranty. Such damages include the cost of reassembling the disassembled vehicle, replacing parts that were lost by Mitsubishi, and the entire amount of Carey's judgment against the Norwitzes for storage of the disassembled pieces. This is precisely what the legal doctrine of equitable estoppel requires.

The Norwitzes are also entitled to a jury trial as to whether Mitsubishi has an obligation under the express warranty to repair the Norwitzes' vehicle. Mitsubishi claims that the expert opinion of one of the mechanics at Carey Motors regarding the reason for the engine failure should be believed while the expert opinion of Mr. Norwitz should be disregarded. The law requires that the argument about which witness should be believed be resolved by the jury at trial, not by the court on a motion for summary judgment.

II. ARGUMENT

A. The Norwitzes Presented Competent Evidence that Their Vehicle's Engine Failure Was not Caused by a Lack of Oil.

Mitsubishi claims that the testimony of Carey mechanic Rogelio Lopez that the engine failure was due to a lack of oil is uncontroverted. This is simply false. The Norwitzes offered the Declaration of Grant Norwitz. CP 145-71. Mr. Norwitz testified as follows:

Based on my skill, training and experience, I am confident that the Vehicle was properly maintained and that the . . . damage to the Vehicle's engine was not caused by a lack of oil.

CP 149. Mr. Norwitz's opinion was supported by his inspection of the vehicle and engine on June 23, 2010 at Carey Motors and by the testimony, computer data, and other evidence regarding what happened when the engine failed and what was observed when the engine was inspected. CP 149-

152.

Mitsubishi argues that Mr. Norwitz's expert opinion should be rejected because "Mr. Norwitz has no training or experience in the automotive repair industry." CP 145. The record makes clear that this claim is blatantly false. Mr. Norwitz's training and experience are detailed in his Curriculum Vitae, which is Exhibit A to his Declaration. CP 155. As his Declaration makes clear, Mr. Norwitz has "extensive training, expertise, and experience in the design and repair of internal combustion engines like the one at issue in this case." CP 145. Among other things, Mr. Norwitz was employed as an automotive engineer. CP 155. His duties were "hands on fuel injection, turbocharger, and automotive engineering." *Id.* This included engine fitting, assembly, and testing of automobile engines. *Id.* He received certifications as a Qualified Diesel and Petrol Engine Fitter, a Qualified Turbocharger Technician, and a Qualified Diesel Fuel Injection Technician. *Id.* As a qualified engine fitter with extensive

specialized experience in engine assembly and testing, Mr. Norwitz is far more qualified to render an opinion about the cause of engine failure than Mr. Lopez, who is certified as an automobile mechanic, but has no special training or expertise regarding engines or engine failure.

Mitsubishi also claims that Mr. Norwitz's opinion is "conclusory." This is also false. Mr. Norwitz's Declaration explains in detail the basis for his conclusion that lack of oil was not the cause of the engine failure. The Declaration explains:

Information upon which this opinion is based includes, without limitation:

- a. The oil was replaced before the Vehicle was taken on the cross country trip. A properly functioning engine would not use that much oil in roughly four thousand miles of driving.
- b. Gary Follrich, who was driving the Vehicle when it broke down has testified that the oil pressure light came on briefly and then went out, that no other indicator lights came on, and that the Vehicle made no unusual noises before the engine failed. The lack of oil claimed by Mitsubishi would have resulted in a constant oil

pressure light. In addition, there would have been a great deal of noise caused by friction in an unlubricated engine. The temperature of the engine would have also risen and triggered an engine temperature indicator light.

- c. Mr. Follrich has also testified that the first thing Carey Motors personnel did when the Vehicle arrived at their facility was check the oil. The lack of oil claimed by Mitsubishi would have been detected immediately upon removal of the dipstick, not several weeks after the car had been in the shop as Mitsubishi now claims.
- d. Carey Motors personnel caused additional damage to the engine of the Vehicle by replacing the cam shaft and attempting to start the vehicle without first bore scoping or otherwise determining if there was other damage to the engine.
- e. When I was at Carey Motors on June 23, 2010, I observed the condition of the Vehicle. The engine had been left open and disassembled for nearly eight months. The windows had also been left open during this time. The interior and exterior of the car and the open engine were covered with a thick layer of shop dust and grime. No reasonable repair person would leave a vehicle engine in this state. The damage caused to the engine by being exposed over this period of time has rendered the engine a total loss. It should also be noted that the Vehicle cannot reasonably be transported without first reassembling the engine.

CP 149-51. By contrast, Mr. Lopez's Declaration contains no explanation or basis whatsoever for his conclusory statement that "the single cause of the breakdown of plaintiffs' vehicle was a lack of oil." CP 75.

Mitsubishi also claims that Mr. Norwitz was not driving the vehicle and was not there when the vehicle was brought in. This claim is equally true of Mr. Lopez and has nothing to do with the basis of the respective expert opinions. Mr. Norwitz's Declaration and the attached photographs make clear that Mr. Norwitz personally inspected and observed the condition of the vehicle and the engine at Carey Motors on June 23, 2010.

The trial court clearly erred in granting summary judgment on this record. The trial court's decision on summary judgment is "reviewed de novo, taking all facts and inferences in the light most favorable to the non-moving party." *Estate of Haselwood v. Bremerton Ice Arena*, 166 Wash.2d 489, 497, 210 P.2d 308, 312 (2009). It is well established under Washington

law that “[A]n expert opinion on an ‘ultimate issue of fact’ is sufficient to defeat a motion for summary judgment.” *Xiao Ping Chen v. City of Seattle*, 153 Wash. App. 890, 910, 223 P.2d 1230, 1241 (2009) (citing *Eriks v. Denver*, 118 Wash.2d 451, 457, 824 P.2d 1207, 1210 (1992); *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 352, 588 P.2d 1346, 1350 (1979)).

Moreover, Mitsubishi’s arguments that Mr. Norwitz was not competent to testify have been waived. Mitsubishi made no motion to strike the Declaration. Failure to make a motion to strike waives a claim of deficiency in an affidavit. *Lamon*, 91 Wash.2d at 352, 588 P.2d at 1350 (citing *Meadows v. Grant’s Auto Brokers, Inc.*, 71 Wash.2d 874, 881, 431 P.2d 216, 220 (1967)). In *Lamon*, the defendant claimed lack of competence as to an expert affidavit stating the expert’s opinion that an airplane hatch was not reasonably safe. The court explained:

Defendant contends that the affidavit produced by plaintiff in opposition to summary judgment is not competent

evidence to withstand such a motion.
. . . The record before us, however,
does not reveal any motion to strike
the affidavit or any portion thereof
prior to the trial court's action. Failure
to make such a motion waives
deficiency in the affidavit if any
exists.

Lamon, 91 Wash. 2d at 352, 588 P.2d at 1350. In the present case, defendants made no motion to strike Mr. Norwitz's Declaration. Any claim that Mr. Norwitz was not competent to render the opinion contained in his Declaration is therefore waived. Mr. Norwitz's opinion must be accepted by this court and viewed in the light most favorable to the Norwitzes. Mr. Norwitz's expert opinion that engine failure was not caused by a lack of oil creates a genuine issue of material fact precluding summary judgment.

B. Mitsubishi and Carey Are Estopped from Denying Coverage to the Extent that the Norwitzes Were Damaged by Reliance on Mitsubishi's Representation that Repairs Were Covered.

Mitsubishi and Carey do not dispute that they represented to the Norwitzes that repairs to their vehicle were covered by

warranty. Instead, they claim that the Norwitzes cannot use the doctrine of equitable estoppel as a “sword” but only as a “shield” and that the Norwitzes were not damaged by their reliance on Mitsubishi’s representation that repairs were covered.

The Norwitzes clearly were damaged by their consent to repairs in reliance on Mitsubishi’s representation that repairs were covered by warranty. As Mr. Norwitz’s Declaration and the attached photographs make clear, the vehicle was taken apart by Carey and left disassembled. In addition, Carey obtained a judgment against the Norwitzes for nearly \$13,000 for “storage” of the disassembled vehicle. A glance at the photographs which are exhibits to Mr. Norwitz’s Declaration makes clear that Carey started repairs and then left the vehicle and engine disassembled and in complete disarray. *See* CP 156-71 There is no question that the Norwitzes’ reliance on the representation of warranty coverage resulted in damages of at least the cost of reassembling the vehicle, the damage done by

leaving the engine open and unassembled in a dirty shop, and the judgment for storage of their disassembled vehicle.

Cases cited by Mitsubishi and Carey for the proposition that equitable estoppel may be used as a “shield” but not a “sword” are inapposite. Those cases relate to attempts to remove a contract from the statute of frauds. In Washington, equitable estoppel may not be used as a “sword” to bring an action for damages based on an oral contract that would otherwise be barred by the statute of frauds. *See, e.g. Klinke v. Famous Recipe Fried Chicken*, 94 Wash.2d 255, 259, 616 P.2d 644, 646 (1980).

That is not the situation presented by this case. There is no statute of frauds issue. Instead, the Norwitzes are asserting equitable estoppel as a “shield” against Mitsubishi’s assertion that a warranty exclusion applies and against Carey’s attempt to hold the Norwitzes responsible for storage and reassembly of their vehicle. Washington law makes clear that equitable estoppel does apply to this situation.

Equitable estoppel is based on the principle that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Kramarevcky v. Department of Soc. and Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535, 538 (1993) (quoting *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975)). 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, (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Kramarevcky, 122 Wn.2d at 743, 530 P.2d at 538.

In *Kramarevcky*, the Washington Supreme Court affirmed a Court of Appeals determination that the Department of Social and Health Services was estopped from recouping public assistance benefits it overpaid to Mr. Kramarevcky and another claimant. The court found that the “injury requirement”

was met because benefits recipients had detrimentally relied on the departments' overpayment. *Id.* at 748, 863 P.2d at 541. The detrimental reliance was that the claimants could have applied for other assistance if the overpayments had not been made. *Id.* at 746-748, 863 P.2d at 539-541.

Similarly, the Norwitzes detrimentally relied on Mitsubishi's and Carey's representation that their vehicle was covered by warranty. The Norwitzes consented to work on their vehicle by Carey based on the representation that the work was covered by warranty. They thereby gave up other options like fixing the vehicle themselves or taking the vehicle to another mechanic. It would obviously be inequitable to allow Mitsubishi and Carey to now change position, claim that repairs and related costs are not covered and hold the Norwitzes responsible for the cost of storing and reassembling their vehicle.

Mitsubishi's suggestion that nothing was done to the Norwitzes' vehicle after Mr. Norwitz was told that repairs were

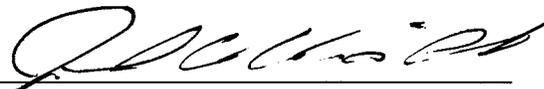
covered by warranty is contradicted by the record. As Mr. Norwitz's Declaration makes clear, two weeks passed and extensive work was done on the vehicle between mid August 2010, when Mitsubishi told Mr. Norwitz repairs were covered, and September 1, 2010, when Mitsubishi changed its position and asserted that the repairs were excluded from warranty. CP 147-48.

Even if the Norwitzes do not prevail at trial on their claim that the needed vehicle repairs are covered by warranty, Carey and Mitsubishi will be responsible for expenses incurred as a result of work done on the vehicle before Mitsubishi changed its position on warranty coverage, specifically the costs of reassembling the vehicle, replacing lost parts and repairing damage done by Carey, and storage costs. These storage costs are the sole basis for Carey's judgment against the Norwitzes.

III. CONCLUSION

The trial court erred in resolving this case on summary judgment. The expert opinion of Grant Norwitz creates a genuine issue of material fact for trial about whether repairs to the Norwitzes' vehicle are covered by warranty. In addition, regardless of whether the Norwitzes prevail on their warranty claim, Mitsubishi and Carey are equitably estopped from denying their representation that repairs were covered by warranty to the extent that Norwitzes incurred damage, including reassembly and storage costs, by their reliance on that representation. The summary judgment of the trial court should be reversed and the case remanded for trial.

Respectfully submitted this 2nd day of February, 2012.

By 
John W. Widell, WSB No. 18678
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on this date, I transmitted a copy of the
Reply Brief of Appellants to all counsel of record.

Dated this 2nd day of February, 2012.

By 
John W. Widell, WSB No. 18678