

No. 74212-4-I

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

GENE BUSROE and SUE BUSROE, husband and wife,

Appellants/Plaintiffs,

v.

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

Respondent/Defendant.

BRIEF OF RESPONDENT

Thomas L. Hause, WSBA #35245
1002 Tenth Street
Snohomish, WA 98290
(360) 568-5065
Attorney for Respondent

2016 JUL 15 PM 2:46
COURT OF APPEALS
STATE OF WASHINGTON

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii-iii
ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	1
ARGUMENT	7
I. Standard of Review	7
II. Substantial Evidence Supports the Trial Court's Conclusion the Pick-Up was Bead Blasted in 2006	8
III. Substantial Evidence Supports the Trial Court's Conclusion the Pick-Up was Painted Three Years After it was Bead Blasted in 2006	10
IV. The Trial Court's Findings of Fact Nos. 7, 8, 9, and 10 are Relevant	11
V. The Trial Court's Conclusions of Law 3, 4, and 5 are Correct	11
VI. No Duty Exists	12
VII. The Economic Loss Rule Becomes The Independent Duty Doctrine	14
VIII. Busroe's Claims Are Barred By the Statute of Limitations	16
CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page(s)</u>
A. WASHINGTON STATE SUPREME COURT	
<i>Alejandro v. Bull</i> , 159 Wash.2d 682, 153 P.3d 864 (2005)	15
<i>Alhadeff v. Meridian on Bainbridge Island, LLC</i> , 167 Wash. 2d 601, 220 P.3d 1214, (Wash. 2009)	13
<i>Burton v. Ascol</i> , 105 Wash.2d 344, 715 P.2d 110, (Wash. 1986)	14
<i>Donatelli v. D.R. Strong Consulting Engineers, Inc.</i> , 179 Wash.2d 84, 312 P.3d 620, (Wash. 2013)	15, 16
<i>Eastwood v. Horse Harbor Found, Inc.</i> , 170 Wash.2d 380, 241 P.3d 1256, 1262 (Wash. 2010)	16
<i>McCleary v. State</i> , 173 Wash.2d 477, 269 P.3d 227, (Wash. 2012)	7, 8, 10
<i>McKown v. Simon Property Group, Inc.</i> , 182 Wash. 2d 752, 344 P.3d 661, (Wash. 2015)	13
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wash.2d 873, 73 P.3d 369, (Wash. 2003)	7, 8, 10
<i>Transamerica Title Ins. Co. v. Johnson</i> , 103 Wash.2d 409, 693 P.2d 697 (Wash. 1985)	13
<i>Wenatchee Sportsman Ass'n v. Chelan</i> , 141 Wash.2d 169, 4 P.3d 162 (Wash. 2010)	8, 10

B. WASHINGTON STATE COURT OF APPEALS

<i>Burns v. McClinton</i> , 135 Wash. App. 285, 143 P.3d 630, (Wash. Ct. App. 2006)	17
<i>Kelly v. Allianz Life Ins. Co. of North America</i> , 178 Wash. App. 395, 314 P.3d 755, (Wash. Ct. App. 2013)	17
<i>Nguyen v City of Seattle</i> , 179 Wash. App 155, 317 P.3d 518,(Wash. Ct. App. 2014)	12
<i>N.L. v. Bethel School Dist.</i> , 187 Wash. App. 460, 348 P.3d 1237, (Wash. Ct. App. 2015)	13
<i>Schreiner Farms, Inc. v. American Tower, Inc.</i> , 173 Wash. App. 154, 293 P.3d 407 (Wash. Ct. App. 2013)	17
<i>Shepard v. Holmes</i> , 185 Wash. App. 730, 345 P.3d 786, (Wash. Ct. App. 2014)	17
<i>Tallariti v. Kildare</i> , 63 Wash. App. 453, 820 P.2d 952, (Wash. Ct. App. 1991)	13
<i>Wold v. Wold</i> , 7 Wash. App 872, 875, 503 P.2d 118 (Wash. Ct. App. 1972)	8

INTRODUCTION

This case stems from an individual's failed attempt to restore an old pick-up truck. Respondent permitted the Appellants to utilize its shop for approximately 3 and 1/2 years while Appellant attempted to restore his pick-up. Respondent performed discrete tasks at Appellants' request and sold various parts to Appellants on a pay as you go basis. But Respondent never agreed to restore the pick-up or supervise Appellants' work.

Some years later, the paint on the pick-up started to blister. And now Appellants blame the Respondent. The trial court ruled in favor of Respondent. This appeal ensued.

ASSIGNMENT OF ERROR

Respondent does not assign any errors to the decision of the Trial Court.

STATEMENT OF THE CASE

I. Course of Proceedings

This is an appeal from a trial before the bench in the Superior Court of the State of Washington in and for the County of Snohomish. On November 27, 2013, Appellants Gene and Sue Busroe filed an Amended Complaint for Damages

asserting unspecified claims related to the painting of a pick-up truck.¹ The matter proceeded to a two day trial before The Honorable Millie Judge commencing September 30, 2015.² On October 9, 2015, the Trial Court issued its Findings of Fact, Conclusions of Law and Order Granting Judgment in Favor of Defendant and Dismissing the Complaint with Prejudice.³ Notice of Appeal to this Court was filed November 4, 2015.⁴

II. The Parties

Appellants Gene Busroe, a retired individual, and his wife Sue (collectively “Busroe”) purchased a 1955 Chevy Pick-up as a project for Gene.⁵ Initially Gene Busroe worked on the pickup at Lake Washington Vo-Tech where he was taking classes for body work and electronics.⁶ When Mr. Busroe needed some parts he contacted the Respondent.⁷

In 2006, Respondent Dreamers Rod, Custom & Pick-ups N.W., Inc. (“Dreamers”) had two facilities.⁸ The facility in Snohomish performed

¹ CP 59 – 64.

² CP 4 – 11, 21.

³ CP 4 – 11.

⁴ CP 2.

⁵ RP Vol. 1, p. 9.

⁶ RP Vol. 1 pp. 9, 10.

⁷ RP Vol. 1 p. 10.

⁸ RP Vol. 1 p. 156.

restoration, fabrication, and metal preparation.⁹ Whereas the facility in Everett primarily sold parts for old cars.¹⁰

III The Nature of the Relationship

Initially, Busroe contacted Dreamers because he needed to purchase a fender.¹¹ Thereafter, Dreamers permitted Busroe to work on his pickup in its shop.¹² Busroe was the only customer ever permitted to do this.¹³ There was no specific agreement with Dreamers, certainly nothing in writing.¹⁴ There was no agreement that Dreamers would supervise Busroe's work.¹⁵ There was no agreement that Dreamers would oversee Busroe's work.¹⁶ Busroe did not contract with Dreamers to remove any, let alone all of rust on the pick-up.¹⁷ As needed, Busroe would buy parts from Dreamers.¹⁸ Also as needed, Busroe hired Dreamers to perform work on the pickup. Busroe paid for the labor.¹⁹ Busroe described the relationship as pay as you go.²⁰

⁹ RP Vol. 1 p. 156.

¹⁰ RP Vol. 1 p. 156.

¹¹ RP Vol. 1 p. 10.

¹² RP Vol. 1 pp. 10, 11.

¹³ RP Vol. 1 p. 162.

¹⁴ RP Vol. 1 p. 27.

¹⁵ RP Vol. 1 p. 27.

¹⁶ RP Vol. 1 p. 27.

¹⁷ CP 9.

¹⁸ RP Vol. 1 p. 28.

¹⁹ RP Vol. 1 p. 28.

²⁰ RP Vol. 1 pp. 29, 173.

Busroe was quite proud of his work. At car shows Busroe displayed a bragging board on an artist easel which states, "Restoration by Gene Busroe."²¹ In fact, Gene Busroe testified that he was proud of taking the pick-up through the restoration process. The bragging board included photos of Busroe performing the restoration work.²² When asked about taking credit for the restoration work Gene Busroe testified, "Yeah. I'm lying."²³

IV. Billing Process

To facilitate billing and payroll, each Dreamers employee would keep a daily log.²⁴ The log would include the tasks performed on a given vehicle and the amount of time spent on the tasks.²⁵ This information is entered into a computer and used to generate an invoice that the customer pays.²⁶ The same procedure applies when a customer purchases a part.²⁷

V. The Bead Blasting Occurred in 2006

As a part of the restoration process, the pick-up is bead blasted. Bead blasting is a process of preparing metal for painting by stripping away existing

²¹ RP Vol. 1 pp. 30, 31.

²² RP Vol. 1 pp. 31, 32.

²³ RP Vol. 1 p. 33.

²⁴ RP Vol. 1 p. 163.

²⁵ RP Vol. 1 pp. 163, 175, and 176.

²⁶ RP Vol. 1 pp. 163, 175, and 176.

²⁷ RP Vol. 1 p. 176.

paint, primer, rust, or other contaminants so only bare metal remains. The testimony is clear. The bead blasting occurred in 2006.

As noted above, employees of Dreamers kept a record of their time on log sheets.²⁸ This information is entered into a computer system and an invoice generated.²⁹ Steve Strabeck, a former employee of Dreamers, followed this procedure on September, 28, 2006.³⁰ Mr. Strabeck kept a daily log with a white base with carbon underneath and wrote down his task and the time it took.³¹ On that date, Mr. Strabeck's time entry on Invoice 1428 read,

STEVE HELPED GENE UNLOAD THE BARE METAL FROM THE TRAILER INTO THE SHOP. SOME OF THE PARTS WERE EXPOSED TO THE MORNING AIR. THESE PARTS WERE WET WITH MORNING FOG AND WATER SPRAY OFF THE TIRES. STEVE TRIED TO DRY THE AREAS HE COULD SEE AND GET TO WITH A TORCH AND RAG.³²

Mr. Strabeck has a specific recollection of these events because he had never dealt with wet vehicle parts that were in bare metal.³³ This is significant to an experienced restorer of vehicles because if the bare metal gets wet “[y]our going to have rust.”³⁴

²⁸ RP Vol. 1 p. 163.

²⁹ RP Vol. 1 p. 163.

³⁰ RP Vol. 2 pp. 59 – 60.

³¹ RP Vol. 2 pp. 58 – 61.

³² RP Vol. 2 p. 60, Ex. 52, p. 5.

³³ RP Vol. 2 p. 61.

³⁴ RP Vol. 2 p. 61.

The pick-up parts had just returned from Alternative Blasters, a bead blasting facility. They were transported from Alternative Blasters to Dreamers in a flat-bed trailer by Eugene Busroe.³⁵ Busroe confirmed that when he returned the pickup to Dreamers it was wet.³⁶ Mr. Busroe was assisted in this endeavor by his friend Donald Meir.³⁷ Mr. Busroe and Mr. Meir were assisted by Mr. Strabeck when they unloaded the parts from the flat-bed trailer.³⁸ Mr. Strabeck's employment with Dreamers ended in 2006.³⁹

Additionally, Invoice 1428 also states:

STEVE LAY OUT PARTS AND MASK AREAS TO BE METAL WORKED BY OWNER AT LATER TIME, ONE STEPPED DEEP PITS THAT STILL HAD RUST IN THEM AFTER THE HEAVY RUST WAS LAYING IN THE SHALLOWED PARTS OF THESE AREAS.⁴⁰

VI. Painting the Pick-up

The Trial Court found the experts all agreed that the truck should have been primed and painted with 2-3 days after the sealant was applied.⁴¹ This is true.⁴² The Trial Court also found that Busroe waited three years to begin the

³⁵ RP Vol. 1 pp. 14, 27.

³⁶ RP Vol. 1 p. 27.

³⁷ RP Vol. 1 p. 130.

³⁸ RP Vol. 1 p. 131.

³⁹ RP Vol. 2 p. 58.

⁴⁰ Ex. 52, p. 5.

⁴¹ CP 6.

⁴² RP Vol. 2 p. 58.

process.⁴³ Further, the three year gap occurred between 2006 and 2009 when Mr. Busroe stopped all work on the truck because he was experiencing serious health problems.⁴⁴ Further, all of the experts agree 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.⁴⁵ In this case, rust remained after the bead blasting, and the metal parts were allowed to get wet, were touched with rags and a blow torch in an attempt to dry them.⁴⁶ The truck sat unprimed for three years.⁴⁷

ARGUMENT

I. Standard of Review

To withstand challenge on review, findings of fact must be supported by substantial evidence.⁴⁸ Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.⁴⁹ Appellate courts “will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.”⁵⁰ If the substantial evidence

⁴³ CP 6.

⁴⁴ CP 6-7.

⁴⁵ CP 7.

⁴⁶ CP 8.

⁴⁷ CP 8.

⁴⁸ *McCleary v. State*, 173 Wash.2d 477, 514, 269 P.3d 227, 245 (Wash. 2012); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369, 372 (Wash. 2003).

⁴⁹ *Id.*

⁵⁰ *McCleary*, 173 Wash.2d at 514.

standard is satisfied, “a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.”⁵¹

A trial court must make findings as to all the ultimate facts and material issues.⁵² Ultimate facts

are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular. They are necessary and controlling facts which must be found in order for the court to apply the law to reach a decision.⁵³

Appellate courts review a trials court’s conclusions of law, including its interpretation of statutes and constitutional provisions, on a de novo basis.⁵⁴

II. Substantial Evidence Supports the Trial Court’s Conclusion the Pick-Up was Bead Blasted in 2006

As noted above, the October 5, 2006 Invoice 1428 read,

STEVE HELPED GENE UNLOAD THE BARE METAL FROM THE TRAILER INTO THE SHOP. SOME OF THE PARTS WERE EXPOSED TO THE MORNING AIR. THESE PARTS WERE WET WITH MORNING FOG AND WATER SPRAY OFF THE TIRES. STEVE TRIED TO DRY THE AREAS HE COULD SEE AND GET TO WITH A TORCH AND RAG.⁵⁵

⁵¹ *Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 880, citing *Wenatchee Sportsman Ass’n v. Chelan*, 141 Wash.2d 169, 176, 4 P.3d 162 (Wash. 2010).

⁵² *Wold v. Wold*, 7 Wash.App. 872, 875, 503 P.2d 118 (Wash. Ct. App. 1972).

⁵³ *Wold*, 7 Wash.App. at 875, 503 P.2d 118.

⁵⁴ *McCleary*, 173 Wash.2d at 514.

⁵⁵ RP Vol. 2 p. 60, Ex. 52, p. 5.

Mr. Strabeck has a specific recollection of these events because he had never dealt with a wet vehicle that was in bare metal.⁵⁶ This is significant to an experienced restorer of vehicles because if the bare metal gets wet “[y]our going to have rust.”⁵⁷ Further, the fact that the parts were bare metal strongly suggests they had been blasted.

Moreover, the parts were transported from Alternative Blasters to Dreamers in a flat-bed trailer by Eugene Busroe.⁵⁸ Busroe confirmed that when he returned the parts to Dreamers they were wet.⁵⁹ Busroe also testified that he was assisted by a friend and Steve Strabeck, a Dreamers employee.⁶⁰ This testimony confirms the pick-up was coming from bead blasting. Donald Meir testified he assisted Mr. Busroe and Steve Strabeck.⁶¹ Again, confirming the pick-up was coming back from bead blasting. Finally, Mr. Strabeck testified that he assisted Busroe and Meir when they unloaded the pick-up from the flat-bed trailer.⁶² Mr. Strabeck’s employment with Dreamers ended in 2006.⁶³ This confirms the year. Additionally, Mr. Strabeck would not have bothered to dry the parts if they were in the condition at the time of purchase. As the trial Court states, “at the time of

⁵⁶ RP Vol. 2 p. 61.

⁵⁷ RP Vol. 2 p. 61.

⁵⁸ RP Vol. 1 pp. 14, 27.

⁵⁹ RP Vol. 1 p. 27.

⁶⁰ RP Vol. 1 pp. 14, 27.

⁶¹ RP Vol. 1 p. 130.

⁶² RP Vol. 1 p. 131.

⁶³ RP Vol. 2 p. 58.

purchase the truck was essentially a hulk vehicle. The exterior body was heavily rusted ...”⁶⁴

Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.⁶⁵ Appellate courts “will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.”⁶⁶ If the substantial evidence standard is satisfied, “a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.”⁶⁷ The testimony of Mr. Busroe, Mr. Meir and Mr. Strabeck, along with Ex. 52 p. 5 is not just substantial evidence it is conclusive evidence. At the very least, this Court should not substitute its judgment for that of the Trial Court.

III. Substantial Evidence Supports the Trial Court’s Conclusion the Pick-Up was Painted Three Years After It was Bead Blasted in 2006

Busroe states, “[i]t is undisputed that Plaintiffs’ vehicle was painted in March of 2009”.⁶⁸ As discussed above, the pick-up was transported from Alternative Blasters to Dreamers in a flat-bed trailer by Eugene Busroe on

⁶⁴ CP 4-5.

⁶⁵ *Id.*

⁶⁶ *McCleary*, 173 Wash.2d at 514.

⁶⁷ *Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 880, citing *Wenatchee Sportsman Ass'n v. Chelan*, 141 Wash.2d 169, 176, 4 P.3d 162 (Wash. 2010).

⁶⁸ Brief of Appellants p. 7.

September 28, 2006. Perhaps it would have been more accurate if the trial Court had said approximately three years.

IV. The Trial Court's Findings of Fact Nos. 7, 8, 9, and 10 are Relevant

Busroe states, “[t]he 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.”⁶⁹ As discussed above, the pick-up was transported from Alternative Blasters to Dreamers in a flat-bed trailer by Eugene Busroe on September 28, 2006. This is supported by the testimony of Mr. Busroe, Mr. Meir and Mr. Strabeck, along with Ex. 52 p. 5. Findings 7 through 10 are relevant.

V. The Trial Court's Conclusions of Law 3, 4, and 5 are Correct

Busroe’s argument that Conclusions of Law 3, 4, and 5 are erroneous is, like several other arguments, based on a belief that bead blasting did not occur in 2006. As discussed at length above, there is more than substantial evidence to support the Trial Court’s finding.

Busroe’s claim that the sealing performed in 2006 was to prevent further rust from the hulk is not only unsupported by any evidence it is completely erroneous. In fact, the opposite is true. If any moisture or rust is sealed in, even a

⁶⁹ Brief of Appellants p. 8.

finger print, it is trapped and acts like a seed.⁷⁰ It only has one place to go. It's up. It can't go through the metal.⁷¹ Sealing in moisture or rust would not prevent rust, it would cause it.

VI. No Duty Exists

The Trial Court found:

The Plaintiffs filed their complaint in this case on August 6, 2013. In it, Plaintiff failed to state a legal theory under which they are entitled to damages. On the first day of trial, Plaintiff asserted that its claims sound in tort, and that they were claiming negligence of the part of Defendant.⁷²

Negligence requires proof of four elements: (1) the existence of a duty to the person alleging negligence, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury.⁷³ Busroe argues, ipse dixit, "Plaintiffs' damages were proximately caused by the negligence of Defendant and its agent."⁷⁴ Setting aside the independent duty doctrine which is discussed below, Busroe must establish Dreamers owed a duty sounding in tort, not simply a contractual obligation.

⁷⁰ RP Vol 2 pp. 46, 52.

⁷¹ RP Vol 2 pp. 46, 52.

⁷² CP 8.

⁷³ *Nguyen v City of Seattle*, 179 Wash.App 155, 164, 317 P.3d 518, 523 (Wash. Ct. App. 2014).

⁷⁴ Brief of Appellants p. 12.

The question of whether the defendant owed a duty of care is one for the court.⁷⁵ In general, courts will find a duty where reasonable persons would recognize it and agree that it exists.⁷⁶ A duty may be predicated either upon a statute or upon the common law.⁷⁷ In considering whether to impose a duty of care, judges should weigh policy considerations and the balancing of interests.⁷⁸ A duty of care “is defined as ‘an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.’ ”⁷⁹ According to the Supreme Court, “the duty question breaks down into three inquiries: Does an obligation exist? What is the measure of care required? To whom and with respect to what risks is the obligation owed?”⁸⁰

In this case, Busroe contacted Dreamers because he needed to purchase a fender.⁸¹ Thereafter, Dreamers permitted Busroe to work on his pickup in its shop.⁸² Busroe was the only customer ever permitted to do this.⁸³ There was no

⁷⁵ *N.L. v. Bethel School Dist.*, 187 Wash.App. 460, 468, 348 P.3d 1237, 1242 (Wash. Ct. App. 2015).

⁷⁶ *Tallariti v. Kildare*, 63 Wash. App. 453, 456, 820 P.2d 952, 953 (Wash. Ct. App. 1991).

⁷⁷ *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wash. 2d 601, 619, 220 P.3d 1214, 1223 (Wash. 2009).

⁷⁸ *McKown v. Simon Property Group, Inc.*, 182 Wash. 2d 752, 763, 344 P.3d 661, 664 (Wash. 2015);

⁷⁹ *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 413, 693 P.2d 697 (Wash. 1985) (quoting William L. Prosser, *Handbook of the Law of Torts* § 53, at 331 (3d ed.1964)).

⁸⁰ *Id.*

⁸¹ RP Vol. 1 p. 10.

⁸² RP Vol. 1 pp. 10, 11.

⁸³ RP Vol. 1 p. 162.

specific agreement with Dreamers, certainly nothing in writing.⁸⁴ There was no agreement that Dreamers would supervise Busroe's work.⁸⁵ There was no agreement that Dreamers would oversee Busroe's work.⁸⁶ Busroe did not contract with Dreamers to remove any, let alone all of rust on the pick-up.⁸⁷ As needed, Busroe would buy parts from Dreamers.⁸⁸ Also as needed, Busroe hired Dreamers to perform work on the pickup. Busroe paid for the labor.⁸⁹ Busroe described the relationship as pay as you go.⁹⁰ The Trial Court concluded the case sounds in contract, not in tort.⁹¹

The Trial Court also concluded Busroe alleged that Dreamers failed to perform in a "workmanlike manner".⁹² But this is a term often used in disputes stemming from construction contracts with warranty claims.⁹³ There is no suggestion in the record of a tort duty.

VII. The Economic Loss Rule Becomes The Independent Duty Doctrine

⁸⁴ RP Vol. 1 p. 27.

⁸⁵ RP Vol. 1 p. 27.

⁸⁶ RP Vol. 1 p. 27.

⁸⁷ CP 9.

⁸⁸ RP Vol. 1 p. 28.

⁸⁹ RP Vol. 1 p. 28.

⁹⁰ RP Vol. 1 pp. 29, 173.

⁹¹ CP 9.

⁹² CP 8.

⁹³ See *Burton v. Ascol*, 105 Wash.2d 344, 346, 715 P.2d 110, 111 (Wash. 1986).

In the past, plaintiffs who were parties to a contract were prohibited from recovering “economic losses” in a tort action arising out of the contract because “tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.”⁹⁴ The *Alejandro* Court states,

[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.⁹⁵

This rule “attempted to describe the dividing line between the law of torts and the law of contract.”⁹⁶ In 2010, however, the landscape began to change.

In *Eastwood v. Horse Harbor Found, Inc.*⁹⁷ the Supreme Court of the State of Washington concluded that “[t]he term ‘economic loss rule’ was a misnomer and renamed the rule the ‘independent duty doctrine’ to more accurately describe how this court [Washington Supreme Court] determines whether one contracting party can seek tort remedies against another party to the contract. The independent duty doctrine continues to ‘maintain the boundary

⁹⁴ *Alejandro v. Bull*, 159 Wash.2d at 682, 153 P.3d 864 (2005), quoting *Factory Mkt., Inc. v. Schuller Int'l, Inc.*, 987 F.Supp. 387, 395 (E.D.Pa.1997).

⁹⁵ *Id.*

⁹⁶ *Donatelli v. D.R. Strong Consulting Engineers, Inc.* 179 Wash.2d 84, 312 P.3d 620, 623 (Wash. 2013).

⁹⁷ 170 Wash.2d 380, 241 P.3d 1256, 1262 (Wash. 2010).

between torts and contract.”⁹⁸ In short, “the economic loss rule does not bar recovery in tort when the defendant’s alleged misconduct implicates a tort duty that arises independently of the terms of the contract.”⁹⁹ But “[w]hen no independent tort duty exists, tort does not provide a remedy.”¹⁰⁰ According to Justice Chambers, “The role of the trial court is to determine if the duty sought to be enforced is a duty essentially assumed by agreement or a duty imposed by law.”¹⁰¹

In this case the only obligations owed by Dreamers to Busroe were assumed by a series of contracts.

VII Busroe’s Claims Are Barred By the Statute of Limitations

The fact that the Amended Complaint was filed on November 27, 2013 is not disputed. The fact that the work on the pick-up began in 2006 and concluded in 2009 is not disputed. Busroe, however, argues the Discovery Rule applies and Gene Busroe claims he discovered the pick-up had a problem in 2011.¹⁰² The Trial Court, however, concluded that Busroe had actual knowledge or should have known from the notation on Invoice 1428 that he had a rust problem under the

⁹⁸ *Donatelli*, 179 Wash.2d at 91.

⁹⁹ *Eastwood*, 170 Wash.2d at 393.

¹⁰⁰ *Id.* at 389.

¹⁰¹ *Id.* at 406 (Chambers, J., concurring).

¹⁰² CP 10.

sealant.¹⁰³ The Trial Court also concluded that at the very least, the invoice put Busroe on inquiry notice.¹⁰⁴

In *Kelly v. Allianz Life Ins. Co. of North America*, the Court of Appeals held that, “[g]enerally, the discovery rule does not apply to an action for breach of contract,”¹⁰⁵ But, it is true that in a proper case, the discovery rule will be applied to an action for breach of contract in a manner similar to the application of the discovery rule to tort claims.¹⁰⁶ Pursuant to the discovery rule, the cause of action accrues when the plaintiff knows, or in the exercise of reasonable care should know, the facts that give rise to the cause of action.¹⁰⁷ If the plaintiff asserts the discovery rule as a basis for delaying the commencement of the limitation period, the burden falls on the plaintiff to establish that reasonable diligence would not have resulted in discovery of the cause of action.¹⁰⁸ Where reasonable minds could differ as to the application of the discovery rule, it is a question for the finder of fact.¹⁰⁹

Invoice 1428, dated October 5, 2006 states:

¹⁰³ CP 9,10.

¹⁰⁴ CP 10.

¹⁰⁵ *Kelly v. Allianz Life Ins. Co. of North America*, 178 Wash. App. 395, 399, 314 P.3d 755, 757 (Wash. Ct. App. 2013), review denied, 180 Wash. 2d 1004, 321 P.3d 1206 (Wash. 2014).

¹⁰⁶ *Shepard v. Holmes*, 185 Wash. App. 730, 739, 345 P.3d 786, 790 (Wash. Ct. App. 2014); *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wash. App. 154, 293 P.3d 407 (Wash. Ct. App. 2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Burns v. McClinton*, 135 Wash. App. 285, 300, 143 P.3d 630, 636 (Wash. Ct. App. 2006).

STEVE LAY OUT PARTS AND MASK AREAS TO BE METAL WORKED BY OWNER AT LATER TIME, ONE STEPPED DEEP PITS THAT STILL HAD RUST IN THEM AFTER THE HEAVY RUST WAS LAYING IN THE SHALLOWED PARTS OF THESE AREAS.¹¹⁰

The Trial Court concluded, “Defendant put Plaintiff on notice of its actions (“removed the rust as best they could”), in Invoice 1428. Plaintiff had actual knowledge or should have known from the notation on the invoice that he had a rust problem under the sealant.”¹¹¹ The Trial Court further concluded, “[e]ven if one could argue Plaintiff lacked actual knowledge of the spreading rust until 2011, the 2006 invoice at least put him on inquiry notice and he should have done further investigation about the rust issue at that time.”¹¹²

These factual conclusions are supported by substantial evidence and should not be disturbed by this Court.

CONCLUSION

The trial Court properly found that Dreamers was not responsible for the rust problem that caused the paint job on Busroe’s truck to bubble. Dreamer’s therefore respectfully requests that the Court deny the Appellants’ appeal and

¹¹⁰ Ex. 52, p. 5.

¹¹¹ CP 9, 10.

¹¹² CP 10.

award Respondent its statutory attorney fees and costs incurred in this appeal pursuant to RCW 4.84.010.

DATED this 13th day of July, 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Thomas L. Hause". The signature is written in a cursive style with a horizontal line underneath the name.

Thomas L. Hause, WSBA #35245

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

2016 JUL 15 PM 2:46
COURT OF APPEALS DIV I
STATE OF WASHINGTON

GENE BUSROE and SUE BUSROE, husband
and wife,

NO. 74212-4-I

Plaintiffs/Appellants,

PROOF OF SERVICE

v.

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

Defendant/Respondent.

TO: Clerk of the Court, AND TO: GENE BUSROE and SUE BUSROE, Appellants,

I, Tracy Swanlund, declare and state on oath and under penalty of perjury under the laws of
the state of Washington as follows:

1. I am over 21 years of age, not a party to or interested in the above-mentioned action, and
otherwise competent to testify to the matters set forth.

2. On the 15th day of July, 2016, I did cause to be delivered via legal messenger service the
following document: **Respondent's Brief.**

3. This document was addressed as follows: James J. Jameson, 3409 McDougall Ave #210,
Everett, WA 98201.

DATED: July 14, 2016.


Tracy Swanlund