

NO. 67519-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GRANT NORWITZ and JUSTINE NORWITZ,

Appellants,

vs.

mitsubishi motors north america, inc., a
california corporation; the carey company dba carey
motors; carey mitsubishi, a washington corporation;
mitchell cooper and jane doe cooper, husband and wife,

Respondents.

BRIEF OF RESPONDENTS

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I. SUMMARY OF RESPONDENTS' ARGUMENT

The Norwitzes assign error only to the dismissal of their breach of warranty claim. The Norwitzes assign error to no ruling concerning their common law claims against Carey Motors or their tortious interference claim against Mitchell Cooper, or to any ruling concerning Carey Motors' counterclaim.

The Court should affirm because neither Mitsubishi nor Carey Motors is legally responsible under the vehicle warranty for repairing the Norwitzes' vehicle engine if the damage to the engine was caused by lack of lubricating oil in the engine. Mitsubishi's warranty does not cover the cost of repairs to the engine if damage was due to improper maintenance. The Norwitzes do not dispute that improper maintenance includes failing to check the engine oil level and change or add oil as necessary.

Mitsubishi presented the trial court with substantial admissible evidence that the engine was damaged in August 2009 because the engine oil level was too low. The "change oil by" date on the sticker that is in the vehicle is October 15, 2007, and the engine failed soon after the oil level warning light lit up while the vehicle was being driven from Santa Fe to

Seattle on the return leg of a round-trip drive to Oshkosh, Wisconsin, during which the oil level was never even checked.¹

Most significantly, and even if a question of fact existed with respect to whether Mr. Norwitz changed the vehicle's engine oil before the vehicle left Seattle for the trip to Oshkosh and back, Mitsubishi offered competent, admissible, and uncontroverted expert testimony that there were no oil leaks but that the engine oil level was low enough to cause, and probably did cause, the engine failure on August 13, 2009. The Norwitzes failed to controvert Mitsubishi's causation evidence with competent and admissible evidence that there had been something wrong with the engine itself when they purchased the Montero in 2006 and that lack of engine oil was not the cause of the 2009 engine failure.

The Norwitzes may not use "equitable estoppel" to establish warranty coverage, because a plaintiff may not use equitable estoppel offensively. Even if equitable estoppel were applicable, the Norwitzes cannot show that their situation would be different had they been told on August 13, 2009, rather than September 1, 2009, that the repairs are not covered by Mitsubishi's warranty.

¹ Grant Norwitz claimed to have changed the oil frequently in the vehicle, but, even if that created a dispute as to whether he had changed the oil by or after the "change oil by" date of October 15, 2007, it did not create an issue of fact as to whether the oil was changed (or checked, even) during the several thousand mile long, round-trip drive to Oshkosh and back.

II. RESTATEMENT OF THE ISSUE PRESENTED BY THE
NORWITZES' ASSIGNMENT OF ERROR

1. With respect to the Norwitzes' claim for breach of warranty by Mitsubishi, did the trial court correctly conclude that the Norwitzes, in response to defendants' motion for summary judgment, failed to offer competent and admissible evidence creating a genuine issue of material fact as to whether the engine in the Norwitzes' 2006 Montero failed in August 2009 because its oil level was allowed to remain too low even after the oil-level warning light came on?

2. Is the Norwitzes' argument that Mitsubishi and/or Carey Motors is equitably estopped to deny that Mitsubishi's warranty covers the damage to the Norwitzes' Montero engine legally invalid under the rule that equitable estoppel may not be used offensively, or as a "sword," by a plaintiff?

3. Even if the Court overlooks the Norwitzes' attempt to use equitable estoppel offensively to establish that Mitsubishi's vehicle warranty covers the damage to their Montero engine, have the Norwitzes failed to cite authority supporting their argument that coverage of an express vehicle warranty may be established by "equitable estoppel"?

4. Even if warranty coverage may theoretically be established through the offensive use of equitable estoppel, did the Norwitzes fail to

offer competent and admissible evidence creating a genuine issue of material fact as to whether they relied to their economic detriment on what they claim were unconditional initial assurances by Carey Motors personnel that repairs to the engine in the Norwitzes' 2006 Mitsubishi Montero would be covered by the terms of Mitsubishi's warranty?

5. To the extent the Norwitzes may use equitable estoppel offensively to claim noncontractual "detrimental reliance" damages based on "equitable estoppel" whether or not Mitsubishi's warranty applies, did they fail to show or explain how they have suffered economic harm that they would not have suffered had they not relied on what they claim were unconditional initial assurances by Carey Motors personnel that repairs to the engine in the Norwitzes' 2006 Mitsubishi Montero would be covered by the terms of Mitsubishi's warranty?

III. COUNTERSTATEMENT OF THE CASE

A. The Norwitzes Purchase a Mitsubishi Montero in 2006.

On October 31, 2006, the Norwitzes purchased a 2006 Mitsubishi Montero. CP 2. A Warranty was provided with the purchase of the vehicle. *Id.*

B. The Norwitzes Lend Their Montero to A Friend's Band to Tow A Trailer Full of Musical Equipment Across The Country and Back.

In mid-July 2009, the Norwitzes loaned their Montero to their friend, John Widell, so that members of Mr. Widell's band could travel to

Oshkosh, Wisconsin and play at a corporate event there. CP 2, 41, 42. The Montero was driven from Seattle, over several mountain ranges to Oshkosh and back by way of Santa Fe, New Mexico, towing a U-Haul trailer containing the band's amplifiers and other equipment. CP 2, 41, 42, 54, 55, 56.

C. The Oil Light Comes On During the Return Trip, the Driver Becomes Concerned, But Admittedly Does Not Check the Oil Level.

Gary Follrich, the only band member who was present in the vehicle for the entire round-trip, testified that he did not recall the oil level in the vehicle being monitored at any time during the cross-country trip. CP 56, 57, 58, 59, 60. On the return trip, the oil light in the vehicle came on in eastern Oregon. CP 60. Mr. Follrich (driving alone at the time), called Mr. Widell, whom he had left in Santa Fe, to inquire if he should check or change the oil, and never heard back from him. CP 60, 61.

At that time I placed a phone call to Mr. Widell and asked him if perhaps he would know what kind of oil I should put in it because, as I saw the oil light come on, I thought maybe I should check the oil, and I hadn't heard back.

And, in fact, I had been considering whether – I recall asking – I actually left message with Mr. Widell, I didn't hear back, about perhaps would I be authorized to take it in for an oil change because we had driven it, you know, quite cross-country and figured that that might be a wise thing to do.

Meanwhile, I didn't worry about it too much because once it pressured up, the oil light went out, and so I figured that it wasn't bone-dry and continued on.

CP 61.

Mr. Follrich continued on the return trip and did not check or change the oil. *Id.*

D. The Oil Light Comes On Again, And The Engine Fails.

On August 13, 2009, when Mr. Follrich came through Yakima, Washington on Interstate 82, he stopped at a rest area. CP 61. As he left the rest area and started driving on an uphill grade, the oil light on the vehicle came on again. *Id.* The vehicle then lost all power and Mr. Follrich pulled to the side of the road. CP 62. Mr. Follrich testified that the vehicle "went dead," and that when he tried to re-start the vehicle, he "heard some kind of a crunch sound that did not sound good." CP 179.

E. Mr. Follrich has the Vehicle Towed to Carey Motors for Diagnosis.

The vehicle was towed to Carey Motors in Yakima, Washington.

Id. Mr. Follrich testified that:

You know, I now realize that I put a lot of assumption into the fact that – I had assumed that the vehicle had been maintained to a degree of when we departed on that trip, but perhaps we should have been a little more on the ball about our own maintenance, like knowing what kind of oil to put in there if we needed to.

CP 63, 64. Mr. Follrich recalled that while at Carey Motors, he learned that the vehicle had a broken timing belt, but that he "heard someone say

that, well, it wasn't completely dry," but at that point he "realized that perhaps we should have been checking the oil a little more regularly." CP 181. He testified that someone told him they had checked the oil, and that it was dry, or not completely dry, but he could not remember who told him that. *Id.*

F. Carey Motors Inspects The Vehicle, Discovering That There is Less Than One Pint Of Dirty, Thick Oil In The Vehicle.

Rogelio Lopez, a certified auto technician and mechanic, was assigned to assess the problem with the plaintiffs' vehicle after it was towed to Carey Motors. CP 74-75. Mr. Lopez noticed initially that the vehicle had a broken timing belt and ordered a new cam sprocket bolt for the overhead camshaft:

Anytime a car/vehicle comes in here with a broken timing belt, we always – the quickest thing to do for the customer and for us is to put a belt on it and see if it starts....So right off the bat, that's our intent. To find out if there's damage, that's the quickest really way.

CP 183. Once the new cam sprocket bolt was received and installed, Mr. Lopez discovered that the cam was seized:

Once you get the sprocket back in there, you try and turn the cam to realign it so you can put the timing belt on it... Well, you couldn't move it. So then I took the cover off to find out why it's not turning, and come to find out that the cam was seized. I took the followers off, the valves, and found that the cam and the head, that's where the seizing was occurring... Well, we found the oil problem. No oil. Cody told me to drain it, see how much was in there. Since there was none in the dipstick, we have to - - Every time

there's a situation like that, you always check to see how much actual oil is in there. Come to find out, there wasn't much at all.

CP 183, 184. Mr. Lopez discovered that the engine had seized due to a lack of lubrication, and that there was less than a pint of dirty and thick oil in the vehicle. CP 75. Mr. Lopez found no evidence of any external oil leaks, and no damage to the cylinders inside. CP 185, 186. In addition, The "change oil by" sticker on the vehicle at the time it was towed to Carey Motors indicated that an oil change had been performed on the vehicle at Renton Mitsubishi. CP 75, 80. The due date on the sticker for the next oil change was October 15, 2007. *Id.* When the vehicle arrived at Carey Motors, it still contained a Mitsubishi filter. *Id.*, CP 82.

G. Mitsubishi Denies Warranty Coverage And The Norwitzes Do Not Authorize Repair Or Remove The Vehicle From Carey Motors' Service Bay

The warranty that came with the Norwitz' Montero provided that the customer is responsible for maintaining proper fluids in the vehicle.

CP 98, 99, 102. The Warranty stated the following (in pertinent part):

**DAMAGE CAUSED BY IMPROPER
MAINTENANCE OR FAILURE TO FOLLOW THE
RECOMMENDED MAINTENANCE SCHEDULE**
The repair of damages, which are caused because parts or services used were not those prescribed in this booklet's recommended maintenance schedule, are not covered under warranty. *It is the owner's responsibility to maintain the Vehicle as more fully set forth in, and in accordance with, the maintenance schedules outlined in*

this booklet. Be advised that Warranty coverage may be denied if proper maintenance is not followed.

CP 98 (emphasis added).

MAINTENANCE/WEAR

Parts and labor needed to maintain the vehicle and the replacement of parts due to normal wear and tear are not covered by warranty and are the owner's responsibility (unless those costs result from a warranty covered repair).

Examples are:

- Brake pads/shoes
- Clutch disc facings
- Wiper blades
- ***Lubrication***
- Engine tune-ups
- ***Replacing filters, coolant or fuses***
- Replacing spark plugs
- Cleaning and polishing

CP 99 (emphasis added).

WARRANTY REPAIR ORDER

Receipts covering the performance of maintenance services should be retained in the event questions arise concerning maintenance. These receipts should be transferred to each subsequent owner of this vehicle. *MMNA reserves the right to deny warranty coverage if the vehicle has not been properly maintained.* However, denial will not be based solely on the absence of maintenance records.

*Id.*² The Warranty advised that the *oil level should be inspected each time fuel is added to the vehicle.* CP 102 (emphasis added).

Mitchell Cooper, the Mitsubishi District Parts and Service Manager, denied warranty coverage because the engine's failure was

² The "Regular Maintenance Schedule" in the Warranty specified that the oil should be also be changed in the vehicle every 7,500 miles or 6 months, whichever occurs first. CP 101-115.

caused by a lack of sufficient oil. CP 69, 70. After Mitsubishi denied warranty coverage, the Norwitzes did not authorize further work or repairs on the vehicle, and they did not attempt to remove the vehicle. CP 48, 49. Mr. Norwitz testified that he “left it exactly where it is,” knowing that storage costs might be incurred. CP 49.

On January 11, 2010, previous counsel for Carey Motors sent a letter to the Norwitzes’ counsel, John Widell, requesting that the Norwitzes remove their vehicle from the service shop. CP 72, 73. The letter informed the Norwitzes that if the vehicle was not removed within 10 days of the date of the letter, Carey Motors would begin assessing a storage cost of \$11.00 per day. *Id.* On October 18, 2010, defense counsel sent an additional letter to Mr. Widell again asking the Norwitzes to remove their vehicle, as it was taking up a viable service bay. CP 34.³ The Norwitzes did not remove the vehicle. CP 84.

H. The Norwitzes Sue Mitsubishi, Carey Motors, and Mr. and Mrs. Mitchell Cooper

The Norwitzes filed this lawsuit on December 11, 2009, against Mitsubishi, Carey Motors, and Mitchell and Eileen Cooper, claiming breach of warranty, misrepresentation, and intentional interference with a contractual relationship by Cooper. CP 1-6. Carey Motors

³ To the extent the Norwitzes imply in their opening brief that Carey Motors conditioned release of the vehicle on payment of storage or other charges, that is not true and the record does not support such a claim. *See* CP 34.

counterclaimed, seeking charges for vehicle storage, towing, parts, and diagnostic service. CP 15-22.

I. All But One Of The Norwitzes' Claims Are Dismissed On Summary Judgment.

The defendants filed a Motion for Summary Judgment on all claims and counterclaims. Mitsubishi presented the unrefuted expert opinion of Mr. Lopez, a Master ASE (Automotive Service Excellence) certified automotive technician with a Master Elite Certification from Mitsubishi, who inspected and diagnosed the vehicle:

In my professional opinion on a more probable than not basis, and based on what I observed at the time I inspected plaintiffs' vehicle, the single cause of the breakdown of plaintiffs' vehicle was a lack of oil. In my experience, the viscosity of the oil is a clear indicator of lack of maintenance on the vehicle, as the oil does not thicken like that unless it has been in the vehicle for a significant amount of time without being changed.

CP 75. The Norwitzes presented the declaration of Mr. Norwitz, who was not in the vehicle or present at the time of the engine failure, and who had not performed an inspection of the vehicle's engine after the failure. CP 145-151. Mr. Norwitz testified that the damage could not have been caused by a lack of oil. CP 149. The Norwitzes presented no other testimony on the cause of engine failure, expert or otherwise.

On April 7, 2011, the Honorable Bruce Heller granted defendants' motion in part, and dismissed all of the Norwitzes' claims except for one,

finding an issue of fact as to whether Carey Motors caused additional damage to the engine of the vehicle by attempting to start the vehicle without first bore scoping or otherwise determining if there was other damage to the vehicle. CP 205. Judge Heller ruled that there were issues of fact as to whether it was legitimate for Carey Motors to bill the Norwitzes for diagnostic work provided before warranty coverage was denied. *Id.* Judge Heller's written ruling did not address Carey Motors' counterclaims for towing and storage costs. CP 217, 218.

J. Plaintiffs' One Remaining Claim Is Dismissed On Carey Motors' Motion for Reconsideration

Carey Motors subsequently moved for reconsideration on the Norwitzes' one remaining claim for damages against Carey Motors, and for amendment of the written order to specifically reflect the Court's oral ruling on Carey Motors' towing and storage costs. CP 206-221. Carey Motors cited to the previously-submitted excerpts of Mr. Lopez' deposition transcript where he testified that he had never started the engine on the vehicle, and reminded the court that the Norwitzes had presented no evidence that there was any damage to their vehicle beyond that caused by the lack of oil. CP 207. The record also reflected that it was Mr. Follrich that had attempted to start the vehicle after the engine died, and not Carey Motors personnel. CP 179, 183, 184.

The Norwitzes then submitted a Supplemental Declaration of Grant Norwitz, presenting new testimony claiming that, since the entry of the Order on Summary Judgment, he had picked up the vehicle from Carey Motors and inspected the engine. CP 230. Carey Motors moved to strike the Supplemental Declaration as untimely. CP 234. Judge Heller granted the motion for reconsideration in its entirety and did not consider Mr. Norwitz' supplemental declaration.⁴ CP 239-241. Judge Heller dismissed the Norwitzes' one remaining claim against Carey Motors for allegedly damaging the vehicle, and ordered the Norwitzes to pay Carey Motors all fees associated with the towing and storage of their vehicle (\$5,188), as well as pre-judgment interest. *Id.*

After the entry of the Order on Reconsideration, the only issue remaining for trial was on Carey Motors' counterclaim, i.e. for diagnostic services and parts provided before Mitsubishi denied coverage. CP 241. Carey Motors voluntarily dismissed that counterclaim. CP 295.

K. Carey Motors Is Granted Its Attorneys Fees Pursuant to RCW 4.84.260.

Carey Motors moved for an award of attorney's fees and costs pursuant to RCW 4.84.260. Judge Heller granted the motion, and final

⁴ The Norwitzes did not assign error to Judge Heller's refusal to consider Grant Norwitz' Supplemental Declaration.

judgment in favor of Carey Motors was entered on July 25, 2011 in the amount of \$12,161.00.⁵ CP 316-320.

L. The Norwitzes Appeal, Assigning Error Only to the Dismissal of the Breach of Warranty Claim.

The Norwitzes filed their Notice of Appeal on August 4, 2011. CP 322-330. In their opening brief, the Norwitzes assign error only to the trial court's dismissal of their claim for breach of warranty.⁶

IV. ARGUMENT

A. The Norwitzes' Breach Of Warranty Claim Was Properly Dismissed On Summary Judgment Because The Norwitzes Failed To Offer Competent And Admissible Evidence To Support The Causation Element Of That Claim.

The Norwitzes failed to offer any evidence establishing an issue of material fact with regard to their breach of warranty claim. On summary judgment, after a defendant meets the initial burden of showing the absence of an issue of material fact, the inquiry shifts to the party with the burden of proof at trial, the plaintiffs. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). If the plaintiff

⁵ The \$12,161 represents the following: \$5,188 towing and storage costs from January 21, 2010 to April 26, 2011; \$490.01 prejudgment interest; \$232.49 costs; and \$6,250 attorneys fees. CP 316-318. Contrary to the Norwitzes' assertion in their opening brief at page 3, Carey Motors' counterclaim for labor associated with examining and diagnosing the vehicle were not included in the judgment, as Carey Motors voluntarily dismissed that counterclaim. CP 295-297.

⁶ Plaintiffs do not assign error to, present argument about, or seek to vacate the Summary Judgment in favor of Carey Motors and Mitchell and Eileen Cooper, nor do they assign error to, present argument about, or seek to vacate the award of attorneys fees and costs to Carey Motors.

fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial, then the defendant's motion for summary judgment should be granted. *Id.* at 625.

Here, Mitsubishi submitted expert testimony that the cause of the engine failure was lack of lubrication. The Norwitzes tacitly acknowledged that the warranty does not cover damage due to a lack of lubrication, but failed to carry their burden to offer competent and admissible evidence that the damage to the vehicle was not due to a lack of lubrication, and thus was covered under the warranty.

1. The Fact That The Subject Warranty Did Not Provide Coverage For A Lack Of Maintenance Was Undisputed.

The warranty stated that coverage will be denied if the vehicle is not properly maintained. The Norwitzes did not dispute the requirements of the warranty, or that the oil level should be inspected *each time fuel is added to the vehicle*.

2. Testimony That The Damage To The Vehicle Was Due to A Lack Of Oil Was Uncontroverted.

Once Mitsubishi showed that the vehicle was damaged due to a non-warranted issue, the burden shifted to the Norwitzes to offer competent and admissible evidence that the condition of the vehicle was covered by the warranty. *Howell*, 117 Wn.2d. at 624. The Norwitzes

failed to do so. Rogelio Lopez' expert testimony that the engine failure was the result of a lack of oil went unrefuted.

The only testimony offered by the Norwitzes was the conclusory opinion testimony of Mr. Norwitz. Not only had Mr. Norwitz never performed an examination of the engine after the engine failure, but he was also unqualified to opine as an automotive mechanical expert. *See* CP 145-155. Mr. Norwitz has no training or experience in the automotive repair industry. *See* CP 153-155. Rather, his experience is in the aeronautics field, frequently as an executive or marketing representative. *Id.* He is not an ASE-certified mechanic, and pointed to nothing in his background which revealed any knowledge, training, or experience with automotive engine breakdown diagnostics or repair. Moreover, Mr. Norwitz was not driving the vehicle at the time it broke down, nor was he present when it was taken to Carey Motors.

Mr. Norwitz' conclusory opinions that lack of oil could not have caused the engine failure were all that was presented by the Norwitzes to contest the qualified diagnosis of Carey Motors' ASE-Certified Mechanic who inspected the vehicle and diagnosed the problem, and even those "opinions" offered no alternative explanation for the engine failure. The Norwitzes presented *no* evidence to meet their burden of proving that the engine failure was caused by a defect in workmanship or materials, or that

it was covered under the warranty. Judge Heller properly granted summary judgment on the warranty issue.

B. The Norwitzes' Equitable Estoppel Theory Is Legally Invalid And Unsupported By The Record.

1. The Norwitzes Cannot Seek Damages on A Theory of Equitable Estoppel.

As plaintiffs, the Norwitzes cannot affirmatively assert that warranty coverage is established through equitable estoppel. Equitable estoppel is “not available for offensive use by plaintiffs.” *Mudarri v. State*, 147 Wn. App. 590, 618, 196 P.3d 153 (2008), *citing Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 397, 879 P.2d 276 (1994) (quoting *Greaves v. Med. Imaging Sys., Inc.*, 71 Wn. App. 894, 898, 862 P.2d 643 (1993)).⁷ Equitable estoppel may only be used as a “shield” or

⁷ In *Mudarri*, a non-tribal casino owner sought a declaration that would allow him to lawfully operate electronic scratch ticket games in his casino (the nearby tribal casinos were permitted to do so). 147 Wn. App. 590. The trial court entered a summary judgment dismissal of the action. *Id.* Mudarri appealed, arguing equitable estoppel, claiming that “he relied to his detriment on the State fairly and equitably administering gambling laws,” and that the State misrepresented its capacity to consider authorizing electronic scratch tickets in the private sector. *Id.* The Court of Appeals held that Mudarri was not permitted to use equitable estoppel as a offensively as a “sword,” and, that as a plaintiff, he “could not affirmatively assert that the State was equitably estopped from preventing his proposed operation of electronic scratch ticket games.” *Id.* The Court affirmed the trial court’s entry of the order on summary judgment in favor of the State, and the Washington State Supreme Court denied review. *Mudarri v. State*, 166 Wn.2d 1003, 208 P.3d 1123 (2009).

In *Greaves*, the plaintiff argued that his oral employment contract should be taken out of the statute of frauds and rendered enforceable under the equitable estoppel theory. 71 Wn. App. 894. The Court of Appeals rejected that argument, and the Washington Supreme Court affirmed, stating that equitable estoppel was not an available argument for the plaintiff’s offensive use. *Id.* at 397.

“defense”; it may not be used as a “sword.” *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980).

The Norwitzes rely on *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 863 P.2d 535 (1993), and *Wilson v. Westinghouse Elec. Corp.*, 85 Wn. 2d 78, 530 P.2d 298 (1975), in support of their equitable estoppel argument. But both cases are distinguishable because neither the *Kramarevcky* or *Wilson* petitioners used the equitable estoppel argument as an *offense* – they used it as a defense, or a “shield.” The petitioners in *Kramarevcky* were both former recipients of public assistance benefits, who argued equitable estoppel in defense of DSHS’ attempt to seek recoupment of public assistance overpayments. In *Wilson*, the Petitioner argued equitable estoppel in defense of his employer’s attempt to recover all overages paid in his pension benefits.

In this case, Mitsubishi denied warranty coverage, and the Norwitzes picked up their swords and offensively argued that equitable estoppel establishes warranty coverage. Equitable estoppel cannot be used to establish warranty coverage where there is none. Washington law simply prohibits such an argument. The Norwitzes’ equitable estoppel arguments therefore fail.

2. The Norwitzes Failed To Cite Any Authority Supporting Their Argument That Coverage Of An Express Vehicle Warranty May Be Established By “Equitable Estoppel.”

The Norwitzes cite no legal support for their argument that equitable estoppel may establish warranty coverage. Contentions that are not supported by authority are not properly considered by an appellate court. *Pettet v. Wonders*, 23 Wn. App. 795, 599 P.2d 1297 (1979), review denied, 93 Wn.2d 1002 (1979), *citing Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974). The Norwitzes’ equitable estoppel arguments would therefore fail for that reason, even if they could use such arguments offensively.

3. Even If Equitable Estoppel Were Applicable, The Norwitzes Failed to Provide Any Competent or Admissible Evidence to Support that they “Relied” To Their Detriment.

If, theoretically it were determined that warranty coverage could be established by equitable estoppel, the Norwitzes failed to offer competent and admissible evidence to support such a claim. To establish equitable estoppel, a party must prove the following elements:

- (1) an admission, statement, or act inconsistent with a claim afterward asserted;
- (2) action by another in reasonable reliance on that act, statement, or admission; and
- (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

Teller v. APM Terminals Pac., 134 Wn. App. 696, 712, 142 P.3d 179 (2006). Equitable estoppel is not favored in Washington Courts. *Id.*

There is no competent evidence, testimonial or otherwise, that supports an equitable estoppel argument in this case. Even if Mr. Norwitz' assertion that "warranty coverage was initially granted by Mitsubishi after Mitsubishi personnel concluded that there was sufficient oil in the engine" were true, it does not change the physical facts of the vehicle which point to the single cause of the engine failure resulting from a non-warranted condition. Moreover, the Norwitzes' contention ignores the very nature of an examination and diagnosis.

In support of their "inconsistency" argument, the Norwitzes rely on their contention that Carey Motors checked the oil before determining that the repairs were covered by warranty. This contention is based on the testimony of Mr. Follrich, the driver, as to what he recalls being told by an unidentified person at Carey Motors. CP 181.⁸ Mr. Follrich's testimony about being told the oil had been checked establishes only that the engine was not completely dry, not that it contained enough oil to protect the engine from failure. CP 181.

⁸ Even if the Norwitzes had offered that testimony as an ER 801(d)(2) admission by Carey Motors, it was inadmissible to prove their breach of warranty claim against Mitsubishi because Follrich's testimony did not establish that the statements were made on behalf of Carey Motors, much less on behalf of Mitsubishi. Plaintiffs must set forth specific facts that sufficiently disclose that a genuine issue as to a material fact exists. *See Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006).

If the Norwitzes could prove that Carey Motors was inconsistent in its initial diagnosis, the Norwitzes cannot show that they reasonably relied on such representations to their detriment. Reliance in the context of an estoppel argument must be justified. *Marashi v. Lannen*, 55 Wn. App. 820, 824, 780 P.2d 1341 (1989). Reliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them. *Id.*, at 824-825; *see also Concerned Land Owners of Union Hill v. King County* 64 Wn. App. 768, 778, 827 P.2d 1017 (1992). Moreover, the injury element of equitable estoppel is not met if the party asserting the estoppel is required to do what it already would have been required to do under the circumstances. *See In re Marriage of Sanborn*, 55 Wn. App. 124, 129, 777 P.2d 4 (1989).

In *Sanborn*, the parties' divorce decree provided that when the former wife became eligible, her maintenance would be reduced by the amounts she received from the Social Security Administration (SSA). 55 Wn. App. 124. The former wife applied for the SSA benefits, but only received benefits for a few months out of the year. *Id.* The former husband subsequently reduced all monthly maintenance payments. *Id.* The former wife claimed that she was entitled all of the past-due maintenance, interest on the unpaid maintenance, and all her attorney fees. *Id.* The former husband argued that the claim for past-due maintenance

was barred by equitable estoppel. *Id.* The court held that the doctrine of equitable estoppel did not bar the former wife's claim because the former husband failed to demonstrate any injury other than having to do what he was legally obligated to do. *Id.*

The Norwitzes rely on *Kramarevcky* and *Wilson* for the proposition that a party should be held to a representation made where inequitable consequences would otherwise result to another party who has, in good faith, relied thereon. 122 Wn.2d 738; 85 Wn.2d 78. But *Kramarevcky* involved an overpayment of public assistance benefits, which Kramarevcky relied on by not applying for other assistance he otherwise would have been eligible for. *Id.* *Wilson* involved an employee who relied upon a misrepresentation of retirement benefits by his employer, to his detriment, because he was unable to defer his retirement date (which would have allowed him to receive a larger amount) and/or he was unable to seek other employment. *Id.*

Unlike *Kramarevcky* and *Wilson*, there is no evidence that the Norwitzes made any decisions in reliance on the warranty determination. The Norwitzes, somewhat misleadingly, argue that in reliance on Mitsubishi's initial indication that repairs would be covered by Warranty, they consented to repairs by Carey Motors. But the record indicates that it was Mr. Follrich who brought the car in for a diagnosis. Once Carey was

able to make a diagnosis, Carey's work on the vehicle stopped. By September 1, 2011, the Norwitzes knew that Mitsubishi was denying warranty coverage. The Norwitzes never consented to anything beyond the diagnosis, because after they were informed that the repairs would not be covered by warranty, they refused to give any further instruction, leaving the vehicle in Carey Motors' service bay for eighteen months.

The judgment Carey Motors obtained against the Norwitzes includes no charges for repairs, or even for diagnosis, which work was authorized and which the Norwitzes would have had to have someone perform regardless, unless they were prepared to junk their 2006 Montero before knowing why it had broken down, which they have never claimed they were.

The Norwitzes claim that they somehow missed an opportunity to fix the engine themselves, take the vehicle to their own mechanic, or take the car to an expert to evaluate the warranty coverage issue. But the record reflects that, after being informed of the denial of warranty coverage, plaintiffs *chose* not to fix the engine themselves, *chose* not to take the vehicle to their own mechanic, *chose* not to take the car to an expert, and in fact, *chose* to leave the vehicle "exactly where it is," despite the fact that they were contacted multiple times to remove the vehicle

from Carey Motors' service bay. Any damage⁹ that occurred to the vehicle after it came to Carey Motors was due to the Norwitzes' own refusal to remove their vehicle or otherwise give permission to Carey Motors to remove it. Moreover, there is no *evidence* that the Norwitzes "own" mechanic would have done anything Carey's mechanic(s) did not do.

The Norwitzes claim that once the engine was started (by Carey Motors), that none of their above-stated "options" existed any longer. But the record reflects that upon the vehicle's arrival to Carey Motors (with Mr. Follrich), Carey determined that the timing belt was broken, and never was able to start the vehicle because it found the oil problem before disassembling it. The record further reflects that it was Mr. Follrich who started the vehicle when it was on the side of the road, before the vehicle was brought to Carey Motors, and that he "heard some kind of a crunch sound that did not sound good." Any damage to the vehicle that may exist from an attempt to re-start the vehicle exists as a result of Mr. Follrich's attempt to re-start the vehicle after it died.

The Norwitzes' equitable estoppel arguments therefore fail. They are not legally permitted to offensively utilize equitable estoppel to establish warranty coverage where there is none. In addition, the

⁹ Although not an issue to the appeal, there has been no admissible evidence proffered by the Norwitzes that there was damage done to the vehicle after it arrived to Carey Motors.

Norwitzes have not submitted any competent or admissible evidence that Carey Motors was inconsistent in their diagnosis or in the facts known to it; that the Norwitzes relied on any said alleged misrepresentation; or that they were damaged in any way, save for the damage caused by their own failure to mitigate. The trial court properly rejected the Norwitzes' equitable estoppel arguments, and its dismissal of the breach of warranty claim should be affirmed, as there is no genuine issue of material fact.

C. Attorney Fees for Appeal.

The Norwitzes' opening brief does not make it clear exactly what trial court ruling(s) they are asking this Court to reverse. They assign error solely to the dismissal of the claim for breach of the warranty that Mitsubishi, but not Carey Motors or Mr. Cooper, gave for the 2006 Montero, and they assert at page 18 of their brief that Mitsubishi should be equitably estopped to deny warranty coverage (because of what Carey Motors personnel allegedly told Grant Norwitz initially). The conclusion section of the Norwitzes' brief, however, requests reversal of the "judgment," and the only Judgment the trial court entered was in Carey Motors' favor on its counterclaim; the Norwitzes' claims against defendants were dismissed by summary judgment orders, and no separate judgments were entered for Mitsubishi or the Coopers.

If the Court affirms, to the extent that the Norwitzes do not expressly disclaim, in their reply brief, any request that the judgment for Carey Motors be vacated, the Court should award respondents the attorney fees incurred to respond to those arguments in the Norwitzes' opening brief that do not clearly pertain exclusively to Mitsubishi. The only argument that clearly pertains exclusively to Mitsubishi would be the argument that a question of fact as to causation precluded summary dismissal of the breach of warranty claim. Thus, attorney fees incurred to respond to the Norwitzes' arguments based on equitable estoppel should be recoverable if respondents prevail on appeal. The Court has authority to make a fee award pursuant to RAP 18.1 and RCW 4.84.260, under which Carey Motors was awarded its attorney fees in the trial court. The Norwitzes do not assign error to or offer argument concerning Carey Motors' right to a fee award under RCW 4.84.260.

V. CONCLUSION

The trial court correctly granted summary judgment to the Respondents on all claims. This Court should affirm.

RESPECTFULLY SUBMITTED this 4th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 4th day of January, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 4th day of January, 2012, at Seattle, Washington.


Becky Rogers, Legal Assistant