74212-4

74212-4

NO. 74212-4-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

GENE BUSROE and SUE BUSRO,
husband and wife,

Plaintiffs/Appellants

v.

DREAMERS ROD, CUSTOM &
PICK-UPS N.W., INC.,

Defendants/Respondents

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN 15 PM 2:56

BRIEF OF APPELLANTS

James J. Jameson, WSBA # 11490
Attorney for Plaintiffs

James J. Jameson
James J. Jameson, P.S.
3409 McDougall Ave., Ste. 201
Everett, WA 98201
(425) 258-8444

TABLE OF CONTENTS

	PAGE
I. ASSIGNMENT OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR	2
III. STATEMENT OF CASE.....	3
IV. ARGUMENT.....	6
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES	PAGE
Sunnyside Valley Irrigation District v. Dickie,	
149 Wn.2d 873, 879 (2003)	6
Alejandre v. Bull, 159 Wn.2d 674 (2007)	10
Eastwood v. Horse Harbor Foundation, Inc.,	
170 Wn.2d 380 (2010)	10, 11
Elcon Construction v. Eastern Washington University,	
174 Wn.2d 157 (2012)	11
Ruth v. Dight, 75 Wn.2d 660 (1969)	12
1000 Virginia Limited Partnership v. Vertecs Corp.,	
158 Wn.2d 566, 579,580 (2006)	13

ASSIGNMENTS OF ERROR

1. The trial court erred in making Findings of Facts critical to its judgment. These findings, which were not supported by substantial evidence, are contained in the courts Findings of Fact 6, 7, 8, 9, 10, 11 and 17. These errors led the court to its erroneous Conclusions of Law 3, 4 and 5 and ultimately to its judgment dismissing Plaintiff's case.
2. The trial of court erred in its Conclusion of Law 2 that proof of an independent duty was necessary to allow recovery by Plaintiff's on their theory of Defendant's liability in tort.
3. The trial court erred in its Conclusion of Law 5 that the Statute of Limitations barred Plaintiffs' claims against Defendant.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does substantial evidence support the finding of the trial court in Finding of Fact 6 that the Plaintiffs' vehicle had been "bead blasted" prior to September 28, 2006?
2. Does substantial evidence support the finding of the trial court in Findings of Fact 11 and 17 that the Plaintiffs' vehicle was painted three years after the "bead blasting" process was completed?
3. Do the errors set forth above render Findings of Fact 7, 8, 9 and 10 irrelevant?
4. Did the errors in the courts Findings of Fact, as set forth above, lead to erroneous Conclusions of Law 3, 4 and 5?
5. Were the Plaintiffs required to prove an independent duty that breached by Defendant which proximately caused Plaintiffs' damages in order to prevail on their tort claim against Defendant as set forth in the trial court's Conclusion of Law 2?
6. Did the trial court's errors, set forth above, cause it to conclude that the Plaintiffs' claims against Defendant were barred by the Statute of Limitations (Conclusion of Law 5)?

STATEMENT OF THE CASE

Upon his retirement, Plaintiff Gene Busroe, decided he would like to restore a classic vehicle. A friend of Mr. Busroe owned a 1955 Chevrolet pickup that was in very bad shape and sold it to Mr. Busroe. (RP Vol I, page 9 lines 9-16). In looking for parts for the pickup Mr. Busroe ran across Defendant Dreamers Rod, Custom and Pickup NW, Inc. (Dreamers). After speaking with owner Craig Leckner and his son, Mr. Busroe determined he would take the pickup to Dreamers for the restoration work. Dreamers advertised that they specialized in restoration of custom vehicles and allowed the Busroes a pay as you go payment plan. (RP Vol. I, page 10 line 15 to Page 11 line 6). Mr. Busroe took the pickup to Dreamers in September of 2006 to begin the restoration work. (RP Vol. II, page 7 lines 20-22 and trial exhibit 52 pages 3-5).

While Mr. Busroe performed some minor work on the restoration, the majority of the work was performed by Dreamers, their employees or agents. (RP Vol. I, page 11 lines 8-15).

Over the period of the next approximately two and one half years restoration work was performed upon the pickup. One of the last tasks to be performed in the restoration process was painting the vehicle. The

vehicle painting was performed by Dreamer's agent Brandon Knowles in March of 2009. (Finding of Fact 12, CP 30).

Prior to painting a process known as "bead blasting" was performed to blast all parts to bare metal prior to painting. As stated in the trial court's Finding of Fact 17 (CP 30) "all of the expert witnesses testifying at trial agreed that the paint bubbled and blistered because the proper procedures were not followed prior to painting. The proper procedure would have been to blast the parts to bare metal with all rust removed, and then to apply sealer as soon as possible without allowing any moisture onto the metal." The trial court further found in Finding of Fact 16 (CP 30) "in approximately the fall of 2011, Mr. Busroe testified that he first noticed that the paint on his truck was blistering and bubbling." The trial court further found in Finding of Fact 16 "since then, the problems with the paint have gotten considerably worse, so that the paint is blistering significantly on the hood, the roof, the back of the cab, and the fenders."

The court further found that Finding of Fact 18 (CP 31) that the testimony of the expert witnesses as to the cost to repaint the pickup ranged from $17,000 to $90,000 with "two mid-range, but admittedly conservative, estimates" of $28,505.60 and $45,392.63.

The trial court's Finding of Fact 6 (CP 29) was pivotal in its decision. The court therein found that the pickup had been "bead blasted" in 2006 and further, in its Findings of Fact 11 (CP 29) found that Mr. Busroe waited three years to actually have the vehicle painted. There is simply no evidence that the vehicle was "bead blasted" in 2006.

As previously stated Craig Leckner, owner of Dreamers, testified "Work Order No. 1 would have been the very first time that the project showed up at the shop, so it would have been the first invoice for Gene Busroe's project." (RP Vol. II, page 7 lines 20-22). This work order is dated 09-28-06 (Exhibit 52 page 5). From this date until the painting of the pickup in March of 2009 the testimony of both Mr. Busroe and Mr. Leckner indicates that virtually all restoration work was done. The "bead blasting" did not occur until much later. Mr. Busroe testified that from the time the parts were returned from the blaster until the pickup was actually painted was between two weeks and a month. (RP Vol. II, page 74 line 24 to page 75 line 1) Furthermore, Mr. Busroe testified that he did not perform any work on the vehicle from the time it was returned from Alternative Blasters (the company that performed the 'bead blasting") until the time it was painted (RP Vol. I, page 48 lines 11-14). None of this testimony was disputed.

ARGUMENT

1. There is no substantial evidence to support the finding made by the trial court in Finding of Fact 6 that Plaintiffs' vehicle had been "bead blasted" prior to September 28, 2006.

A trial court's Findings of Fact are reviewed under a substantial evidence standard. In other words, is there substantial evidence in the trial record to support the Findings of Fact made by the court. Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 879 (2003).*

Questions of Law and Conclusions of Law are reviewed de-novo *Id. at 880*.

Not only was there no substantial evidence to support this finding, there was simply no evidence produced at trial to support this finding. As set forth below, this erroneous finding is crucial to the trial court's decision in this matter.

2. There is no substantial evidence that the Plaintiffs' vehicle was painted three years after the "bead blasting" process as found by the court in Findings of Fact 11 and 17.

It is undisputed that Plaintiffs' vehicle was painted in March of 2009. The trial court's erroneous finding that the "bead blasting" occurred in 2006, as set forth above, led the court to the further erroneous finding that there was a three year time span between the "bead blasting" and painting.

As set forth in appellants' statement of the case and citations to the record, therein, the testimony of Defendant's owner, Craig Leckner, was that September of 2006 is when Mr. Busroe initially brought the hulk into his shop. Furthermore, the testimony of both Mr. Leckner and Mr. Busroe is that virtually all the restoration work was performed between September 2006 and March 2009 when the painting occurred.

Mr. Busroe's uncontradicted testimony is that the painting occurred between two weeks and one month after the "bead blasting" and that he performed no work on the vehicle between the "bead blasting" and the painting of the vehicle.

All of this testimony leads to the inescapable conclusion that the court misinterpreted the evidence that the "bead blasting" had occurred in 2006.

3. The erroneous findings set forth, above, render Findings of Fact 7, 8, 9 and 10 irrelevant.

The trial court's Findings of Fact 7 through 10 (CP29) are only relevant if the court's finding that the vehicle was "bead blasted" in 2006 is correct. These findings indicate the condition of the vehicle in 2006, when it was originally brought into the Defendant's shop which was prior to all restoration work being performed and prior to the "bead blasting" which occurred two weeks to one month prior to the painting of the vehicle. Again, these Findings of Fact were crucial to the court's ultimate resolution of this matter given its finding that the "bead blasting" occurred in 2006.

4. The errors in the trial court's Findings of Fact as set forth above, led the court to its erroneous Conclusions of Law 3, 4 and 5.

The trial court's Conclusions of Law 3, 4 and 5 (CP32-33) are all reached based upon the court's erroneous findings that there was a three

year gap between the "bead blasting" and painting and that the condition of the Plaintiffs' vehicle in 2006 was the condition after the "bead blasting", as opposed to its condition before restoration and before the "bead blasting".

Conclusion of Law 3 indicates that the "bead blasting" was ineffective to remove all of the rust as shown by Defendant in invoice 1428 (Exhibit 52). It is believed that this is a typographical error as there is no Invoice 1428 contained in Exhibit 52. Invoice 1438 is from 2006 and it is believed that this is the invoice to which the court refers.

Again, this Conclusion of Law shows that the court erroneously believed that the "bead blasting" occurred in 2006. As set forth above, there is simply no evidence from which the court could make this finding.

Conclusion of Law 4 continues with the erroneous finding that the actions in sealing the vehicle after being blasted occurred in 2006. In fact, while sealing did occur in 2006, it was sealing to prevent further rust from the hulk when it was originally brought into the shop, and had nothing to do with improper preparation of the vehicle after the blasting but before painting occurred.

Once again, the trial court based Conclusion of Law 5 on its erroneous finding that October 5, 2006 was the date on which Plaintiffs' claims commence. This is simply incorrect as the "bead blasting" did not occur until years later.

These Conclusions of Law which were based upon erroneous Findings of Fact led the trial court to dismiss Plaintiffs' Complaint against Defendant.

5. There is no requirement that Plaintiffs prove an independent duty owed by the Defendant to Plaintiffs in order to prevail on their tort claims.

In 2007 the Washington State Supreme Court ruled that economic loss was not recoverable in tort in an action on a real estate purchase and sale agreement. *Alejandre v. Bull*, 159 Wn.2d 674 (2007). The rule raised in that case was known as the "economic loss rule". Courts used this rule to bar tort claims for economic loss in a variety of circumstances that went far beyond what the *Alejandre* court intended.

As a result, three years later, the court issued its opinion in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380 (2010). In that case the court propounded the "independent duty doctrine". The

Eastwood court found that the economic loss rule was being expanded far beyond what the court intended and held that where there is a duty which is independent of the contract economic damages are still recoverable in tort.

In *Elcon Construction v. Eastern Washington University*, 174 Wn.2d 157 (2012) which involved a non-real estate purchase and sale agreement case regarding a drilling contract, the court held that the independent duty doctrine did not apply. The court found that the doctrine applied to only a narrow class of cases arising out of real property sales and construction on real property. The court further directed lower courts not to apply the doctrine to tort remedies unless and until the Supreme Court decides otherwise based upon considerations of common sense, justice, policy and precedent. *Elcon* at 165. Therefore, the court found that the independent duty doctrine did not bar the Plaintiffs' claims as it was wholly inapplicable.

Given the holding in *Elcon*, the independent duty doctrine has no applicability in this case. Therefore, the trial court erred when it concluded that Plaintiffs' tort claims were barred as the court found this to be a contract case with no independent duty owed by Defendant to Plaintiffs.

As set forth above, all experts who testified at trial testified that the cause of the paint bubbling and blistering was that proper procedures were not followed prior to painting (ie. blasting the parts to bare metal with all rust removed and then applying sealer as soon as possible without allowing any moisture onto the metal). The unrebutted testimony is that the "bead blasting" occurred shortly before painting, that Mr. Busroe did not perform any work post-blasting and that Defendant's agent performed the painting of the vehicle. Therefore, the Plaintiffs' damages were proximately caused by the negligence of Defendant and its agent.

6. The trial court should have applied the Discovery Rule to conclude that the Plaintiffs' claims against Defendant were not barred by the Statute of Limitations.

Given that the conclusion of the trial court that Plaintiffs' tort claims against Defendant were not cognizable because of the lack of an independent duty is erroneous, the court should have applied the discovery rule to find that Plaintiffs' claims were not barred by the Statute of Limitations.

Discovery Rule: Beginning with *Ruth v. Dight*, 75 Wn.2d 660 (1969), Washington courts have applied the discovery rule in numerous

situations involving tort claims. A good discussion of the expansion of the discovery rule in tort cases is set forth in *1000 Virginia Limited Partnership v. Vertecs Corp., 158 Wn.2d 566, 579,580 (2006).* As in those cases there was no way for Plaintiffs to know, or even suspect that the paint job on their vehicle had serious latent defencts.

In the instant case, the painting of Plaintiffs' vehicle occurred in 2009. The court found that Plaintiff Gene Busroe's uncontradicted testimony was that he first saw evidence of the improper paint job by way of bubbling in the paint in 2011 (Conclusion of Law 4, CP 32,33). No evidence was presented that Plaintiffs should have discovered the faulty paint job prior to the date of actual discovery. The Summons and Complaint in this action were filed and served in 2013 (CP 59-68), well within the three year tort statute of limitations and therefore the statute of limitations has no applicability in this matter.

Therefore, the Plaintiffs' cause of action against Defendant is not barred by the statute of limitations.

CONCLUSION

In conclusion, given the trial court's errors, set forth above, this court should reverse the trial court's Order Granting Judgment in favor of Defendant and Dismissing the Complaint with Prejudice and order a new trial on Plaintiffs' Amended Complaint.

DATED: June 15, 2016

RESPECTFULLY SUBMITTED:

By: _____
James J. Jameson, WSBA # 11490
Attorney for Plaintiffs

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2016 JUN 15 PM 2:56

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

GENE BUSROE and SUE BUSROE, husband and wife, Plaintiffs/Appellants, v. DREAMERS ROD, CUSTOM & PICK-UPS N.W., INC., Defendants/Respondents.	NO. 74212-4-I DECLARATION OF MAILING

I, Sunni Bailey, declare that on the 15th day of June, 2016, I deposited in the U.S. Mail, postage prepaid thereon, an envelope directed to:

Thomas L. Hause
Gourley Law Group
P.O. Box 1091
Snohomish, WA. 98291-8092

Said envelope contained Brief of Appellants

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Everett, Washington this 15th day of June, 2016.

Sunni Bailey
Legal Assistant

JAMES J. JAMESON, P.S.
ATTORNEY AT LAW
3409 McDOUGALL AVE., SUITE 201
EVERETT, WA 98201
(425) 258-8444
FAX (425) 258-9412