

APPEALS

No. 33780-1-II

FILED  
JUN 11 2015  
COURT OF APPEALS,

DIVISION II

OF THE STATE OF WASHINGTON

Cascade Auto Glass, Inc., *Appellant*,

v.

Progressive Casualty Insurance Company,  
Progressive Specialty Insurance Company,  
Progressive Auto Pro Insurance Company,  
Progressive Northern Insurance Company,  
Progressive Preferred Insurance Company,  
Progressive Northwestern Insurance Company,  
*Respondents.*

**REPLY BRIEF OF APPELLANT CASCADE AUTO GLASS, INC.**

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99-22-5 W.C.

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## INTRODUCTION

The trial court in this case erred by granting summary judgment where there was evidence presented creating disputed genuine issues of material fact to be resolved at trial. Nothing in Progressive's brief to this Court changes that point of view. Indeed, Progressive's recitation of facts ignores in their entirety the facts presented by Cascade in opposition to Progressive's motion.

Moreover, with respect to the breach of the parties' pricing agreement, the issue is not whether the agreement *may* be terminated but rather whether it *was* terminated or instead merely breached. Progressive seems to be of the mind that because the agreement was terminable at will, it was functionally not enforceable because any act of non-compliance could be construed as termination. Such a position, for which no support was cited, is completely without authority.

Cascade, as the assignee of Progressive's policyholders, need not establish that it will prevail at trial in order to have the decision of the trial court reversed. Rather, with the benefit of all reasonable inferences being drawn in its favor, Cascade need only show that it might prevail. The evidence here more than meets that standard.

## ARGUMENT

**1. The trial court erred in concluding that no evidence existed of breach of the pricing agreement.**

In granting summary judgment on Cascade's first claim for breach of the insurance contract, the superior court committed reversible error for at least two reasons: (1) evidence was presented that Progressive failed to abide by the contract during the time period over which there is no dispute that the agreement was in place; and (2) as a matter of law, Progressive's attempted termination of the agreement was ineffective. As a result, summary judgment on this count was improper.

While Progressive argues that it made payments to Cascade according to the terms of the April 1999 agreement, the record shows that in fact it breached that agreement more than 40 times. *See* Complaint Ex. A., CP 9-10 and Nelson Declar. ¶ 6, CP 73; Nelson Suppl. Declar. ¶5, CP 356. That fact in and of itself merits reversal of the trial court's decision on count one.

Beyond that factual issue, Progressive never comes to grips with the fact that the documents it now points to as terminating the agreement are ineffective to accomplish that termination as a matter of law. By Progressive's reasoning in its brief, a party to a written agreement, terminable at will, may simply cease to perform the agreement and that

alone is enough to terminate the agreement and not subject the non-performing party to remedies for breach. Such a position has no authority to support it.

The principal termination case cited by Progressive, *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wn.App. 1, 776 P.2d 721 (1989), has no application to the facts presented here. In *Birkenwald*, there was no written agreement and there was an unreasonable belief that the verbal understanding between the parties would last forever. The issue ultimately presented in that case was whether legislative changes in the law affecting distributors rights impacted the defendant's ability to terminate the agreement at will. The court concluded there that it did not.

Even more critically, the facts in that case show that what was occurring was Birkenwald was attempting to sell its distributorship to a third-party and assign its distribution arrangement. The defendant there first put Birkenwald on notice that it had to approve any such change and then later terminated the agreement in writing with 60 days notice. In the present case, the parties had a written contract, Progressive did not sign anything terminating the agreement, Progressive gave virtually no notice and unilaterally attempted to modify the payment terms.

The other termination case cited by Progressive is similarly distinguishable. In *Robbins v. Seattle Peerless Motor Company*, 148 Wn.

197, 268 P. 594 (1928), there was a services agreement whereby the plaintiff purchased a car from defendant and defendant agreed at first to purchase gas from plaintiff and later agreed to send cars for washing to plaintiff. When defendant stopped sending cars for washing, plaintiff stopped making payments on the car that was purchased and the vehicle was repossessed. The case did not turn on cancellation of the agreement but rather on plaintiff's inability to prove any damages; the court did not need to decide the contract duration issue because plaintiff had failed at trial to prove the elements of his damages.

The issue presented by this appeal is not whether the agreement could be terminated – Cascade acknowledged that it clearly could be terminated at will, just as Progressive argues. What is at issue is whether an unsigned letter that seeks to modify the price terms of the written agreement succeeds in terminating that agreement. Simply failing to perform on a contract, which is what Progressive did in this instance, is not enough to terminate the written agreement. Such conduct constitutes a breach of the agreement for which Progressive is liable for damages. To conclude otherwise is to indicate that contracts terminable at will are not contracts at all and can never be enforced.

Progressive also never addresses the fact that the correspondence it relies upon in claiming termination was not intended to terminate all

agreements given (a) every time the letter was sent subsequently, it contained the same language about superseding any prior agreement, a statement that was utterly unnecessary if in fact the agreements were terminated and (b) if the agreement provided more favorable pricing to Progressive than its proposed pricing, the agreement's pricing was to be followed and the letter ignored. In other words, the letters sent by Safelite, supposedly on Progressive's behalf, were only intended to unilaterally modify the pricing components of the agreement, not terminate the agreement completely. Without Cascade's consent such efforts were unenforceable and had absolutely no effect.

Progressive breached the April 1999 pricing agreement with Cascade by never properly terminating the agreement and by not paying in accordance with its terms. Progressive could have terminated the agreement at any time in writing, signed by an authorized representative of Progressive. Simply not performing under the terms of the agreement and instead performing utilizing something that attempted to unilaterally alter the terms of the agreement is insufficient. Accordingly, the trial court's decision granting Progressive summary judgment on count one should be reversed.

**2. The trial court erred in dismissing Cascade's claim for breach of the insurance policies.**

Progressive argues that the trial court properly dismissed

Cascade's second claim for two reasons: (1) Cascade never came forward with any evidence showing any breach of the insurance policies or any damages; and (2) an Idaho Supreme Court decision justifies an insurer paying any amount it so chooses so long as prior notice is provided. Both positions in this case are wrong.

First, Progressive decidedly misrepresents the state of the record in the trial court. To begin, evidence of Cascade's charges to Progressive and Progressive's payments to Cascade were set forth in the exhibit to the complaint and were verified by the declaration of Brad Nelson. Nelson Supp. Declar. ¶ 5, CP 356. How Cascade receives payment on behalf of Progressive was also set forth in that declaration. *Id.* ¶ 4, CP 356. That testimony in and of itself is enough to survive summary judgment on the question of damages.

Moreover, with respect to whether Cascade presented any evidence of breach, Cascade set forth in interrogatory responses how it is that its prices are reasonable in the market. Response to Interrogatory 18, CP 288. That is consistent with the deposition testimony of Brad Nelson, Cascade's vice president:

We will figure out the market by looking at the historic levels that we were reimbursed by a particular insurance carrier. We will also look at the historic and current levels of other insurance carriers, so what those reimbursement levels are. We will factor in agreements

that we've signed with various insurance carriers, as well as, ah, agreements that we've signed with, you know, the carrier that we're negotiating with at that time.

Deposition of Brad Nelson at p. 150, CP 251.<sup>1</sup> Moreover, in the present case, the parties' written agreement established that it was a "fair price" for the work being performed by Cascade. Whether it remained a fair price under the circumstances would necessarily be a fact question to be determined at trial. All of that evidence was sufficient to establish, at the very least, a question of fact as to whether Progressive had breached its insurance policies in the payment of Cascade's invoices.

Conspicuously missing from Progressive's brief is any mention of the Minnesota case where, as here, a glass company sued Progressive for breach of its insurance policy by failing to pay in full amounts that were billed by the glass company. There, the trial court concluded after a bench trial that Progressive did indeed breach the terms of the insurance policy even though, unlike here, Progressive had based its payments on a supposed market survey and even though the glass company's prices were higher than some of its competitors. *See Glass Service Co., Inc. v.*

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<sup>1</sup> Progressive repeatedly makes reference in its brief to Cascade's deposition. This misstates the nature of the deposition taken. Mr. Nelson's deposition was taken as an individual, not pursuant to Wa. Civ. R. 30(b)(6). As a result, Mr. Nelson's failure to be able to provide certain information at his deposition is not an admission by the company and should not be so interpreted.

*Progressive Specialty Ins. Co.*, 603 N.W. 849 (Minn. Ct. App. 2000), discussed at page 21 of Cascade’s opening brief. Cascade presented similar evidence in opposition to the motion for summary judgment as was presented at trial in the *Glass Service* case.

In the record below, evidence was presented to the superior court that, if believed, would merit a finding that Progressive breached its insurance policies in underpaying Cascade’s invoices. That conclusion requires the trial court’s grant of summary judgment be reversed.

Progressive predictably attempts to salvage the court’s decision by relying on the Idaho Supreme Court’s decision in *Cascade Auto Glass, Inc. v. Idaho Farm Bur. Ins. Co.*, 115 P.3d 751 (Id. 2005). As noted in Cascade’s opening brief, that case has nothing to do with the present dispute because of Idaho Farm Bureau’s unique policy language. That case turned entirely on the language “The cost of repair or replacement is based on the cost of repair agreed upon by us....” *Idaho Farm Bureau*, 115 P.3d at 752 (noting the policy language) and at 755 (“The policy is clear in stating that Farm Bureau will pay the amount agreed to by Farm Bureau.”). The Idaho Supreme Court concluded that, based on the quoted policy language, “We agree with the district court that the provisions of the insurance policy clearly provide that Farm Bureau can make a unilateral agreement about what amounts it will pay for windshield

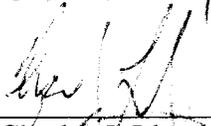
replacement or repair services.” 115 P.3d at 755. No similar policy language exists here. Therefore, *Idaho Farm Bureau* has absolutely no application here whatsoever.<sup>2</sup>

### CONCLUSION

Cascade submitted sufficient evidence to establish a *prima facie* case of breach of contract, both with respect to the specific price agreement entered into by the parties and with respect to Progressive’s insurance policies. Because the record establishes that there are genuine issues of material fact to be resolved at trial, the decision granting Progressive summary judgment was reversible error. Accordingly, Cascade respectfully requests that the decision of the superior court below be reversed and the matter remanded.

Dated: May 22, 2006

LIVGARD & RABUSE, P.L.L.P.

By 

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<sup>2</sup> In contrast, Cascade notes that this same issue concerning sufficiency of evidence in connection with a breach of the insurance policy claim was briefed and argued and is presently awaiting a decision of a panel of this Court in *Cascade Auto Glass, Inc. v. Farmers Ins. Group*, Court file 32609-4.

**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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Cascade Auto Glass, Inc.,

No. 33780-1-II

Plaintiff-Appellant,

v.

**CERTIFICATE OF  
SERVICE**

Progressive Casualty Insurance  
Company, Progressive Specialty  
Insurance Company, Progressive Auto  
Pro Insurance Company, Progressive  
Northern Insurance Company,  
Progressive Preferred Insurance  
Company, Progressive Northwestern  
Insurance Company,

Defendants-Respondents.

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I hereby certify that on the 22nd day of May, 2006, I served the foregoing Reply Brief of Appellant Cascade Auto Glass, Inc. on the following parties at the following addresses:

Douglas Foley  
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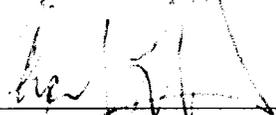
by mailing to each a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to said parties at the address set

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MAY 23 11:26 AM '06  
K. J. [Signature]

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Minnesota, on said day with postage prepaid.

LIVGARD & RABUSE, P.L.L.P.

By

  
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Dated: 22 May, 2006