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74622-7

No. 74622-7

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**COURT OF APPEALS  
STATE OF WASHINGTON**

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SAFECO INSURANCE CO. OF AMERICA

Appellant,

v.

COBALT BOATS, LLC

Respondent.

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**BRIEF OF APPELLANT  
SAFECO INSURANCE CO. OF AMERICA**

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William E. Pierson, Jr., WSBA No. 13619  
LAW OFFICE OF WILLIAM E. PIERSON, JR. | PC  
600 First Avenue, Suite 233  
Seattle, WA 98104  
Telephone: (206) 254-0915  
bill.pierson@weplaw.com

Attorneys for Appellant  
SAFECO INSURANCE CO. OF AMERICA

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in granting [CP 250-252] respondent's motion for summary judgment [CP 15-39] by concluding the rationale underlying the decision in *Olmsted v. Hulder*, 72 Wn.App. 169, 863 P.2d 1355 (1993), applicable to warranty disclaimers, did not apply, with equal force, to limitation of remedies provisions in a warranty.

2. The trial court erred as a matter of law in denying [CP 299] appellant's motion for reconsideration [CP 255-260] by not allowing appellant to supplement the Court's record in order to introduce evidence of an applicable repair estimate.

3. The trial court erred in considering new arguments submitted by respondent for the first time in support of respondent's motion for reconsideration [CP 273-280], belatedly based on CR 59(a)(9) [CP 327].

4. The trial court erred as a matter of law when it dismissed appellant's entire claim based on the trial court's consideration of respondent's motion for reconsideration [CP 327].

## II. STATEMENT OF THE CASE

### A. Factual Background.

#### 1. Nature of the Dispute Between the Parties.

This lawsuit arose due to the sinking of a Cobalt model 232 twenty-three foot motor boat (“boat”) on September 4, 2012 while it was moored at a marina in Kirkland, Washington<sup>1</sup>.

At the time this boat sank, it was owned by Al Duenas and insured by appellant, SAFECO INSURANCE CO. OF AMERICA (“Safeco”)<sup>2</sup>.

Al Duenas purchased the boat that sank in July 2007 from a dealership in Oregon and took delivery of the boat in August 2007<sup>3</sup>.

Respondent, COBALT BOATS LLC (“Cobalt”) manufactured the boat that sank<sup>4</sup>.

Experts for both Safeco (Ned McCrea) and Cobalt’s liability insurer Chubb (Robert Spencer) agreed the sinking of the

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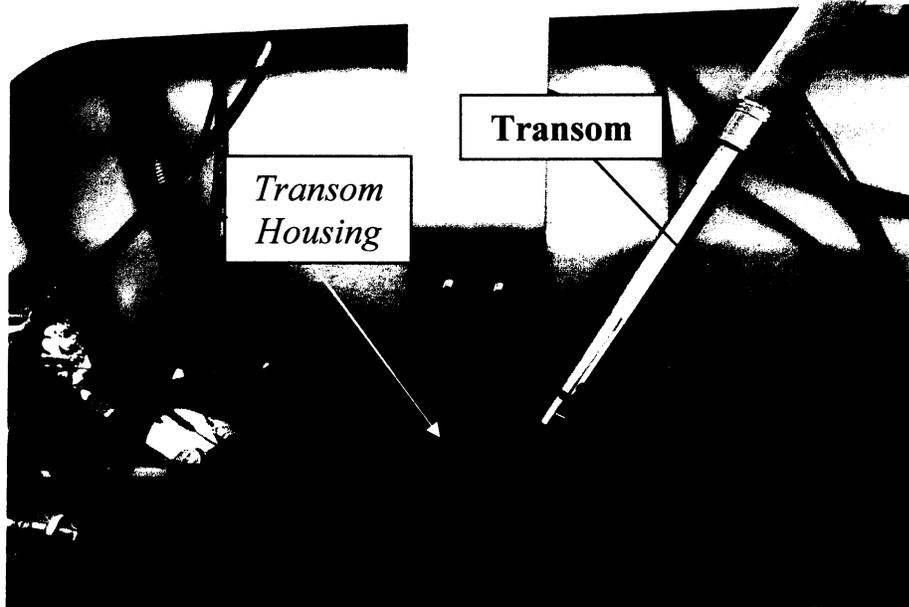
<sup>1</sup> CP 23: p. 9, lines 8-10.

<sup>2</sup> CP 20: p. 6, lines 19-23; CP 15, lines 20-22.

<sup>3</sup> CP 41: ¶6.

<sup>4</sup> *Id.*

boat was the result of a massive water leak that originated through the transom for the boat.<sup>5</sup>



#### CP 173 – Appendix A

Experts for both Safeco and Cobalt’s liability insurer agreed the water leak at the transom occurred because the transom housing (also variously referred to as the “gimbal housing”, “transom shield” or “transom assembly”<sup>6</sup>) was not

<sup>5</sup> CP 26, lines 8-17; CP 92, line 20 – CP 93, line 9; CP 165, ¶8; CP 173.

<sup>6</sup> CP 64; CP 93, lines 5-9; CP 235, line 22 – CP 236, line 23. Plaintiff’s expert Ned McCrea referred to the transom housing as the “sterndrive gimbal housing bolts” in his original report dated September 13, 2012. CP 130-131. Mr. McCrea later clarified in his deposition that the “gimbal housing” should be referred to as the *transom housing*. CP 235, lines 22-24. Sean Callan, an engineering manager with Cobalt, referred to the transom housing as either the “gimbal housing” or the “transom assembly”. CP 42, ¶9, lines 14-17; CP 64. Robert Spencer, Cobalt’s liability insurance expert, referred to the transom housing as also being known as the “transom shield” or the “sterndrive gimbal housing”. CP 93, ¶8, lines 5-9.

properly bolted to the transom of the boat<sup>7</sup>. The transom housing is located in the stern of the boat and is part of the motor mount for the boat's engine whereby the engine is mounted to the transom<sup>8</sup>.

Cobalt was responsible for originally bolting the transom housing to the transom when the boat was manufactured<sup>9</sup>. In moving for summary judgment, Cobalt claimed as the first basis for its motion that it did not manufacture the transom housing<sup>10</sup>. Safeco contended this was irrelevant since Cobalt did not dispute it bolted the transom housing to the transom when the boat was initially assembled in Cobalt's factory<sup>11</sup>.

As a result of Mr. Duenas's boat sinking, Safeco paid him \$67,032.54 in damages sustained by the boat<sup>12</sup>. Cobalt does not dispute the reasonableness of the amount paid by Safeco for these damages, either in terms of their scope or amount.

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<sup>7</sup> CP 92 - 93, ¶¶7, 8; CP 165 - 166, ¶¶7-10.

<sup>8</sup> CP 166, ¶9.

<sup>9</sup> CP 166, ¶10.

<sup>10</sup> CP 21, lines 11-13.

<sup>11</sup> CP 42, lines 3-5.

<sup>12</sup> CP 25, lines 3-14.

When Mr. Duenas purchased the boat, he received a 10 year warranty from Cobalt that stated:

**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.<sup>13</sup>

In moving for summary judgment, Cobalt claimed that Safeco's theory of causation was questionable because Mr. Duenas had used the boat for more than five years before the sinking and had performed maintenance and repairs on the boat before its sinking<sup>14</sup>. In making this claim, Cobalt ignored the undisputed fact that the boat had been operated for less than 50 hours over the course of those five years,<sup>15</sup> and none of the maintenance or repairs alluded to involved the proximate cause

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<sup>13</sup> CP 18, line 14 – CP 19, line 8; CP 57-58. Appendix B.

<sup>14</sup> CP 16, lines 1-9.

<sup>15</sup> CP 189, p. 37, lines 13-20.

of the water leak: the transom housing or the tightening of the bolts for the transom housing<sup>16</sup>.

**B. Procedural Background.**

**1. Initial Pleadings.**

Safeco filed its *Complaint for Damages* against Cobalt on November 12, 2014 and alleged a single cause of action for breach of an express warranty. CP 1-4.

Cobalt filed its *Answer* on January 20, 2015, and later filed a *First Amended Answer* on February 9, 2015. CP 7-12. Cobalt denied the allegations in Safeco's *Complaint for Damages* and raised as affirmative defenses: (1) failure to state a claim upon which relief can be granted; (2) waiver; (3) comparative fault; and (4) laches.

**2. Cobalt's Motion for Summary Judgment.**

On August 28, 2015 Cobalt filed a motion for summary judgment [CP 15-39] with accompanying supporting declarations from: (1) Sean Callan [CP 40-64]; (2) Debbie Meigs [CP 65-90]; (3) Robert Spencer [CP 91-106]; and (4) Daniel Park [CP 107-150].

Safeco timely filed its response to Cobalt's motion for summary judgment on September 14, 2015 [CP 151-162] with

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<sup>16</sup> CP 290, line 18 – CP 291, line 24.

accompanying declarations from Edward J. McCrea [CP 163-176] and William E. Pierson, Jr [CP 177-205].

Cobalt timely filed its reply to Safeco's response on September 21, 2015 [CP 206-211] with an accompanying, second declaration from Daniel Park [CP 212-248].

On September 25, 2015 the trial court heard oral argument on Cobalt's motion for summary judgment. CP 249.

On October 2, 2015 the trial court entered an order granting Cobalt's motion for summary judgment. CP 250-252.

### **3. Motions for Reconsideration.**

On October 12, 2015 Safeco timely filed a motion for reconsideration [CP 255-260] with an accompanying second declaration from William E. Pierson, Jr. [CP 261-270]

On October 12, 2015 Cobalt also timely filed a motion for reconsideration [CP 273-280] with an accompanying third declaration from Daniel Park [CP 281-294].

On November 10, 2015 the trial court denied Safeco's motion for reconsideration [CP 299] and ordered Safeco to file a response to Cobalt's motion for reconsideration by November 23, 2015 [CP 298]. On November 19, 2015 Safeco filed the requested response [CP 300-307]. On November 20, 2015 Cobalt filed its reply to Safeco's reply [CP 308-313].

On December 4, 2015 the trial court granted Cobalt's motion for reconsideration. CP 326-327.

Safeco filed its *Notice of Appeal to the Court of Appeals* on December 7, 2015. CP 314-325.

### III. LEGAL ARGUMENT

#### A. Standard of Review.

An appellate court reviews a trial court's ruling on summary judgment *de novo*, performing the same inquiry as the trial court. *Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

#### B. The Sinking of Safeco's Insured's Boat Is Covered Under Cobalt's 10 Year Warranty.

In moving for summary judgment, Cobalt claimed the transom housing fell outside scope of Cobalt's 10 year warranty.<sup>17</sup>

Safeco's *Complaint for Damages* against Cobalt alleged a single cause of action for breach of an express warranty<sup>18</sup>. A product is not reasonably safe because it did not conform to a manufacturer's express warranty if: (1) the warranty is made part of the basis of the bargain; (2) the warranty relates to a material

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<sup>17</sup> CP 16, lines 11-13.

<sup>18</sup> CP 3, ¶4.5.

fact or facts concerning the product; and (3) the warranty turns out to be untrue. RCW 7.72.010(6); RCW 7.72.020(2).

### **1. The Warranty.**

It is undisputed in this case that when Mr. Duenas purchased the boat, he received a written 10 year warranty from Cobalt that stated:

**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. (Emphasis added.)<sup>19</sup>

Experts for both Safeco and Cobalt's liability insurer agreed the sinking of the boat was the result of a massive water leak that originated through the transom for the boat.<sup>20</sup> The transom is part of the hull at the rear end (stern) of the boat. A transom that is free from structural defects in material and

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<sup>19</sup> CP 57-58; Appendix B.

<sup>20</sup> CP 26, lines 8-17; CP 92, line 20 – CP 93, line 9; CP 165, ¶8.

workmanship in normal, non-racing and non-commercial use does not leak water while the boat is in the water.<sup>21</sup>

Experts for both Safeco and Cobalt liability insurer also agreed the water leak at the transom occurred because the transom housing was not properly bolted to the transom of the boat<sup>22</sup>. The transom housing is part of the motor mount for the boat's engine whereby the engine is mounted to the transom<sup>23</sup>. Cobalt was responsible for originally bolting the transom housing to the transom when the boat was manufactured<sup>24</sup>.

**a. Basis of the Bargain.**

Cobalt's 10 year warranty, by its express terms, warrants that the transom and motor mounts for Mr. Duenas's boat were free from any structural defects in workmanship. Cobalt does not deny that this 10 year warranty was made part of the basis of the bargain when Mr. Duenas originally purchased the boat.

Mr. Duenas testified as follows with respect to the width and breadth of any discussions he had with anyone regarding any warranty on his boat:

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<sup>21</sup> CP 165, ¶8.

<sup>22</sup> CP 92 - 93, ¶¶7,8; CP 165 - 166, ¶¶7-10.

<sup>23</sup> CP 166, ¶9.

<sup>24</sup> CP 166, ¶10.

24 Q. Did you receive any warranties in connection  
25 with your purchase of the boat?

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1 A. The Cobalt?

2 Q. Yes.

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

5 Q. Okay.

6 A. The certificate of warranty.

7 (Exhibit 2 marked)

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

10 A. Yes.

11 Q. What is it?

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

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

16 A. Yes.

17 Q. What is your understanding of the warranties  
18 that were applicable to this boat?

19 A. That the boat shouldn't sink.

20 Q. Do you know the terms of the warranties?

21 A. I can read it to you.

22 Q. I guess I'm asking, did you have a

23 recollection of what the warranties were independent of  
24 what this document says?

25 A. I think at the time the, due to Cobalt's

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1 reputation, I wasn't worried about any particular  
2 warranties at the time.

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

5 A. Yeah. He said it's a bumper to bumper  
6 warranty and, you know, it's a ten-year warranty on this  
7 machine. I said, okay, great.

8 Q. What was your understanding of what was meant

- 9 by a bumper to bumper warranty?  
10 A. That if I had any issues with the boat, it  
11 would be taken care of by them or a Cobalt dealer.<sup>25</sup>

**b. Materiality.**

The workmanship associated with the transom and motor mounts is a material fact pertaining to the boat in this case since the transom and motor mounts were responsible for the leak that sank Mr. Duenas's boat.

**c. Falsehood.**

Finally, Cobalt's 10 year warranty was not true. The transom and motor mounts for Mr. Duenas's boat were not free from structural defects associated with their workmanship. When originally installed, the bolts for the transom housing were not properly tightened creating a separation at the transom that created an opportunity for water to enter inside the boat and, with enough time, sink it.

**2. Scope of the Warranty.**

The interpretation of a contract is usually a question of law which is reviewed by an appellate court *de novo*. *Martinez v. Miller Industries., Inc.*, 94 Wn.App. 935, 943-944, 974 P.2d 1261 (1999). In construing what legal obligations are imposed by the language of a specific instrument, the objective meaning

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<sup>25</sup> CP 186 – 188: p. 29, line 24 – p. 32, line 11.

of the language determines liability. Contracting parties are bound by what they say rather than by what they secretly intend. *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 552, 546 P.2d 440 (1976).

Contract interpretation and contract construction are separate endeavors. When interpreting a contract a court is giving meaning to the symbols of expression used by another person. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). In contrast, when construing a contract a court is engaging in the process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation. *Id.*

The primary objective in contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract. *International Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). The court, however, must distinguish the parties' intent at the time of formation from the interpretations the parties are advocating at the time of the litigation. *Id.* Contract interpretation is a matter of law. *Id.*

Washington follows the "objective manifestation theory" of contract interpretation, under which the focus is on the

reasonable meaning of the contract language to determine the parties' intent, rather than the unexpressed subjective intent of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Courts generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst*, 154 Wn.2d at 504. And courts view the contract as a whole, interpreting particular language in the context of other contract provisions. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000).

The operative words at issue in the 10 year warranty are:

- Hull and Deck
- Transom
- Motor mounts
- Structural defect
- Material
- Workmanship

The 10 year warranty warranted 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) [sic] years from the

date of delivery to the original retail purchaser.” (Emphasis added) The term “workmanship” by definition applies to a process, not simply a piece of material. Workmanship is defined as “the execution or manner of making or doing something”.<sup>26</sup>

According to the plain wording of Cobalt’s 10 year warranty, the hull and deck include the transom and the motor mounts. The transom and motor mounts are warranted to be free from any structural defects in either material or workmanship.

A leaking transom compromises the structural integrity of the hull in the most fundamental of ways.<sup>27</sup> A boat simply can’t stay afloat with a leaking transom.

**a. Transom.**

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. This is in keeping with the essential purpose of the 10 year warranty: that the transom is free from any structural defect in either material or workmanship. This means not only is the material that makes up the transom free from any defect, but the

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<sup>26</sup> Webster’s Third New International Dictionary, p.2635 (2002). See GR 14.

<sup>27</sup> “Structural” is defined as relating to the load bearing members or scheme of a structure as opposed to its ornamental elements. Webster’s Third New International Dictionary, p.2266 (2002).

way in which the transom is constructed is also free from any structural defect. A leaking transom in a boat is a fundamental and elementary structural defect.

In arguing for summary judgment, Cobalt glibly stated, “Although the [transom] 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.”<sup>28</sup> In order for the motor inside the boat to turn the propeller located outside the boat and makes the boat move, the motor has to be attached to the propeller. This attachment is made through a hole in the transom. The hole is part of the transom. In order to remain watertight, this hole must be properly sealed. The transom housing is the means by which this watertight seal is achieved. Mechanically, the watertight seal is achieved through properly tightening the bolts for the transom housing to the transom. If this is not done properly, the transom leaks and the boat can potentially sink<sup>29</sup>.

Cobalt sought to avoid this interpretation by arguing to the trial court that the “plain language” utilized in the 10 year warranty covered only structural defects relating to the material

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<sup>28</sup> CP 30, lines 15-17.

<sup>29</sup> CP 64; CP 173.

utilized in the construction of the hull, not the manner in which the hull and deck were assembled and joined together. This interpretation conveniently overlooks the fact that the transom fabricated by Cobalt included permanently bolting the transom housing to the transom itself by means of torque bolts. If this connection is not made properly, the boat will leak and eventually sink. Safeco argued to the trial court and submits to this Court the term “transom”, as used in Cobalt’s 10 year warranty, includes the watertight seal achieved by permanently bolting the transom housing to the transom to insure the boat remains watertight.

Cobalt argues this interpretation is not reasonable because it would necessarily bring within the scope of Cobalt’s 10 year warranty a large number of other items attached to the stern or transom, including the sterndrive, propellers, deck lights, water skiing racks, diving boards and showers. However, what 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. A leaking transom compromises the structural integrity of the boat by failing to keep the boat afloat. 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 and therefore do not impact the structural integrity of the hull and deck.

**b. Motor Mounts.**

In moving for summary judgment, Cobalt noticeably failed to make any mention or allusion to the phrase “motor mounts” contained in the 10 year warranty. In support of its motion, Cobalt defined what it believed were the relevant nautical terms at issue, neglecting to make any mention of the phrase “motor mounts.”<sup>30</sup> Cobalt admitted it fabricated the “motor mounts” and considered them to be part of the “hull and deck” referred to in the 10 year warranty.<sup>31</sup> At no point did any of the declaration testimony from any of the three fact witnesses submitted in support of Cobalt’s motion (Sean Callan, Debbie Meigs and Robert Spencer) ever claim that the transom housing was not part of the motor mounts for the boat. On the other hand, Safeco’s expert explained the transom housing was how the motor for the boat was mounted to the transom<sup>32</sup> and Cobalt’s expert did not dispute this characterization.

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<sup>30</sup> CP 18, lines 4-11.

<sup>31</sup> CP 20, lines 8-11.

<sup>32</sup> CP 166, lines 2-3.

Thus, the sinking of Mr. Duenas's boat was covered under Cobalt's 10 year warranty because this warranty covered a loss proximately caused by a structural defect associated with the workmanship for the transom, the motor mounts or both.

**C. The Limitation of Remedies Provision Relied Upon By Cobalt Is Unenforceable As a Matter of Law.**

Cobalt's 10 year warranty contained the following limitation of remedies provision:

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<sup>33</sup>.

As a result of the boat sinking, Safeco paid its insured, Al Duenas, a little over \$67,000.00. Of this amount, \$57,000.00 was for the cost to repair the boat. The remaining approximately \$10,000.00 was for certain consequential damages stemming from the sinking (towing, storage, loss of equipment, etc.).<sup>34</sup>

Washington disfavors disclaimers in warranties and finds

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<sup>33</sup> CP 57-58: Appendix B.

<sup>34</sup> CP 25, lines 3-14.

them to be ineffectual in consumer transactions unless they are explicitly bargained for and set forth with particularity. *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971).

A presumption leans against the enforceability of warranty disclaimers in consumer transactions and the burden lies on the party seeking to enforce the disclaimer to prove its legality. *Puget Sound Financial LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 438, 47 P.3d 940 (2002). Cobalt singularly failed to carry this burden.

In order 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. *Olmsted v. Hulder*, 72 Wn.App. 169, 177, 863 P.3d 1355 (1993).

In resisting Cobalt’s motion for summary judgment, Safeco contended the rule of decision announced in the *Olmsted* decision, which directly followed the precedent first announced in the *Berg* decision, was just as applicable to an exclusionary clause, *i.e.* limitation of remedies provision, in a warranty as it was to a warranty disclaimer. *Rottinghaus v. Howell*, 35 Wn.App. 99, 103, fn. 3, 666 P.2d 899 (1983). A limitation of remedy provision has just as much capacity to be unfair in a consumer transaction as a warranty disclaimer if not explicitly bargained for. *Cox v. Lewiston Grain Growers, Inc.*, 86

Wn.App. 357, 368, 936 P.2d 1191 (1997). The trial court disagreed but gave no explanation for why the *Olmsted* decision did not apply with equal force to limitations of remedy as it did to warranty disclaimers. The trial court simply stated Safeco had failed to cite any case authority in support of this proposition.<sup>35</sup>

In *Rottinghaus v. Howell*, 35 Wn.App. 99, 107, 666 P.2d 899 (1983), it was expressly held that the rule that a warranty disclaimer was ineffectual unless specifically negotiated between the buyer and seller extended to and was equally applicable to a limitation of remedies provision in a warranty.

In *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn.App.357, 367, 936 P.2d 1191 (1997), it was again expressly held that the limitation of remedies provision in a warranty was ineffectual unless specifically negotiated between the buyer and seller.

Regardless of whether this is a consumer or commercial transaction, the *Berg* rule should apply due to the specific requirements of the sale. No negotiations occurred regarding the disclaimer or exclusionary clause contained in the delivery ticket. The court did not err by concluding the disclaimer was unenforceable.

*Id.*, 86 Wn.App. at 368.

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<sup>35</sup> CP 251, lines 17-21.

Other courts have concluded that rules applicable to warranty disclaimers are equally applicable to limitation of remedy provisions found in warranties. *See e.g. Siebel v. Layne Bowler, Inc.*, 56 Or.App. 387, 392, 641 P.2d 668 (1982).

In this case, Cobalt presented no evidence that any disclaimer of the 10 year warranty, including but not limited to the limitation or remedy provision relied upon by Cobalt in support of its motion for summary judgment, was ever discussed with Mr. Duenas by anyone, much less bargained for by either the dealer or Cobalt with Mr. Duenas.

Consequently, this Court should rule as a matter of law that the limitation of remedies provision in the 10 year warranty relied upon by Cobalt in support of its motion for summary judgment below is unenforceable as a matter of law.

**D. The Trial Court Erred as a Matter of Law In Not Allowing Safeco to Supplement the Court's Record to Introduce Evidence of an Applicable Repair Estimate.**

The trial court granted Cobalt's motion for summary judgment in an order dated October 2, 2015. In pertinent part, the trial court held:

There is no genuine issue of material fact that 1) Safeco never sought to repair the boat after it sank nor [sic]

2) that the boat has been stored outdoors exposed to the elements and subject to spoliation for three years. This delay is inexcusable as the boat was inspected by Safeco's surveyor five days after the sinking. On September 13, 2012, this 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. *Clark County PUD v. Wilkinson*, 139 Wn.2d 840 (2000).<sup>36</sup> {Emphasis added}

Safeco requested the trial court reconsider this holding on the grounds the factual basis relied upon by the Court was different from what had been argued by Cobalt in support of its laches argument as contained in its motion for summary judgment and oral arguments made at the time of the hearing on this motion.<sup>37</sup> The trial court summarily denied Safeco's motion for reconsideration.<sup>38</sup> In doing so, the trial court abused its

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<sup>36</sup> CP 250, line 20 – CP 251, line 6.

<sup>37</sup> CP 258.

<sup>38</sup> CP 299.

discretion under CR 59 by unfairly preventing Safeco from rebutting the conclusion that Safeco never sought to estimate the cost to repair the boat after it sank.

A trial court's denial of a motion for reconsideration and its decision to consider new or additional evidence presented with the motion is reviewed to determine if the trial court's decision is manifestly unreasonable or based on untenable grounds. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

CR 59 states in pertinent part:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order

may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

...

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

...

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

Cobalt's motion for summary judgment contended as

follows:

Here, Safeco asserts a claim only for damages, not repairs. Complaint ¶¶5.1-5.2. Since the date of the sinking, Safeco has never requested repairs from Cobalt and therefore deprived Cobalt of the opportunity to repair or replace any defective parts...<sup>39</sup>

Cobalt never claimed in support of its motion for summary judgment that it had been prejudiced by Safeco's failure to either repair its insured's boat or estimate the cost to repair its insured's boat as a result of its sinking.<sup>40</sup> Rather, Cobalt claimed it had been prejudiced by Safeco *never asking Cobalt* to repair its insured's boat.

Cobalt knew from discovery completed in this case that a repair estimate had been prepared by North Lake Marine on September 23, 2012<sup>41</sup> approximately three (3) weeks after the boat sank, and was produced by Safeco in response to Cobalt's first set of interrogatories propounded to plaintiff in this

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<sup>39</sup> CP 032, line 22 - CP 033, line 5.

<sup>40</sup> CP 252, lines 2-4.

<sup>41</sup> CP 261 - 269, ¶¶ 3, 4, Ex. A.

lawsuit<sup>42</sup>.

If Cobalt had in fact made the claim, as articulated in the trial court's October 2, 2015 *Order*, that Safeco never sought after three years to estimate and/or seek repairs to the boat after it sank, as opposed to the three weeks that in fact was case, Safeco would have directed the trial court's attention to the September 23, 2012 repair estimate that had been prepared at Safeco's request thereby negating any claim of prejudice due to inexcusable delay. *Clark County PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 848-849, 991 P.2d 1161 (2000). Since, however, Cobalt never made such a claim, Safeco did not produce such evidence in written opposition to Cobalt's motion or bring it to the trial court's attention at the time oral argument was heard by the trial court on Cobalt's motion for summary judgment.

Consequently, Safeco requested the trial court reconsider its holding on October 2, 2015 and allow Safeco to produce the September 23, 2012 repair estimate and supporting documentation which would have provided ample basis for the trial court to then deny Cobalt's motion for summary judgment in its entirety. In summarily denying Safeco's motion for reconsideration, the trial court abused its discretion under CR 59

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<sup>42</sup> CP 113, Ex. A., p. 2, lines 7-12.

by unfairly preventing Safeco from demonstrating the factual bases for the dismissal of Safeco's lawsuit, *i.e.* that Safeco never sought to estimate the cost to repair for the boat after it sank, was factually erroneous.

**E. The Trial Court Erred in Considering New Legal Theories Submitted by Cobalt in Support of Cobalt's Motion for Reconsideration of the Trial Court's Granting of Cobalt's Motion for Summary Judgment.**

After the trial court issued its October 2, 2015 *Order* granting Cobalt's motion for summary judgment, Cobalt requested the trial court to reconsider<sup>43</sup> the first part of its ruling wherein the trial court had ruled:

There 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<sup>44</sup>.

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<sup>43</sup> CP 273-280.

<sup>44</sup> CP 251, lines 12-16.

However, Cobalt did not specify which subsection of CR 59(a). (1) – (9), it purported to invoke in bringing its motion for reconsideration. Moreover, the trial court did not indicate in its *Order Requesting Response* dated November 10, 2015 which subsection of CR 59 it was invoking in granting defendant’s motion for reconsideration<sup>45</sup>.

Generally, a party is not permitted to present new legal theories based on new and different citations to the record in a motion for reconsideration. *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241. 122 P.3d 729 (2005). In requesting Safeco to provide a response to Cobalt’s motion for reconsideration, the trial court allowed Cobalt to essentially re-argue its motion for summary judgment based on new legal theories with new and different citations to the record.

Cobalt’s first argument contained in its motion for reconsideration was based on deposition testimony from Safeco’s expert, Ned McCrea, which was available to Cobalt but not utilized by Cobalt in replying to Safeco’s response to Cobalt’s original motion for summary judgment.<sup>46</sup> Thus, Cobalt’s motion for reconsideration was not based on newly discovered evidence.

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<sup>45</sup> CP 298.

<sup>46</sup> CP 213, lines 2-3; CP 228 – 248.

CR 59(a)(4). Safeco contended there was no other basis under CR 59(a) to consider Cobalt's motion for reconsideration<sup>47</sup>.

The trial court disagreed. The trial court first observed, citing *Martini v. Post*, 178 Wn.App. 153, 162, 937 P.2d 612 (1992), that "the decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion". The trial court held in the context of a summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. "Generally, nothing in CR 59 prohibits the submission of new or additional materials for reconsideration." *Id.* The trial court then proceeded to grant Cobalt's motion for reconsideration under the "catch-all" provision in subsection (a)(9).<sup>48</sup>

What the trial court failed to acknowledge was that in considering Cobalt's motion for reconsideration, the trial court wasn't just considering new or additional evidence, it was entertaining a whole new set of arguments Cobalt had not presented in its original motion for summary judgment. In allowing Cobalt to present these new arguments, the trial court was abusing its discretion under CR 59.

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<sup>47</sup> CP 300-301.

<sup>48</sup> CP 326-327.

In its motion for reconsideration, Cobalt stated:

When Safeco filed its complaint, it alleged that the sinking of the Duenas's boat fell within the scope of Cobalt's 10-Year Limited Warranty because sterndrive gimbal housing bolts were loose at the time of manufacture, and the 10-Year Limited Warranty covered the transom of the boat<sup>49</sup>.

This is not an accurate summary of the contents of plaintiff's complaint. A simple review of plaintiff's complaint would indicate as such:

3.5 The 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.

...

4.5 Defendant, COBALT BOATS LLC, is strictly liable to plaintiff for all harm, as defined by RCW 7.72.010(6), sustained as a result of the sinking of the 2007 Cobalt 232 pleasure boat on September 4, 2012 in that the this pleasure boat did not conform to defendant's express ten

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<sup>49</sup> CP 275, lines 11-14.

year warranty.<sup>50</sup>

It was Cobalt who claimed in its original motion for summary judgment that, “Here, Safeco *appears to reason* that, because the hull and deck warranty extended to the boat’s transom, a sinking caused by a loose gimbal housing, which is attached to the transom, is covered under Cobalt’s 10-Year Limited Warranty (emphasis added).”<sup>51</sup> This was a conscious and premeditated attempt by Cobalt to limit the discussion surrounding the scope of the 10 year warranty to the transom and not to the motor mounts. In its original motion for summary judgment, Cobalt chose to ignore *all* of the wording contained in the 10-year warranty at issue which stated:

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) [sic] years from the date of delivery to the original retail purchaser. (Emphasis added)

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<sup>50</sup> CP 002-003.

<sup>51</sup> CP 29, lines 20-22.

Cobalt completely neglected to mention in its original motion for summary judgment that the 10 year warranty extended to the motor mounts as well as the transom. It was left to Safeco's response to observe that the warranty applied to both the transom and the motor mounts.

At the deposition of Safeco's expert, Ned McCrea, Mr. McCrea testified that the fiberglass sheet that was the principal vertical component part of the transom was inspected after the sinking and found to contain no defects<sup>52</sup>. However, Mr. McCrea noted in his original report, testified at his deposition and explained in his declaration filed in opposition to Cobalt's motion for summary judgment that the transom housing had been improperly bolted to the fiberglass sheet comprising the transom thereby rendering the transom unseaworthy, *i.e.* the transom leaked. A leaking transom compromises the structural integrity of the hull in the most fundamental of ways.<sup>53</sup> A boat simply can't stay afloat with a leaking transom.

Cobalt argued in support of its motion for reconsideration that Mr. McCrea's observation that the fiberglass sheet (which

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<sup>52</sup> CP 237, line 15 CP 238, line 11; CP 241, lines 4-7.

<sup>53</sup> "Structural" is defined as relating to the load bearing members or scheme of a structure as opposed to its ornamental elements. Webster's Third New International Dictionary, p.2266 (2002).

was the principal component of the transom) was in a pristine condition and without defect after the sinking confirmed the 10 year warranty had not been breached in so far as the transom was concerned. Once again, this argument glossed over the fact that plain wording of the 10 year warranty applied to a defect in either the material or the workmanship associated with the transom. Mr. McCrea accurately and truthfully testified he could find no defect in the material (fiberglass sheet) used to construct the transom. Mr. McCrea effectively admitted there was no defect in the material (fiberglass sheet) that made up the transom.

However, Mr. McCrea had continually noted in his written report and subsequent deposition and declaration testimony that he most certainly discovered a defect in the workmanship associated with the transom: the transom housing bolts had not been properly tightened leaving a space whereby water could leak into the boat and, with sufficient time, sink it. A leaking transom is most definitely a defect in the workmanship associated with the transom.

All of this was briefed extensively in relation to Cobalt's original motion for summary judgment.

In Cobalt's motion for reconsideration, Cobalt attempted to conflate the term "engine mount" contained in the

maintenance recommendations for the sterndrive published by a third party (Mercruiser) with the term “motor mounts” contained in the 10 year warranty authored by Cobalt. This was an entirely new argument presented which Cobalt had not presented in its motion for summary judgment or at oral argument of its summary judgment motion.

In its motion for reconsideration, Cobalt readily admitted, “Mr. McCrea [plaintiff’s expert] disagreed that this recommendation (in the maintenance recommendations for the motor) referred to the sterndrive gimbal housing bolts that Safeco alleged were loose at the time of manufacture...”<sup>54</sup> Nevertheless, Cobalt claimed in its motion for reconsideration that Mr. McCrea never equated “motor mounts” with the transom housing. This statement simply cannot be squared with Cobalt’s simultaneous acknowledgement that Mr. McCrea’s declaration testimony stated that the bolting of the transom housing to the transom was how the motor for the boat is mounted to the transom. This description by Mr. McCrea is the very definition of a motor mount.

Cobalt’s final new argument contained in its motion for reconsideration was the 10 year warranty only applied to certain

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<sup>54</sup> CP 274, lines 11-12; lines 20-22.

parts of the hull and deck of the boat, not the process of assembling those parts to complete the manufacture of the boat. Once again, Cobalt ignored the plain wording of the 10 year warranty which applies to both material and workmanship. Apparently, Cobalt doesn't understand that workmanship is part of a process. Workmanship is defined as "the execution or manner of making or doing something".<sup>55</sup>

The 10 year warranty warranted 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) [sic] years from the date of delivery to the original retail purchaser." (Emphasis added) The term "workmanship" by definition applies to a process.

A rational, fair-minded person could certainly (and probably would) conclude that a warranty stating the boat's transom and motor mounts are free from any defects in *workmanship* would include the bolts for the transom housing being properly tightened during the boat's manufacture in order to insure the transom remains watertight. Such a conclusion

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<sup>55</sup> Webster's Third New International Dictionary, p.2635 (2002).

should be considered a reasonable interpretation of this contract language as a matter of law. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

However, in its motion for reconsideration, Cobalt claimed for the first time that the 10 year warranty only covered the fiberglass portion of the hull and deck that Cobalt fabricated at its manufacturing facility. If the wording of the 10 year warranty is subject to two or more reasonable interpretations, the provision is ambiguous as a matter of law and is to be construed against the drafter, in this case defendant. *Pierce County v. State*, 144 Wn.App. 783, 813, 185 P.3d 594 (2008); *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn.App. 415, 420, 869 P.2d 1097 (1994).

The trial court effectively refused to find that the 10 year warranty extended to defects in material *and* workmanship in granting Cobalt's motion for reconsideration. In refusing to do so, the trial court decided Cobalt's motion for reconsideration on wholly untenable grounds given the plain wording contained in the 10 year warranty and thereby abused its discretion in granting Cobalt's motion for reconsideration.

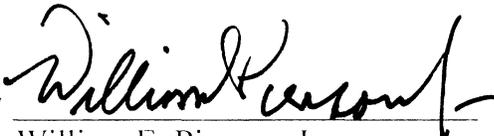
#### IV. CONCLUSION

Safeco would request that this Court do what the trial

court below should have done – deny Cobalt’s motion for summary judgment in its entirety. In doing so, Safeco would request this Court to expressly hold the limitation of remedies provision contained in Cobalt’s 10 year warranty is unenforceable as a matter of law.

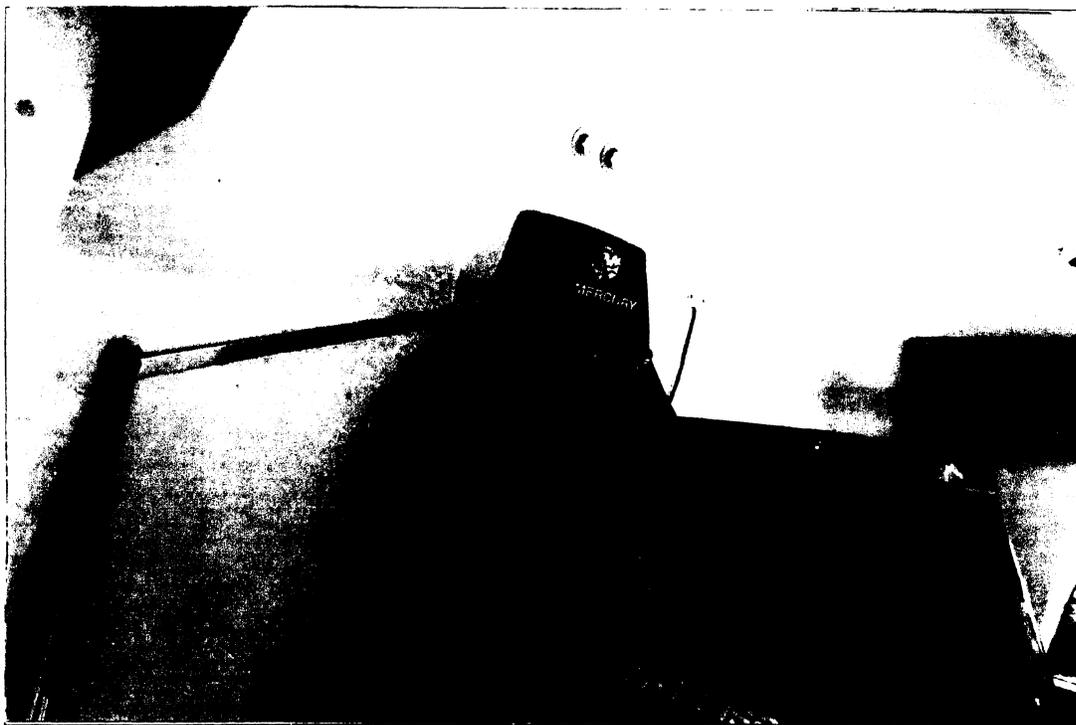
RESPECTFULLY SUBMITTED this 25th day of April, 2016.

LAW OFFICE OF  
WILLIAM E. PIERSON, JR. | PC

By   
William E. Pierson, Jr.  
WSBA No. 13619

Attorneys for Appellant  
SAFECO INSURANCE CO. OF  
AMERICA

# Appendix A



Picture # 3 THE FEELER GAUGE BETWEEN THE TRANSOM AND THE GIMBAL HOUSING.



Picture # 4 TORQUE WRENCH ON GIMBAL HOUSING BOLT. THE BOLT WAS NOT PROPERLY TIGHTENED.

# Appendix B



## **CERTIFICATE OF LIMITED WARRANTY**

Subject to the terms and conditions in this warranty, Fiberglass Engineering, Incorporated, a Kansas corporation doing business as Cobalt Boats ("Cobalt"), warrants to the original retail purchaser (and any subsequent owner) of a new Cobalt boat purchased from an authorized Cobalt dealer for personal, non-racing and non-commercial use ("Owner"), as follows:

**Ten (10) Year Limited Transferable 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.

**Two (2) Year Limited Transferable 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.

**THERE ARE NO EXPRESS WARRANTIES OTHER THAN THE ABOVE LIMITED EXPRESS WARRANTIES. IN THE EVENT ANY LAW DOES NOT PERMIT THE DISCLAIMER OF ANY IMPLIED WARRANTY, THEN IN NO EVENT SHALL ANY IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE, EXTEND BEYOND THE DURATION OF THESE EXPRESS WRITTEN WARRANTIES.**

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

**Exclusions.** The above described limited warranties do not apply if such Cobalt boat has been used at any time commercially, industrially, for racing or other competition or for revenue producing purposes, and also do not apply to: (1) engines, outdrives, propellers, controls, batteries, or other equipment or accessories which are separately warranted by the manufacturers thereof; (2) engines, outdrives, propellers, controls, trailers, equipment or accessories installed by persons or parties other than Cobalt or an authorized Cobalt dealer; (3) windshield leakage, rainwater leakage, windshield or window damage or breakage; (4) deterioration or damage, fading or shrinkage of upholstery, carpet or canvas; (5) damage related to the alteration or modification of such Cobalt boat with any structurally affecting addition, component or accessory not specifically in accordance with Cobalt's specifications or offered as an option by Cobalt; (6) damage or deterioration of gelcoat or other surface finishes, vinyls, fabrics, steel and steel finishes; (7) damage or failures caused by operation of the Cobalt boat outside of the maximum horsepower specifications recommended by Cobalt; (8) damage or failure related to repairs made by any service provider not approved by Cobalt; and (9) damage or failure related to alteration, modification, misuse, neglect, negligence, accident or failure to provide reasonable care and maintenance of such Cobalt boat.

**Remedies.** During the applicable limited warranty period, as set forth above, covered warranty repairs shall be made without charge by an authorized Cobalt dealer or, at the option of Cobalt, by Cobalt at its plant in Neodesha, Kansas, or at a facility specifically authorized by Cobalt. All warranty repairs shall be subject to the authorization of factory-trained personnel of Cobalt, whose decision shall be final. Transportation to and from an authorized Cobalt dealer, and/or to and from the Cobalt plant in Neodesha, Kansas, for warranty repairs, shall be at Owner's expense. Repair of blisters, when authorized by Cobalt, are covered by this warranty, provided the original factory gelcoat surface has not been altered in any way.



The rights and benefits granted under the above described limited warranty extend to (1) the original retail purchaser of a new Cobalt boat, and (2) any owner of such Cobalt boat during the applicable warranty period, commencing with the date of delivery of such Cobalt boat to the original retail purchaser provided that such limited warranty is validated by such subsequent owner, as set forth herein. **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.**

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above exclusions may not apply to you. This warranty gives you specific legal rights, and you may also have other legal rights which vary from state to state.

**How to obtain Warranty Service.** To validate the above described limited warranty, (1) the original retail purchaser or authorized Cobalt dealer must complete and return the warranty registration card to Cobalt Boats at 1715 N. 8th Street, Neodesha, KS 66757, within ten (10) days after purchase of any new Cobalt boat covered by such limited warranty, and (2) any subsequent owner of a Cobalt boat during the applicable limited warranty period must give written notice of the acquisition of a Cobalt boat to Cobalt within ten (10) days after such purchase. Notification of any warranty claim arising within the applicable warranty period, as set forth above, must be made in writing by the owner of such Cobalt boat or by an authorized Cobalt dealer to Cobalt within thirty (30) days after the discovery of the alleged basis for any warranty claim.

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day he 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:

**Respondent**  
**COBALT BOATS, LLC**

David C. Bratz  
Daniel J. Park  
LEGROS BUCHANAN & PAUL  
701 Fifth Avenue, Suite 2500  
Seattle, WA 98104-7051

- U.S. Mail
- hand delivery
- e-mail transmission
- overnight delivery
- facsimile transmission

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIV 1  
2016 APR 25 PM 12:11

DATED this 25th day of April, 2016.

  
\_\_\_\_\_  
William E. Pierson, Jr.