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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON



DIVISION III

DANA BROWN

Appellant,

vs.

PROTECH AUTO, INC.,

Respondent.

No. 36349-0

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF THE CASE

Protech Auto, Inc. is a Washington corporation which formerly did business in downtown Kennewick. It was owned by James Pentecost, who had been engaged in the restoring and building of custom cars all of his adult life. *(CP 12)*

The nature and business of restoring and rebuilding antique automobiles is such that it is always impossible to determine with accuracy what the cost may be. All work that was done by Protech Auto, Inc. was always done on a time and material basis. *(CP 13)* Pentecost Auto, Inc. was contacted by Dana Fellman, aka Dana Brown, in late 2013. She claimed to own a 1931 Model A Ford that had belonged to her grandfather and she initially contacted Protech Auto, Inc. for the purpose of restoring the vehicle. *(CP 13)*

In February 2014, the vehicle, which had been in storage in West Richland, was totaling disassembled. The motor had been removed, and the vehicle was in a rusted state of disrepair. The gas tank, which is ahead of the dash in a stock Model A Ford, was rusted to such an extent that there were holes in the tank. *(CP 13)*

Dana Fellman Brown said she wanted to drive the vehicle on old Route 66 from Chicago or St. Louis to Los Angeles. She also said she

wanted to “add air conditioning.” After a discussion with James Pentecost, it was decided that the vehicle would be “modernized.” *(CP 13)*

All work on the vehicle was performed by James Pentecost or his staff. All work was itemized monthly and approved by Dana Fellman Brown. No work was done on her vehicle that was not approved by her. *(CP 13)*

The work that was done was itemized monthly, and approved by Dana Fellman Brown. The company did not do any work on her vehicle that was not approved by her. It was agreed that she would pay monthly in order for the work to continue. *(CP 13)*

It was agreed that she would have to pay monthly in order for work to continue. There would be periods of time, month after month, when she did not pay and no work was done on her car. When payments were made and the work was accepted and approved by her, work then continued. *(CP 13)*

In 2017, James Pentecost retired and sold the building. He advised Dana Fellman Brown that the vehicle would have to be completed by others. The simple fact was when she quit paying for the work, no further work was completed. *(CP 14)*

Suit was filed alleging breach of contract, but the terms of any “other contract” were never set forth, specified, or even alleged. *(CP 1, 2)*

The court issued a Civil Case Schedule Order which required that the plaintiff disclose lay and expert witnesses no later than March 26, 2018. *(CP 23, RP 6)* Although the plaintiff initially listed herself, James Pentecost and a former employee of Protech Auto. The former employee of Protech Auto was not available and there were no expert witnesses listed. The defendant listed both lay and expert witnesses. *(CP 24-30)*

In addition to the requirement under the Civil Case Schedule Order, the defendant submitted interrogatories concerning any expert witnesses. The interrogatories were submitted on May 23, 2018, and were to be answered within 30 days. The interrogatories were never answered.

Protech Auto, Inc. submitted a Motion for Summary Judgment. *(CP 4-7)*, and a Memorandum of Authorities in support of the Motion for Summary Judgment, together with an Affidavit of James Pentecost. *(CP 8-17)*

The plaintiff did not respond to the Motion for Summary Judgment. There was no affidavit, no memorandum, and no claim controverting the materials submitted by Protech Auto. *(RP 5)* The plaintiff's attorney advised the Court that his client did not return his telephone calls. *(RP 6)*

At the hearing on Protech's motion for summary judgment, the attorney for the plaintiff advised the court that he had no evidence to

refute the allegations of Defendant Protech Auto, Inc. and he needed “more time.” The court denied the request for additional time and indicated that the court rules and pleadings were appropriate for summary judgment.

The trial court indicated that CR 56(f) controlled when the Court could not grant continuances. The trial court concluded that the plaintiff simply did not meet that standard. (*RP 9*) In fact, the plaintiff did not meet any standard, and presented nothing.

II. ARGUMENT

The Motion for Summary Judgment was not controverted. The brief by the appellant in this case apparently alleges that there was an agreement as to a “lump sum for a restoration job.” (*Appellant’s Brief, p. 7*) It is the appellant’s brief that is the first allegation that there was an “lump sum” proposal. In fact, it would be virtually impossible for anyone in the business of restoring or rebuilding automobiles to guarantee the cost of a project and stay in business. The law concerning the repair business of ordinary vehicles does not apply to a vehicle such as the Model A Ford that was being rebuilt and customized by Protech Auto, Inc. RCW 46.71.025(4).

The plaintiff in this case is now alleging that she does not have to follow the civil rules, or even make an argument to the court.

In *Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 266

(215), the court stated:

In a summary judgment motion, the moving party bears the initial burden of showing the absence of a genuine issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the nonmoving party. If the nonmoving party fails to make a showing sufficient to establish the existence of a genuine issue of material fact, then the court should grant the motion. In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) requires that the response, ‘by affidavits or as otherwise provided in [CR 56] must set forth specific facts showing that there is a genuine issue for trial.’”

In this case, the appellant chose to file nothing. No affidavits were filed, and there was never any allegation that the work performed by the respondent was pursuant to a contract on an “lump sum” (which is now being made in the appellate brief). The records provided by the respondent bely the appellant’s claim. When the work was accepted and paid for, the work continued. When it was not accepted and paid for, the work stopped. It is not the role of the appellate court to create a new claim. The court rules and cases are clear that a party cannot “rely on the pleadings,” but must present factual evidence.

If the appellant had intended to raise an issue of material fact, the appellant had an obligation to come forward demonstrating that differing conclusions were possible. The appellate brief now claims there was a

“lump sum” agreement which was never pled, nor argued, nor presented to the trial court. In fact, the documents which were presented to the trial court demonstrate a pattern of late payment, and confirm the undisputed testimony of James Pentecost that the work was done on a time and material basis, and when not paid, work stopped.

When an affidavit is properly made, and uncontradicted, it can be taken as true for the purposes of passing upon a motion for summary judgment. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Henry v. St. Regis Paper Company*, 55 Wn.2d 148, 346 P.2d 692 (1959).

“A party may not rest on formal pleadings, but must affirmatively present the factual evidence upon which he relies.” *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973).

“A party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings. He must affirmatively present the factual evidence upon which he relies.” *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490 (1983).

The Civil Rules for Superior Court dealing with summary judgment provide in part as follows:

“When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (CR 56(e)).”

III. CONCLUSIONS

1. The appellant failed to comply with the requirements of the Civil Case Schedule Order.
2. The appellant failed to respond to interrogatories concerning any expert witnesses.
3. The appellant may not rely upon allegations in the Complaint. The allegations in the Complaint do not allege what is now asserted in the brief of the appellant.
4. There was no genuine issue of material fact submitted to the trial court.
5. The case was properly dismissed with prejudice.

DATED this 24 day of January, 2019.

LEAVY SCHULTZ DAVIS, P.S.

By



JOHN G. SCHULTZ, WSBA NO. 776
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I served a copy of this document as follows:

Ben Shafton	<input checked="" type="checkbox"/>	U.S. Mail
Caron, Colven, Robison & Shafton, P.S.	<input type="checkbox"/>	Fax
900 Vancouver Street, Suite 100	<input type="checkbox"/>	Email
Vancouver, WA 98660	<input type="checkbox"/>	Legal Messenger Service

DATED at Kennewick, Washington this 24th day of January, 2019.

Andrea Armstrong