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**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE**

RICHARD AZPITARTE, *appellant*

v.

**GAYLE SAUVE, JANE DOE SAUVE and the marital community composed thereof and
BURIEN COLLISION CENTER, INC., *respondents***

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON, THE HONORABLE HOLLIS HILL**

REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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Richard Azpitarte
pro se

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ERRORS IN THE DEFENDANT'S STATEMENT OF THE CASE

In summary judgment all inferences are to be taken in favor of the non-moving party, **Enterprise Leasing, Inc. v. City of Tacoma**, 139 Wn.2d 546, 551, 988 P.2d 961(1999), yet the respondents (hereinafter referred to as the "Sauve defendants" or "Sauve") makes a number of factual assertions even though the appellant (hereinafter referred to as "Azpitarte") presented sufficient evidence to draw a contrary inference. Therefore Azpitarte objects to the following assertions of the Sauve defendants.

1. On June 28th , the Sauve defendants claim there was an "auction." Azpitarte strongly disputes this, because, for the reasons listed in the opening brief, the auction was fictitious. An auction does not occur with falsified AVR's and long distance phone calls from Alaska that the law states are not allowed. Azpitarte presented a plethora of evidence suggested that the "auction" never existed and was a sham paper transaction to cover a theft of an automobile.

2. The Sauve defendants claim they purchased it for \$5000 sight unseen. Azpitarte produced a credible witness that Sauve had possession

of the car for over a year before he allegedly bought it. The AVR claims that Sauve bought it for \$10.00. So which perjured version do we believe?

3. The Sauve defendants never answered the second set of interrogatories and therefore never delivered all information in their possession as required by the discovery rules because they never submitted their answers to key questions under oath.

4. The defendant claims he only purchased one car at auction but does not explain how records from the State towing coordinator clearly indicates that defendant Burien Collision bought two other vehicles which were never titled legally.

5. The Sauve defendants claim they never took possession of the cars until after June 28th in spite of clear testimony from an unbiased witness that they had the car a year earlier.

ERRORS IN SAUVE DEFENDANTS' ARGUMENT

1. THE REGISTERING OF THE CAR IS NOT A PUBLIC RECORD.

Both the Sauve defendants and the court argue that the automobile registration records are "public records" that Azpitarte can easily obtain. Azpitarte argues that what constitutes a diligent search of auto registration

records is a question of fact that should have been submitted to the jury or fact finder.

The most blatant error in the court's and the *Sauve* Defendants' approach is that these are not public records as the term is defined in RCW 42.56, the public disclosure statute. RCW 46.12.635 puts restrictions on the release of this information that could prove prohibitive to someone like *Azpitarte*:

(1) Notwithstanding the provisions of chapter 42.56 RCW, the name or address of an individual vehicle owner shall not be released by the department, county auditor, or agency or firm authorized by the department except under the following circumstances:

(a) The requesting party is a business entity that requests the information for use in the course of business;

(b) The request is a written request that is signed by the person requesting disclosure that contains the full legal name and address of the requesting party, that specifies the purpose for which the information will be used; and

(c) The requesting party enters into a disclosure agreement with the department in which the party promises that the party will use the information only for the purpose stated in the request for the information; and that the party does not intend to use, or facilitate the use of, the information for the purpose of making any unsolicited business contact with a person named in the disclosed information. The term "unsolicited business contact" means a contact that is intended to result in, or promote, the sale of any goods or

services to a person named in the disclosed information. The term does not apply to situations where the requesting party and such person have been involved in a business transaction prior to the date of the disclosure request and where the request is made in connection with the transaction.

(2) Where both a mailing address and residence address are recorded on the vehicle record and are different, only the mailing address will be disclosed. Both addresses will be disclosed in response to requests for disclosure from courts, law enforcement agencies, or government entities with enforcement, investigative, or taxing authority and only for use in the normal course of conducting their business.

(3) The disclosing entity shall retain the request for disclosure for three years.

In addition, the Federal government has implemented 18 USC

§2721 which is even more restrictive:

(a) In General.— A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section

...

(b) Permissible Uses.— Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and

removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321–331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

- (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
- (2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.
- (3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—
 - (A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
 - (B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.
- (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

- (5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.
- (6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.
- (7) For use in providing notice to the owners of towed or impounded vehicles.
- (8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.
- (9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.
- (10) For use in connection with the operation of private toll transportation facilities.
- (11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.
- (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.
- (13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.
- (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

First of all, the court has no evidence before it that the plaintiff Azpitarte is a business, as he has never claimed to be one. Therefore

under the state statute he is not even allowed to request the information directly. There is no case law interpreting whether a “business” under state law would include an attorney... a court could easily conclude the term business is the same as defined by federal statute, which clearly does not include an attorney. The state statute does not on its face, allow for the (b)(4) exception allowed in federal law so there is a possibility that the court rule that (b)(4) does not apply for an attorney investigation in anticipation of investigation.

Even if a court said it would, there is also a factual question as what circumstances constitute a legitimate investigation in anticipation of litigation. The law may require an attorney to have the elements of a cause of action firmly established before he can say his investigation is in anticipation of litigation. It could be argued that an attorney has to have more than a mere suspicion before he launches a fishing expedition on 120 vehicles. This would put Azpitarte in the situation of the chicken and the egg, he would have to be able to prove fraud in order to obtain the evidence he needs to prove it.

Even if the investigation in anticipation of litigation applied, this would then raise a factual question as to whether a diligent search would

include hiring an attorney to search 120 cars every few months for 5-8 years. This could be a costly and prohibitively expensive for someone in Azpitarte's position. As argued in opening brief, though the question of due diligence is ordinarily a question of fact, the issue can be decided as a matter of law if reasonable minds could reach but one conclusion.

Douglass v. Stanger, 101 Wn. App. 243, 256, 2 P.3d 998 (2000). Here reasonable minds could have concluded that a diligent search would not include hiring an attorney to continually keep looking for 120 vehicles.

2. THE PLAINTIFF DID NOT HAVE TO PLEAD THE ELEMENTS OF FRAUD.

As argued in the opening brief, there are two ways to establish fraudulent concealment or misrepresentation. The plaintiff may affirmatively plead and prove the nine elements of fraud or may simply show that the defendant breached an affirmative duty to disclose a material fact. **Stiley v. Block**, 130 Wash 2d 486, 515-16, 925 P.2d 194 (1996) (Talmadge, J., Concurring); **Oates v. Taylor**, 31 Wash. 2d 898, 902-03, 199 P.2d 924 (1948). Either method of proof will activate the statutory discovery rule for fraud, RCW 4.16.080(4). **Viewcrest Co-op Ass'n, Inc. v. Deer**, 70 Wash. 2d 290, 295, 422 P.2d 832 (1967).

Although Azpitarte referred to the above rule by citing to Crisman v. Crisman, Sauve argues the only method to establish there was an affirmative duty to disclose a material fact was to owe that duty only to the defendants. The above rule does not state that. Where inquiry is made, one owes a duty to answer truthfully. 37 C. J. S. 247, § 16. See, also, Goodin v. Palace Store Co., 164 Wash. 625, 4 P.2d 493 (1931). Here, when Azpitarte requested the information from Sauve as to whether he owned the cars, Sauve mislead him by saying no.

In Washington there is a trend toward finding or imposing a duty to disclose material impediments to a transaction even though there is an absence of a fiduciary relationship between the parties in the classic sense. Obde v. Schlemeyer, 56 Wash. 2d 449, 353 P.2d 672 (1960); 36 Wash. L. Rev. 202 (1961).

In Washington, the existence of a statutory requirement can impose a duty. Kaas v. Privette, 12 Wash. App. 142, 529 P.2d 23 (Wa.App. 11/25/1974). Here, the statute imposes a duty to disclose the purchase of a vehicle to the state, it also provides a method on how cars are auctioned after a sale. The Sauve defendants not only prevented the plaintiff from learning of the ownership of the car, they also prevented him from learning

how they obtained it by fraudulently creating a phony auction and then altering the AVR so that officer Helton's written comments on the AVR would not be seen. This prevented Azpitarte from learning the method as to how the car was converted until several years later when he obtained the Helton report and information from the DOL, which showed the AVR had been altered.

In **Crisman v. Crisman**, 931 P.2d 163, 85 Wash.App. 15 (Wash.App.Div.2 01/03/1997) the Washington Court of Appeals applied the discovery rule to the tort of conversion where fraudulent concealment was involved. Under the discovery rule, "a cause of action accrues when the plaintiff discovers, or in the reasonable exercise of due diligence should discover, the elements of a cause of action. **1000 Virginia Ltd. P'ship v. Vertecs Corp.**, 158 Wn.2d 566, 575--76, 146 P.3d 423 (2006)," This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action. **Id.** Here, the plaintiff was prevented from learning the facts needed to establish a cause of action through a large number of fraudulent acts and forgeries listed in the opening brief. Knowing who owned the car

was not enough to establish he had a cause of action. Azpitarte needed to know the facts that would show that the Sauve defendants were not bona fide purchasers.

3. THE SAUVE DEFENDANTS HAVE NOT ADDRESSED WHY THE COURT DID NOT CONSIDER ALL THE CLAIMS ASSERTED IN THE COMPLAINT.

The Sauve defendants ignore that the reasoning for the car allegedly being titled 2005, does not hold for the other cars because there is no evidence in the record that they were even titled. Their counsel simply make a statement “if the purchase of one car is beyond the statute of limitations then the purchase of additional vehicles the same day is beyond the statutory time limitation.”

Not only is the assertion false (the cars were purchased at other times, it is completely illogical to argue that just because he titled one car, that somehow translates into a free pass to convert as many other cars as he wants by not titling them.

CONCLUSION

For all the reasons stated above, the appellant requests that the ruling of the trial court be reversed and the case reinstated with the plaintiff being allowed to continue with discovery.


Richard Azpitarte

I hereby certify that on May 29th, 2012, I caused to be served a copy of the appellants ~~opening~~ ^{REPLY} brief by the method indicated below and addressed to the following:

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- Hand Delivered By: _____
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