

74622-7

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No. 74622-7

**COURT OF APPEALS
STATE OF WASHINGTON**

SAFECO INSURANCE CO. OF AMERICA

Appellant,

v.

COBALT BOATS, LLC

Respondent.

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

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LEGAL ARGUMENT IN REPLY

A. Standard of Review.

Respondent, COBALT BOATS LLC (“Cobalt”), does not take issue with Safeco’s contention that the proper standard of review in this case with respect to the trial court’s ruling on summary judgment below is *de novo*, with the reviewing court performing the same inquiry as the trial court. *See Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

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

In moving for summary judgment, Cobalt claimed the transom housing fell outside scope of Cobalt’s 10 year warranty.

1. Elements of Breach of Express Warranty Claim.

Appellant’s, SAFECO INSURANCE CO. OF AMERICA (“Safeco”), *Complaint for Damages* against Cobalt alleged a single cause of action for breach of an express warranty. A product is not reasonably safe because it did not conform to a manufacturer’s express warranty if: (1) the warranty is made part of the basis of the bargain; (2) the warranty relates to a material fact or facts concerning the product; and (3) the warranty turns out to be untrue. RCW 7.72.010(6); RCW 7.72.020(2). Cobalt does not dispute this.

2. The 10 Year Warranty.

Cobalt does not dispute that when Mr. Albert Duenas, Safeco's insured, purchased the boat at issue in this lawsuit, he received a written 10 year warranty from Cobalt that stated:

**Ten (10) Year Limited
Transferrable Warranty on Hull
and Deck.**

Cobalt warrants that the hull and deck including floor, stringers, bulkheads, *motor mounts, transom* and deck/hull joints of a new Cobalt boat are free from structural defects in material and workmanship under normal, non-racing and non-commercial use for a period of (10) years from the date of delivery to the original retail purchaser. (Emphasis added.)¹

Cobalt does not dispute that experts for both sides in this case agree the sinking of Mr. Duenas's boat was the result of a massive water leak that originated through the transom for the boat.²

Cobalt does not dispute that the transom is part of the hull of the boat³.

¹ CP 57-58.

² CP 26, lines 8-17; CP 92, line 20 – CP 93, line 9; CP 165, ¶8.

³ CP 42, lines 3-4.

Cobalt does not dispute that a transom that is free from structural defects in material and workmanship in normal, non-racing and non-commercial use does not leak water while the boat is in the water.⁴

Cobalt does not dispute that experts for both sides also agree the water leak at the transom occurred because the transom housing was not properly bolted to the transom of the boat⁵.

Cobalt does not dispute it was responsible for originally bolting the transom housing to the transom when the boat was manufactured⁶.

a. Basis of the Bargain.

Cobalt does not deny that the 10 year warranty was made part of the basis of the bargain when Mr. Duenas originally purchased the boat.

b. Materiality.

Cobalt does dispute that the workmanship associated with the transom and motor mounts is a material fact pertaining to Mr. Duenas's boat in this case. Cobalt attempts to dispute this element by diverting attention away from what all is involved

⁴ CP 165, ¶8.

⁵ CP 92 - 93, ¶¶7,8; CP 165 - 166, ¶¶7-10.

⁶ CP 166, ¶10.

with “workmanship” as that term is used in the 10 year warranty.

c. Falsehood.

Cobalt does dispute that its 10 year warranty was not true in this case.

3. Scope of Cobalt’s 10 Year Warranty.

The 10 year warranty warranted that the “*hull and deck* including floor, stringers, bulkheads, *motor mounts, transom* and deck/hull joints of a new Cobalt boat are free from *structural defects* in *material* and *workmanship* under normal, non-racing and non-commercial use for a period of (10) [sic] years from the date of delivery to the original retail purchaser.” (Emphasis added) The term “workmanship” by definition applies to a process, not simply a piece of material. Workmanship is defined as “the execution or manner of making or doing something”.⁷ The workmanship associated with the transom would include what is attached to it during its initial fabrication to allow for the transom to function as it was designed to. A transom is not designed to leak while a boat is in the water.

A leaking transom compromises the structural integrity of

⁷ Webster’s Third New International Dictionary, p.2635 (2002). See GR 14.

the hull in the most fundamental of ways.⁸ A boat simply can't stay afloat with a leaking transom. Cobalt does not dispute that what caused Mr. Duenas's boat to sink was a leaking transom.

a. Transom.

In Cobalt's *Response Brief*, Cobalt contends, "[T]he gimbal housing [i.e. transom housing referred to in Safeco's *Opening Brief*] is not part of the hull or deck of the boat. It is part of the sterndrive or inboard/outboard drive (I/O), a separate component, manufactured by Mercury Marine." *Response Brief*, pp. 17-18. This is a rhetorical device to divert attention from the fact that it was the transom that leaked and led to the sinking of Mr. Duenas's boat.

Sean Callan, the Engineering Manager for Cobalt, readily admits the transom housing (a/k/a gimbal housing, a/k/a transom assembly, a/k/a transom shield) is supposed to be attached to the stern of the boat⁹. Cobalt conceded for purposes of its motion for summary judgment that "transom" refers generally to the back of the boat, *i.e.* the stern¹⁰. Mr. Callan claims Cobalt did not manufacture the transom housing or the bolts used to fasten the

⁸ "Structural" is defined as relating to the load bearing members or scheme of a structure as opposed to its ornamental elements. Webster's Third New International Dictionary, p.2266 (2002).

⁹ CP 42, lines 14-16.

¹⁰ RP 6, lines 13-15.

transom housing to the transom¹¹, but does not deny that it was Cobalt who bolted the transom housing to the transom of Mr. Duenas's boat at Cobalt's Kansas manufacturing facility¹².

Cobalt accuses Safeco of relying on a "tortured" interpretation of the term "transom" – i.e. anything intended to be permanently bolted to the transom. Yet, Cobalt does not deny in this lawsuit that the transom housing must be properly bolted to the transom in order to keep the *transom* from leaking. Cobalt does not deny in this lawsuit that the transom housing was improperly bolted to the transom thereby causing the *transom* to leak and eventually resulting in the sinking of Mr. Duenas's boat.

Cobalt's *Response Brief* at p. 19 claims that the term "transom" is supposed to be "narrowly defined" because of the definition of "transom" used in the *Owner's Manual*¹³. However, the 10-year warranty at pages 1-2 and 1-3 of the *Owner's Manual*¹⁴ does not incorporate the definitions contained in the "Nautical Terms" section of the *Owner's Manual*. Likewise, the "Nautical Terms" section of the *Owner's Manual* at pages 1-9 to 1-11¹⁵

¹¹ CP 42, lines 16-20.

¹² CP 166, lines 22-23.

¹³ CP 60.

¹⁴ CP 57-58.

¹⁵ CP 59-61.

does not purport to apply to the terms utilized in the 10 year warranty. To underline this point, the terms “floor”, “stringer”, “motor mount” and “deck/hull joint”, or four out the six specific things covered by the 10 year warranty, are not defined in any fashion by either the 10 year warranty itself or the “Nautical Terms” section of the *Owner’s Manual*.

Cobalt’s *Response Brief* at p. 4 cites CP 42 (page 3 from the declaration of Sean Callan) in support of the contention that “the Owner’s Manual defined several nautical terms relevant to this dispute.” However, there is absolutely nothing in Mr. Callan’s declaration, at p. 3 or anywhere else that makes such a representation.

Cobalt does not dispute that the manner in which the motor is attached to the propeller is made through a hole in the transom. That hole is part and parcel of the transom. Cobalt does not dispute that in order for the transom to remain watertight, this hole must be properly sealed. From a design standpoint, Cobalt does not dispute that the transom housing is the means by which this watertight seal for the transom is achieved. From a mechanical standpoint, Cobalt does not dispute that this watertight seal is achieved through properly tightening the bolts for the transom housing to the transom. Cobalt does not dispute that if this mechanical seal is not properly made in the

installation of the transom housing, the transom will leak and the boat can potentially sink¹⁶. Finally, and most importantly, it was a leaking transom that caused Mr. Duenas's boat to sink.

It should therefore be overwhelmingly obvious to this Court that a defect in the watertight seal for the transom, resulting from the improper installation of the transom housing, is a structural defect in the workmanship associated with the transom of Mr. Duenas's boat that falls within the scope of Cobalt's 10 year warranty.

At his deposition, Safeco's expert defined certain terms for Cobalt's counsel. He defined what he meant when he used the term transom¹⁷. He drew a technical distinction between the transom shield and gimbal housing, explaining it was the transom shield rather than the gimbal housing that was not properly bolted to the transom¹⁸. At his deposition, Safeco's expert testified he did not discover any defect in the material used to construct the transom because there was no cracking or deformation in the fiberglass material used for the transom¹⁹, but did testify by way of declaration that he discovered a defect in

¹⁶ CP 64; CP 173.

¹⁷ CP 237.

¹⁸ CP 235-236.

¹⁹ CP 240-241; *see also* CP 167, ¶12.

the workmanship associated with the construction of the transom²⁰.

By way of footnote, Cobalt claims for the first time on appeal that Cobalt never intended the gimbal housing to be permanently bolted to the transom. *Response Brief*, p. 21, footnote 3. Such a contention is preposterous. It is synonymous with claiming Cobalt never intended for Mr. Duenas's boat to remain permanently watertight while afloat. Cobalt bases this new contention on maintenance guidelines for the Mercruiser sterndrive installed in Mr. Duenas's boat which recommended retorquing the "connection to the gimbal ring to the steering shaft" every 100 hours or annually (whichever occurs first)²¹. Tightening bolts on a periodic basis is consistent with proper maintenance of a permanent installation; a temporary installation theoretically wouldn't require preventive maintenance on a regularly scheduled basis.

Cobalt continues to argue that the 10 year warranty only applies to defects relating to the structural integrity of the fiberglass hull and deck which Cobalt fabricated, not the process of mounting the motor to the boat. *Response Brief*, p. 23. To

²⁰ CP 165, line 3 – CP 167, line 2.

²¹ CP 66, 89.

reiterate, the only way for the hull of Mr. Duenas's boat to remain watertight is if the transom housing was properly bolted to the transom insuring the transom would not leak. The 10 year warranty covers not only any defects in the materials used to make the boat but also any defects in the workmanship associated with how the boat was constructed. A leaking transom is an obvious structural defect due to improper workmanship and is therefore covered under the 10 year warranty.

b. Motor Mounts.

It cannot be stressed enough that in moving for summary judgment, Cobalt noticeably failed to make any mention or allusion to the phrase "motor mounts" contained in the 10 year warranty. By not even mentioning the motor mounts in moving for summary judgment, Cobalt hoped the motor mounts would not become part of the discussion as to the scope of its 10 year warranty. When the trial court itself observed Cobalt's obvious and transparent failure to mention whether the motor mounts fell within the overall scope of the 10 year warranty, Cobalt was forced to confront what it had originally tried to hide²².

Safeco never shifted any of its theories of recovery as

²² RP 6, line 16 – RP 7, line 7.

Cobalt accuses it of doing. Rather, in opposing Cobalt's motion for summary judgment, Safeco forced Cobalt to confront the full width and breadth of the 10 year warranty's scope, thereby exposing Cobalt's artificial attempt to limit the warranty's scope by failing to even mention the motor mounts in its motion for summary judgment.

Cobalt claims Safeco's interpretation of the phrase "motor mounts" is unreasonable because the "motor mounts" are not part of the hull and deck referred to in the 10 year warranty but are part of the sterndrive or motor. This is simply wishful thinking on the part of Cobalt. The plain and unambiguous language contained in the 10 year warranty states the hull and deck are to be free of any structural defect in the workmanship associated with either the motor mounts or the transom. The process of installing the stern drive motor involves fastening the sterndrive to the transom by way of the transom housing. If this is done improperly, the watertight seal for the transom is compromised which constitutes a structural defect under the 10 year warranty.

Cobalt accuses Safeco of engaging in "twisted logic" by arguing the term "motor mounts" refers only to an object, not a process. Once again, Cobalt ignores the plain wording of the 10 year warranty which applies to both material and workmanship.

Apparently, Cobalt doesn't understand that workmanship is part of a process. Again, workmanship is defined as "the execution or manner of making or doing something",²³.

On appeal, Cobalt continues to attempt to conflate the term "engine mount" contained in the maintenance recommendations for the sterndrive published by a third party Mercruiser²⁴ with the term "motor mounts" contained in the 10 year warranty authored by Cobalt²⁵. In its motion for reconsideration, Cobalt readily admitted, "Mr. McCrea [plaintiff's expert] disagreed that this recommendation (in the maintenance recommendations for the motor – CP 90) referred to the sterndrive gimbal housing bolts that Safeco alleged were loose at the time of manufacture..."²⁶ Whatever Mercruiser intended the term "motor mount" to mean is irrelevant for present purposes. The relevant inquiry is what the term "motor mounts" means in the context of the 10 year warranty.

Cobalt continues to claim on appeal that Safeco's expert Mr. McCrea never equated "motor mounts" with the transom housing. Cobalt tries to portray Safeco's statement that "the

²³ Webster's Third New International Dictionary, p.2635 (2002).

²⁴ CP 90.

²⁵ CP 57.

²⁶ CP 274, lines 11-12; lines 20-22.

transom housing is part of the motor mount for the boat's engine whereby the engine is mounted to the transom" (*Opening Brief*, p. 18) as being somehow demonstrably different from Safeco's expert testimony that "the transom shield is on the fore (inside) of the transom and is part of how the motor for the boat is bolted to the transom".²⁷ . A "mount" is defined as a frame or means of support, i.e. how the motor for the boat is bolted to the transom. Webster's Third New International Dictionary, p. 1477 (2002). The transom housing is what supplies this means of support. Such a means of support is exactly what the British airborne at Arnhem Bridge needed during Operation Market Garden in World War II.

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

By way of footnote, Cobalt now acknowledges that given the holding in *Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971), the trial court erred as a matter of law and concedes limitation of remedy provisions, not just disclaimer provisions, are ineffectual in consumer transactions unless they are explicitly bargained for and set forth with particularity. *Response Brief*, p. 27, footnote 6.

²⁷ CP 166, lines 2-3.

In its *Response Brief*, Cobalt again fails to present any evidence that the *limitation or remedy provision* relied upon by Cobalt in support of its motion for summary judgment was ever discussed with Mr. Duenas by anyone affiliated with Cobalt. Cobalt points to nothing that would indicate the limitation of remedy provision was bargained for between either the dealer or Cobalt and Mr. Duenas. Instead, Cobalt cites deposition testimony from Mr. Duenas that the 10 year warranty was discussed in general which left Mr. Duenas with the impression that it was a “bumper to bumper warranty”.²⁸ However, there was no discussion at all as to the actual limitation of remedy provision relied upon by Cobalt in this lawsuit, much less any negotiation for its inclusion in the 10 year warranty provided Mr. Duenas by Cobalt for the boat.

In *Olmsted v. Mulder*, 72 Wn.App. 169, 177, 863 P.2d 1355 (1993), this Court was very explicit in holding that in order to satisfy the “bargained for” requirement, there must be some evidence, at a minimum, of a discussion of the disclaimer (or in this instance the limitation of remedy provision) between the buyer and the seller. Safeco’s argument in this regard on appeal is not “too restrictive” as claimed by Cobalt. Rather, Safeco’s

²⁸ CP 188.

argument is that Cobalt has completely failed to meet this minimum threshold.

A general discussion about the warranty, particularly one that left Mr. Duenas (probably falsely) with the belief that everything was covered, does not meet the minimum threshold of discussing the limitation of remedy provision required to enforce this provision. The fact that the limitation of remedy provision appeared in capitalized, bold font does not mean it was either discussed or bargained for. Safeco does not contend the limitation of remedy provision was hidden from view in imperceptibly tiny boilerplate. Rather, Safeco has demonstrated conclusively there was no discussion at all of the limitation of remedy provision at the point of sale, or for that matter at any other time relevant in this lawsuit.

In Cox v. Lewiston Grain Growers, 86 Wn.App. 357, 936 P.2d 1191 (1997), Lewiston Grain Growers relied on a disclaimer of warranty and limitation of remedy provision, collectively referred to as the exclusionary clause, contained in a delivery ticket. Division Three specifically held the exclusionary clause was unenforceable because the terms of the exclusionary clause had never been discussed between the buyer (Cox) and seller (Lewiston Grain Growers). *Id.*, 86 Wn.App. at 362; 367. The same is true in this case.

The limitation of remedy provision relied upon by Cobalt in this lawsuit is therefore unenforceable as a matter of law under all of the legal authority cited to in Safeco's *Opening Brief*, pages 19-22.

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

Cobalt claims that the trial court did not err in exercising its discretion by denying Safeco's motion for reconsideration. Cobalt argues, "With regard to repairs, the material issue is not the cost of the repairs, but whether Safeco asked Cobalt to repair Mr. Duenas's boat." *Response Brief*, p. 33. This is what Cobalt originally argued to the trial court was the material issue, not what the trial court identified as the material issue forming the basis for its decision.

When the trial court granted Cobalt's motion for summary judgment, the trial court held:

There is no genuine issue of material fact that 1) Safeco never sought to repair the boat after it sank nor [sic] 2) that the boat has been stored outdoors exposed to the elements and subject to spoliation for three years. This delay is inexcusable as the boat was inspected by Safeco's surveyor

five days after the sinking. On September 13, 2012, this surveyor indicated in his report that a repair appraisal was being done. *However, no repair estimate is in the court record. Thus, the delay on Safeco's part in estimating and/or seeking repairs is inexcusable* and it prejudices defendants [sic] ability to establish what repairs could or could not have been accomplished three years ago. Therefore, laches bars Safeco from seeking repairs three years after the sinking. *Clark County PUD v. Wilkinson*, 139 Wn.2d 840 (2000).²⁹ {Emphasis added}

It is evident from Cobalt's argument to this Court that Cobalt concedes the factual basis relied upon by the trial court in granting Cobalt's motion for summary judgment was different from what Cobalt had argued before the trial court in support of its laches argument. The rationale employed by the trial court in denying Safeco's motion for reconsideration constituted an abuse of the trial court's discretion under CR 59 because it unfairly prevented Safeco from rebutting the trial court's unjustified conclusion that Safeco never sought to estimate the cost to repair the boat after it sank. The trial court's conclusion is even more untenable since it seems to assume, or at the very least infer, that

²⁹ CP 250, line 20 – CP 251, line 6.

Safeco paid its insured over \$67,000.00 without any written documentation to justify such a payment. Solvent insurance companies just don't do that.

In its *Response Brief*, Cobalt does not deny this. Instead, it tries to reframe the issue as it originally presented it to the trial court rather than address the actual basis utilized by the trial court for its decision on the issue of laches. Cobalt never claimed in support of its motion for summary judgment below that it had been prejudiced by Safeco's failure to either repair its insured's boat or estimate the cost to repair its insured's boat as a result of its sinking.³⁰ Rather, Cobalt claimed it had been prejudiced by Safeco *never asking Cobalt* to repair its insured's boat³¹.

Cobalt knew from discovery completed in this case that a repair estimate had been prepared by North Lake Marine on September 23, 2012,³² approximately three (3) weeks after the boat sank, and was produced by Safeco in response to Cobalt's first set of interrogatories propounded to plaintiff in this lawsuit³³.

³⁰ CP 252, lines 2-4.

³¹ CP 42, line 22 – CP 43, line 1.

³² CP 261 – 269, ¶¶ 3, 4, Ex. A.

³³ CP 113, Ex. A., p. 2, lines 7-12.

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

Consequently, Safeco requested the trial court reconsider its holding on October 2, 2015 and allow Safeco to produce the September 23, 2012 repair estimate and supporting documentation which would have provided ample basis for the trial court to then deny Cobalt's motion for summary judgment in its entirety. In summarily denying Safeco's motion for reconsideration, the trial court abused its discretion under CR 59 by unfairly preventing Safeco from demonstrating the factual bases for the dismissal of Safeco's lawsuit, *i.e.* that Safeco never sought to estimate the cost to repair for the boat after it sank, was

factually erroneous.

E. The Trial Court Erred in Granting Cobalt’s Motion for Reconsideration.

Cobalt argues the trial court properly found that laches barred Safeco’s breach of warranty claim because the undisputed evidence showed that Safeco neither stored the boat in a secure location nor maintained it in a repairable condition. This was not the basis for the trial court’s decision. As explained above, the trial court held “the delay on Safeco’s part in estimating and/or seeking repairs is inexcusable and it prejudices defendants [sic] ability to establish what repairs could or could not have been accomplished three years ago. Therefore, laches bars Safeco from seeking repairs three years after the sinking. *Clark County PUD v. Wilkinson*, 139 Wn.2d 840 (2000).”³⁴

That being said, it would now seem an opportune time to call for the assistance of Captain Obvious in refuting Cobalt’s claim the trial court properly dismissed Safeco’s breach of warranty claim on the grounds of laches. In making this argument, Cobalt completely ignores the fact that the reason Mr. Duenas’s boat was damaged in the first place was because it sank! As a result of Mr. Duenas’s boat sinking, Safeco

³⁴ CP 250, line 20 – CP 251, line 6.

determined the boat was a total loss³⁵. Cobalt has never denied this fact. Under this set of circumstances, storing the boat in a secure location in order to maintain it in a repairable condition was a *non sequitur*. All the damage that could be done had been done because the boat had ended up underwater. Lake Washington had managed to do all the damage needed to render Mr. Duenas's boat a complete loss. Safeco believes it would be safe for this Court to judicially notice that no amount of Pacific Northwest precipitation would or could manage to do any material additional damage to what had already been done as a result of the boat's sinking!

In sum, the trial court granted defendant's motion for reconsideration on untenable grounds and thereby abused its discretion providing sufficient grounds for this court to reverse the trial court's decision to dismiss plaintiff's complaint in this lawsuit based on the doctrine of laches.

IV. CONCLUSION

Safeco would request that this Court do what the trial court below should have done – deny Cobalt's motion for summary judgment in its entirety. In doing so, Safeco would

³⁵ CP 264-267 (cost to repair = \$75,958.82); CP 186, p. 23, lines 15-17 (purchase price = \$61,200.00).

request this Court to expressly hold the limitation of remedies provision contained in Cobalt's 10 year warranty is unenforceable as a matter of law.

RESPECTFULLY SUBMITTED this 24th day of June,
2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

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DATED this 24th day of June, 2016.



William E. Pierson, Jr.

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