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No. 64164-6 I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

TAWNIE BEARWOOD

Plaintiff/Appellant,

v.

JANE THURIK

Defendant/Respondent.

APPELLANT'S BRIEF

KING COUNTY SUPERIOR COURT
CAUSE NO. 08-2-11995-5 SEA
HONORABLE JUDGE WILLIAM DOWNING

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

ORIGINAL

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INTRODUCTION

The "family car doctrine" imposes liability on a parent whose child causes an automobile accident, where the car is owned or "maintained" by the parent, for the "customary conveyance of family members" and other family "business", and where at the time of the accident the car is being driving by the child with the express or implied consent of the parent.

Cameron v. Downs, 32 Wn. App. 875, 880-81, 650 P.2d 260 (1982).

Respondent Jane Thurik's daughter Arielle caused a car accident that injured Appellant Tawnie Bearwood. The car Arielle was driving at the time had originally been a high-school graduation gift to her from an uncle. Jane Thurik's name was originally on the title as well.

Bearwood sought to impose liability for the accident upon Jane Thurik under the "family car doctrine", because:

At the time of the accident, unemployed Arielle (then age 24) was living with her mother Jane Thurik, rent free;

Though her name was no longer on the title, Jane Thurik insured the car;

Jane Thurik paid for gas for the car, directly and/or indirectly by providing for Arielle's "living expenses";

Jane Thurik used the car when she pleased and there were keys to it in the family "key box";

At least once Jane Thurik had paid for repairs to the car; and

At least once, Jane Thurik had denied Arielle access to the car as a sanction for not remaining in community college.

Despite the above evidence, essentially all of it undisputed, the Trial Court granted Summary Judgment of Dismissal to Jane Thurik.

ASSIGNMENT OF ERROR

The Trial Court erred in granting Jane Thurik's Motion for Summary Judgment.

Issue: Would the above evidence support liability under the "family car doctrine" and therefore defeat summary judgment?

STATEMENT OF THE CASE

Essentially all the following evidence comes from the deposition of Respondent Jane Thurik. Thus:

1. Jane Thurik's daughter Arielle was born April 3rd, 1981. CP77. At the time of the accident in this case, she was 24 years old. CP77. She was living at home, with her mother. CP77. She was "between jobs". CP77. At the time of her deposition Jane Thurik couldn't remember exactly, but didn't

believe that Arielle had been enrolled in school at the time of the accident.

CP78. Arielle did not pay "rent" in any formal sense. CP78.

2. At the time of the accident, Jane Thurik had long been divorced from Arielle's father, who lived in Spokane. CP78. No evidence was offered that, at the time of the accident, Arielle was receiving any financial support whatsoever from him.
3. With a "break" for school here and there, Arielle has lived at home with Jane Thurik her entire life, including following her graduation from high school. CP78. Arielle was living at home as of her June 18th, 2009 deposition. CP78.
4. When Arielle graduated from high school, her uncle gave her a car as a graduation gift. CP79.
5. Jane Thurik was originally on the title with Arielle. CP96. In 2003, Jane Thurik's name had been removed from the title. CP97, 98.
6. However, as of the day of the accident, Jane Thurik was insuring the car under her auto policy. CP83. This occurred as follows:

“ Arielle had gotten a high quote for insurance. And I called my insurance company and said "My daughter is living in my household, and I'm looking at putting her on my policy." And at that time I disclosed her age and any information that they asked me, and they had a much better rate than anything that she got. And I said "Great. Let's add her to my policy so she can have full coverage". It was just a better rate". “

CP83. (emphasis added)

7. Neither Arielle nor Jane produced any credible evidence that Arielle ever even reimbursed Jane Thurik the cost of adding Arielle to her policy, let alone compensated Jane for obtaining Arielle this additional coverage at a lower rate. Arielle's Declaration in Support of Summary Judgment said, simply, that:

“At the time of the collision, my car was insured under my mother's auto policy, which listed me as the principal operator of the Toyota. The Toyota was ultimately included under my mother's policy because SHE was able to obtain better insurance rates than I could obtain on my own”.

CP70. (emphasis added)

8. In fact, no clear evidence was ever submitted that Arielle had ever paid for insurance on the car, on any regular basis. Jane Thurik testified that Arielle had made "some" payments by reimbursing her father or mother for payments they'd made. CP79. Jane Thurik "believed" but didn't remember "for sure", that Arielle was making insurance payments "before the policy [in effect at the time of the accident]". CP79. (emphasis added)
9. What is certain is that Jane Thurik substantially subsidized Arielle's living expenses. Arielle acknowledged in her Declaration in Support of Summary Judgment that;

“My mother did occasionally help me with various living expenses since 1999. As my income increased, I reimbursed my mother for a substantial portion of the expenses paid on my behalf.”

CP69 . (emphasis added)

In fact, at the time of the accident, as already noted, Arielle was unemployed. CP77. No evidence was submitted of any income, other than as produced by Jane Thurik. And, Jane Thurik was not paying a regular “allowance”. CP78.

10. More specifically, Jane Thurik periodically provided Arielle gas money for the car. CP80. Jane Thurik testified that "as Arielle became older and had jobs" she would 'buy her own gas". CP80. Jane Thurik was asked directly about the situation around the time of the accident;

QUESTION: Can you tell me what the situation was in terms of buying gas for the car in June of 2005"?

ANSWER: I don't remember if she was working. I really can't. I really can't.

CP80.

The obvious (and utterly unsurprising) inference from this testimony is that when Arielle was unemployed, Jane Thurik gave her gas money. And Thurik had already testified, perhaps two minutes into the deposition, that Arielle was "between jobs" in June of 2005. CP77.

11. Arielle's Declaration in Support of Summary Judgment acknowledged that Jane Thurik helped her with "various" expenses. CP69.
12. When Arielle's uncle gave her the car, one "condition" had been that she attend college. CP69. At one point, because Arielle had left the community college she was attending, Jane Thurik took the car away from her. CP80, 81. At that time, in anticipation of selling the car, Jane Thurik paid for some repair work on the transmission. CP81. Arielle never reimbursed her for this work. CP81. Ultimately, Jane Thurik decided to let Arielle use "her" car again. Arielle was nineteen when this incident occurred. CP81, 82.
13. There were several extra keys to the car in the household "key box". CP81. Jane Thurik specifically testified that "I would let [Arielle] use her car and she would let me use hers". CP81. The liability policy covering the car listed Arielle as the "principal" operator. CP70.
14. Following the accident, in correspondence with Bearwood's counsel, the Thurik's insurance company referred to Jane Thurik as the "policy holder". CP100. Partly as a result of this, when litigation commenced, Jane Thurik was inadvertently named as Defendant, not Arielle, on the mistaken belief that Jane Thurik was the driver¹.

¹ Counsel offers no "excuse" for this error, but will point out that such inadvertencies are so foreseeable as to be specifically covered by Court Rule. CR15(c).

15. The Complaint was filed on April 8th, 2008, shortly before the statute of limitations expired. Under RCW 4.16.170, to preserve the statute, service must be had by July 7th, 2008 (90 days after filing).
16. Counsel appeared for Jane Thurik on June 25, 2008. CP6. On Tuesday, July 1st, 2008, 84 days after filing, Jane Thurik's Answer was filed. CP7. The Answer admitted that Jane Thurik "owned or co-owned" the car Arielle Thurik was driving at the time of the accident. CP11. But the Answer correctly pointed out that Jane Thurik was not driving the automobile at the time of the accident and asserted no liability on her part. CP7-10.
17. Subsequently, Bearwood's counsel wrote Jane Thurik's counsel, pointing out that Jane Thurik was still responsible under the "family car doctrine". CP71.
18. Jane Thurik's counsel then filed an Amended Answer, now denying that Jane Thurik had any ownership in the car. CP11- 14.
19. On August 6th, 2009, Respondent moved for Summary Judgment. CP21-34. Respondent's Motion listed one "issue presented" as whether the "family car doctrine [was] inapplicable". CP26. The Motion argued that the doctrine didn't apply to the so-called "undisputed facts" as recited by Thurik's counsel. CP26-34.
20. Bearwood defended the motion with the evidence set forth above. CP71-100.

21. The trial court granted the Motion, denied Reconsideration, and dismissed the case. CP106-108, CP115-116.
22. This appeal timely followed. CP117-124.

SUMMARY OF ARGUMENT

This court reviews the evidence de novo. The evidence must be construed in the light most favorable to Bearwood, the non-moving party.

The evidence so construed obviously supports an inference that Jane Thurik "maintained" the car for her live-in daughter Arielle, who used it for "customary family business", with Jane Thurik's "express or implied" permission. Thus the family car doctrine applies and summary judgment was improper.

ARGUMENT

THIS COURT REVIEWS THE EVIDENCE DE NOVO

This point is so axiomatic as to require no discussion. Castro v. Stanwood School District No. 401, 151 Wn.2d 221, 86 P.3d 1166 (2004).

FOR PURPOSES OF SUMMARY JUDGMENT THE EVIDENCE MUST
BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE NON-
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So too is this point inviolate. Sherman vs. State 128 Wn.2d 164. 905
P.2d 355 (1995).

THE EVIDENCE SUPPORTS THE APPLICATION OF THE FAMILY
CAR DOCTRINE

The elements of the "Family Car Doctrine" have been stated to be:

"(1) [T]he car is owned, provided or maintained by the parent; (2) for the customary conveyance of family members and other family business; (3) and at the time of the accident the car is being driven by a member of the family for whom the car is maintained; (4) with the express or implied permission of the parent."

Cameron v. Downs, 32 Wn.App. 875, 880, 650 P2 260 (1982).

(Emphasis added)

The doctrine does NOT apply only TO MINOR children. Dillon v. Burnett, 197 Wash. 371, 375, 85 P.2 656 (1938) where the Court said:

"The fact that appellant son was over twenty-one years of age is not important. He was living with the appellant father as a member of the Latgter's family, and used the automobile at will".

Each element is obviously supported by credible evidence, to wit:

1. *Jane Thurik "maintained" the car*

It hardly seems reasonable to deny that Jane Thurik "maintained" the car Arielle was driving at the time of the accident.² She insured it. She directly and indirectly subsidized it by giving Arielle money for "various living expenses", specifically including gas money when Arielle was out of work, as she was at the time of this accident. Jane Thurik paid for at least one substantial repair to the car.

In Kaynor v. Farline, 117 Wn. App. 575, 72 P.3d 262 (2003), the following facts were held to create issues of fact whether the defendant parents---who were divorced---had respectively "maintained" the car in question:

The Defendant mother had:

1. Allowed the car to be "titled" in her name when it was originally purchased (as did Jane Thurik in this case);

² On this record, it is something of an understatement to "admit" that Jane Thurik "occasionally" helped Arielle with "various" living expenses. Arielle had no income at the time of the accident.

2. Permitted the son to keep the car at her house (as did Jane Thurik in this case);
3. Bought snow tires for the car (roughly akin to the repairs Jane Thurik paid for in this case);
4. Insured the car, for two months, well before the accident (as opposed to Jane Thurik insuring Arielle's car as of the day of the accident).

The Defendant father, had:

1. Insured the car at the time of the accident (as did Jane Thurik in this case);
and;
2. "Occasionally" bought gas for the car, when the son was visiting him in Idaho (as opposed to Jane Thurik who directly paid for gas and/or subsidized Arielle's entire life throughout).

The question might be posed: What didn't Jane Thurik do to "maintain" the car? Or: other than drive it, what did Arielle do?

2. *The car was provided and used for the "customary convenience" of the family*

This "requirement" has been worded somewhat differently throughout the cases, but is clearly to be construed broadly. In Mylnar v. Hall, 55 Wn. 2d 739, 350 P.2d 440 (1960), the court said:

"In order to fasten liability upon the parents for the negligence of the child, under the family car doctrine, the plaintiff must show that the parents owned, provided or maintained the automobile in question and that it was for the general use, pleasure, and convenience of the family".

(emphasis added)

In Kaynor, *supra*, the court said at 117 Wn. App. 588:

"In sum, the issue as to what constitutes general use, pleasure, and convenience of a family is a question of fact that may change from family to family depending on the needs of the family and the authorization granted by the parent or parents".

Recall that keys to the car were in the family "key box".

The car in question here was originally provided as an incentive for Arielle to go to college. It was used 'generally' for transportation to/from school and work, and obviously for her convenience, to say nothing of Jane Thurik's. At least once Jane Thurik acknowledged that she drove the car when hers was in the shop. CP80, 81.

Again, the question: What was the car for, if not the general "use and convenience" of the household comprising Jane and Arielle Thurik?

Indeed, Jane Thurik was able to insure the car based on the premise that Arielle was the “principal”, not sole driver of this family vehicle.

3. *Arielle was a family member at the time of the accident.*

This was never disputed.

4. *Arielle was using the car with Jane Thurik's IMPLIED permission (at least)*

The "elephant in the room" on this issue is Arielle's literally-total dependence upon Jane Thurik. At the time of this accident, Arielle was living at home, paying no rent, unemployed and not in school, as she seems to have been for most of her adult life.

Consider the very practical ways that Jane Thurik could have effectively denied Arielle access to the car:

She could have simply taken it away from her, which in fact she had done at one point, though Arielle's name was on the title;

She could have withheld money with which to buy gas for it, and/or to fund Arielle's other "living expenses";

She could have refused to insure it;

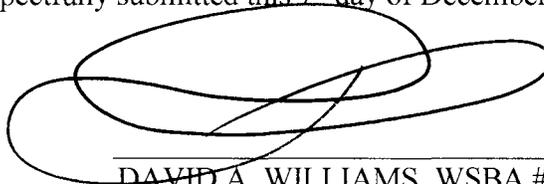
She could have refused to allow Arielle to park it at her home.

Conversely, by allowing Arielle to keep the car at her home, subsidizing her living expenses, buying gas for the car and insuring it, how was Jane Thurik not giving Arielle "implied" permission to use the car?

CONCLUSION

The family car doctrine was meant to apply to this type of case. The Judgment should be reversed.

Respectfully submitted this 7st day of December, 2009

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

DAVID A. WILLIAMS, WSBA #12010

CERTIFICATE OF SERVICE

I, Angie Baumgartner, hereby declare: I am over the age of 18 and not a party to this action. My business address is Nine Lake Bellevue Drive, Suite 104 Bellevue, Washington 98005. On the date indicated below, I caused the following document(s) to be served in the manner noted below:

1. *Appellant's Brief (corrected)*

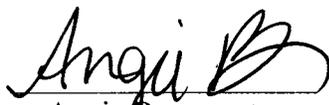
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I declare the under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.


Angie Baumgartner

DATED this 7th day of DECEMBER 2009