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NO. 62276-5-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

NORM'S TRUCK AND EQUIPMENT, a Washington Corporation,
Plaintiff/Respondent,

v.

JOSEPH G. PILLING and LISA B. PILLING dba JOSEPH PILING
ENTERPRISES,
Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. RESPONDENT'S ASSIGNMENT OF ERROR

1. Trial court Findings of Fact Nos. 15 and 16

No substantial evidence supports the trial court's findings that Norm's Truck received and lost parts to the Pillings trailer.

B. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Did the payments issued by the Pillings in full payment of invoices issued for painting the Pillings' two trailers constitute an account stated or an accord and satisfaction? (Assignment of Error A.)

Issue No. 2: Was there an implied contract for bailment? (Assignment of Error A, Issue B.)

Issue No. 3: Are breach of bailments contractual in nature, or torts? (Assignment of Error A, Issue B.)

Issue No. 4: Did the trial court err in applying the economic loss rule to the Pillings' bailment claims? (Assignment of Error A, Issue B.)

Issue No. 5: Are the Pillings entitled to relief on their breach of warranty claims? (Assignment of Error A, Issue C.)

Issue No. 6: Did the trial court abuse its discretion in refusing the Pillings' request to amend their pleadings after trial to assert a new claim for relief? (Assignment of Error B, Issue C.)

Issue No. 7: Did substantial evidence support the trial court's finding that Norm's Truck received and lost the Pillings' trailer parts? Were damages properly assessed for the lost parts? (Respondent's Assignment of Error.)

Issue No. 8: Should Norm's Truck be awarded attorney fees at trial and on Appeal? (Assignment of Error C, Issue D.)

C. COUNTERSTATEMENT OF THE CASE

1. Facts

Respondent Norm's Truck and Equipment, Inc., hereinafter, "Norm's Truck", sandblasted and painted two side-dump trailers for Appellants Joseph Pilling and Lisa Pilling, hereinafter "the Pillings". CP 305, 306. This case is related to the payment for the second trailer. The first trailer was painted and delivered to the Pillings on or about August 22, 2005. CP 306. An invoice was issued to the Pillings for the first trailer in a pre-tax gross sum of \$5,769.80. Ex. 9, RP 12/19/07, p. 22. The Pillings issued their check in payment for painting the first trailer on August 27, 2005, in the sum of \$5,700.00. CP 306.

The Pillings then delivered a second side-dump trailer to Norm's Truck in Pacific, Washington. CP 306. The second trailer was sandblasted and painted. CP 306. Norm's Truck issued its Invoice No. 15233 for the balance due for the labor and materials in painting the second trailer in the total sum of \$4,994.14. CP 306, Ex.5, RP 12/19/07, pp.16, 154. This case is related to the payment for the second trailer. The Pillings took delivery of the second trailer and issued their check dated February 1, 2006, for the full

amount of the Norm's Truck invoice in the amount of \$4,994.14. Norm's Truck released the trailer, and released its mechanic's lien for the work performed, based upon receipt of the check from Pillings for payment in full. CP 306, RP 12/19/07, pp.15-17.

Mr. Norman Bilbrey originally prepared a work order estimate and provided it to Mr. Joseph Pilling for painting the Pillings' first trailer. Ex. 9, RP 12/19/07, p. 22. Exhibit 9 contains all of the terms of the parties' agreement. When the first trailer was finished, the work order became an invoice which was delivered to Mr. Pilling. RP 12/19/07, pp. 21, 60-62. Norman Bilbrey contacted Joseph Pilling and advised him of the total cost for the first trailer in the sum of \$5,700.00. RP 12/19/07, pp. 50, 184-186, 197, 198. Mr. Pilling paid the full invoice price for the first trailer, and subsequently delivered a second trailer to be painted. CP 306. After Mr. Pilling took delivery of the first trailer, he paid the negotiated cost to paint the first trailer of \$5,700.00. RP 12/19/07, p. 55. Upon completion of the second trailer, Mr. Pilling asked for and received an invoice for painting the second trailer. Ex. 5, RP12/19/07, pp. 154, 164. Mr. Pilling took delivery of the second trailer and issued his February 2007 check for payment in full of the second invoice. Ex.5, RP 12/19/07, pp. 154, 164, CP 306.

Approximately a week after the Pillings took delivery of the second trailer, they stopped payment on their check issued in payment on Invoice No. 15233. RP 12/19/07, pp. 15-21. CP 307. Norm's Truck, through its attorney, on March 9, 2006, issued a Notice of Dishonor to the Pillings. RP 12/19/07, pp. 17, 18. CP 307. The notice cautioned the Pillings that unless they paid the amount of the check within 15 days, they may be liable for the cost of collecting the check, attorney fees, interest and a statutory penalty. Ex. 2, RP 12/19/07, p. 154. The Pillings refused to honor their check issued to Norm's Truck. RP 12/19/07, p.17. CP 307.

2. Procedural History

Norm's Truck filed its Complaint for Dishonored Check and Money Due. Norm's Truck alleged that the Pillings issued Check No. 2962 for the total invoice price for the services provided by Norm's Truck when it took delivery of the second trailer, and referenced on the check that the payment was being made on Norm's Truck's Invoice No. 15233. On February 9, 2006, Norm's Truck received notice that the Pillings had stopped payment on the check issued in payment for the second trailer. CP 1-7, 307.

The Pillings filed their Answer and Counterclaim, alleging that Norm's Truck had breached the agreement for painting their

first trailer with the incorrect paint; by failing to paint stripes on both the first and second trailer; by failing to install parts on the second trailer; for charging excessive sums for the paint used on the first trailer, and refusing to credit Pillings with the cost of parts on the second trailer. The Pillings claimed in the alternative that in the event that Norm's Truck did not breach its contract by a loss of trailer parts, that it breached its duty as bailor of said parts. CP 307, pp. 90-96, 133-134.

This case proceeded to arbitration under King County mandatory arbitration. CP 45-53. The Pillings appealed an arbitration award, dated July 7, 2007. Trial de Novo proceeded before Judge Bruce E. Heller on December 17, 2007. CP 54-56. RP 12/19/07, p.1.

The Trial court entered its revised Findings of Fact and Conclusions of Law on June 16, 2008. CP 305-311. Judgment in favor of Norm's Truck for the full amount of the Pilling check, plus costs and attorney fees was entered on August 18, 2008. CP 346-349.

D. SUMMARY OF ARGUMENT

As reported in the trial court's Findings of Facts 1-9, this is a dishonored check case. There has been no challenge to the trial

court's Findings of Fact 1-14. The Pillings' primary excuse for refusing payment to Norm's Truck centered around the Pillings' claims that the first trailer was painted with incorrect paint, and that Norm's Truck did not paint stripes on either the first or the second trailer. Defendants' Amended Answer, Affirmative Defenses and Counterclaims, Paragraphs, 2, 3, 4, 6 and 8. The Pillings' claims that the incorrect paint was used on the first trailer is not only inaccurate, it is not relevant. The Pillings were well aware of the paint used on the first trailer, the cost of the paint and material charged by Norm's Truck and the labor charges for the work performed on the first trailer. RP 12/19/07, pp. 185, 195-198.

The trial court in Conclusion of Law 3, stated that the \$4,994.00 check issued by Pillings in full payment of the invoice for painting the second trailer, constitutes an account stated. This conclusion precludes the Pillings' breach of contract claims. Additionally, in Conclusion of Law 5, the Court found that the economic loss rule, and specifically, the case of Alejandro v. Bull, bars the Pillings' Counterclaim for loss of the trailer parts. The trial court incorporated into its Findings of Fact and Conclusions of Law the Court's oral decision entered on May 15, 2008. The trial court in Conclusion of Law 6, dismissed both the Pillings' breaches of

contract claim and their claim for breach of bailment. In the Findings of Fact and Conclusions of Law entered on June 16, 2008, the Court determined that the Pillings were not justified in issuing a stop payment on their check issued to Norm's Truck in payment for painting the second trailer.

E. STANDARD OF REVIEW

The trial court's Factual Findings 1-14 have not been challenged, thus they are verities on appeal. In re Contested Election of Schoessler, 140 Wash.2d 368, 385, 998 P.2d 818 (2000). Norm's Truck seeks review of Findings of Fact 15 and 16.

Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence. Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. Id. If the standard is satisfied the appellate court will not substitute its judgment for that of the trial court. Croton Chemical Corporation v. Birkenwald, Inc., 50 Wash.2d 684, 686, 314 P.2d 622 (1957). The trial court's conclusions of law are reviewed de novo. Veach v.

Culp, 92 Wash.2d 570, 573, 599 P.2d 526 (1979).

F. ARGUMENT ON THE MERITS

Issue No. 1-Did the payments issued by the Pillings in full payment of invoices issued for painting the Pillings' two trailers constitute an account stated or an accord and satisfaction? (Assignment of Error A.)

The Pillings' issuance of the check for \$4,994.00 constituted an "account stated". On Appeal, the Pillings offer no argument contesting the trial court's Conclusion of Law 3. The Restatement of Contracts defines an account stated as a "manifestation of assent by debtor and creditor to a stated sum as an accurate computation of the amount due to the creditor. It is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms." Restatement (Second) of Contracts 282 (2) (1981). National Association of Creditors, Inc. vs. Ultican 190 Wn. 109, 66 P.2d 824, (1937). The Pillings knew there were disputes over both the first and second trailers but paid the full amount of Norm's Trucks' invoices on both.

When the Pillings paid the full invoice price for the second trailer, Norm's Truck released its mechanic's lien and the trailer to the Pillings. The Pillings paid the full invoice price for the second

trailer without protest or manifesting any attempt to negotiate the amount in the future. Sunnyside Valley Irrigation District v. Roza Irrigation District, 124 Wn.2d 312, 877 P.2d 1283 (1994). Northwest Motors vs. James, 118 Wn.2d 294; 822 P.2d 280 (1992).

The payment of the Norm's Truck invoice constituted an accord and satisfaction. This case is similar to the Northwest Motors case where a customer reviewed a disputed invoice, issued a check for the full amount of the invoice in exchange for return of his car, and then immediately directed his bank to stop payment. Since an account stated was created, thereafter, the owner could not assert later his dissatisfaction with the cost of the repair bill as a defense to the repairman's action on the check following a stop payment order. Northwest Motors vs. James 118 Wash.2d 294; P.2d 280 (1992). In Northwest Motors vs. James, the Court determined that applying ordinary contract principles determines whether a party owes on the contract and whether a check was issued to satisfy their obligation on the contract. A party is bound by his or her objective manifestations. In Northwest Motors vs. James, the Court states at pp. 302, 303:

"When Petitioner James tendered the \$4,596.42. check to Respondent Northwest, he did not protest the repair costs nor the amount stated on

the invoice. He did not express his intent to negotiate on the costs at a later time.” Restatement (Second) of Contracts 282(2) (1981).

Issue No. 2- Was there an implied contract for bailment?

(Assignment of Error A.)

There was no express contract nor term of any contract relating to the Pillings’ parts. There was no implied contract. Mr. Fischer, the Pillings’ attorney, argued in the Motion for Reconsideration hearing, that although there was no agreement with respect to the Pillings’ parts, and even though there were no terms discussed concerning parts, there was an expectation of the parties that the trailers and the parts would be returned. There was no agreement, and in fact, no discussion between Norm’s Truck and Pillings relating to parts which were alleged to have been delivered with the second trailer. RP 12/19/07, pp. 37-52. The care, custody and control of any parts to be delivered with the trailers were not part of the parties’ contract. RP 3/7/08, pp. 20-23, 36-38.

There can be no expectation, nor any implied contract without knowledge of the parts or some discussion of the parts and their safe keeping. There was no agreement nor any evidence supporting a claim that there was an agreement relating to the

Pillings' parts. Without an agreement or at least, discussion, there can be no breach of a contract duty. Mr. Fischer, attorney for the Pillings, argued that it was understood between the parties that the trailers would be returned with parts. There is no evidence of any such understanding, expectation, agreement, nor any meeting of the minds between Norm's Truck and the Pillings on the parts. In fact, the parts were never discussed. RP 12/19/07, p. 38.

Bailment is a consensual transaction, where a bailor intentionally delivers an item to a bailee who accepts them with knowledge of his duties. It requires a manifested intent to accept possession and exercise control over the item. Collins v. Boeing Co., 4 Wn.App. 705, 483 P.2d 1282 (1971).

The trailer parts were not only absent from the parties' contract, they were not, according to Mr. Pilling's testimony, a material part of the agreement with Norm's Truck. Mr. Pilling testified that the parts, or the lack thereof, "weren't really any big deal." RP 12/19/09, pp. 120, 121.

In Washington, the courts recognize contracts implied in fact and contracts implied in law. The party claiming the benefit of an implied contract must establish that there was a meeting of minds of the parties on the terms of the implied contract. Asheim v.

Pigeon Hole Park, Inc., 175 F.Supp. 320, Affirmed; 283 F.2d 288, (1959). A contract implied in fact grows out of the intention of the parties to the transaction and there must be a meeting of minds. Heaton v. Imus, 93 Wn.2d 249, 608 P.2d 631, (1980); Davis v. Niagra Machine Company, 90 Wn.2d 342 581 P.2d 1344 (1978). Here, there can be no implied contract since there was never any meeting of the minds between Norm's Truck and the Pillings with respect to the parts. In fact, the parts were never mentioned between the parties until after the Pillings stopped payment on their check. In order to find an implied contract, there must be facts showing a mutual consent and intention to contract. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 137 P.2d 97 (1943). Contracts implied in law or constructive contracts differ from implied in fact contracts. Constructive contracts arise from an implied legal duty based on the prevention of unjust enrichment. Family Medical Building, Inc. v. State DSHS, 104 Wn.2d 105, 702 P.2d 459, (1985). Eaton v. Engelcke Manufacturing, Inc., 37 Wn.App. 677, 681 P.2d 1312 (1984). Under the doctrine of unjust enrichment, one who receives a benefit must pay for it only under circumstances where it would be unjust for him to keep the benefit without paying for it. Irwin Concrete, Inc. v. Suncoast Properties,

Inc., 33 Wn.App. 190 653 P.2d 1331 (1982). A constructive contract is to provide payment for services rendered, not to impose a duty in the absence of an agreement.

Here there is no implied contract in fact due to a complete failure of mutual consent, and there is no contract implied in law, since no party has been unjustly enriched. The parties here had an express agreement for painting the Pillings' trailers which was silent with respect to any parts. Parties may not ignore the terms of their express agreement and bring an action based upon an implied contract relating to the same subject matter. MacDonald vs. Haner, 43 Wn.App. 81, 715 P.2d 519, (1986).

Issue No. 3- Are breach of bailments contractual in nature or torts. (Assignment of Error A, Issue B.)

In essence, the Pillings alleged that Norm's Truck was negligent in its duty as a bailor with regard to safekeeping of the parts. If there was a tort duty for bailment imposing a negligence standard, the Pillings' claim is barred by the economic loss rule.

The Pillings argue that their claim for bailment is not merely a tort claim, but a contractual right arising out of a commercial transaction. The Pillings assert that in a commercial transaction, implied warranties and other commercial standards apply to provide

bailment claims not applicable in tort cases.

At p. 13 of the Appellant's Brief, the case of Mieske v. Bartell Drug Co., 92 Wn.2d 40, 593 P.2d 1308 (1979), is cited, which was discussed at the Reconsideration Hearing. RP 5/15/08 pp. 6-9. This case involved a contract by Bartell Drugs to process film. In the Mieske case, the film, which was the object of the contract, was lost. In the present case, the only agreement between the parties was for Norm's Truck to paint the Pillings' trailers. There was no agreement regarding the Pillings' parts. Here, the Pillings are trying to impose an unbargained-for agreement for bailment. None of the cases cited by the Pillings involved the care, custody and control of an article which was not the subject of an express agreement. Each of the cases is based on an actual agreement to receive an item, to provide for its care, and later, the return of that article. None of these critical factors are present with respect to the the Pillings' parts. The Pillings state that the Mieske case "shows that the Supreme Court implicitly recognized the contractual nature of the bailment claim." Appellant's Brief, p. 13. The Pillings argue the Supreme Court in the Mieske case anticipated the economic loss rule of its subsequent cases and allowed only a contractual remedy, instead

of a traditional tort remedy, for the breach of a bailment.

The Pillings also cite the case of American Nursery Products v. Indian Wells Orchard, 115 Wn.2d 217, 797 P.2d, 477 (1990). Appellant's Brief, p. 13. The American Nursery Products case involved a bailment for mutual benefit, where both parties received a benefit flowing from the bailment. This case is significant in that the Court held that the claim in a bailment was for damages from negligence. This indicates that negligence in a bailment is a tort duty and a remedy which is barred by the economic loss rule. The Pillings have at no point shown that Norm's Truck received any benefit from receipt of the Pillings' parts and therefore, there can be no mutual benefit bailment. Norm's Truck knew and agreed to receive and perform services on the Pillings' trailers. There was never any knowledge, discussion, or agreement with respect to any trailer parts.

Bailment claims are equitable claims that require the Court to address duty and issues of negligence. Rams v. Grimshaw, 162 P.2d 91, 23 Wn.2d 864 (1945); Lunt v. Mt. Spokane Skiing Corp., 62 Wn.App. 353, 814, P.2d 1189, (1991), Review denied, 118 Wn.2d 1007 822 P.2d 288; Eifler v. Shurgard Capital Management Corp. 71 Wn.App., 684, 861, P.2d 1071, (1993).

There was in fact no bailment relationship between Norm's Truck and the Pillings. Knowledge of the bailee in possession of the property is essential to the existence of a bailment. Theobald v. Satterthwaite, 30 Wn.2d 92, 190, P.2d 714 (1948). Although Norm's Truck had knowledge of the delivery and possession of the Pillings' trailer, there is no evidence of any discussion of the parts, nor any knowledge on the part of Norm's Truck that they were being provided with the Pillings' parts for the trailer or that they would be responsible for the parts. Therefore, there cannot be a bailment without Norm's Truck's knowledge of the existence of the parts and an agreement on their duties with respect to these parts. If there was delivery of parts to Norm's Truck, these parts had nothing to do with Norm's Truck's painting of the Pillings' trailers.

A distinction also must be made between the delivery of the trailers which was acknowledged, and the parts. The trailers, which were the subject of the parties' agreement, were returned without damage. There was no agreement with respect to the parts, nor any duty owed by Norm's Truck.

Issue No. 4-Did the trial court err in applying the economic loss rule to the Pillings' bailment claims? (Assignment of Error A, Issue B.)? Washington has adopted the economic loss rule "to hold

parties to their contract remedies when a loss potentially implicates both tort and contract relief.” Alejandre vs. Bull, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). “The rule prohibits plaintiffs from recovering in tort, economic losses to which their entitlement flows only from contract, because tort law is not intended to compensate parties for losses suffered as the result of a breach of duties assumed only by agreement.” Alejandre, at p. 682. In Alejandre, the Alejandres purchased a home from Bull which had a defective septic system. The Alejandres sued Bull claiming fraud and negligence. The Supreme Court held that under Washington law, the defective septic system at the heart of the Plaintiffs’ claim was an economic loss within the scope of the parties’ contract. The economic loss rule precluded any recovery under a negligent misrepresentation theory. The Court stated that the purpose of the economic loss rule is “to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses”. The Court reasoned that “when parties’ difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the Plaintiff may wish to use in describing it.” Quoting Beeson v. Ericksen, 22 Kan.App.2d 452, 461, 917 P.2d, 901 (1996).

Alejandre, at p. 683. Here, Defendants Pilling have used the word bailment to address difficulties arising solely from a contractual relationship.

In essence, the Pillings claim that Norm's Truck was negligent in losing parts delivered with its trailers. The economic loss rule bars claims not provided for in the parties' contract. Under the economic loss rule, the Pillings cannot recover under a bailment theory, but are limited to their contract remedies. The parties had the opportunity to allocate the risk for their lost parts in their contract. If they chose not to allocate this risk, the loss falls on the Pillings. The economic loss rule is particularly applicable here. There is no evidence the parties even knew a bailment would occur. Norm's Truck never received any parts or had no knowledge that any parts were delivered with these trailers. Silence is not golden. The Pillings clearly have not established that they ever discussed or reached any agreement with Norm's Truck on their trailer parts. Since the parties' work order agreement was silent, the risk of loss of any parts are with the Pillings.

It is undisputed that the parties here were in a contractual relationship to paint the Pillings' trailers. Because the Pillings' claim for lost parts arises directly from their contractual relationship with

Norm's Truck to paint their trailers, the resulting claim for loss of parts is one in contract and the economic loss rule applies barring the Pillings' claims in tort for lost parts.

The economic loss rule applies to hold parties to their contract remedies when a loss potentially implicates both tort and contract relief. If the economic loss rule applies, the party will be held to contract remedies regardless of how a plaintiff characterizes the claims. Tort law is concerned with obligations imposed by law rather than bargain. Contract law carries out an expectation bargain. "Where economic losses occur, recovery is confined to contract to insure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. If tort and contract remedies were allowed to overlap, certainty and unpredictability in allocating risk would decrease and impede future business activity." Alejandre at pp. 682, 683.

Any recovery is confined to the contract to insure that the allocation of risk and the determination of potential future liability are based on what the parties bargained for in the contract. This is true even where the specific risk of loss was not expressly allocated in the parties' contract. Alejandre, at pp. 686, 687. The Court in Alejandre barred tort claims, even where there was no contractual

remedy. The economic loss rule applies where the parties could or should have allocated the risk of loss, or had the opportunity to do so. Alejandre at p. 687. The Court reasoned that there is no reason to burden society as a whole for the losses of one who has failed to bargain for adequate contractual remedies. If the party could have allocated its risk, the rule applies; all that is required is that the party had the opportunity to allocate the risk of loss.

The application of the economic loss rule has been premised upon the opportunity for parties in an equal bargaining position to allocate risk. Griffith v. Centex Real Estate Corp., 93 Wn.App. 202, 969 P.2d 46 (1998). Here, clearly the Pillings and Norm's Truck had the opportunity to discuss and allocate risks relative to any parts that may have been delivered to Norm's Trucks. The parties' failure to bargain for and allocate the risk precludes any claims for non-contractual remedies or damages. An allocation of risk occurs not only when the allocation is described in the written contract, but also when the written agreement is silent on the allocation of risk. The silence of the contract on risk allocation leaves each party to absorb the risk that that party encounters because the parties had the opportunity when forming their contract to allocate risk. Alejandre at p. 688. This Court also determined that the economic

loss rule applied to bar both negligent and intentional misrepresentation in Carlile v. Harbor Homes, Inc., 194 P.3d 280, (Wn. 2008).

The Pillings are limited to the contract remedies the parties bargained for and agreed upon. Alejandre at pp. 682,683. There was no bargaining or agreement on the Pillings' parts. Here, the Pillings are pursuing purely economic damages to compensate them for the cost of the lost trailer parts. Because the damages were purely economic, the economic loss rule precludes the Pillings from recovering in tort on their contract claim against Norm's Truck.

Issue No. 5-Are the Pillings entitled to relief on their breach of warranty claims?

The Pillings argue a right to damages are recoverable under a breach of warranty theory and cite East River S.S. Corp. v. Transamerica Delaval, 476, U.S. 858, 872-873, 106 S. Ct. 2295, 90 L.Ed. 2d 865 (1986). Appellants' Brief, pp. 17, 18. The Pillings argue that although bailment sounds like a tort claim, it is a valid claim under the standards for breach of warranties. Here, no warranties apply to the Pillings' parts. There were no express or implied warranties of merchantability or fitness under the UCC which apply to the sale of goods. There were no parts sold here as

part of the parties' contract. In fact, there was no contract at all relative to the Pillings' parts.

The Pillings tried to circumvent the application of the economic loss rule by alleging the breach of the UCC's implied warranties of merchantability and fitness for use. Appellant's Brief, p. 19. Neither an implied warranty of merchantability or fitness for a particular use are implicated here. No one contends that the Pillings' trailers that were painted by Norm's Truck were not merchantable or fit for their intended use. Norm's Truck was not selling the trailers nor any parts to the Pillings. The Pillings have cited no authority for UCC remedies for failure to return goods. In the Appellant's Brief at p. 21, the Pillings are careful to use the term *understanding* of the parties instead of an *agreement* of the parties. The Pillings concede that there was no agreement between the parties relative to their parts. There can be no understanding between the parties as argued by the Pillings without discussion and agreement. Therefore, there was no express or implied contract with respect to the Pillings' parts.

The Pillings cite RCW 62A.2-712 as a basis for their right to withhold payment to Norm's Truck. Appellant's Brief, p. 21. Factually, the Pillings made payment and then later dishonored

their check by stopping payment. Norm's Truck neither sold the trailers nor the parts to the Pillings, and in fact, the Pillings' parts had nothing to do with the transaction between Norm's Truck and the Pillings. Norm's Truck was hired simply to paint the Pillings' trailers. RCW Title 62A specifically references sales. The entire chapter relates to the sales of goods. RCW 62A.2-106(1), specifically states this article is limited to contracts and agreements relating to the present or future sale of goods. Any implied warranty for goods to be merchantable under RCW 62A.2-314, only relates to contracts for sale of goods. Appellant's Brief, pp. 21, 25. Likewise, any implied warranty for fitness for a particular purpose under RCW 62A.2-315 again, only applies to a contract for sale of goods and only when the seller at the time of the contracting had reason to know of the particular purpose for which the goods were being sold and acquired by the buyer. Appellant's Brief, pp. 21, 25. Likewise, any right to cover under RCW 62A.2-712, relates to breach of a contract for sale of goods. The purchaser has the right to cover by purchasing goods in substitution for those to be provided from the seller. Therefore, the implied and express warranties upon which the Pillings base their claim for loss of parts do not exist in the present case. There simply was no contract for

sale of goods nor a contract for sale by Norm's Truck to the Pillings of any parts.

Issue No. 6- Did the trial court abuse its discretion in refusing the Pillings' request to amend their pleadings after trial to assert a new claim for relief?

The Pillings assign as error the trial court's refusal to allow the Pillings to amend their Counterclaim after the trial on their Motion for Reconsideration. The Pillings sought to amend their Counterclaim to include a breach of warranty claim under the RCW 62A.2.

The Pillings cite CR 15(b) in support of their claim to amend their claims and pleadings after the trial. Even though CR 15(b) provides the Court the right to allow the amendment of pleadings even after judgment, the decision to allow amendments to the pleadings is addressed to the sound discretion of the trial court. The Pillings sought to amend their pleadings to assert claims for breach of the implied warranties of merchantability and fitness for use. CR 15(b) allows the Court to amend a party's pleadings to conform to the evidence. This is only allowed when issues not raised by the pleadings are tried by the express and implied consent of the parties. Here, the issues and evidence to support

the claims for breach of implied warranties were not raised or tried by the parties during the course of the trial, but were raised subsequently for the first time in the Pillings' Motion for Reconsideration.

The trial court did explain its reasoning behind barring the Pillings' amendment of its Answer and Counterclaim post-trial in its oral ruling. RP 5/15/08, pp. 9-13. "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." Dewey v. Tacoma School District No. 10, 95 Wn.App. 18, 26, 974, P.2d 847 (1999). The Pillings did not plead before or during the trial a cause of action for breach of the implied warranties of merchantability and fitness for a particular use under the RCW 62.A2.

Issue No. 7: Did substantial evidence support the trial court's finding that Norm's Truck received and lost Pillings' trailer parts? Were damages properly assessed for the lost parts?

Neither of the Pillings' trailers were delivered to Norm's Truck with any lights, mud flaps or auxiliary equipment. RP 12/19/07 pp. 50-52. There was no request from the Pillings to Norm's Truck for replacement, or the cost of any trailer parts, until

after this lawsuit was commenced. RP 12/19/07 pp. 50-52.

On January 3, 2008, the trial court issued its initial Findings of Fact and Conclusions of Law. Appendix A-1. In the initial Findings of Fact and Conclusions of Law, the Court found that Mr. Kevin Bilbrey provided the more credible evidence with respect to whether parts, including lights and mud flaps, were delivered with either of the Pillings' first and second trailers. The Court concluded that Mr. Bilbrey was being truthful when he testified about the absence of lights and mud flaps when the trailers arrived at the Norm's Truck facility. Findings of Fact, 15. Appendix, A-1.

The parties were encouraged by the trial court to submit written comments to the Court's Findings of Fact and Conclusions of Law. On February 5, 2008, the Court revised the Findings of Facts and Conclusions of Law. CP 205-211. The most significant change was the Court's reversing its prior findings with respect to Mr. Kevin Bilbrey's testimony and the proof of missing parts. In the second set of Findings of Fact and Conclusions of Law, the trial court found that it was possible that the loss of the parts lies with Mr. Bride, who had sold the trailers to Mr. Pillings, or the driver who had delivered the second trailer, but likely that Norm's Truck had lost the trailer parts. The trial court allowed as damages to the

Pillings the full amount of all items listed in the J2R Truck and Trailer Invoice. Ex. 7, RP 12/19/07, p.120. This exhibit contained not only charges for mud flaps and lighting supplies, but the majority of the invoice was for the labor for installation of the flaps and the lights. There was clearly no agreement by Norm's Truck to install parts nor agreement by the Pillings to pay to install any parts. It is error to charge Norm's Truck the labor charges to install any parts. The trial court erred in entering its Finding of Fact, 16, providing as damages the full amount of the invoice.

There is no credible evidence supporting the trial court's conclusion that it was likely that Norm's Truck lost the Pillings' parts. This is a finding on which the trial court reversed itself between the first Findings of Fact dated January 3, 2008, and its second Findings of Fact entered on February 5, 2008. Finding of Fact 15, CP 205-211. There is no evidence that parts were actually delivered to Norm's Truck's business site. RP 12/19/07 pp. 99, 145, 147. The second trailer was delivered to Norm's Truck work site by Three Rivers Truck. RP 12/19/07, pp. 145,146. Neither Mr. Pilling nor any of his witnesses, including Mr. Scott Bride, could provide any evidence that any parts were delivered with the second trailer to Norm's Truck work site. RP 12/19/07, pp.140-148. The trial

court in its Findings of Fact 15, found that it was possible that the loss of the Pillings' parts lies with either Mr. Bride or the truck delivery driver, or more likely, Norm's Truck had misplaced the parts. Finding of Fact 15, CP 305-311. Appendix A-2.

The Pillings claimed missing lights and mud flaps on the second trailer. Mr. Kevin Bilbrey testified that this trailer arrived at Norm's Truck without lights or mud flaps. RP 12/19/07, pp. 50-53. Mr. Scott Bride is not a disinterested witness; if the trailers were delivered without parts, Mr. Bride would be responsible for their cost. RP 12/19/07, pp. 147-149. There was certainly a break in the chain of custody of these trailers and any alleged parts for the trailers. The truck driver who actually delivered the trailers to Norm's Truck did not testify, nor was there any witness who could testify that the second trailer was delivered with parts. RP 12/19/07 pp. 147-149. The Pillings had the burden of proof to establish that Norm's Truck lost trailer parts that were delivered to it. The Pillings failed to provide any evidence that parts actually were delivered with the second trailer to Norm's Truck. Mr. Kevin Bilbrey testified that he installed from his shop, running lights and mud flaps to get the driver and the Pillings' second trailer safely down the road. RP 12/19/07, pp. 35, 36, 38. Mr. Pilling testified that the trailer, when it

arrived in Oregon, had minimum lights on it. RP 12/19/07, p.116.

Issue No. 8- Attorney fees at Trial and Norm Truck's request for attorney fees on Appeal.

Pursuant to RAP 18.1(b), Norm's Truck seeks a decision affirming the trial court's award of attorney fees. Norm's Truck also requests an award of attorney fees and expenses on Appeal. The same grounds supporting the trial court's basis for an award of attorney fees also apply on Appeal. The Pillings argue that if the Court of Appeals reverses the trial court's decision in favor of Norm's Truck, they have prevailed on the right to stop payment on the check issued to Norm's Truck under Toyota of Puyallup, Inc., v. Tracy, 63 Wn.App., 346, 818 P.2d 1122 (1991).

There is ample authority supporting the award of attorney fees to Norm's Truck at trial and on Appeal. First, the Pillings did not improve their position over the arbitration award. MAR 7.3 mandates the assessment of costs and reasonable attorney fees against a party who appeals an arbitration award and fails to improve their position at the Trial de Novo. MAR 7.3 does not limit the award of attorney fees to the amount in controversy or the amount of the arbitration award. Also, Norm's Truck is also entitled to its costs and reasonable attorney fees based upon the Notice of Dishonor which was served upon the Pillings after they stopped payment on their check of \$4,994.14. The Notice of Dishonor was the basis for the trial court's Conclusions of Law No. 6 wherein it

awarded statutory penalties, expenses, costs and fees to Norm's Truck under RCW 62A.3-515.

The Pillings argue that even if the Court of Appeals affirms the Superior Court's decision, the decision awarding attorney fees should be reversed based upon reasonableness and failure to segregate. The Pillings argue that \$33,727.00 in attorney fees awarded by the trial court here is not reasonable due to the fact that the amount in controversy was only approximately \$5,000.00. Whether the fee award is reasonable is a matter of discretion for the trial court, which will be reversed only for an abuse of discretion. Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 859 P.2d 1210 (1993). The fact that the attorney fees exceeded the amount in controversy in and of itself is not a basis for reversing a trial court on the award to Norm's Truck of its reasonable attorney fees. There is also no reason to segregate attorney fees based upon the issues argued at and after trial. The facts underlying the multiple issues and claims in this case are so intertwined the related fees cannot be feasibly segregated. Simpson v. Thorslund, 2009-WA-0721.010, (July 2009). Norm's Truck prevailed on the sole issue for trial, whether the Pillings were justified in stopping payment on the check they issued to Norm's Truck. The trial court ruled that they were not.

The Pillings also argue that there were insufficient findings and evidence for the Court to evaluate the award of reasonable attorney fees. In hindsight, after they have caused both parties to

incur substantial attorney fees, the Pillings realize that they should not have appealed the arbitration award. This is no basis to adjust the attorney fees incurred by Norm's Truck that were caused by the Pillings' appeal of the arbitration award. The fact that the attorney fees awarded to Norm's Truck greatly exceed the amount of the arbitration award should have been assessed by the Pillings and their attorney at the time the Pillings chose to appeal the arbitration award. They chose to incur the significant and substantial fees involved in the Superior Court trial and subject Norm's Truck to the same expenses. The risk to this approach is the possibility that the court may rule against the Pillings and assess actual attorney fees and costs incurred.

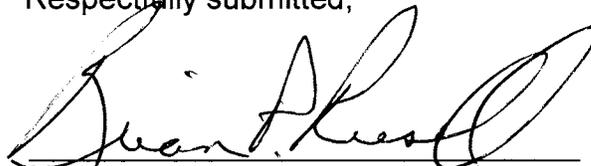
The Pillings in their appeal do not evaluate any of the factors under a Lodestar evaluation for the trial court's determination of reasonable attorney fees. Bowers v. Transamerica Title Insurance Co., 100 Wn.2d 581, 675 P.2d 193 (1983). The Court presumes the Lodestar amount is reasonable. Hennigsen v. WorldCom, Inc., 102 Wash.App. 828, 9 P.3d 948 (2000). The Pillings do not make any specific argument or objection against the time and labor incurred by Norm's Truck's counsel, as set forth in the Declaration of Brian P. Russell supporting the Motion for Attorney Fees. CP 330-343. The Trial court at the time of the award of attorney fees in this case had reviewed the attorney declaration of Brian P. Russell setting forth the date and the description of the services performed, the amount of time incurred, and the hourly rate for determination of the

fee award. The Pillings have made no objection to any of the work done, other than a blanket claim that the total amount is unreasonable. Norm's Truck did prevail on all of the Pillings' claims that the wrong paint was used, the failure to paint stripes, and the loss of any alleged parts from the trailer.

H. CONCLUSION

This case is a classic application of the economic loss rule. The agreement to paint the two trailers between the Pillings and Norm's Truck was silent concerning the Pillings' trailer parts. There was never any discussion or agreement relating to the Pillings' parts. The Pillings argue there was an implied agreement or duties to deliver the parts based on implied warranties outside the parties' agreement. Here, the parties' agreement is silent as to these parts, and the risk of loss rests with the Pillings and cannot be the basis for their dishonor of the check they issued to Norm's Truck.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian P. Russell", written over a horizontal line.

BRIAN P. RUSSELL #10715

Attorney for Respondents

The HON. BRUCE E. HELLER

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

NORM'S TRUCK AND EQUIPMENT,
INC., a Washington Corporation,

Plaintiff,

vs.

PILLING dba JOSEPH PILLING
ENTERPRISES,

Defendant.

NO. 06-2-10777-2 KNT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come on for trial on December 19, 2007, and the Court having heard argument of counsel, testimony of the witnesses, and considered evidence presented, and finding itself fully apprised now, therefore, enters the following:

FINDINGS OF FACT

I.

Plaintiff Norm's Truck & Equipment, Inc. ("Plaintiff"), is a Washington Corporation doing business in Pacific, King County, Washington.

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Unsigned
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II.

Defendants Joseph G. Pilling and Lisa B. Pilling (“Defendants” or “Mr. Pilling”), are residents of Monroe, Oregon, doing business as Joseph Pilling Enterprises.

III.

Plaintiff sandblasted and painted two side-dump trailers for Defendants. These jobs were performed on two separate occasions with separate invoices issued for each trailer. The first trailer was painted and delivered to Defendants on or about August 22, 2005, and an invoice was issued to Defendants for \$6,277.54, which included tax in the amount of \$507.74. After delivery of this first trailer, Defendants paid Plaintiff \$5,700.00 for work on the first trailer. Plaintiff acknowledges that Defendants should not have been charged tax since they reside in Oregon. Plaintiff does not dispute the amount Defendants paid for the first trailer.

IV.

On or about October 5, 2005, Defendant had a second side-dump trailer delivered to Plaintiff for painting. Plaintiff sandblasted and painted this side-dump trailer pursuant to Defendants’ instructions. After the work was completed, Plaintiff issued its Invoice No. 15233 in the sum of \$4,994.14.

V.

After receipt of the invoice, Defendants sent their agent to the Plaintiff’s business site in Pacific, Washington, to pick up the painted trailer, at which time a check in the sum of \$4,994.14 for full payment of the invoice was delivered to Plaintiff.

VI.

Upon receipt of the Defendant’s check, Plaintiff released the trailer to Defendants.

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VII.

1 Defendants stopped payment on the check after they took delivery of the
2 painted side-dump trailer. Norm Bilbrey called Mr. Pilling to discuss the situation
3 with him. Mr. Pilling did not respond.

VIII.

4
5 On March 9, 2006, Plaintiff issued a Notice of Dishonor, pursuant to RCW
6 62A.3-503, to the Defendants demanding payment of the check. Defendants did not
7 respond to the Notice of Dishonor, nor did they make the check good.

8 IX.

9 Plaintiff filed the present lawsuit on March 29, 2006, seeking a judgment for
10 the \$4,994.14 check issued to them by Defendants, interest, statutory penalties under
11 the Notice of Dishonor, and for their attorney fees and court costs.

X.

12 Defendants admit that they did not pay the face amount of the check, but
13 claim that no payment was due.

14 XI.

15 Defendants allege that Plaintiff breached an agreement to paint the first trailer
16 with acrylic enamel paint rather than a more expensive IMRON paint, failed to paint
17 stripes on the first trailer, lost parts delivered with the first trailer, and failed to install
18 these parts on the first trailer. Defendants also claim that Plaintiff breached an
19 agreement to paint stripes on the second trailer, lost parts delivered with the trailer,
20 and failed to install parts on this trailer.

XII.

21 The most significant issue regarding the first trailer concerns the acrylic vs.
22 IMRON paint dispute. Defendants provided approximately ten gallons of acrylic
23 paint to Plaintiff for use on the first trailer. Plaintiff misplaced or lost the paint
24 provided by Defendants. Mr. Kevin Bilbrey, Plaintiff's shop manager, contacted Mr.
Pilling to notify him that the materials provided had been lost. Mr. Pilling provided

1 Plaintiff the paint code for the material that was lost, which was a code exclusive to
2 IMRON paint. Mr. Bilbrey testified that he discussed use of the IMRON paint on the
3 first trailer and the cost of this material with Mr. Pilling, and that Mr. Pilling
4 approved its use. Mr. Pilling denies any discussions relating to IMRON prior to the
5 completion of the trailer and claims there was no agreement regarding the price of the
6 IMRON.

7 XIII.

8 The Court finds the testimony of Mr. Bilbrey to be more persuasive. First,
9 Mr. Pilling's testimony was inconsistent. He first testified he had no discussion with
10 Mr. Bilbrey regarding the use of IMRON. He then testified that he told Mr. Bilbrey
11 not to use IMRON because it blistered. When questioned by the Court as to why he
12 would have raised the IMRON issue if Mr. Bilbrey had not first sought his approval
13 to use IMRON, Mr. Pilling conceded he did not remember when the conversation
14 occurred. Even if Mr. Pilling had told Mr. Bilbrey not to use IMRON, Defendants
15 have not explained why Plaintiffs would have willfully disregarded their instructions.
16 The Court notes that when Defendants instructed Plaintiff to paint the second trailer
17 with acrylic paint, Plaintiff complied. Lastly, the Court finds that Defendants'
18 paying of the bill for the first trailer without protest is inconsistent with their claim
19 that they had instructed Plaintiff not to use IMRON. As a result of the use of
20 IMRON, the bill was considerably higher than it would have been had acrylic paint
21 been used. Had there been an agreement not to use IMRON, the Court finds it
22 unlikely Defendants would have willingly paid the full amount.

23 XIV.

24 Defendant testified that he had an oral agreement with Mr. Norman Bilbrey,
owner of Norm's Truck & Equipment, to paint stripes on the trailer at a cost of
\$250.00. This agreement is confirmed by the invoice for the first trailer which states,
"Install Stripe." Mr. Pilling acknowledged in his testimony that he never provided
any specifications to Plaintiff for the stripes. According to Mr. Pilling, he was

1 expecting Mr. Kevin Bilbrey to call him regarding the specifications. It is not clear
2 from the testimony what the basis for this expectation was and who had the
3 obligation to call whom. In any event, Plaintiff did not paint a stripe on the first
4 trailer. Yet, according to the invoice, the parties agreed to \$3250.00 for labor,
5 including the painting of the stripe. Had Defendants questioned the invoice for the
6 first trailer, they would likely have been entitled to a refund for the portion of the
7 labor for installing the stripe that was not performed. Yet even after the first trailer
8 was delivered to Defendant, Mr. Pilling did not bring to Plaintiff's attention the fact
9 that the stripe had not been painted. In fact, there is no evidence that he discussed the
10 stripe issue with Plaintiff when he had the second trailer delivered to Plaintiff.
11 Unlike the first invoice, the second invoice makes no mention of a stripe. It was not
12 until the second trailer was returned to them that Defendants claimed that Plaintiff
13 breached the agreement by failing to paint stripes on both trailers.

14 XV.

15 Defendants also contend that Plaintiff lost parts to both trailers, including
16 lights and mud flaps. Mr. Scott Bride testified that when the two trailers were taken
17 from his yard for delivery to Plaintiff, the parts were located in boxes in the bottom
18 of the two trailers. Mr. Bride was not present when the trailers arrived at Plaintiff's
19 facility. Mr. Kevin Bilbrey testified that he inspected the trailers when they arrived
20 at the Plaintiff's worksite, and that they did not contain any of the alleged missing
21 equipment, including lights, and mud flaps. This statement is not entirely accurate
22 since, according to Mr. Pilling, the second trailer arrived in Oregon with cylinders
23 and airbags. Notwithstanding this misstatement, the Court finds Kevin Bilbrey to
24 have been a credible witness. Based on his demeanor and his willingness to admit
that Plaintiff lost the acrylic paint supplied by Defendants, the Court concludes that
Kevin Bilbrey was being truthful when he testified to the absence of the lights and
mud flaps when the trailers arrived at his facility.

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1 Wherefore, having made its FINDINGS OF FACT, the Court now enters its

2 CONCLUSIONS OF LAW

3 I.

4 Venue is proper in King County pursuant to RCW 4.12.025.

5 II.

6 Defendants Pilling are subject to the jurisdiction of this Court pursuant to
7 RCW 4.28.185, by the transaction of business within the State of Washington with
8 Plaintiff.

9 III.

10 Defendants' issuance of the check for \$4,994.14 for work performed by the
11 plaintiff in payment of the Plaintiff Norm's Truck & Equipment Invoice No. 15233,
12 constitutes an account stated.

13 IV.

14 The Notice of Dishonor of Check issued by Plaintiff to Defendants in this case
15 complied with the requirements of RCW 62A.3-503 through 522.

16 V.

17 A purported stamp of the drawee, payor bank or presenting bank, on or
18 accompanying the instrument stating that acceptance or payment has been refused
19 creates a "presumption of dishonor." RCW 62A.3-505.

20 VI.

21 Defendants failed to establish by a preponderance of the evidence that
22 Plaintiff breached its agreements with Defendants, with respect to the type of paint
23 used and responsibility for lost parts. While Defendants could have reasonably
24 demanded a reduction of the \$250.00 charged for labor on the first trailer based on
the failure to paint stripes, the issuance of Defendant's check for \$5,700.00 in
payment of the plaintiff's Invoice No. 15064, constitutes an accord and satisfaction.
The Court finds no evidence of an agreement to paint a strip on the second trailer.

1 Defendants were therefore not justified in stopping payment on the check for
2 \$4,994.14.

3 VII.

4 Norm's Truck and Equipment, Inc., should be issued a judgment for payment
5 of the check issued by Defendants Pilling in the sum of \$4,994.14. Additionally,
6 they should be awarded the statutory penalties, expenses, costs, and fees set forth in
7 RCW 62A.3-515, including interest at the rate of 12% per annum from February 1,
8 2006, to the date of these findings, a \$300.00 penalty and a \$40.00 collection cost, as
9 set forth in the statute, as well as the attorney fees and court costs. Plaintiff shall file
10 an application for fees and costs no later than January 17, 2008. Defendants shall file
11 their response to the application no later than January 24, 2008. Any reply by
12 Plaintiff shall be filed no later than January 28, 2008.

13 Date this ____ day of January, 2008.

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15 _____
16 JUDGE BRUCE E. HELLER
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The HON. BRUCE E. HELLER

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

NORM'S TRUCK AND EQUIPMENT,
INC., a Washington Corporation,

Plaintiff,

vs.

PILLING, dba JOSEPH PILLING
ENTERPRISES,

Defendants.

NO. 06-2-10777-2 KNT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come on for trial on, and the Court having considered written and oral argument of counsel, testimony of the witnesses, and evidence presented, and finding itself fully apprised, now, therefore, enters the following:

FINDINGS OF FACT

I.

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Plaintiff sandblasted and painted two side-dump trailers for Defendants. These jobs were performed on two separate occasions with separate invoices issued for each trailer. The first trailer was painted and delivered to Defendants on or about August 22, 2005, and an invoice was issued to Defendants for \$6,277.54, which included tax in the amount of \$507.74. After delivery of this first trailer, Defendants paid Plaintiff \$5,700.00. Plaintiff acknowledges that Defendants should not have been charged tax since they reside in Oregon. Plaintiff does not dispute the amount Defendants paid for the first trailer. Defendants claim that the \$5,700.00 included a partial credit that would be applied to work on a second trailer. Plaintiff denies this claim.

IV.

On or about October 5, 2005, Defendant had a second side-dump trailer delivered to Plaintiff for painting. Plaintiff sandblasted and painted this side-dump trailer pursuant to Defendants’ instructions. After the work was completed, Plaintiff issued its Invoice No. 15233 in the sum of \$4,994.14.

V.

After receipt of the invoice, Defendants sent their agent to the Plaintiff’s business site in Pacific, Washington, to pick up the painted trailer, at which time a check in the sum of \$4,994.14 for full payment of the invoice was delivered to Plaintiff.

VI.

Upon receipt of the Defendant’s check, Plaintiff released the trailer to Defendants.

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4 situation with him. Mr. Pilling did not respond.

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19 and failed to install those parts on this trailer.

20 XII.

21 The most significant issue regarding the first trailer concerns the acrylic vs.
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23 paint to Plaintiff for use on the first trailer. Plaintiff misplaced or lost the paint
24 provided by Defendants. Mr. Kevin Bilbrey, Plaintiff's shop manager, contacted Mr.
Pilling to notify him that the materials provided had been lost. Mr. Kevin Bilbrey
testified that he discussed use of the IMRON paint on the first trailer and the cost of
this material with Mr. Pilling, and that Mr. Pilling approved its use. Mr. Pilling

1 denies any discussions relating to IMRON prior to the completion of the trailer and
2 claims there was no agreement regarding the price of the IMRON.

3 XIII.

4 The Court finds the testimony of Mr. Kevin Bilbrey to be more persuasive.
5 First, Mr. Pilling's testimony was inconsistent. He initially testified he had no
6 discussion with Mr. Kevin Bilbrey regarding the use of IMRON. He then testified
7 that he told Mr. Kevin Bilbrey not to use IMRON because it blistered. When
8 questioned by the Court as to why he would have raised the IMRON issue if Mr.
9 Kevin Bilbrey had not first sought his approval to use IMRON, Mr. Pilling conceded
10 he did not remember when the conversation occurred. Assuming Mr. Pilling had told
11 Mr. Kevin Bilbrey not to use IMRON, Defendants have not explained why Plaintiff
12 would have willfully disregarded their instructions. The Court notes that when
13 Defendants instructed Plaintiff to paint the second trailer with acrylic paint, Plaintiff
14 complied. Lastly, the Court finds that Defendants' paying of the bill for the first
15 trailer without protest is inconsistent with their claim that they had instructed Plaintiff
16 not to use IMRON. As a result of the use of IMRON, the bill was considerably
17 higher than it would have been had acrylic paint been used. Had there been an
18 agreement not to use IMRON, the Court finds it unlikely Defendants would have
19 willingly paid the full amount. The Court is not persuaded that the parties agreed that
20 the bill for the first trailer was too high and that a partial credit would be given for
21 work on the second trailer. Had there been such an agreement, the Court finds that
22 Defendants would not have paid the full amount for work performed (\$4994.14) on
23 the second trailer without demanding a credit.

24 XIV.

25 Defendant testified that he had an oral agreement with Mr. Norman Bilbrey,
26 owner of Norm's Truck & Equipment, to paint stripes on the trailer at a cost of
27 \$250.00. This agreement is confirmed by the invoice for the first trailer which states,
28 "Install Stripe." Mr. Pilling acknowledged in his testimony that he never provided

1 any specifications to Plaintiff for the stripes. According to Mr. Pilling, he was
2 expecting Mr. Kevin Bilbrey to call him regarding the specifications. It is not clear
3 from the testimony what the basis for this expectation was and who had the
4 obligation to call whom. In any event, Plaintiff did not paint a stripe on the first
5 trailer. Instead, it painted both trailers in two different color tones. Mr. Pilling
6 testified he saw the first trailer five weeks before he picked up trailer number 2. Yet
7 even after the first trailer was delivered to Defendant, Mr. Pilling did not bring to
8 Plaintiff's attention the fact that the stripe had not been painted. Nor did he contact
9 Plaintiff and demand that a stripe be installed on the second trailer. It was not until
10 the second trailer was returned to them that Defendants claimed that Plaintiff
11 breached the agreement by failing to paint stripes on both trailers. Based on
12 Defendants' failure to question the absence of the stripe after the first trailer was
13 delivered to him, the Court finds that there was no agreement to install stripes, as
14 opposed to contrasting colors, on the two trailers.

13 XV.

14 Defendants also contend that Plaintiff lost and failed to install lights and mud
15 flaps on the second trailer. Mr. Scott Bride testified that when the second trailer was
16 taken from his yard for delivery to Plaintiff, the parts were located in a box in the
17 bottom of the trailer. Mr. Bride was not present when the trailer arrived at Plaintiff's
18 facility and the driver who delivered the trailer to Plaintiff did not testify. Mr. Kevin
19 Bilbrey testified that he inspected the trailer when it arrived at the Plaintiff's
20 worksite, and that they did not contain any uninstalled parts, including lights and
21 mud flaps. This statement is not accurate since, according to Mr. Pilling, the second
22 trailer arrived in Oregon with cylinders and airbags. While it is possible that the
23 responsibility for the missing lights and mud flaps lies with Scott McBride or the
24 driver, the Court finds, on a more probable than not basis, that the missing parts were
misplaced at Plaintiff's facility, similar to the acrylic paint for the first trailer.

XVI.

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2 Defendants incurred damages in the amount of \$564.19 to purchase and have
3 mud flaps and lights installed on the second trailer.

4 Wherefore, having made its FINDINGS OF FACT, the Court now enters its

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6 CONCLUSIONS OF LAW

7 1. The Court has jurisdiction over the subject matter and parties in this case.

8 2. This is an action by Plaintiff for wrongful dishonor of a negotiable
9 instrument by Defendants, and counterclaims by Defendants for breaches of contract
10 and bailment by Plaintiff. Plaintiff bears the burden of establishing the wrongful
11 dishonor, and Defendants bear the burden of proving their entitlement to, and amount
12 of, a judgment on their claims for breach of contract and/or breach of bailment, by a
preponderance of the evidence.

13 3. Defendants' issuance of the check for \$4,994.14 for work performed by
14 Plaintiff in payment of the Plaintiff Norm's Truck & Equipment Invoice No. 15233,
15 constitutes an account stated.

16 4. The Notice of Dishonor of Check issued by Plaintiff to Defendants in this
17 case complied with the requirements of RCW 62A.3-503 through 522.

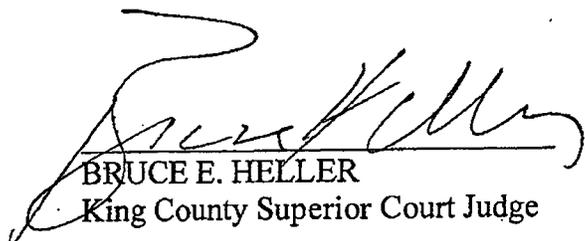
18 5. The "economic loss rule," *see, Alejandre v. Bull*, 159 Wn.2d 674 (2005),
19 bars Defendants' counterclaim related to the loss of the mud flaps and lights. This
20 finding incorporates the Court's May 15, 2008 oral decision regarding this issue.

21 6. Defendants' counterclaims, including those relating to the IMRON paint
22 and the paint striping, are dismissed. Accordingly, Defendants were not justified in
23 stopping payment on the check for the work done on the second trailer.
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7. Plaintiff should be issued a Judgment in the amount of \$4,994.14. Additionally, it should be awarded the statutory penalties, expenses, costs, and fees set forth in RCW 62A.3-515, including interest at the rate of 12% per annum, the \$300.00 penalty, and the \$40.00 collection cost, as set forth in the statute, as well as the attorney fees and costs, to be determined separately.

Dated this 16th day of June, 2008.


BRUCE E. HELLER
King County Superior Court Judge

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7 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
8 DIVISION I, AT SEATTLE

9 Norm's Truck & Equipment, Inc., a Washington
10 corporation,

11 Respondent,

12 vs.

13 Joseph G. Pilling and Lisa B. Pilling, dba Joseph Pilling
14 Enterprises,

15 Appellants.

Ct. App.No. 62276-5-1

King County Superior Ct. Cause No.:

06-2-10777-2KNT

DECLARATION OF SERVICE

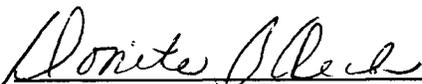
16 I DONITA DECK declare:

- 17 1. I am a permanent resident of the United States and a resident of the State of Washington,
18 over the age of twenty-one years, not a party to the above-caption action, and competent to
19 testify as a witness.
- 20 2. I am employed with the law firm of Brian P. Russell, 17820 1st Avenue South, Suite 102,
21 Normandy Park, WA. 98148 as a legal assistant.
- 22 3. That on July 30, 2009, I caused to be served a true and correct copy of the following:
23 Respondent's Brief and Declaration of Service, on the following parties via U.S. Mail, postage
24 prepaid:

25 Francois L. Fischer, Attorney for Defendants
Fischer Law Offices
200 Winslow Way West, Suite 300
Bainbridge Island, WA 98110
Phone: 206-780-8555

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

Signed at Normandy Park, King County, Washington, on July 30, 2009.


Donita G. Deck

DECLARATION OF SERVICE-1

BRIAN P. RUSSELL
ATTORNEY AT LAW
17820 1ST AVENUE SOUTH STE 102
NORMANDY PARK, WA 98148
PHONE: 206-244-3200
FAX: 206-248-2023