

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.

BRIEF OF APPELLANTS

JOHN W. WIDELL,
WSBA NO. 18678
Attorney for Appellants

Law Office of John W. Widell
3937 Agua Fria St.
Santa Fe, NM 87507
(206) 713-1490

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 DEC -5 PM 3:17

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR.....2

III. ISSUE.....2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....13

**A. This Court Applies a De Novo Standard of
 Review.....13**

**B. The Norwitzes Presented Sufficient Proof That
 Their Engine Repairs Were Covered By Warranty
 13**

VI. CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	13
<i>Kramarevcky v. Department of Soc. and Health Servs.</i> , 122 Wn.2d 738, 863 P.2d 535 (1993).....	15, 16, 17
<i>Mudarri v. State</i> , 147 Wn. App. 590, 196 P.2d 153 (2008) . .	13
<i>Wilson v. Westinghouse Elec. Corp.</i> , 85 Wn.2d 78, 530 P.2d 298 (1975).....	15, 17, 18

Court Rule

CR 56(c).....	13
---------------	----

I. INTRODUCTION

This case arises because the engine on the Norwitzes' Mitsubishi Montero needs to be replaced after only 34,000 miles. Mitsubishi has refused to honor the comprehensive new vehicle warranty sold with the car. To make matters worse, Mitsubishi and its local Yakima dealership, the Carey Company, repeatedly represented to the Norwitzes that all repairs *would* be covered by warranty. Only after disassembling and doing further damage to the engine did Mitsubishi claim that repairs were not covered by warranty. Worse still, Mitsubishi refused to even reassemble the engine. Instead, the company told the Norwitzes' to come get the pieces of their car and charged them for taking the car apart and for storing the pieces of their disassembled vehicle. The trial court dismissed the Norwitzes' claims and granted the Carey Company a judgment for more than \$13,000 in storage and attorneys' fees. This decision was made on summary judgment

so the Norwitzes were deprived of their right to a trial of their claims. The decision is obviously in error. The Norwitzes presented proof of their case more than sufficient to overcome summary judgment. The decision of the trial court should be reversed and remanded for trial.

II. ASSIGNMENTS OF ERROR

The trial court erred in dismissing the Norwitzes' claim for breach of warranty because there are genuine issues of material fact for trial.

III. ISSUE

Whether a breach of warranty claim may properly be dismissed on summary judgment where the plaintiff has presented proof that the vehicle was properly maintained, that the vehicle malfunctioned due to a manufacturing defect, that the repairs were fully covered by the terms of the warranty, and that the manufacturer and authorized dealer represented that

repairs would be fully covered by warranty and then refused to complete the repairs, damaged and left the vehicle disassembled, and charged thousands of dollars for repairs and storage.

IV. STATEMENT OF THE CASE

Plaintiffs Grant and Justine Norwitz are the owners of a 2006 Mitsubishi Montero, Vehicle Identification Number JA4MW51S06J002566 (“the Vehicle”). **Norwitz Declaration ¶ 3. (CP 146).** They bought the Vehicle new from an authorized Mitsubishi dealer on October 31, 2006. **Id.** The Vehicle was sold with a “5 year / 60,000 mile” new vehicle warranty and a “10 year /100,000 mile” power train warranty. **Id. at ¶ 4.** Since they bought the vehicle, plaintiffs have properly maintained the Vehicle in accordance with the manufacturer’s recommendations. **Id. at ¶ 5.** Mr. Norwitz regularly changed the oil himself or took the car to a service facility for oil changes, consistently changing the oil more often and after fewer miles than recommended by the manufacturer.

Id.

At the end of July 2009, the Norwitzes loaned the Vehicle to friends for a cross country trip. **Id. at ¶ 6.** At this time, the Vehicle had just under 30,000 miles on the odometer, was in good working order, and had recently had the oil changed. **Id.** On August 13, while being driven back to Seattle, the Vehicle broke down on the highway. **Id. at ¶ 7.** Although the oil pressure light briefly came on and then went out again, there were no unusual noises, warning lights, or other indications that a breakdown was imminent before the engine abruptly made a loud clunk and stopped running. **Id.; Follrich Deposition pp. 21-23 (CP 177-179).** The Vehicle was towed to Carey Mitsubishi, an authorized Mitsubishi dealership operated by The Carey Company in Yakima, Washington. **Id.** Mr. Follrich, who was driving the Vehicle when it broke down, has testified that the first thing Carey Motors personnel did when the vehicle arrived at their facility was to check the oil. **Follrich Deposition at p. 25 (CP 181).**

Approximately one week after the vehicle was delivered to Carey Mitsubishi for repairs, Mr. Norwitz contacted the dealership to inquire about the status of the Vehicle. **Norwitz Declaration at ¶ 9 (CP 147).** He spoke with Jeff Briggs in the service department at Carey Mitsubishi. **Id.** Mr. Briggs told Mr. Norwitz that the cam gear on the Vehicle's engine had broken and would be replaced under warranty, and that the Vehicle would then be "good to go." **Id.** Mr. Norwitz asked if the engine had been bore scoped. Mr. Briggs assured Mr. Norwitz that the engine had been bore scoped and told Mr. Norwitz that he was lucky because the only damage found was the broken cam gear. **Id. at ¶ 10.** Mr. Briggs represented to Mr. Norwitz that all repairs would be covered by warranty. **Id. at ¶ 9.** Mr. Norwitz has testified that he would never have authorized repairs had he not been assured that they were covered by warranty. **Id. at ¶ 11** No storage charges of any kind were ever discussed with or agreed to by Mr. Norwitz. **Id.**

Over the next two weeks after he spoke with Mr. Briggs,

Mr. Norwitz had several conversations with Mitsubishi and Carey Motors personnel. **Id. at ¶ 12 (CP 147-48).** Corey Swearingen, a manager at Carey Motors, informed Mr. Norwitz that there was now significant damage beyond a broken cam gear, and additional warranty repairs would need to be made. **Id.** These repairs included replacement of the cylinder heads and other engine parts. **Id.** As with the other repairs, Mr. Swearingen made clear that these repairs were covered by warranty, and Mr. Norwitz's authorization of the repairs was premised on that understanding. **Id.**

On Monday, August 31, 2009, following several conversations between Mr. Norwitz and Mitsubishi about getting the Vehicle from Yakima to Seattle, a Mitsubishi customer service representative called to inform Mr. Norwitz that the Vehicle would be delivered to him in Seattle and that warranty repairs would be completed by that Tuesday or Wednesday. **Id. at ¶ 13 (CP 148).**

On the afternoon of Tuesday, September 1, 2009, nearly

three weeks after the car broke down and was towed to Carey, the same Mitsubishi customer service representative called and informed Mr. Norwitz that Mitsubishi had “discovered” that there had not been enough oil in the engine and was refusing all warranty repairs. **Id. at ¶ 13.**

Mr. Norwitz is an expert in the design, maintenance, and repair of internal combustion engines like the one at issue in this case. **Id. at ¶ 2 and Exhibit A (Mr. Norwitz’s Curriculum Vitae) (CP 145-146; 153-155).** Based on Mr. Norwitz’s skill, training and experience, he has testified that he is confident that the broken cam shaft and other damage to the Vehicle’s engine was not caused by a lack of oil. **Id. at ¶ 17 (CP 149-51).** Information upon which Mr. Norwitz’s expert opinion is based includes the following:

- a. The oil was replaced before the Vehicle was taken on the cross country trip. A properly functioning engine with only 34,000 miles on the odometer would never use that much oil in

several thousand miles of driving.

- b. Gary Follrich, who was driving the vehicle when it broke down 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 should have resulted in a constant oil pressure light. In addition, there would have been a great deal of noise caused by insufficient engine lubrication. The engine would also have heated up and triggered an engine temperature indicator light. There were also no codes generated by the Vehicle's computer diagnostics. A lack of oil would have certainly generated oil pressure and engine temperature codes.
- 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.

- d. When Mr. Norwitz was at Carey Motors on June 23, he observed the condition of the Vehicle. The engine had been left open and disassembled for nearly ten months. The car windows had also been left open. The interior and exterior of the car and the open engine were covered with a thick layer of shop dust and grime. Photographs are attached to Mr. Norwitz's Declaration. The damage caused to the engine by being exposed over this period of time has rendered the engine a total loss.
- e. Carey Motors also caused substantial damage to

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.

Id.

Carey does not impose storage charges in the ordinary course of its business. **Briggs Deposition at 25 (191); Lopez Deposition at 31-32 (CP 186-87); Swearingen Deposition at 34 (CP 195).**

On December 15, 2009, The Norwitzes filed their complaint against Mitsubishi and Carey in King County Superior Court. **Complaint (CP 1-6).** Carey filed a counterclaim for the storage costs and the cost of disassembling the Norwitzes' engine. **Defendant the Carey Company's Complaint with Counterclaims and Affirmative Defenses (CP 15-20).**

On April 7, 2011, King County Superior Court Judge Bruce Heller granted in part Mitsubishi's and the Carey

Company's motion for summary judgment as follows:

1. All of Plaintiffs' causes of action are dismissed with the exception of the claim that Defendant caused additional damage to the engine of Plaintiff's vehicle by attempting to start the vehicle without first bore scoping or otherwise determining if there was other damage to the vehicle. With respect to this claim, the Court finds that there are material issues of fact that were not adequately addressed in Defendants' summary judgment pleadings. Defendants are not precluded from bringing an additional summary judgment motion on this issue.

2. Material issues of fact also exist as to whether Plaintiffs may be charged for the vehicle parts diagnosis, and service done on the vehicle before Warranty coverage was denied.

Order Granting in Part and Denying in Part Defendants'

Motion for Summary Judgment, p. 2 (CP 221). On May 4, 2011, Judge Heller granted the Carey Company's motion for reconsideration as follows:

Plaintiffs' Complaint and the claims set forth therein are hereby dismissed as a matter of law with prejudice, and plaintiffs shall pay to defendant Carey Motors all fees associated with the storage of Plaintiffs' vehicle (charged at \$11.00 per day, accruing as of January 21, 2010 to the present, and every date thereafter while the vehicle

remains at Carey Motors). Plaintiffs shall also pay to defendant Carey Motors all fees associated with the towing of Plaintiffs' vehicle, which amounts to \$117.50. Plaintiffs shall also pay pre-judgment interest on the storage fees, computed at the rate of twelve percent (12%) per annum from the date of towing (August 13, 2009), until paid.

The only issue remaining for trial in this matter is on defendant Carey Motors' counterclaim of whether Plaintiffs may be charged for the vehicle parts, diagnosis, and service done on the vehicle before Warranty coverage was denied.

Order Granting Defendant Carey Motors' Motion for Reconsideration and Amendment of the Written Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, pp. 2-3 (CP 240-241). On June 9, 2011 Carey voluntarily dismissed the portion of its counterclaim held over for trial. **Stipulated Order of Dismissal Without Prejudice and Without Award of Attorney Fees of Defendant Carey Motors' Counterclaim for Labor Only (CP 295-296).** On July 25, 2011, Judge Heller entered final judgment in favor of the Carey Company in the amount of \$13,222.50, including \$6,250 in attorney fees.

Judgment in Favor of the Carey Company, Inc. (CP 316-318). On August 4, 2011, the Norwitzes filed a timely notice of appeal to this Court. Plaintiffs Notice of Appeal (CP 322-330).

V. ARGUMENT

A. This Court Applies a De Novo Standard of Review.

When reviewing a summary judgment, the Court of Appeals applies the same standard of review as the trial court. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.2d 153, 160 (2008). *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

B. The Norwitzes Presented Sufficient Proof That Their Engine Repairs Were Covered By Warranty.

The Norwitzes presented the trial court with proof that

Mitsubishi represented that repair of their engine was covered by warranty as follows:

Approximately one week after the Vehicle was delivered to Carey Mitsubishi for repairs, I contacted the dealership to inquire about the status of the Vehicle. I spoke with Jeff Briggs in the service department at Carey Mitsubishi. Mr. Briggs told me that the cam gear on the Vehicle's engine had broken and would be replaced under warranty, and that the Vehicle would then be "good to go."

...

Over the next two weeks, I had several conversations with Mitsubishi personnel and with personnel at Carey Motors. Corey Swearingen, a manager at Carey Motors, informed me that . . . additional warranty repairs would need to be made. These repairs included replacement of the cylinder heads and other engine parts. As with the other repairs, Mr. Swearingen made clear that these repairs were covered by warranty and my authorization of the repairs was premised on that understanding.

Declaration of Grant Norwitz in Opposition to Defendants' Motion for Summary Judgment, p. 3 (CP 147).

In light of Mitsubishi's own determination and representation to the Norwitzes that repair of their engine was

covered by warranty, the trial court's finding *on summary judgment* to the contrary is obviously in error. Under principles of equitable estoppel, there is at a minimum an issue of fact as to whether the repairs are covered. Beyond that, the Norwitzes, not Mitsubishi or Carey, should be entitled to summary judgment on this issue.

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 Supreme Court explained that “equitable estoppel against the government is not favored.” *Id.* The court nevertheless held that equitable estoppel was appropriate. The court held that “overpaying benefits to the respondents does satisfy the first element of estoppel, which involves an ‘act’ inconsistent with a party's later claim.” *Id. at* 744, 863 P.2d at 539. 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.

The court also found, not only injury, but also “manifest

injustice,” an additional more rigorous requirement placed on those claiming equitable estoppel against the government. The court explained:

In analyzing whether the respondents met their burden of showing they would suffer a manifest injustice, the Court of Appeals considered the following factors: (1) the respondents did not have the resources to repay the debt without drawing on funds currently needed to meet their most basic needs; (2) the respondents provided DSHS with timely and accurate information, and the overpayments resulted solely from the Department's error; (3) the overpayments involved a continuation of benefits for which the respondents had been eligible, and there was no reason they would have been alerted to the fact of overpayment; and (4) there was no evidence the respondents were abusing the public assistance system. These factors establish that the “manifest injustice” element has been met in these cases.

Kramarevcky, 122 Wn.2d at 748-749, 863 P.2d at 540-541.

In *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 530 P.2d 298 (1975), the Washington Supreme Court held that Westinghouse, a private employer, was estopped from reducing an employee’s retirement benefits after mistakenly representing them to be a higher amount. The plaintiff was held to have

relied to his detriment on the representation by not pursuing “other options for employment.”

Even under the more rigorous standard for governmental equitable estoppel, Mitsubishi is not legally permitted to deny warranty coverage after representing that the repairs were covered, obtaining the Norwitzes’ consent to the repairs based on that representation, disassembling the vehicle, and causing damage in the process.

The elements of equitable estoppel are met in this case. First, Mitsubishi’s representation that there was warranty coverage conflicts with its current claim that there is no coverage. Second, the Norwitzes acted in reliance on the representation by consenting to repairs by Carey, Mitsubishi’s Yakima dealership. Third, the Norwitzes are injured. If Mitsubishi had told the Norwitzes at the outset that coverage did not apply, the Norwitzes had many options, including fixing the engine themselves, taking the car to their own mechanic, or taking the car to an expert to evaluate the warranty coverage

issue. Once the engine was started despite a broken camshaft and then disassembled, none of these options existed any longer. As Mr. Norwitz explained in his Declaration,

Carey Motors personnel caused additional damage to the engine of the Vehicle by replacing the camshaft and attempting to start the vehicle without first bore scoping or otherwise determining if there was other damage to the engine. When I was at Carey Motors on June 23, 2010, I observed the condition of the Vehicle. The top end of the engine had been left open and uncovered 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 black soot, shop dust and grime. . . . The additional damage caused to the engine . . . by being exposed over this period of time has rendered the vehicle a total loss

Declaration of Grant Norwitz in Opposition to Defendants' Motion for Summary Judgment, p. 6-7 (CP 150-151).

As with the action for recoupment after overpayment of benefits in the *Kamarevsky* case, it would be unjust to permit Mitsubishi to renege on its representation that all repairs would be covered by warranty after obtaining consent to the repairs, damaging the engine by attempting to start it, and completely

disassembling the engine and vehicle in a manner that rendered the vehicle a total loss. The Norwitzes had no responsibility whatsoever for Mitsubishi's representation that the repairs were covered. Mitsubishi had all the information it needed to make a determination. In fact, Mitsubishi checked the oil in the vehicle *before* making the decision that all repairs were covered by warranty. **Follrich Deposition at 25 (CP 181)**. Allowing Mitsubishi to tell the Norwitzes repairs were covered by warranty, obtain their consent to the repairs, disassemble and damage the Norwitzes' car rendering it a total loss, and then refuse to honor the warranty and obtain a judgment for more than \$13,000 *against* the Norwitzes would be a manifest injustice.

Even if equitable estoppel did not apply, summary judgment would not be appropriate in this case. Mitsubishi's initial determination that warranty coverage existed is strong evidence, certainly enough evidence for summary judgement purposes, that the malfunction of the Norwitzes' vehicle is

covered by warranty. This evidence is even more compelling since Mitsubishi checked the oil before determining that the repairs were covered by warranty. **Follrich Deposition at 25 (CP 181)**. Mitsubishi's sole reason for now claiming that the repairs are not covered is that there was insufficient engine oil. This claim is contradicted by Mitsubishi's own determination of coverage after checking the engine oil. The claim is also contradicted by extensive proof to the contrary presented by plaintiffs. Plaintiffs presented expert testimony and other proof that the engine failure in this case was not in fact caused by a lack of oil. **Norwitz Declaration at ¶ 17 (CP 148) (quoted at pp. 9-12 above)**. There was at least an issue of fact for trial as to whether warranty coverage applied.

VI. CONCLUSION

After checking the oil in the Norwitzes' car, Mitsubishi made a determination that repairs were covered by warranty. Mitsubishi communicated this decision to the Norwitzes and

obtained their consent to repairs. After disassembling and causing irreparable damage to the Norwitzes' vehicle, Mitsubishi changed its position and claimed that the warranty did not apply. The legal doctrine of equitable estoppel prohibits this change of position. Even if equitable estoppel did not apply, there would be an issue of fact as to whether needed repairs are covered by warranty. The trial court's judgment should be reversed and the case remanded for trial.

Respectfully submitted this 5th day of December, 2011.

By



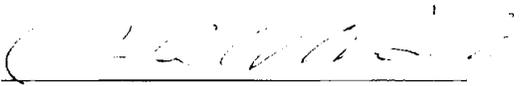
John W. Widell, WSB No. 18678

Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on this 5th day of December, I transmitted a copy of the Brief of Appellants to all counsel of record.

Dated this 5th day of December, 2011.

By 
John W. Widell, WSB No. 18678