IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GRANT NORWITZ and JUSTINE NORWITZ, a Washington marital community, Appellants, v. MITSUBISHI MOTORS NORTH AMERICA, INC., a California corporation; THE CARY COMPANY dba CAREY MOTORS; CAREY MITSUBISHI, a Washington corporation; MITCHELL COOPER and JANE DOE COOPER, husband and wife, Respondents.	)	No. 67519-2-I DIVISION ONE UNPUBLISHED OPINION FILED: December 10, 2012

Becker, J. — The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. In this action for breach of a car's warranty, the only admissible evidence concerning the car's engine failure showed that it was due to inadequate maintenance. We affirm summary judgment dismissal of the car owner's action for breach of the warranty.

In October 2006, Grant Norwitz bought a new Mitsubishi Montero from a Mitsubishi dealership. The car had a 5-year/60,000 mile new vehicle warranty.

In July 2009, when the car had just under 30,000 miles on the odometer, Norwitz lent it to his friend John Widell. Widell and his band of musicians used the car to tow a trailer of musical equipment to Wisconsin and back. On the return trip, the band traveled through New Mexico.

On August 13, 2009, band member Gary Follrich was driving the car alone on his way back to Seattle. In eastern Oregon, he saw the oil light go on temporarily. Follrich telephoned Widell to ask him what kind of oil to put in the car but was unable to reach him. He did not check the oil or add oil. Later that day in eastern Washington, Follrich stopped at a rest stop. After he pulled away, the oil light came on again. After a short while driving on a steady uphill grade, the car suddenly lost power. Follrich pulled to the side of the road. He tried to restart the car and heard what he described as a metal on metal "crunch sound that did not sound good." He had the car towed to Carey Mitsubishi in Yakima.

Norwitz spoke to Carey personnel in the following weeks. They informed him that the needed repairs were within the warranty. Norwitz authorized repairs.

On September 1, 2009, Carey contacted Norwitz to inform him that its technician had discovered there was insufficient oil in the engine. The technician did not complete the repairs. Mitchell Cooper, a Mitsubishi employee, informed Norwitz that he was denied warranty coverage of the cost of the repairs because he had failed to follow the warranty's maintenance requirements.

The car remained in a storage bay

at Carey for some months. In January 2010, counsel for Carey sent Norwitz a letter asking him to remove the car and informing him that Carey would begin charging a storage fee of $11 per day.

In March 2010, Norwitz sued. He named as defendants Mitsubishi Motors North America, Inc., Carey Mitsubishi, the Carey Company dba Carey Motors, and Mitchell and Jane Doe Cooper. He claimed a breach of his warranty contract, among other causes of action. Carey counterclaimed, seeking reimbursement for costs of labor, storage, and towing.

About a year later, the defendants moved jointly for summary judgment. The court granted the motion.

The court entered a stipulated order dismissing Carey's counterclaim for labor costs. The court entered summary judgment for Carey on the storage and towing costs, plus an award of attorney fees and costs under the statute providing for attorney fees in damages actions of $10,000 or less. RCW 4.84.250.

Norwitz appeals.

BREACH OF WARRANTY

Norwitz's only assignment of error on appeal is to the court's dismissal of his claim for breach of warranty. He contends a jury could find that the car's oil levels were properly maintained.

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. Tornetta

v. Allstate Ins. Co., 94 Wn. App. 803, 808, 973 P.2d 8, review denied, 138 Wn.2d 1012 (1999). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We construe the evidence and inferences from the evidence in favor of the nonmoving party. Tornetta, 94 Wn. App. at 808.

Under a category describing "WHAT IS NOT COVERED," Norwitz's new vehicle warranty expressly excluded coverage for any damage "caused by improper maintenance":

> 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.*

(Emphasis added). The "Regular maintenance schedule" applicable to cars not subjected to "severe" use required the owner to carry out oil changes every 7,500 miles or every six months, whichever occurred first. The "Severe maintenance schedule" required oil changes more frequently. The maintenance guide advised owners that the engine's oil level "should be inspected . . . each time fuel is added." In the event the owner needed to one day submit a claim under the warranty, the owner was advised to retain receipts to prove proper

maintenance:

> 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.

(Emphasis added.)

To prove that improper oil maintenance was the cause of the engine failure, Mitsubishi relied on the declaration of Rogelio Lopez, the technician who discovered the car's low oil level. Lopez said that in the course of determining why the engine had seized, he removed the drain plug and "collected less than one pint of very dark, dirty and thick oil from the vehicle." He found no evidence of external oil leaks to explain the low oil level. Based on his observations of the vehicle and the quality and quantity of the oil he found in it, Lopez believed that improper oil maintenance was the "single cause" of the car's breakdown:

> 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.

Lopez provided a photograph of an oil change sticker he discovered when inspecting Norwitz's vehicle. This sticker indicated that the last recorded oil change on the car was performed at Renton Mitsubishi, and the next oil change would be due on October 15, 2007, or at 9,997 miles. The August 2009 engine failure occurred almost two years and

24,000 miles later. Lopez offered his opinion that the quality and quantity of oil he observed in Norwitz's car was consistent with the Renton oil change having been the car's most recent oil change.

Lopez's declaration met Mitsubishi's initial burden as the moving party to show the absence of a genuine dispute of fact as to why the engine failed. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). The burden then fell upon Norwitz, the nonmoving party, to set forth specific facts rebutting Mitsubishi's show of proof and disclosing the existence of a material issue of fact. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Norwitz could not rely on speculation, argumentative assertions that unresolved factual issues remain, or having his affidavits accepted at face value. Seven Gables Corp., 106 Wn.2d at 13.

Norwitz provided his own sworn declaration stating that at the time he loaned the car to the band in July 2009, the car "had recently had the oil changed." This assertion was vague and conclusory. He did not state when this alleged oil change took place, where it was carried out, or who performed it. To raise a genuine dispute of fact for trial, an affidavit must set forth specific information as to "what took place, an act, an incident, a reality as distinguished from supposition or opinion." Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Norwitz provided his own opinion that the engine could not have failed due to a lack of oil in the engine because the car did not display the warning signs he claims it would have exhibited if

the engine was about to seize for this reason. According to Norwitz, a car about to break down due to poor engine lubrication would have exhibited a constant oil pressure light, a high temperature indicator, and sounds emanating from under the hood, and such a car's computer would later have revealed "codes" reflecting oil-related problems.

An expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show that the affiant is competent to testify to the matters stated. Lilly v. Lynch, 88 Wn. App. 306, 320, 945 P.2d 727 (1997); Rothweiler v. Clark County, 108 Wn. App. 91, 100-01, 29 P.3d 758 (2001), review denied, 145 Wn.2d 1029 (2002). Norwitz submitted his curriculum vitae to establish his expertise. While he held an engineering position from 1984 to 1989 that included hands-on engine fitting, assembly, and testing of automotive engines, Norwitz does not show that he ever had experience with Mitsubishi vehicles or with any cars or engines or vehicle computers comparable to the 2006 Mitsubishi. We conclude he was not competent to provide an expert opinion eliminating lack of oil as the cause of the engine failure.

Norwitz submits Follrich's deposition testimony that the car's oil was tested as soon as he brought it to the dealership. Norwitz suggests this proves that the car was not lacking in oil. But Follrich did not testify that the oil check revealed an abundant, or even an adequate, level of oil. He merely testified that he heard someone say that the engine "wasn't completely dry."

Norwitz describes conversations

he had with Carey employees Jeff Briggs and Cody Swearingen during the two weeks after the car arrived at the dealership. Briggs told Norwitz that technicians had diagnosed the car's problem as a broken cam gear and that Norwitz was lucky because that problem fell within the warranty. Swearingen told him the technicians had discovered that the cylinder heads and other engine parts needed to be replaced, but that these problems were also within the warranty. Norwitz contends that because these conversations show that Carey employees thought there was coverage after the engine oil had been initially checked, they provide evidence that the malfunction of the Mitsubishi was covered by warranty. The conversations with Briggs and Swearingen do not, however, raise any inference that there must have been adequate oil in the engine. They took place before Lopez had ruled out the other possible diagnoses and then discovered the engine had less than a pint of dirty, thick oil.

In short, the record does not contain evidence sufficient to persuade a reasonable juror that the cause of the engine's failure was anything other than improper oil maintenance.

EQUITABLE ESTOPPEL

Norwitz argues Mitsubishi should be equitably estopped from denying warranty coverage because Briggs and Swearingen represented that repairs would be fully covered by warranty, Norwitz relied on their assurances of warranty coverage in deciding to authorize repairs, and then Carey Motors refused to complete the repairs and left

the vehicle in the storage bay disassembled and exposed to damage.

Equitable estoppel is based on the principle that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. Kramarevcky v. Dep't of Social & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The elements of equitable estoppel are:

> (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Kramarevcky, 122 Wn.2d at 743. The party asserting the doctrine must also be free from fault in the transaction at issue. Kramarevcky, 122 Wn.2d at 743 n.1. Washington courts do not favor equitable estoppel, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence. Teller v. APM Terminals Pac., Ltd., 134 Wn. App. 696, 712, 142 P.3d 179 (2006).

Norwitz's equitable estoppel theory fails. He may have satisfied the first and second elements for summary judgment purposes, but he fails to create a genuine dispute of fact as to the third element. He provided no evidence that he suffered any "injury" as a direct result of relying on Carey's assurances of warranty coverage. A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Boguch v. Landover Corp., 153 Wn. App. 595, 609, 224 P.3d 795 (2009).

Norwitz provided no evidence to show how leaving his engine disassembled caused him harm. He

states his damages include replacing parts that were lost by Mitsubishi, but the record contains no evidence of any lost parts. When Norwitz had his car towed out of Carey Motors, he signed a form acknowledging receipt of his car "with all parts" and signed an attached inventory list. Norwitz states his damages include the cost of reassembling the disassembled vehicle, but the record contains no evidence that the cost to repair a disassembled engine would be greater than the cost to make the same repairs to an intact engine. There is no evidence that Norwitz faced higher towing costs out of Yakima because the engine was disassembled. He faced no charges for any of the work Carey mechanics did on the car after he authorized repairs. Carey Motors initially counterclaimed for these costs, but later withdrew this claim.

Norwitz contends he was harmed by Carey Motors' assurances of coverage because in the course of carrying out repairs, a Carey technician attempted to start the engine, causing additional damage. But the record contains no evidence that this occurred. At his deposition, Lopez explained that in the ordinary course of a timing belt repair, he would try to start a car after replacing the timing belt:

> 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 we put a belt on it. Boom, it starts right up. So right off the bat, that's our intent. To find out if there's damage, that's the quickest really way.

However, Lopez went on to explain that in this case, he was unable to complete the timing belt repair because the cam gear had 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* to continue with your diagnosis. *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. . . . Come to find out, there wasn't much at all.

(Emphasis added.) After finding the oil problem in September 2009, Lopez did not work on the car again until November 2009, when he was asked by his supervisor to take apart the cylinders to see if there was any damage inside. He found no damage and only partially reassembled the cylinders. When he had finished working on it, the engine was still disassembled. Lopez's testimony presents no reasonable inference that Lopez ever tried to start the car.

Norwitz's only remaining evidence that a Carey employee tried to start his car is his own statement in a supplemental declaration that an unidentified Carey employee told him that "the engine would not turn over using the starter." This supplemental declaration was filed three weeks after the court entered summary judgment. The trial court properly declined to consider it.

Norwitz contends he was injured in reliance on Carey's assurances of warranty coverage because the car was exposed to grime and dust in the Carey Motors storage bay, rendering the car "a total loss." But this exposure was not the inevitable result of Carey's initial assurances of warranty coverage. Carey informed Norwitz on September 1, 2009, that warranty coverage was denied. By this time, the car had been in the storage

bay about 2 weeks. Norwitz did not travel to Yakima to observe the condition in which the vehicle was being kept until June 23, 2010—nearly 10 months later. Norwitz did not remove the car until April 26, 2011. Norwitz explained at his deposition that he chose to leave the car at Carey Motors because he did not want to "interfere with evidence":

> Q: Have you attempted to come pick up the vehicle?
> A: Absolutely not.
> Q: Why not?
> A: Because I have no evidence . . . what is being done to it. I couldn't even get the spare pieces of what they had replaced. So in order to not actually incriminate or allow them to say that I've interfered with evidence, I've left it exactly where it is.

This explanation is not persuasive. Norwitz fails to identify the evidence he preserved by leaving his car in Yakima. He could have retrieved the car as soon as warranty coverage was denied, and thereby avoided the long-term exposure damage. Norwitz cannot assert equitable estoppel unless he was "free from fault" in the transaction. Kramarevcky, 122 Wn.2d at 743 n.1.

Norwitz contends he was harmed in reliance on Carey's assurances of coverage because he incurred more than $5,000 in storage costs. But it was Norwitz who decided to leave the car in the Carey storage bay for 20 months. He was informed in January 2010 that daily storage fees would begin to accrue if the car was not removed. Norwitz was required to mitigate his foreseeable damages, and he failed to do so. See Snowflake Laundry Co. v. MacDowell, 52 Wn.2d 662, 674, 328 P.2d 684 (1958).

The court may grant a summary judgment motion if, from all the evidence, reasonable minds could reach but one

conclusion. Heath v. Uraga, 106 Wn. App. 506, 513, 24 P.3d 413 (2001), review denied, 145 Wn.2d 1016 (2002). The only reasonable conclusion in this case is that Mitsubishi was entitled to deny warranty coverage due to a lack of proper maintenance of the car.

ATTORNEY FEES

Mitsubishi and Carey claim they are entitled to a partial award of appellate attorney fees under RCW 4.84.250. After succeeding on its counterclaim for storage costs and towing fees, Carey obtained an award of attorney fees and costs under this statute, which allows for attorney fees and costs to the prevailing party in damages actions of $10,000 or less. A companion section of the statute allows for prevailing party attorney fees on appeal. RCW 4.84.090.

Mitsubishi and Carey, who are represented jointly on appeal, contend they are entitled to fees on appeal under this statute for time spent responding to any arguments in Norwitz's opening brief that pertain to Carey, since Carey received fees at trial. This argument presumes that Norwitz is contesting Carey's judgment on appeal. He is not. Norwitz does address the storage costs in this appeal, but only as support for his breach of warranty arguments—not as a direct challenge to the judgment on Carey's counterclaim. That judgment was the only basis for the award of fees under RCW 4.84.250. Norwitz assigns error only to the summary judgment dismissal of his claim for breach of warranty. Because the judgment on the Carey

counterclaim is not at issue in this appeal, the statute does not authorize an award of fees on appeal.

Affirmed. Respondents' attorney fee request is denied.

Becker, J.

WE CONCUR:

Leach, C.J.

Schindler, J.