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CASE NO. 68833-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KATHRYN MUELLER,

Respondent,

v.

HAURY'S AUTO BODY, INC.,
a Washington corporation,

Appellant.



A handwritten signature in black ink is written over a circular court stamp. The stamp contains the text "SUPERIOR COURT" at the top, "JAN 19 1990" on the left, and "2:10" at the bottom.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Respondent Kathryn Mueller cannot point to any written contract executed by her and Haury's Auto Body, Inc. ("Haury's") that stated Haury's would restore Ms. Mueller's vehicle to a rest-free condition. The trial court nevertheless ruled that Haury's breached a contract by failing to do so. Ms. Mueller attempts to support the trial court's breach-of-contract ruling by arguing the trial court correctly considered parol evidence to add that new obligation to the parties' written contract. In so arguing, however, Ms. Mueller ignores clear Washington precedent that bars a court from considering extrinsic evidence which varies, contradicts or modifies a written contract. The trial court erred in relying on parol evidence to modify the parties' written contract, and the trial court's breach-of-contract ruling should be reversed.

This Court should also reverse the trial court's ruling that Haury's violated Washington's Automotive Repair Act, RCW 46.71.005 *et seq.* by overcharging Ms. Mueller. Ms. Mueller did not plead that theory in her complaint and she

offered no evidence that she thereafter, prior to trial, notified Haury's or the trial court of her intention to rely on that theory. The trial court erred in awarding Ms. Mueller damages on an unpled theory.

Haury's respectfully asks this Court to reverse the trial court's rulings and to find for Haury's on these issues. Alternatively, Haury's asks this Court to reverse and remand this case to the trial court.

II. ARGUMENT

A. The Trial Court Erred by Considering Parol Evidence of the Parties' Contract

Ms. Mueller first argues that the trial court did not err by considering parol evidence of the terms of the parties' contract. The parol evidence in question was Ms. Mueller's testimony that she wanted her vehicle returned in a rust-free condition. Ms. Mueller argues that the trial court properly considered this parol evidence, and therefore substantial evidence supported the trial court's ruling that Haury's breached the contract by failing to restore the

vehicle to a rust-free condition. Brief of Respondent, pp. 7-13.

More specifically, Ms. Mueller argues the parties executed a Repair Authorization which constituted a "partially integrated" contract which was missing essential terms - notably, the scope of work to be performed by Haury's. Ms. Mueller argues that the trial court properly considered parol evidence to fill in the missing terms of that partially integrated contract. Brief of Respondent, p. 10.

Ms. Mueller's argument contains both factual and legal errors. Factually, Ms. Mueller ignores the fact that the parties, on November 3, 2006, executed a detailed five-page estimate which set out what work Haury's would perform on the vehicle. Instead, Ms. Mueller refers only to the two contracts the parties executed on October 9, 2006: the Repair Authorization and the Payment for Services Agreement. Plaintiff's Exs. 3 and 4.

In fact, the parties did agree *in writing* on the scope of work Haury's would perform. Three weeks after Ms. Mueller signed the Repair Authorization, she returned to Haury's, inspected

the vehicle with Jeff Butler, and signed a new document which identified in detail the work Haury's would perform. That document, signed by Ms. Mueller on November 3, 2006, was a detailed five-page, 146-item estimate of work to be performed on the vehicle. Plaintiff's Ex. 9.

That November 3, 2006 estimate reflected the parties' agreement about what work Haury's would perform on the vehicle. That November 3, 2006 agreement supplemented the parties' Repair Authorization executed on October 9, 2006. Ms. Mueller's argument on parol evidence makes sense only if we ignore the existence of the November 3, 2006 contract.

There is a good reason why Ms. Mueller wholly ignores the November 3, 2006 agreement. It nowhere states that Haury's would restore the vehicle to a rust-free condition. See Plaintiff's Ex. 9. Instead, Ms. Mueller refers only to the parties' Repair Authorization and argues that parol evidence was necessary to provide the missing essential terms of the parties' contract. Brief of Respondent, p. 10. In fact, the "essential terms" identifying

Haury's scope of work are identified in detail the November 3, 2006 agreement.

Legally, Ms. Mueller ignores the principle that in Washington parol evidence cannot be used to vary, contradict or modify the written contract. Ms. Mueller refers in passing to the "context rule" of contractual interpretation articulated in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). Brief of Respondent, pp. 9-10. She fails to mention, however, that the context rule cannot be used as the trial court used it.

Washington law is clear that extrinsic evidence may be used to determine the meaning of specific words and terms in a written contract, "but not to show an intention independent of the instrument or to vary, contradict, or modify the written word." *State v. R. J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 448 (2009) (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (emphasis added)). The Washington Supreme Court has made clear that extrinsic evidence may not be used "that would vary, contradict or modify the

written word" or that "would show an intention independent of the instrument." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). *Accord, Ney v. University of Washington*, 163 Wn. App. 875, 883, 260 P.3d 1000 (2011), *review denied*, 173 Wn.2d 1018 (2012) (recognizing rule); *King v. Rice*, 146 Wn. App. 662, 671, 191 P.3d 946 (2008) (court recognized that "extrinsic evidence may not modify or contradict a written contract in the absence of fraud, accident, or mistake[.]").

Even the decisions cited by Ms. Mueller recognize this principle. For instance, Ms. Mueller cited *Emrich v. Connell*, 105 Wn.2d 551, 716 P.2d 863 (1986). Brief of Respondent, p. 10. That decision states, "[p]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake." 105 Wn.2d at 555-56 (citing *Buyken v. Ertner*, 33 Wn.2d 334, 341, 205 P.2d 628 (1949)).

Despite this principle, Ms. Mueller argues that the trial court did not err by considering and relying on extrinsic evidence that added a completely new term to the parties' contract - the obligation of Haury's to restore the vehicle to a rust-free condition. That obligation is nowhere set down in writing. It is not part of the parties' written contract, and it was error for the trial court to modify the parties' written contract through the parol evidence offered by Ms. Mueller.

Ms. Mueller also argues that Haury's did not object to the admission of this parol evidence. Brief of Respondent, p. 9, n. 8. This argument reflects a fundamental misunderstanding of the parol evidence rule. The parol evidence rule "is not a rule of evidence but one of substantive law." *Emrich*, 105 Wn.2d at 556. As the Washington Supreme Court wrote:

We have said that the parol evidence rule is a rule of substantive law, and that failure to object to oral testimony inconsistent with the written agreement does not constitute a waiver of the right to have inconsistent parol evidence excluded.

Reeder v. Western Gas & Power Co., 42 Wn.2d 542, 552-53, 256 P.2d 825 (1953) (citing *McGregor v. First Farmers'-Merchants' Bank*, 180 Wash. 440, 40 P.2d 144 (1935)).

Similarly, in *Cooley v. Hollister*, 38 Wn. App. 447, 452, 687 P.2d 230 (1984), the court wrote:

In Washington, it is settled law that the parol evidence rule is not a device for exclusion, but a rule of substantive law. Therefore, regardless of whether, as here, it is admitted without objection, if the rule applies, the evidence is not competent and may not be considered as having probative value. (citations omitted).

The trial court erred by finding that Haury's breached a contract by failing to restore the vehicle to a rust-free condition.

B. The Trial Court Erred By Not Determining Which Version of the Repair Authorization Was Executed by Ms. Mueller

Ms. Mueller concedes that she presented to the trial court two separate versions of the Repair Authorization. As discussed in detail in Haury's opening brief, the two versions differed in one significant detail. In the first version, Ms. Mueller checked the box indicating, "I do not want a written estimate." CP 10. In the second

version, Ms. Mueller checked the same box indicating she did not want a written estimate; in the second version, however, a second box is checked indicating:

Proceed with repairs, but contact me if the price will exceed \$16,000.

(Plaintiff's Ex. 3).

Ms. Mueller does not explain why she had two different and conflicting versions of the Repair Authorization nor does she explain why she reportedly checked two different options on the second version. Instead, Ms. Mueller argues only that Haury's waived any argument regarding this issue by failing to raise the issue with the trial court.

It is Haury's contention that the trial court erred as a matter of law by failing to define the terms of the parties' contract before making any findings of fact or conclusions of law as to whether Haury's breach such a contract. Before a party is held to have breached a contract, it must first be determined what the contract says. Construction of a contract is a question of law. *Knipschielf v. C-J Recreation,*

Inc., 74 Wn. App. 212, 215, 872 P.2d 1102, review denied, 124 Wn.2d 1027 (1994) ("Interpretation of the terms of a contract is a question of law and is reviewed *de novo* by the appellate court.").

C. **The Trial Court Erred By Awarding Damages to Ms. Mueller Under A Theory She Did Not Plead**

Ms. Mueller silently acknowledges she did not allege in her complaint that Haury's violated the Automobile Repair Act ("ARA"), RCW 46.71.005, *et seq.*, by overcharging her. Rather, Ms. Mueller argues that her complaint should be read broadly enough to include such a claim and that the issue was nevertheless tried by agreement of the parties. Brief of Respondent, pp. 17-20. Neither argument is persuasive.

Ms. Mueller's complaint cannot reasonably be read to include a claim that Haury's violated the ARA by overcharging her. In her complaint, Ms. Mueller alleged in relevant part that Haury's first violated the ARA by failing to return to her parts that were removed from the car. Ms. Mueller specifically alleged that Haury's violated RCW 46.71.021. CP 6. That provision in the ARA addresses a repair facility's obligation,

under the listed circumstances, to return to the customer old parts removed from a vehicle. That provision does not address any aspect of overcharging.

Ms. Mueller separately alleged that Haury's violated the ARA by charging for new parts not actually provided, and alleged that Haury's thereby violated RCW 46.71.045(3). CP 6. That statutory provision is limited to the conduct of retaining payment for parts not delivered or labor no performed.

The trial court did not award Ms. Mueller damages based on either of these pled theories. Instead, the trial court awarded Ms. Mueller damages based on the separate theory that Haury's overcharged Ms. Mueller. Under the ARA, overcharging is addressed in a separate provision - RCW 46.71.025(2). Tellingly, Ms. Mueller never relied on that provision in her complaint, and her allegations were not sufficient to place Haury's on notice of that unpled theory.

Civil Rule 8(a) requires that a complaint for relief "contain (1) a short and plain statement of the claim showing that the pleader

is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." The complaint must "apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest." *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993), review denied, 123 Wn.2d 1024 (1994). "A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 25, 974 P.2d 847 (1999).

In *Trask v. Butler*, 123 Wn.2d 835, 846, 872 P.2d 1080 (1994), our supreme court wrote that to give effect to CR 8, "a litigant must plead more than general facts in a complaint to properly alleged a CPA cause of action." The court added:

In hindsight it is easy to view facts and agree they support a CPA claim. It is a much more difficult, if not an impossible task, to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint.

123 Wn.2d at 846.

In this case, Ms. Mueller did allege that Haury's violated specific sections of the ARA.

She did not allege that Haury's violated the ARA by overcharging her. Nor has she presented any evidence that she ever notified Haury's or the trial court prior to trial that she intended to raise this issue. Ms. Mueller failed to satisfy the notice pleading standards.

Separately, Ms. Mueller is incorrect in arguing the issue of overcharging was tried "by agreement" of the parties. Brief of Respondent, pp. 19-21. In determining whether parties impliedly tried an issue, an appellate court is to consider the record as a whole, including whether the issue was raised before trial and in opening arguments, the evidence on the issue admitted at trial, and the legal and factual support for the trial court's conclusions on the issue. *Dewey*, 95 Wn. App. at 26. In this case, Ms. Mueller has presented no evidence that she ever raised her overcharging claim prior to trial or that she ever notified Haury's or the trial court of her intention to present evidence on the issue.

This issue goes to a question of fundamental fairness. Should a plaintiff be able to recover

under a theory of liability she never raised prior to trial? If Ms. Mueller's argument is accepted, a litigant could simply await trial and surprise an opponent with a new claim so long as enough facts were intermixed in the complaint. That result was rejected by our supreme court in *Trask*, 123 Wn.2d at 846, and should be rejected here.

D. Ms. Mueller Does Not Dispute that the Trial Court Erred in Calculating CPA Damages

Haury's contends the trial court erred in calculating CPA damages. Ms. Mueller did not respond or oppose the arguments presented in Haury's opening brief that the trial court erred by not taking into account the retail sales tax and the ARA provision (RCW 46.71.025(2)) which permits a repair facility to bill up to 110 percent of a written estimate, exclusive of the retail sales tax. At a minimum, the trial court's award of CPA damages must be reduced.¹

¹ Ms. Mueller also errs in stating that a violation of the ARA is a per se violation of the CPA. Brief of Respondent, p. 23. In fact, a violation of the ARA only establishes the first three elements of a CPA claim. RCW 46.71.070. A plaintiff must still establish damages and causation from the alleged conduct. *Clark v. Luepke*, 118 Wn.2d 577, 585, 826 P.2d 147 (1992) (our supreme court stated that even if a repair facility violated the ARA, a plaintiff must still prove injury caused by the ARA violation in order to maintain a cause of action under the CPA).

III. CONCLUSION

For the reasons set forth herein and in Appellant's opening brief, Haury's asks this Court to reverse the trial court and rule that Haury's did not breach a contract with Ms. Mueller, and that Ms. Mueller cannot recover damages under the ARA and CPA for a theory she did not plead. Alternatively, Haury's asks this Court to reverse the trial court's findings and conclusions on these issues and remand the case for a new trial. As a final alternative, Haury's asks this Court to reduce the amount of CPA damages awarded by the trial court.

RESPECTFULLY SUBMITTED this 10th day of December, 2012.

FORSBERG & UMLAUF, P.S.


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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing APPELLANTS' REPLY BRIEF on the following in the manner indicated:

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SIGNED this 10th day of December, 2012, at
Seattle, Washington.



Jean M. Young