75352-5

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COURT OF APPEALS, DIVISION ONE

OF THE STATE OF WASHINGTON

ALL STAR TRUCKING, LLC,

Appellant,

vs.

RYDER VEHICLE SALES, LLC

Respondent.

RESPONDENT'S BRIEF

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1. Overview

Appellant's case was dismissed not merely because it was legally without merit, appellant simply had no evidence. His factual declaration was translated by his wife (not a certified interpreter) and not even signed. He submitted hearsay invoices for truck repairs but had not a piece of testimony on what the repairs were for, if they were necessary, and no testimony that any repair was to fix a malfunction under warranty.

He had no admissible evidence; only argument.

Appellant at the Trial Court and here misunderstands the issue on summary judgment. He primarily argues it would be inappropriate for respondent to waive or limit any warranty therefore respondent's motion should have been denied. Appellant ignores respondent's motion did not rely on any limitation or waiver of warranty. The motion assumed the propriety of all warranties, express and implied. Appellant moved only that, assuming the applicability of all warranties, there was no evidence any were breached. Candidly, respondent believed appellant's claims were so lacking it made its motion on that limited basis to avoid distraction of the issues appellant raises here. Appellant's brief asks for reversal of a decision never made.

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2. Facts

A. APPELLANT PURCHASED HIS TRUCK AS-IS IN AN ARMS LENGTH TRANSACTION WITH ALL KNOWN FACTS DISCLOSED

Mr. Singh signed the sales contract for his 2007 Freightliner Columbia with 764,881 miles on June 27, 2014 for $29,099. CP 90.

The contract said in ALL CAPS the sale was "as is, where is, with all faults" and waived all warranties, express or implied with a limitation of consequential damages "except as expressly provided in a written limited warranty agreement executed by an authorized representative of Ryder..." Id. Mr. Singh signed directly below that.

Mr. Singh declined a service contract that would have paid for his repairs. CP 92, ¶ 6.; CP 94.; CP 60.

Ryder gratuitously gave a "limited warranty" covering only "defects in material and workmanship" for 30 days or 10,000 miles whichever came first. CP 95. It did not cover consequential damages or break downs caused by wear and tear. Id. Mr. Singh signed that.

Appellant asserts no person translated this paperwork. He brought a friend to the dealership, fluent in English, specifically to translate. CP 62.

Appellant conceded the dealership did not steer him to any truck; he arrived knowing what he wanted and came for it. CP 45-49. He knew

other trucks, the same as he wanted and with less miles, were on the lot; he picked the least expensive one. CP 91, ¶ 2.; CP 48.

Appellant admitted he had a full opportunity to inspect the truck; he ran it for 20 minutes and determined "tires are okay... no cracks... inside was good... there were no cracks, and the body was also good, no cracks." CP 49-50.

Appellant's brief implies respondent's manager was not candid. Appellant conceded that is untrue. Appellant did not below and does not here identify a single thing respondent or its manager said that was untrue much less merely incorrect.

Appellant asserts respondent told him the truck was inspected. That is true. CP 92. CP 96-104. Nothing notable was found; the tail lights did not work; the visor lights were "dim;" the license plate light was out. CP 96. There is no evidence respondent knew of any problem that was present but not disclosed; assuming there was even a problem present. Appellant's complaint admits appellant gave him 3 inspection reports before he bought the truck and to date has never identified a single thing inaccurate or false in them. CP 2, ¶ 2.3.1. Appellant identifying problems that happened later is not the same thing.

Appellant implies he was dissuaded from having an inspection but filed no evidence he asked to conduct one and was refused. Further,

respondent provided appellant 48 hours after purchase to have it inspected and to return it if there were problems. CP 112:

> If the customer did not have the opportunity to inspect the vehicle prior to purchase, they will have 48 hours from the time the customer takes delivery of the vehicle to check the vehicle over and contact (the dealership) with any concerns.

Appellant identifies in his opening brief that when he drove the truck home he found a leaking front axle. He admits appellant fixed that at his request. CP 66-67.

B. APPELLANT USED THE TRUCK EXTENSIVELY, ANY PROBLEMS WERE RELATED TO WEAR AND TEAR

Appellant's first trip was to California; after hauling a load south, up the Syskious mountain pass, a "check engine light" came on while climbing a hill outside of Weed, California. He had no problems to that point. CP 70.

Appellant did not break down; he decided to pull the truck over and have it towed despite the fact it was still driving fine. CP 70. Below Appellant offered no evidence on what the problem was or what caused it. He claims at deposition to have paid for repairs to a "fuel injector" and "turbo" charger, CP 71-72, but in discovery produced an invoice for an injector and "regulator." CP 113-116.

Appellant contends respondent did not pay this bill. That is true; respondent never said it would. Appellant provided no evidence to respondent at the time of the repair, nor on summary judgment of: (1) what the need/cause of the repair was, much less (2) that the cause was covered by the gratuitous warranty respondent provided. Appellant plainly confuses a warranty with an all risks insurance policy. They are not the same.

Appellant admitted after the first repair he hauled loads from Seattle to Los Angeles through October. He had no problems doing so. CP 76-80. That trip crosses two, steep mountain passes each way: The Syskious in Oregon and the Grapevine outside Los Angeles County.

During that time appellant complained of a few trivial wear and tear issues.

In August 2014 he complained the air conditioning was not blowing cold enough for him; Ryder paid for that although it was covered by no warranty. CP 122, 124.

In October 2014 Appellant complained a mechanic told him the truck was overheating caused by a "faulty turbo." CP 77. Offered by Appellant below, Appellant relating what a mechanical to him was hearsay but respondent addressed it on summary judgment for completeness. Although the problem was covered by no warranty,

appellant agreed to pay to fix it. CP 85, 123, 125.

Exactly how long and far Appellant continued to drive his truck is unclear because he violated DOT regulations by not maintain a driving log. CP 86-89. See CFR 300-399. Respondent tried to blame his employer but the CFR required him to keep and preserve his own log to show compliance with sleeping regulations. Id.

Regardless, although Appellant at deposition asserted the last time he drove the truck was September 11, 2014, CP 83, invoices produced in discovery showed he continue to accrue mileage on the truck through October. CP 118-119.

Based on the last invoice produced in discovery, Appellant drove the truck no less than 18,398 miles, back and forth between Seattle and Los Angeles approximately 18 times after buying the truck. Id.

Appellant does not know the exact date the following happened, but he asserts upon returning from Los Angeles and arriving in Sumner he felt a "vibration." CP 79-80. He described no other problems; no loss of power or anything, while pulling his load. Id. It happened only "when (he) returned to the yard (for his next load) in Sumner." Id.

Rank hearsay by appellant but offered for context, appellant asserted his wife told him she called respondent and was told to take the truck to Pacific Power for inspection. CP 80-81. It was there Appellant

obtained an estimate to rebuild his entire engine for $21,000. CP 123.

Appellant offered not a scintilla of evidence the engine actually needed to be rebuilt nor assuming that was true, why. Appellant's evidence was only the submission of an estimate, apparently expecting the Trial Court to assume that because he had an estimate that meant (1) it needed to be rebuilt and (2) it had anything to do with respondent as opposed to the over 18,000 miles he put on the truck since buying it or the basic fact the truck had over 750,000 miles when bought. For all the Trial Court knew based on the plaintiff's evidence, the engine needed no rebuild and appellant simply asked Pacific Power to provide him an estimate to do so. Respondent explicitly premised its motion on the principle of Young v. Key Pharmaceuticals, pointing out the lack of evidence and putting appellant to produce it to color the elements. Appellant failed.

C. NO REPAIRS WERE COVERED, APPELLANT WAIVED ALL CLAIMS

The ease with which the following may be said belies its dispositive nature. Appellant produced not a shred of evidence on summary judgment of the mechanical need or reason for a single repair. Even assuming the repairs were necessary, which appellant provided no evidence on, Appellant provided no evidentiary link between the repair

made and the cause of the breakdown that led to the repair itself. Was it wear and tear. Was it a defect. Was it vandalism. Was it misuse. Or, was it a covered cause under the warranty. At the time the repairs were taking place, appellant provided no greater evidence. He simply demanded respondent pay; again, apparently thinking his limited warranty was an all-risks insurance policy. It was not.

Despite that, respondent agreed to conduct repairs to the truck to accommodate a vocal and difficult customer – frankly because he was pestering the dealership beyond end. CP 93, ¶ 9. In August appellant agreed to recharge the truck's air conditioning system, fix an oil leak and replace hoses for $1,467.30. CP 122. Those are quintessentially wear and tear yet appellant paid for them. Appellant's good faith in this process is clear.

Respondent agreed to conduct two additional repairs, not covered by the limited warranty, in exchange for appellant agreeing to release and discharge respondent of any possible claims arising out of the transaction. One was in October, after the warranty expired; respondent paid $5,624.05 to replace worn-out parts in the fuel system. CP 125.

Appellant executed a separate release in September for other repairs. CP 124. Both releases included the following language; agreed

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to by appellant:

> You understand that Ryder is agreeing to make this payment as a one-time business of accommodation for you and not because it is obligated to do so under the terms of the warranty or otherwise.
>
> By accepting these terms from Ryder and signing below, you agree to waive and release Ryder and all of its affiliated companies and persons from all further responsibility of any kind with respect to the vehicle and from and against any claims you may have with respect to it, whether those claims are now known by you or hereinafter discovered. You further acknowledge that this waiver and release is unconditional, that Ryder has relied upon it in making this accommodation, and that your signature below acknowledges your agreement and authority to make this agreement.

CP 124, 125.

Contrary to appellant's argument that respondent did not pay for the repairs he signed releases in exchange for, he admitted at deposition respondent paid all his repair bills except the first one when he pulled to the side of the road outside of Weed and his final demand that respondent pay to rebuild the entire engine. CP 75-76.

3. Authority And Argument

A. THE TWO RELEASES ARE DISPOSITIVE

Even if appellant had claims to make arising out of the transaction, the two releases he signed months after he bought the truck released and discharged them.

Appellant's argument he did not waive the claims by signing the releases is one paragraph at page 16. Appellant does not deny the waivers' language is effective to waive the claims nor does he argue they are unconscionable or unenforceable for public policy. He did not make those arguments to the Trial Court and may not raise them here in reply.

To this Court, Appellant argues he did not receive consideration in exchange because respondent was "obligated to pay for repairs regardless." In a vacuum and ignoring the total lack of record created by appellant, the argument is logical. It stumbles however on the fatal flaw appellant filed no evidence the repairs Ryder agreed to pay for in exchange for the releases were within the gratuitous warranty. Appellant must create a question of fact the repairs were covered by the gratuitous warranty before asserting respondent's offering to pay them was a failure of consideration. He did not do that.

In one sentence and with no citation to the record appellant asserts "Ryder did not even make the required payment." However, cited above, at deposition appellant admitted the only repairs not paid were the initial repair in Weed and the estimate to rebuild his entire engine. Neither was the subject of the releases.

Appellant implies, without authority, he was coerced into signing because if he did not Ryder would not make the repairs. Appellant is half

correct: Ryder would not pay unless appellant signed. But, that was because the repairs were not covered. If that constitutes coercion, every settlement agreement is coercive. That is not the test.

Washington enforces settlement agreements according to their terms. Brinkerhoff v. Campbell, 99 Wn.App. 692, 696 (2000). To oppose the enforcement of a release the opposing party has the "burden of proving that there is no genuine dispute over the existence of material terms of the agreement." Id. at 696-697. See also Condon v. Condon, 177 Wn.2d 150, 162 (2013) citing verbatim Brinkeroff with approval. Possible defenses are "fraud, coercion" or mistake. Brinkerhoff, 99 Wn.App. at 696.

Appellant is assumed to understand the contents and intention of the agreements he signed. Perry v. Cont'l Ins. Co., 178 Wash. 24, 28, (1934). He is deemed to have understood the agreements even if not read. McCorkle v. Hall, 56 Wn. App. 80, 83 (1989). It bears noting again Appellant had a friend fluent in English; he brought him along to buy the truck. Ostensibly, Appellant's wife translated his declaration for him. Appellant had resources available to translate. It is poorly placed and an improper appeal to prejudice for appellant to use his ethnicity or national origin to curry sympathy on these basic contractual issues.

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B. NO WARRANTY WAS BREACHED

Between pages 9 and 15 of his brief appellant argues respondent may not limit a warranty or assert a warranty was disclaimed. Again, respondent did not move for dismissal on that basis.

Respondent's motion assumed the effectiveness of all warranties (express and implied), arguing none was breached. Appellant did not understand that on summary judgment and still does not. Respondent cannot obtain reversal on an issue that was not the reason for dismissal.

Putting all his eggs in the basket of trying to defeat a waiver argument, respondent made and makes essentially no effort to establish any warranty was breached. That was/is a fatal oversight.

i. Ryder Did Not Breach The Gratuitous Warranty

The gratuitous warranty only covered breakdowns caused by "defects in material and workmanship" for the first 30 days or 10,000 miles whichever comes first. CP 95. Appellant had no evidence any of his breakdowns resulted from that; he did not provide such to Ryder at the time and filed no evidence in response to summary judgment. Even ignoring the hearsay nature of appellant's invoices and the assumptions made in his brief, the repairs were uniquely items that failed only after 750,000 miles of wear and tear: fuel injectors, belts, hoses, and the like.

The gratuitous warranty is a contract. To prevail on a claim of its breach, appellant has the "burden of proving that the defendant breached the contract." Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 83 (2011). Here, that required appellant to present evidence his truck experienced a break down covered by the language of the warranty.

Under the gratuitous warranty, it is not enough appellant had his vehicle repaired. Both to make a warranty claim and resist summary judgment he was required to present evidence his repair(s) were necessitated by "defects in material and workmanship" that caused a breakdown in the first 30 days or 10,000 miles, whichever came first. He has never done that. Respondent need not even rely on the clear warranty exclusion that "hoses, belts, thermostats" and related items were not covered even if they had a manufacturer defect, CP 95, because appellant did not prove a covered cause of loss in the first place.

Appellant takes between pages 9 and 13 arguing respondent cannot limit its own warranty but never explains how applying the plain language of the scope of the gratuitous warranty constitutes a "limitation" of it. Appellant's argument is comparing apples and oranges and makes no sense. Respondent need not respond to appellant's arguments that because he does not speak English as a first language any limitation or

waiver of warranty, assuming a waiver or limitation is even relied upon, would be unconscionable. See. See Perry v. Cont'l Ins. Co., 178 Wash. 24, 28, (1934); McCorkle v. Hall, 56 Wn. App. 80, 83 (1989).

ii. Appellant Has Not Demonstrated Any Other Warranty Was Breached

The only warranty appellant even pays lip service to possibly being breached is the implied warranty of merchantability. However, while appellant feigns an argument he cites not a single element, item of evidence, much less provide any argument as to why the relatively minor repairs he encountered colored it. Appellant may not ask this court to provide relief on matters not briefed or raised. RAP 12.1.

"The term "merchantable" is not synonymous with "perfect"..." Tallmadge v. Aurora Chrysler Plymouth, Inc., 25 Wn. App. 90, 94 (1979) (quotes in original). To breach this warranty the item must essentially fail its purpose. The fountainhead of all such cases, Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wn. App. 39 (1976) held the warranty of merchantability was breached when a dealership sold a race car - a stock car which by outward appearance looked like any car but had a race engine and suspension; all of which were modifications concealed not merely under the hood but within the engine itself and undercarriage. Id. at 44. The vehicle was all but inoperable on the street. Id.

Here, appellant used the truck substantially, hauling heavy loads 18,000 miles having completed a load from Los Angeles on his last trip with no problem except feeling a minor vibration. Even then appellant identified no problem with performance. That, in a truck seven years old that he bought with over 750,000 miles on it for $29,000, that he put another 18,000 miles on, when a new one costs approximately $130,000.[1]

Appellant relies heavily on his estimate relating by hearsay how much it will allegedly cost to rebuild his engine. Ignoring the hearsay, as noted above appellant's possession of an estimate for what it would cost if the engine was rebuilt is not evidence it needs to be rebuilt. Further, even assuming it needs to be rebuilt appellant has no evidence that is so outside the norm for a truck with 768,000 miles on it that it proves the truck fails its essential purpose.

Appellant does not even mention the implied warranty of fitness for a particular purpose. That claim does not lay but respondent identified it on summary judgment and for completeness will here. Cited above, appellant admitted he did not rely on respondent to pick the truck; not the model or the specific one he bought. He concedes he did not rely on respondent's "skill or judgment in selecting" the item he bought. Lewis & Sims, Inc. v. Key Indus., Inc., 16 Wn. App. 619 (1976).

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[1] See CP 30, p. 17, fn. 4 of respondent's summary judgment brief.

C. APPELLANT HAS NOT DEMONSTRATED A QUESTION OF FACT ON HIS CPA CLAIM

Appellant's argument is a straight cut-and-paste from its summary judgment brief. At the Trial Court appellant cited not a single piece of evidence nor explained how any action of respondent colored the elements of a CPA claim other than to vaguely assert a jury could find respondent's action was "oppressive and heavy-handed." That is not an element. The actual elements require an act that is "unfair or deceptive" along with a variety of others all of which appellant ignored. Really, appellant's CPA claim was a throwaway derivative assertion piggybacking on his warranty claims. When the warranty claims failed, so too did the CPA claim. Appellant did nothing in the trial court to color a CPA claim other than making his warranty claims.

D. CLEAN-UP OF OTHER ISSUES

When respondent moved for summary judgment it addressed several assertions appellant made at deposition. Appellant asserted no fraud or negligent misrepresentation claim or any that would give rise to a cause of action over some of the factual allegations made but appellant wanted to address those head-on. They included the assertion a sales manager for respondent supposedly told appellant he did not need to have the vehicle inspected and that everything was fine on the truck.

Appellant raises none of those issues in his brief to this Court as supporting any assignment of error or issue relating to them. He made no argument using those depositions assertions in the body of his brief. Even if respondent's manager said the things appellant contends, they provide no basis to reverse the order of dismissal. Again, this Court should not grant relief on matters not briefed. RAP 12.1.

However, given the short nature of this brief respondent will briefly address those factual issues if only for completeness.

Before a used truck is sold, the dealership inspects it and fixes material issues. CP 92 ¶ 5; CP 96-104. It was undisputed below the dealership provided appellant three inspection reports before he purchased the truck, id., and despite that, appellant presented not a scintilla of evidence respondent did not fix every defect those inspections found.

The fact appellant had a few wear and tear related problems tens of thousands of miles later does not mean the truck was not in reasonably good working order when purchased much less that any of the problems appellant had later were even manifest in the truck for the dealership to have discovered them at the time.

Appellant admitted that regardless of what the sales manager said, including the assertion the manager said the truck was "fine," appellant

conceded he knew that met fine for a truck with 750,000 miles on it:

> Q: So when you heard that, did that imply or mean anything to you beyond the basic words used?
>
> A: That's all he said, that the truck is fine. You can take the truck.
>
> Q: You understood that it was still a truck with three quarters of a million miles on it?
>
> A: Yes.
>
> Q: So if he said that anything was fine, it would be fine for a truck with three quarters of a million miles on it; it was not a new truck?
>
> A: Yes.

CP 57.

As to the allegation the manager supposedly said the truck needed no inspection, assuming that was true for summary judgment it was undisputed the sales contract provided appellant two additional days to have the truck inspected after purchase and to bring it back to have any items fixed. CP 112. Appellant admitted he did that with the leaky axel and respondent fixed it at his request. Mr. Singh completed this form after purchase and identified only a leaking front axle. Id; CP 66-67.

Respondent is hesitant to make the following argument because even on the face of what Appellant asserts he has not demonstrated respondent did not deliver on what the sales manager said regarding

inspections and repairs. However, to the extent appellant asserted the manager made statements such as a truck was fine, etc., such generalized statements are not actionable. They are quintessentially "puffery" that do not themselves become a term of a transaction. Babb v. Regal Marine Indus., Inc., 179 Wn. App. 1036 (2014) (review granted but not reversed, remanded on other grounds, 180 Wn.2d 1021, 329 P.3d 67 (2014)). "Mere puffery, (is) not actionable." Id.

Appellant asserted a claim of unjust enrichment in his complaint but did not contest it on summary judgment and did not raise it in his brief to this court.

4. Conclusion

It is suggested appellant's brief is so lacking in facts or authority as to be without a good faith basis. Respondent does not ask for costs; it did not do so in the Trial Court either. However, that does not mean this appeal contains any debatable issues. The trial court's dismissal on summary judgment should be affirmed.

DATED this 22nd day of December, 2016.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALL STAR TRUCKING, LLC, Appellant, vs. RYDER VEHICLE SALES, LLC Respondent.	)	NO. 75352-5 ~~75909-4-I~~ CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused the foregoing document to be delivered legal messenger to:

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Dated this 23rd day of December, 2016, at Seattle, Washington.

Cecilia Campagna

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