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No. 74622-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON

SAFECO INSURANCE CO. OF AMERICA

Appellant,

v.

COBALT BOATS, LLC

Respondent.

Appeal from King County Superior Court
No. 14-2-30690-3 SEA

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BRIEF OF RESPONDENT
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I. INTRODUCTION

Respondent Cobalt Boats, LLC (“Cobalt”) provides a 10-year limited hull and deck warranty which includes the “floor, stringers, bulkheads, motor mounts, transom and deck/hull joints for a new Cobalt boat.” A customer’s remedy for breach of warranty is limited to repair.

Appellant Safeco Insurance Co. of America (“Safeco”) filed this subrogation action seeking to recover amounts it paid to its insured on a claim involving the September 4, 2012 sinking of a Cobalt boat. For the purposes of summary judgment, the parties did not dispute that the boat sank due to a loose “gimbal housing,” a separate component from the hull and deck relating to the sterndrive, which was bolted to the back of the boat. Safeco’s breach of warranty claim relies on an untenable interpretation of “transom” and “motor mounts” in the warranty which impermissibly expands those terms to include anything affixed to the transom and the process of mounting the motor to the boat.

The trial court wisely rejected Safeco’s expansive interpretation of the 10-year limited warranty and dismissed Safeco’s claims pursuant to Cobalt’s motion for summary judgment and motion for reconsideration. Additionally, the trial court held that laches barred Safeco’s claims because undisputed evidence showed that Safeco left the boat uncovered in a salvage yard and never requested repairs, thereby depriving Cobalt of the opportunity to provide the exclusive remedies set forth in the warranty.

For these reasons, the trial court's orders granting summary judgment against Safeco's claims should be affirmed.

II. STATEMENT OF THE CASE

A. Factual Background

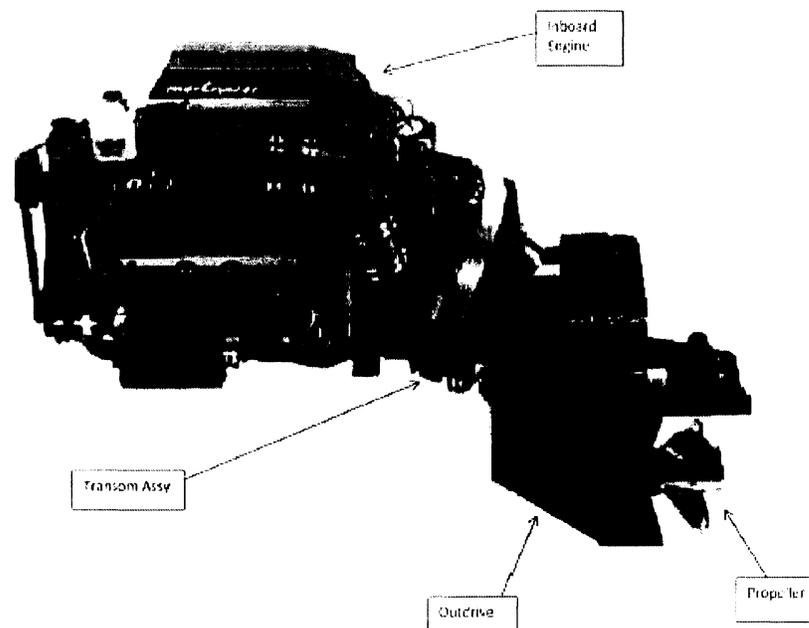
1. Safeco's insured purchases a 2007 Cobalt 232.

Cobalt is a leading manufacturer of recreational boats located in Neodesha, Kansas. CP 17, 41. On August 6, 2007, Safeco's insured, Albert Duenas, purchased a 2007 Cobalt 232, a 23-foot recreational boat, from Bridge City Watersports in Wilsonville, Oregon. CP 2, 66. Mr. Duenas accepted delivery of the boat the same day as the day of purchase. CP 66. Mr. Duenas's Cobalt 232 was outfitted with a MerCruiser 350 Mag MPI Bravo 3 sterndrive manufactured by a company called Mercury Marine. CP 42, 66. A "sterndrive," also known as an inboard/outboard drive (I/O), combines features found on both inboard and outboard engines. CP 42. The inboard engine sits just forward of the stern while the drive unit (outdrive) lies outside the hull. CP 42. Power travels from the inboard engine, through the stern to the outdrive, and downward to the propeller below the waterline. CP 42.

The "gimbal housing" is attached to the stern of the boat and lies between the inboard engine and outdrive. CP 42. As Safeco has pointed out, the parties and their experts have variously referred to the gimbal housing as the "transom housing," "transom shield" or transom assembly."

Appellant's Brief at 3. Cobalt did not manufacture the sterndrive, gimbal housing, or gimbal housing bolts on Mr. Duenas's boat. CP 42. These items were manufactured by Mercury Marine. CP 42.

A photograph of a sample of a MerCruiser sterndrive, which shows the inboard engine, outdrive, and gimbal housing/transom assembly, is set forth below:



CP 42, 64.

2. Cobalt provides a 10-year limited warranty covering the hull and deck.

The owner's manual for Mr. Duenas's Cobalt 232 included a "Certificate of Limited Warranty" which provided express 10-year and 2-year limited warranties. CP 41-42, 57-58. Cobalt provided a 10-year

limited warranty covering the hull and deck of Mr. Duenas's boat. The 10-year limited warranty provided as follows:

Ten (10) Year Limited Transferrable Warranty on Hull and Deck. Cobalt warrants that the hull and deck including floor, stringers, bulkheads, *motor mounts, transom* and deck/hull joints of a new Cobalt boat are free from structural defects in material and workmanship under normal, non-racing and non-commercial use for a period of (10) years from the date of delivery to the original retail purchaser.

CP 41-42, 57 (emphasis added).

The owner's manual defined several nautical terms relevant to this dispute:

DECK – The open surface on the boat where the passengers walk.

HULL – The body of the boat.

STERN – The back of the boat.

TRANSOM – The transverse beam across the stern.

CP 42, 59-60.

In addition to the 10-year warranty, Cobalt provided a 2-year limited warranty covering other items, including “components not separately warranted by the manufacturer” and “all components manufactured by Cobalt other than the hull and deck.” The 2-year limited warranty provided as follows:

Two (2) Year Limited Transferrable Warranty on Gelcoat Finish, Upholstery, Components Not Separately Warranted by the Manufacturer and

All Components Manufactured by Cobalt Other Than the Hull and Deck. Cobalt warrants that the gelcoat finish, upholstery, components not separately warranted by the manufacturers thereof and all components manufactured by Cobalt with respect to a new Cobalt boat are free from structural defects in material and workmanship under normal, non-racing and non-commercial use for a period of two (2) years from the date of delivery of such Cobalt boat to the original retail purchaser.

CP 41-42, 57.

Finally, the Certificate of Limited Warranty limited an owner's remedies for breach of warranty to repairs. The limitation-of-remedies clause states in relevant part:

COBALT'S ONLY RESPONSIBILITY, AND THE OWNER'S ONLY REMEDY, IS REPAIR AS DESCRIBED IN THIS WARRANTY. COBALT SHALL NOT BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT OR SPECIAL DAMAGES.

CP 41-42, 58 (emphasis in original).

3. Mr. Duenas's boat sinks on September 4, 2012.

On September 4, 2012, more than five years after purchase, Mr. Duenas's Cobalt 232 sank while moored at Carillon Point in Kirkland, Washington. CP 2. No one was injured in the sinking. CP 107, 114. Pullen Tows and Marine Salvage raised the boat and towed it to Northlake Marina in Kenmore, Washington. CP 2, 164, 169.

Safeco's marine surveyor, Edward McCrea, inspected the boat at North Lake Marina. CP 164, 169. In his report, Mr. McCrea concluded

that the “vessel sank due to the improper tightening of the sterndrive gimbal housing bolts.” CP 170. He noted that he was “able to push feeler gauges between the gimbal housing and the transom on the outside of the hull[.]” CP 170. He further noted that he was “not able to register 10 pounds of force on the gimbal housing bolts with a torque wrench” even though “Mercruisers [sic] suggested torque for those bolts is 25 pounds.” CP 170. Mr. McCrea opined that the bolts were loose “from the time of manufacture” and concluded that the primary cause of the loss was “manufacturing error.”¹ CP 170.

Mr. Duenas submitted a claim to Safeco under his watercraft policy, and Safeco paid a total of \$67,032.54 to Mr. Duenas subject to a \$500 deductible. CP 4.

4. Safeco stores the boat uncovered at an unsecured salvage yard.

After the sinking, Mr. Duenas’s boat was taken to Copart, a salvage yard, located in Arlington, Washington. CP 107-108, 114, 147-48. On September 24, 2012, Copart issued a “Confirmation of Seller Hold” to Safeco warning that the vessel would be stored outdoors in an unsecured location. CP 108, 150. Specifically, the Confirmation of Seller

¹ Mr. McCrea’s finding that the sinking was caused by a “manufacturing error” was based, in part, on Mr. Duenas’s representations that “no work has been performed that would have caused the bolts to become loose.” CP 170. To the contrary, however, the repair records reflect that maintenance was routinely performed on the sterndrive and inboard engine. CP 117-128. Moreover, one of the parts listed on an October 20, 2011 maintenance record is described as “MOUNTING KIT * BRAVO.” CP 125.

Hold stated as follows:

The sole intent of the Seller Hold Program is to prevent the sale of certain vehicles. Copart is not an evidence holding facility. **The subject vehicle is currently stored outdoors. . . . Vehicles are moved with forklifts and there is always a possibility that damage could inadvertently occur when moving the vehicle. If this is a concern, or the vehicle is being stored in a state recognizing the tort of spoliation of evidence, Copart strongly urges you to make immediate arrangements to move the vehicle to a secure location. . . .**

CP 108, 150 (emphasis added).²

Cobalt's insurer, Chubb Group of Insurance Companies, retained Arnold & Arnold, Inc. to investigate the cause of the sinking. CP 92. On January 9, 2013, Capt. Robert Spencer of Arnold & Arnold examined the boat at Copart. CP 92. Capt. Spencer discovered that the boat was uncovered and exposed to the elements. CP 92. It was raining heavily at the time of the inspection. CP 92. Capt. Spencer noted that overall the vessel was water soaked, with the cushions being totally saturated. CP 92.

Capt. Spencer agreed that the vessel likely sank due to the transom shield being loose, resulting in the deterioration of the transom shield gasket and allowing water ingress. CP 93. He could not, however, determine whether the vessel sank due to a manufacturing defect or other cause, because the vessel had been through too many maintenance cycles to verify the cause of the sinking. CP 93. Capt. Spencer observed wrench

marks on the transom shield and outdrive securing nuts and bolts, but he could not determine who tightened or loosened these nuts or when these events occurred. CP 93.

Capt. Spencer further opined that there should have been indications forecasting this incident prior to the sinking, both audible and due to steady water ingress, if the sinking was caused by a manufacturing defect. CP 93. If the loose transom shield was a long-term defect which gradually caused the deterioration of the seal, it also should have been noticed during routine inspections and when hauling the vessel out of the water. CP 93.

Finally, Capt. Spencer clarified that the “transom” is the “athwartship structure at the stern of the vessel to which the gimbal housing, the trim tabs, and other auxiliaries are attached.” CP 93. “The ‘transom shield’ is a local term for the transom housing aka transom shield aka sterndrive gimbal housing.” CP 93. “The transom shield is attached to the transom, and is an entirely separate component from the transom of a vessel.” CP 93. Capt. Spencer found no evidence leading him to believe that “the sinking was caused by a defect in the transom, stern, deck, or hull of the vessel.” CP 93.

² Safeco identified Copart as the current custodian of the boat when it responded to Cobalt’s discovery requests on March 31, 2015. CP 107, 114.

B. Procedural Background

1. Safeco files complaint against Cobalt.

On November 12, 2014, Safeco filed its complaint against Cobalt, asserting a single claim for breach of express warranty under the Washington Products Liability Act, Chapter RCW 7.72. CP 1-4. Although the exclusive remedy for breach of warranty is repairs, Safeco did not seek repairs from Cobalt. CP 57-58. Safeco sought only damages. CP 4. Indeed, Safeco has never requested repairs from Cobalt for this claim. CP 66-67.

Safeco's complaint singularly focused on the portion of the 10-year warranty covering the "transom" of the boat. Safeco alleged that "[t]he reason the Duenas's 2007 Cobalt 232 pleasure boat sank was because the sterndrive gimbal housing bolts were not properly tightened at the time of manufacture." CP 2. It further asserted that "Mr. Duenas received a ten year warranty covering and extending to the *transom* of the pleasure boat." CP 2 (emphasis added). Safeco sought an award of damages in the sum of \$67,032.54 plus pre-judgment interest. CP 4.

2. Cobalt files motion for summary judgment.

On August 28, 2015, Cobalt filed a motion for summary judgment. CP 15-39. Cobalt argued *inter alia* that the sinking of Mr. Duenas's Cobalt 232 fell outside the scope of Cobalt's 10-Year Limited Warranty for the hull and deck. CP 29-32. Specifically, Cobalt argued that Safeco

lacked evidence that a defect in the transom of the boat caused the sinking. “Although the gimbal housing was attached to the boat’s transom, the sinking of the boat had nothing to do with a structural defect or workmanship issue with the transom itself.” CP 30. Alternatively, Cobalt argued that Safeco’s sole remedy for breach of warranty was repair, and laches barred Safeco from obtaining repairs nearly three years after the sinking. CP 32-33.

3. Safeco testifies that the transom of the vessel is “pristine.”

After filing its motion for summary judgment, Cobalt took the deposition of Safeco’s Rule 30(b)(6) corporate representative on September 9, 2015. CP 212-213, 229. Safeco designated its surveyor, Edward McCrea, as its corporate representative to testify about the following topics: (1) Safeco’s investigation into the cause of the sinking of the Boat; (2) Safeco’s knowledge concerning the transom of the Boat and similar types of pleasure boats; (3) Safeco’s knowledge concerning the sterndrive housing and transom assembly of the Boat and similar types of pleasure boats; and (4) Safeco’s knowledge concerning the sterndrive housing and transom assembly of the Boat and similar types of pleasure boats. CP 212-13, 219-20, 222-26, 234.

During the deposition, Safeco’s corporate representative testified as follows about Safeco’s understanding of the terms transom, gimbal housing, and transom shield:

Q. You used the term transom, and I don't think you've defined that term. What do you mean by transom?

A. The transom is the aft end of the boat. It's a piece of the boat that runs from the port hull side to the starboard hull side and from the hull bottom to the rails of the boat.

CP 237.

Q. What is the gimbal housing?

A. It's part of -- actually, you know what, gimbal housing should be transom housing - - or transom ring, actually, so it isn't totally accurate, but **the gimbal housing is part of the sterndrive/outdrive.** It's comprised of the transom shield, the gimbal housing, and the drive unit itself, and the gimbal housing has to do with the -- it allows you to steer the boat or turn the drive so you can steer the boat.

Q. **So, I guess, what was not properly tightened? Was the gimbal housing or the transom housing?**

A. **It was the transom shield actually.** The bolts were not tightened properly.

Q. Now you're using a different term. **What is a transom shield?**

A. **It's the part that bolts up against the transom of the boat.**

CP 235-236 (emphasis added). Safeco also testified that "Mercrusier" manufactured the transom shield, engine, and drive unit on the Duenas' boat. CP 239.

As to the transom (opposed to the gimbal housing or transom shield), Safeco testified that the transom of the boat was “pristine” and did not contain any defects. Specifically, Safeco testified as follows:

Q. And how are you able to rule out transom compression as a possible cause for loosening the bolts.

A. It didn't exhibit any of those symptoms, any of those things that I just mentioned: **There was no cracking, the transom had no -- was not deformed at all. It looked pristine.**

Q. Would you agree with the statement that the boat was structurally sound?

A. Yes. To my -- within limits of course, but yes.

Q. **Did you notice any defects with the transom itself?**

A. **No, I don't recall that we did see any defects with the transom itself.**

CP 240-241 (emphasis added).

During its deposition, Safeco also testified about the engine mounts for the boat:

Q. Do you see under the first bullet point it says, “Check the **engine mount** for tightness and retorque if necessary.”

A. Yes.

Q. What does that mean to you?

A. That means that they should check the **engine mounts** and make sure they're

tightened to their proper specification.

Q. Would that include the nuts and bolts that you're referring to?

A. No, it wouldn't. These -- different -- totally different operation.

Q. What bolts do you think -- can you explain the difference?

A. Okay. I was looking to see if we had a picture. **The engine mount bolts are similar to your engine mount bolts that are in a car that attach your car engine to your car frame. Toward the front -- the front end of the engine on both sides of the engine are steel pieces that protrude out and those pieces are the engine mounts and they are bolted to a part of the bolt [sic] that's called the stringer, and that's what holds the engine in place and keeps it from moving around.**

CP 281, 289-90 (emphasis added).

4. The trial court grants Cobalt's motion for summary judgment.

Although Safeco's complaint relied on the term "transom" in the 10-year hull and deck warranty to support Safeco's breach of warranty claim, Safeco's counsel switched theories and started focusing on the term "motor mounts" after Safeco's 30(b)(6) witness admitted that the transom was "pristine" and free from defects. During oral argument, the following exchange occurred:

THE COURT: I see your expert opining on the screws not being tightened enough when he looked the vessel, right?

MR. PIERSON: Right.

THE COURT: But I don't see anything about the actual transom itself being bowed in any way.

MR. PIERSON: No. He specifically stated that he could not find that.

THE COURT: Okay. So that wasn't the case.

MR. PIERSON: Okay. So the only thing that you're relying on is the workmanship of tightening those bolts and saying that -- by definition is a motor mount because you're mounting the motor onto the transom.

MR. PIERSON: Correct.

...

THE COURT: Uh-huh. Okay. I understand your argument.

RP 26:1-13 to 27:7.

On October 2, 2015, the trial court granted Cobalt's Motion for Summary Judgment. CP 250-252. The trial court held that the limitation-of-remedies provision was enforceable and that laches barred Safeco's breach of warranty claim:

[T]he limitation of remedies provision in the express warranty is enforceable. . . . Therefore, Safeco's claim is limited to payment for repairs to the boat. There is no genuine issue of material fact that 1) Safeco never sought to repair the boat after it sank nor 2) that the boat has been stored outdoors exposed to the elements and subject to spoliation for three years. This is inexcusable as the boat was inspected by Safeco's surveyor five days after its sinking. On September 13, 2012, the surveyor

indicated in his report that a repair appraisal was being done. However, no repair estimate is in the court record. Thus, the delay on Safeco's part in estimating and/or seeking repairs is inexcusable and it prejudices defendants [sic] ability to establish what repairs could or could not have been accomplished three years ago. Therefore, laches bars Safeco from seeking repairs three years after the sinking.

CP 251-52.

As to the scope of the warranty, the trial court found that “[t]here is a genuine issue of fact as to whether plaintiff’s claims fall within the 10 year limited warranty; i.e. whether the transom housing/ sterndrive gimbal housing is part of the motor mount, whether defendant is responsible for the loose nature of the bolting of the transom housing/sterndrive gimbal housing bolts and whether these conditions constitute structural defects as defined by the warranty.” CP 251.

5. The trial court grants Cobalt’s motion for reconsideration.

After the trial court issued its order granting Cobalt’s motion for summary judgment, both parties moved for reconsideration. CP 255-260, 273-280. Cobalt pointed the trial court to the prior testimony of Safeco’s 30(b)(6) witness where Safeco admitted that the “engine mount” is the part of the boat where the engine is bolted to the boat to keep the engine in place—it does not refer to the *process* of mounting the motor to the boat as Safeco’s counsel claimed. CP 276-77.

Safeco's counsel moved for reconsideration seeking to supplement the record with a repair estimate. CP 261-70.

On November 10, 2015, the trial court issued orders denying Safeco's motion for reconsideration and requesting a response from Safeco to Cobalt's motion for reconsideration. CP 298-99.

On December 4, 2015, the trial court granted Cobalt's motion for reconsideration and entered summary judgment against Safeco's claims. CP 232-24. First, the trial court ruled that the "decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion." CP 323. "In the context of a summary judgment, unlike in trial, there is no prejudice if the court considers additional facts on reconsideration." CP 223. Second, as to the merits, the trial court found that "there is no issue of material fact and plaintiff's claims are not covered by defendant's 10 year warranty." CP 324.

Safeco filed a notice of appeal on December 7, 2015. CP 314-15.

III. LEGAL ARGUMENT

A. Standard of Review.

An appellate court reviews a grant of summary judgment *de novo*. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981, 986 (2008). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law.” *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259, 261 (2000). “[T]he moving party bears the initial burden of showing the absence of an issue of material fact.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989).

“If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff.” *Id.* Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment. *See Grimwood v. Univ. of Puget Sound*, 110 Wash.2d 355, 360, 753 P.2d 517 (1988); *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wash.2d 1, 13, 721 P.2d 1 (1986). If the plaintiff ““fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should grant the motion.” *Young*, 112 Wn.2d at 225 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

B. The Trial Court Properly Held that the Loss Was Not Covered by Cobalt’s 10-Year Limited Warranty.

The primary issue in this appeal is whether a sinking caused by loose gimbal housing bolts falls within the scope of Cobalt’s express 10-year hull and deck warranty. For the purposes of summary judgment, the parties did not dispute that Mr. Duenas’s boat sank due to a loose gimbal housing. As noted above, the gimbal housing is not part of the hull or

deck of the boat. It is part of the sterndrive or inboard/outboard drive (I/O), a separate component, manufactured by Mercury Marine.

“Words in a contract should be given their ordinary meaning.” *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 944, 974 P.2d 1261, 1266 (1999). “A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning.” *Mayer v. Pierce Cty. Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323, 1326 (1995). “A provision, however, is not ambiguous merely because the parties suggest opposing meanings.” *Id.* “An ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971, 974 (1983). “The construction of a contract relies heavily on the parties’ intent, which is determined by examining the entire agreement, its subject matter and objectives, the facts surrounding its creation, the subsequent acts of the parties, and the reasonableness of the parties’ interpretations.” *Sackman Orchards v. Mountain View Orchards*, 56 Wn. App. 705, 706, 784 P.2d 1308, 1309 (1990).

In seeking the reversal of the trial court’s orders, Safeco relies on two tortured interpretations of the terms “transom” and “motor mounts.” First, Safeco “contends in this lawsuit the term ‘transom,’ as used in Cobalt’s 10 year warranty, includes anything intended by Cobalt to be

permanently bolted to the transom, like the transom housing.” Appellant’s Brief at 15. Second, Safeco contends that the “transom housing is part of the motor mount for the boat’s engine whereby the engine is mounted to the transom.” *Id.* at 10. Both of these interpretations of the terms defy the plain meaning of the terms “transom” and “motor mount” and unreasonably extend the protections of the 10-year warranty beyond its intended scope.

1. “Transom” is narrowly defined to mean the transverse beam across the stern.

The term “transom” is expressly defined in the owner’s manual as “[t]he transverse beam across the stern.” CP 60. This definition is consistent with the definition used in dictionaries and maritime treatises. *See, e.g.,* THE AMERICAN HERITAGE DICTIONARY (2nd College Ed., Houghton Mifflin Co. 1982) (defining transom as a “transverse beam affixed to the sternpost of a wooden ship and forming part of the stern”); Richard J. Nikas, *Where the Street Meets the Sea: A Nautical Glossary for Maritime Lawyers*, 9 U.S.F. Mar. L.J. 245, 275 (1996) (defining transom as “[t]he transverse part of the stern”). Safeco presented no evidence that a defect with the transom—the transverse beam across the stern—caused or contributed to the sinking of Mr. Duenas’s boat.

Safeco seeks to define the term transom more broadly as “part of the hull at the rear end (stern) of the boat.” Appellant’s Brief at 9. This definition, however, contradicts the express definition of “transom” in the

owner's manual. It also renders the term "stern," which is separately defined in the owner's manual as the "back of the boat," to be meaningless. Such a definition violates the basic tenets of contract interpretation. *Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn. App. 269, 274, 711 P.2d 361, 364 (1985) ("An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective."). Accordingly, Safeco failed to present any evidence that a defect in the "transom" caused the sinking.

2. Cobalt's 10-year warranty does not include anything "permanently bolted to the transom."

Even if the Court of Appeals accepts Safeco's broader definition of transom, which makes the term indistinguishable from stern, Safeco's breach of warranty claim fails, because Safeco admitted that the transom (as defined by Safeco) was not defective. When asked about the transom, Safeco's Rule 30(b)(6) corporate representative testified that the transom "was not deformed at all" and that it "looked pristine." CP 240. Safeco further testified that it did not recall seeing "any defects with the transom itself." CP 241. In other words, Safeco admitted that there was nothing wrong with the transom of the boat.

Accordingly, Safeco's counsel asks the Court of Appeals to stretch the term "transom" even further to include "anything intended by Cobalt

to be permanently bolted to the transom, like the transom housing.”³ Appellant’s Brief at 15. This interpretation bears no relation to the ordinary meaning of the term transom and ignores the intent and context in which the 10-year limited warranty was made.

The full title of the 10-year limited warranty is “**Ten (10) Year Limited Transferrable Warranty on Hull and Deck.**” CP 41-42, 57 (emphasis in original). The 10-year limited warranty goes on to state as follows: “Cobalt warrants that the hull and deck including floor, stringers, bulkheads, motor mounts, transom and deck/hull joints of a new Cobalt boat are free from structural defects in material and workmanship under normal, non-racing and non-commercial use for a period of (10) years from the date of delivery to the original retail purchaser.” CP 41-42, 57.

The text of the 10-year limited warranty makes clear that it is a *hull and deck* warranty. The words “floor, stringers, bulkhead, motor mounts, transom and deck/hull joints” all modify the terms “hull and deck.” Cobalt intended the 10-year limited warranty to cover defects relating to the structural integrity of the fiberglass hull and deck which Cobalt fabricates. CP 42. Cobalt did not intend the 10-year limited

³ Safeco presented no evidence that Cobalt intended the gimbal housing to be *permanently* bolted to the transom. To the contrary, the maintenance guidelines for the Mercruiser sterndrive installed in Mr. Duenas’s boat recommended retorquing the “connection to the gimbal ring to the steering shaft” every 100 hours or annually (whichever occurs first). CP 66, 89. As a practical matter, if the gimbal housing was permanently affixed to the stern of the boat, an owner could never remove or replace the sterndrive for the life of the boat.

warranty to extent to all components attached to the hull and deck, such as the sterndrive, gimbal housing, propellers, deck lights, water ski racks, showers, and other accessories. CP 42.

Under Safeco's interpretation, all of these components and accessories, including the ones that were not manufactured by Cobalt, would fall within the scope of the 10-year limited warranty simply by virtue of being attached to the hull or deck of the boat.⁴ All components of a boat are somehow connected to the hull and deck. Safeco's interpretation would essentially transform the 10-year hull and deck warranty into a 10-year express warranty covering the *entire* boat.

Moreover, Safeco's interpretation of the 10-year limited warranty would render the 2-year limited warranty, which covers "components not separately warranted by the manufacturer" and "components manufactured by Cobalt other than the hull and deck," completely meaningless. No owner would need to invoke the 2-year warranty because, under Safeco's interpretation, anything that is affixed to the hull

⁴ Safeco tries to distinguish the gimbal housing from other components and accessories by arguing as follows: "[W]hat critically separates the transom housing from the rest of these other items identified by Cobalt is that the transom housing must be properly bolted to the transom in order to insure the structural integrity of the transom, *i.e.* so the transom doesn't leak. . . . The sterndrive, propellers, deck lights, water ski racks, diving boards or showers do not directly impact the ability of the transom to remain water tight" Appellant's Brief at 17-18. Safeco's arbitrary distinction between the gimbal housing and other components has no support in the text of the 10-year limited warranty. Moreover, it is conceivable that other components somehow attached to the hull and deck, such as an anchor or toilet, could affect the ability of a boat to remain

or deck of the boat falls within the 10-year warranty.⁵

3. Cobalt's 10-year limited warranty does not cover the process of mounting the motor to the boat.

Alternatively, Safeco argues that the loss falls within the 10-year limited warranty because the “transom is part of the motor mount for the boat’s engine whereby the engine is mounted to the transom.” Appellant’s Brief at 10. Again, Safeco’s complaint makes no mention of a defect in the “motor mount.” Safeco shifted theories and began emphasizing the terms “motor mount” in the 10-year limited warranty after Safeco’s Rule 30(b)(6) corporate representative admitted that the transom was “pristine” and free from defects.

Safeco’s interpretation of motor mount is unreasonable. The term “motor mounts” falls within Cobalt’s 10-year *hull and deck* warranty. The term modifies the words “hull and deck.” The sterndrive or motor, which is manufactured by Mercury Marine, is not part of the hull and deck, and the process of installing the sterndrive to the boat has nothing to do with the structural integrity or workmanship of the hull and deck.

watertight. This distinction is unworkable and creates ambiguity in the warranty where none exists.

⁵ Safeco might have been able to establish that the loss was fell within Cobalt’s 2-year limited warranty if it could show that the loss was caused by a “component[] not separately warranted by the manufacturer.” The sinking, however, occurred on September 4, 2012, more than five years after delivery, and therefore a breach of warranty claim under the 2-year warranty would have been untimely.

The plain language of the 10-year limited warranty also shows that the term “motor mounts” refers to an object, not a process. The terms “floor, stringers, bulkhead, motor mounts, transom, and deck/hull joints” in the 10-year warranty are all nouns—the inclusion of these terms in the 10-year warranty makes clear that Cobalt considers these components to be part of the hull and deck of the boat. In this context, construing the term “motor mounts” to refer to the *process* of installing the sterndrive to the hull of the boat (rather than as a noun) does not make any sense. There is no reasonable explanation why Cobalt would refer to a series of objects (floor, stringers, etc.), with the sole exception of motor mounts, which refers to a process, even though the term motor mounts is located right in the middle of the clause referring to objects. This twisted logic defines the ordinary meaning of the terms.

Moreover, Cobalt’s engineer manager stated that Cobalt “fabricates the floor, stringers, bulkheads, motor mounts, transom, and deck/hull joints of its boats.” This demonstrates that the motor mounts are objects that Cobalt manufactures—they do not refer to the process of installing the sterndrive on the boat. CP 42. Likewise, Safeco’s Rule 30(b)(6) corporate representative testified that the “engine mounts” are distinguishable from the process of bolting the gimbal housing to the hull of the boat. CP 290. Safeco testified that the engine mounts of a boat are similar to the part where a “car engine” is attached to a “car frame.” CP

290. It further stated that the engine mounts are the pieces that are “bolted to the part of the [boat] that’s called the stringer, and that’s what holds the engine in place and keeps it from moving around.” CP 290.

If Cobalt had intended to warrant the process of installing the sterndrive to the boat, it could have simply said so. There is no reasonable explanation why Cobalt would have hidden this protection in a 10-year hull and deck warranty and then cryptically referred to the process of installing the sterndrive to the hull as a “motor mount.”

Finally, Safeco failed to present any *evidence* that the term “motor mounts” refers to the process of installing the sterndrive to the hull. Safeco cites the Declaration of Edward McCrea for the proposition that the “transom housing is part of the motor mount for the boat’s engine whereby the engine is mounted to the transom.” Appellant’s Brief at 4, 10. The declaration, however, simply states that “[t]he transom shield is on the fore (inside) of the transom and is part of how the motor for the boat is mounted to the transom.” CP 166. Taking this statement to support the proposition that the term “motor mounts” in the 10-year limited warranty refers to the process of installing the sterndrive to the hull is a bridge to far.

Safeco’s claim that the term “motor mounts” refers to a process is not supported by evidence—it is simply an argument or conclusion. In its motion for summary judgment, Cobalt demonstrated that there the absence

of an issue of material fact—namely the absence of proof that the sinking fell within the scope of Cobalt’s 10-year limited warranty. Consequently, the burden fell on Safeco to demonstrate—by affidavit or otherwise—the existence of a genuine issue of material fact to avoid summary judgment. Safeco failed to meet this evidentiary burden.

C. The Trial Court Properly Held that Laches Barred Safeco’s Breach of Warranty Claim.

Safeco’s breach of warranty claim also fails under the doctrine of laches. Safeco does not dispute that the Certificate of Limited Warranty in the owner’s manual expressly limited a customer’s remedy for breach of warranty to repairs. CP 58. Specifically, the Certificate of Limited Liability states, in capitalized, bold-face font as follows: **“COBALT’S ONLY RESPONSIBILITY, AND THE OWNER’S ONLY REMEDY, IS REPAIR AS DESCRIBED IN THIS WARRANTY. COBALT SHALL NOT BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT OR SPECIAL DAMAGES.”** CP 41-42, 58 (emphasis in original).

Article 2 of the UCC permits a manufacturer to limit a buyer’s remedies for breach of warranty. The statute provides that an “agreement may . . . limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or *to repair and replacement of non-conforming goods or parts . . .*” RCW 62A.2–719(1)(a) (emphasis added).

In *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380, 386 (1971), Washington’s Supreme Court held that disclaimers of implied warranties in consumer transactions “are ineffectual unless explicitly negotiated between buyer and seller and set forth with particularity” See also *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 438, 47 P.3d 940, 945 (2002) (“According to the decision in *Berg*, warranty disclaimers in a contract must be both (1) explicitly negotiated and (2) set forth with particularity.”). “[T]he *Berg* rule has been extended to cases involving exclusionary clauses under RCW 62A.2–719(3).” *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 223, 797 P.2d 477, 481 (1990).⁶

Safeco does not dispute that the limitation-of-remedies provision in the Certificate of Limited Warranty was set forth with particularity. The limitation-of-remedies provision is prominently set forth in the Certificate of Limited Warranty and the key language is set forth in capitalized, bold-face font. Instead, Safeco claims that the limitations-of-remedies provision fails to satisfy *Berg*’s “bargained for” requirement.

⁶ At the trial court, Safeco failed to cite authority supporting the proposition that the *Berg* rule applies to limitation-of-remedy or exclusionary clauses. CP 155-57. In granting summary judgment, the trial court found that “[c]ase law cited by Safeco to the contrary refers to warranty disclaimers, not to a limitation of remedies as is found in the warranty in question and as is provided for in the UCC.” CP 251. After reviewing the additional authorities cited by Safeco in this appeal, Cobalt agrees that the *Berg* rule has been extended to exclusionary clauses.

The record, however, establishes that Mr. Duenas did in fact receive the Certificate of Limited Warranty and that the salesperson discussed the warranty with him. Specifically, Mr. Duenas testified as follows:

Q. Did you receive any warranties in connection with your purchase?

A. The Cobalt?

Q. Yes.

A. I just received the -- the owner's manual the warranty.

Q. Okay.

A. The certificate of warranty.

(Exhibit 2 marked)

Q. Mr. Duenas, do you recognize the document I just gave you?

A. Yes.

Q. What is it?

A. It's a certificate of limited warranty from Cobalt.

Q. Is that the same document that you received when you purchased the boat?

A. Yes.

...

Q. Did the salesman go over the warranties with you?

A. Yeah. He said it's a bumper to bumper warranty, and that, you know, it's a ten-year

warranty on this machine. I said, okay, great.

CP 188.

Safeco cites *Olmsted v. Mulder*, 72 Wn. App. 169, 863 P.2d 1355 (1993), for the proposition that “to satisfy the ‘bargained for’ requirement, there must be some evidence, at a minimum, of a discussion of the disclaimer between the buyer and seller.” Appellant’s Brief 20. Safeco’s understanding of the bargained for requirement, however, is far too restrictive.

As *Olmsted* observed, “[t]here is not a wealth of authority on the ‘bargained for’ requirement.” *Olmsted*, 72 Wn. App. at 176. “Normally, this requirement is applied to avoid giving effect to a seller’s disclaimer of express or implied warranties where that disclaimer is in a contract prepared by the seller and contained in fine print or boilerplate.” *Id.* (citing *Lyll v. DeYoung*, 42 Wash.App. 252, 257, 711 P.2d 356 (1985)). “The seller has the burden of demonstrating that such a disclaimer was known to the buyer and bargained for before it will be considered valid and given effect.” *Id.* at 176-77.

In *Olmsted*, the Court of Appeals found that the “bargained for” requirement was satisfied because a disclaimer of warranty was discussed by the parties. *Olmsted*, 72 Wn. App. at 177 (“The ‘as is’ clause in this case was certainly known to the Olmsteds. Fred Olmsted testified that he discussed the provision with agent Donna Mae Schultz. This was

sufficient to satisfy the ‘bargained for’ requirement.”). The Court of Appeals, however, did not hold that discussion of the disclaimer was the *sole* method for satisfying the bargained for requirement. Other courts have recognized that this is merely an example of how the requirement can be satisfied. *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 396, 238 P.3d 505, 514 (2010) (“The ‘bargained for’ requirement is designed, in part, to prevent sellers from hiding disclaimers in the fine print or boiler plate of a contract—for example, discussing the provision may be sufficient to show that the parties ‘bargained for’ the disclaimer.”). The bargained for requirement does not require “that one must bargain for each and every written term of a contract.” *Lyall*, 42 Wn. App. at 257.

Here, the record shows that Mr. Duenas acknowledged receiving the Certificate of Limited Warranty which included the limitation-of-remedies provision. He also testified that the salesperson discussed the warranty with him at the time of purchase. The limitation-of-remedies provision was conspicuously located in the Certificate of Limited Warranty—not a separate document. Moreover, the limitation-of-remedies provision is set forth in capitalized, bold-face font. The operative language was not hidden away in boilerplate language. Neither Mr. Duenas nor Safeco can reasonably maintain that the limitation-of-remedies clause was not known to Mr. Duenas at the time of contracting. *See, e.g.*, 33 WASH. PRAC., WASH. CONSTRUCTION LAW

MANUAL § 9:29 (2015-2016 ed.) (noting that disclaimer of warranty set forth in 12-point font and in all capital letters “distinguishes the term from the other terms so that a court should not find that it was hidden in the boilerplate of the agreement.”). Therefore, the “bargained for” requirement was satisfied as to Cobalt’s limitation-of-remedies provision.⁷

Safeco does not dispute that Mr. Duenas and Safeco failed to request that Cobalt repair the boat. Moreover, Safeco does not dispute that the boat has remained in a salvage yard, uncovered, and exposed to the elements. The undisputed evidence shows that Safeco neither stored the boat in a secure location nor maintained it in a repairable condition. Accordingly, the trial court did not err in finding that laches barred Safeco’s breach of warranty claim. CP 251-52; *Clark Cnty. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn. 2d 840, 848, 991 P.2d 1161 (2000) (“Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay.”).

D. The Trial Court Did Not Err in Granting Cobalt’s Motion for Reconsideration.

Safeco also asserts that the trial court erred in granting Cobalt’s motion for reconsideration.⁸ A trial court has the discretion whether to

⁷ See *State v. Avery*, 103 Wn.App. 527, 537, 13 P.3d 226 (2000) (appellate court can affirm the trial court’s decision on any grounds).

⁸ Of course, Safeco’s objection to Cobalt’s submission of additional materials with its motion for reconsideration is ironic given that Safeco also presented additional materials with its motion for reconsideration. CP 255-260.

consider additional materials submitted with a motion for reconsideration as to a prior ruling on a motion for summary judgment. “The decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court’s discretion.” *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013) (citing *Chen v. State*, 86 Wash. App. 183, 192, 937 P.2d 612 (1997)). “In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration.” *Id.* (citing *August v. U.S. Bancorp*, 146 Wash. App. 328, 347, 190 P.3d 86 (2008) (internal quotation marks omitted). “Generally, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration.” *Id.*

Safeco acknowledges that the trial court had the discretion to consider additional materials. However, Safeco now argues that the trial court abused that discretion by “entertaining a whole new set of arguments that Cobalt had not presented in its original motion for summary judgment.” Appellant’s Brief at 30.

Safeco’s assertion that Cobalt raised new legal arguments for the first time in its motion for reconsideration is simply incorrect. Cobalt consistently maintained, from the filing of its motion for summary judgment, that the 10-year limited warranty “covers only the structural integrity of the hull and deck which Cobalt fabricates.” CP 30. This protection does not extend to the sterndrive “simply by virtue of being

attached to the transom.” CP 31. Safeco’s contention that Cobalt raised new legal arguments for the first time in its motion for reconsideration is not supported by the record.

Furthermore, the trial court provided Safeco with the opportunity to respond to Cobalt’s motion for reconsideration. CP 298. Safeco responded to the motion for reconsideration, CP 300-306, and therefore it cannot claim that it lacked the opportunity to be heard on the additional materials presented in Cobalt’s motion for reconsideration.

E. The Trial Court Did Not Err in Denying Plaintiff’s Motion for Reconsideration.

Finally, Safeco asserts that the trial court erred in denying its motion for reconsideration which sought to introduce a repair estimate into the record. Appellant’s Brief at 22. As noted above, a trial court has the discretion whether to consider additional materials on a motion for reconsideration. *See Trohimovich v. Department of Labor & Indus.*, 73 Wash. App. 314, 318, 869 P.2d 95 (1994) (trial court did not abuse discretion by failing to grant reconsideration motion).

The trial court did not err in exercising its discretion by denying Safeco’s motion for reconsideration. With regard to repairs, the material issue is not the cost of the repairs, but whether Safeco asked Cobalt to repair Mr. Duenas’s boat. The undisputed record shows that neither Mr. Duenas nor Safeco asked Cobalt to repair the boat. CP 66-67. As a result, Safeco deprived Cobalt of the opportunity to perform the exclusive

remedy set forth in the Certification of Limited Warranty. The repair estimate is immaterial to this issue. Accordingly, the trial court did not abuse its discretion in denying Safeco's motion for reconsideration.

IV. CONCLUSION

For all the above reasons, the trial court's orders granting Cobalt's motion for summary judgment and motion for reconsideration should be AFFIRMED.

RESPECTFULLY submitted this 25th day of May 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached on the following counsel of record:

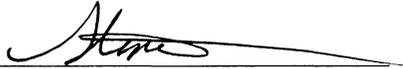
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Via Hand Delivery

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

Dated this 25th day of May 2016.



Signed at Seattle, Washington