

No.290697

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

SEP 29 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

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MIKE REED  
Plaintiff/Petitioner

v.

LES SCHWAB TIRE CENTERS, INC., an Oregon  
Corporation, and JACOB SCHREIBER and JANE DOE  
SCHREIBER, individually, and as a marital community,  
Defendants/Respondents.

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**BRIEF OF RESPONDENTS**

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**A. Statement of the Case and Summary of the Argument.**

On December 5, 2001, Plaintiff Mike Reed executed a "Retail Credit Plan and Security Agreement" with Les Schwab Tire Centers. (CP 136) On July 13, 2007, Mr. Reed purchased from the Spokane Veradale Les Schwab Tire Center located at 15915 E. Sprague Avenue, Veradale, Washington 99037, tires and services in the amount of \$509.82 and executed a "Security Agreement". (CP 139) On May 27, 2008, an employee of Spokane Veradale Les Schwab Tire Center repossessed the tires from Mr. Reed for his failure to make payments for several months on his account.

Despite the admission by Mr. Reed in his deposition that his account was several months overdue, Mr. Reed brought suit against Jacob Schreiber, the Assistant Manager of the Spokane Veradale Les Schwab Tire Center at 15915 E. Sprague Avenue, Veradale, Washington, and against an entity stated to be Defendant Les Schwab Tire Centers, Inc., an Oregon Corporation.

Mr. Reed's Complaint was properly dismissed on Summary Judgment (CP 106-107; RP 19-20) for the following reasons:

1. Mr. Reed admits that his account was overdue at the time the tires were repossessed;
2. The Security Agreement signed by Mr. Reed, authorized Les Schwab Tire Center to enter Mr. Reed's driveway to repossess the tires in question;
3. Mr. Reed admits the alleged conversion was not the proximate cause of damage; and
4. There is no basis for a Consumer Protection Act Claim.

**B. Argument.**

This Court reviews Summary Judgment Orders de Novo and engages in the same inquiry as the Trial Court. This Court will affirm a Summary Judgment if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Crowe v Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)

**1. Mr. Reed's account was in default and his tires were lawfully repossessed.**

The "Security Agreement" signed with the Credit Application by Mr. Reed on December 5, 2001, specifically provides in ¶X that if Mr. Reed fails to perform as agreed, the

“seller may take back any goods under this Agreement. Seller may enter my driveway, garage or similar property without further permission from me.” (CP 137)

Further, the “Security Agreement” (CP 139) executed at the time of the purchase of the tires in question on July 13, 2007, specifically provides:

- . . .
- g. If buyer fails to perform as agreed, if Seller reasonably deems itself unsecure, or, if Buyer is otherwise in default under Buyer’s Retail Agreement, Commercial Agreement, or this Security Agreement, Seller may take any action allowed under law, including without limitation:
    - (1) Seller may declare everything Buyer owes immediately due and payable without further notice. If notice is required, notice shall be deemed reasonable if it is mailed at least 10 days in advance to the last address Buyer has provided to Seller in writing.
    - (2) Seller may take back any goods. Seller may enter Buyer’s driveway, garage, or similar property without further permission from Buyer.

. . .

Mr. Reed in his deposition admits at the time he bought the tires on July 3, 2007, he was aware that Spokane Veradale Les

Schwab Tire Center had the right to repossess the tires if payment was not timely. (CP 131; Reed Depo., 30:14-18) Also, Reed admits that the purchase of the tires was placed on a revolving account with Spokane Veradale Les Schwab Tire Center and as of May 27, 2008, his account was overdue and that he had had numerous contacts from Les Schwab between January, 2008 until the repossession on May 27, 2008 regarding his overdue account. (CP 131; Reed Depo., 31:4-32:23)

On May 27, 2008, the tires in question were mounted on a van that was parked in Mr. Reed's driveway. Jacob Schreiber, an employee of Spokane Veradale Les Schwab Tire Center, jacked the van off the ground, removed the wheels and tires, took the wheels and tires to the Spokane Veradale Les Schwab Tire Center and dismounted the tires, and returned the wheels and mounted them back on the van the following day. (CP 132, 133, 134; Reed Depo., 37:21-38:23, 41:22-42:25, 49:17-50:22) Reed admits there was no damage done to the wheels in the process of repossessing the tires. (CP 134; Reed Depo., 52:13-16)

The Complaint alleges that Schreiber "converted" Mr.

Reed's wheels when the tires were repossessed. The Trial Court correctly determined that temporarily taking the wheels with the tires to the Spokane Veradale Les Schwab Tire Center to dismount the tires in question, and promptly returning the wheels without causing any damage to the wheels does not constitute actionable "conversion" because Mr. Reed admits there was no damage proximately caused by Mr. Schreiber. (CP 134) For legal liability to attach, the claimed breach of duty must be a proximate cause of the resulting injury. *LaPlante v State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Where the facts are undisputed or admitted, the question of proximate cause is one of law which is susceptible to summary judgment adjudication. *Id.*

**2. There is no viable Consumer Protection Act claim.**

The "Security Agreement" signed by Mr. Reed authorized Schreiber and Les Schwab Tire Centers to enter his driveway for the purpose of repossessing the tires in question. Mr. Reed argues that he did not receive a letter dated May 23, 2008, which recited the terms of the Credit Agreement, until May 29, 2008. (CP 135; Reed Depo. 57:1-12) Assuming that Mr. Reed did not

receive this letter until after the tires were repossessed, he read and signed the Credit Agreement at the time the tires were purchased on July 3, 2007. There simply is no legal requirement that the letter of May 23, 2008 be sent to Mr. Reed prior to repossession.

Further, Mr. Reed admits that he does not have knowledge of any other customers of Spokane Veradale Les Schwab Tire Center having their tires repossessed. (CP 135; Reed Depo., 58:2-59:3)

Not only did Spokane Veradale Les Schwab Tire Center have the legal right to repossess the tires for Mr. Reed's failure to make payments, his claims fail to set forth a Consumer Protection Act claim because the actions of Spokane Veradale Les Schwab Tire Center were not "unfair and deceptive" and the actions did not have a "capacity to deceive a substantial portion of the public." *Jolley v Regence Blue Shield*, 153 Wn. App. 434 (2009) In *Jolley*, the court dismissed a CPA claim recognizing the longstanding rule set forth in *Hangman Ridge Training Stables v Safeco*, 105 Wn.2d 778, 790 (1986), which states:

Ordinarily a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest . . .

The purchase contract for the tires was a private contract between Mr. Reed and Spokane Veradale Les Schwab Tire Center. Mr. Reed admittedly was overdue on his account and the contract allowed Spokane Veradale Les Schwab Tire Center to repossess the tires in question. Thus, there is no actionable claim against Spokane Veradale Les Schwab Tire Center, including a claim for violation of the Consumer Protection Act.

**3. The Court properly denied the Motion to add Defendants.**

In the face of the Motion for Summary Judgment, Mr. Reed untimely attempted to expand this lawsuit by moving on March 15, 2010, to amend the Complaint to add Scott Burgess and Ryan Carpenter, and their wives, as Defendants. (CP 52-53) Mr. Burgess and Mr. Carpenter are employees of Spokane Veradale Les Schwab Tire Center. Also, Mr. Reed sought to sue Les Schwab Tire Centers of Washington, Inc. and Les Schwab Tire Centers of Oregon, Inc. (CP 52-53) This case was set for trial for May 3,

2010 and the date for “joinder of additional parties and amendment of claims” had long passed. (CP 148-149) It would have been prejudicial to the Defendants to allow the additional parties and claims to be made, and the likely additional discovery, which would have been well beyond the discovery cutoff date of March 1, 2010.

A motion to amend is addressed to the sound discretion of the trial court and the trial court’s decision will not be reversed on appeal unless there is a manifest abuse of discretion. *Appliance Buyers Credit Corp. v Upton*, 65 Wn.2d 793, 799, 399 P.2d 587 (1965). Further, the court stated that the requested Amended Complaint did not change the underlying determination that, as a matter of law, the claimed conversion was not the proximate cause of damage and, thus, the motion to amend was moot. (CP 103-104; RP 19-20)

**C. Conclusion.**

The trial court’s dismissal of the Complaint should be affirmed.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of Sept.

2010.

MULLIN, CRONIN, CASEY & BLAIR, P.S.

By: Timothy P. Cronin  
Timothy P. Cronin WSBA #08227  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28 day of Sept., 2010, I caused to be served a true and correct copy of the foregoing Respondents' Brief by the method indicated below, and addressed to the following:

Attorney for Appellant

Robert E. Caruso	<u>X</u>	Facsimile
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