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**I. ASSIGNMENTS OF ERROR**

1. Did the Superior Court err by refusing to grant an order of replevin when the vehicle was divested through larceny, triggering application of RCW 10.79.050?
2. Did the Superior Court err in relying on the factually distinguishable case of *Harris v. Northwest Motor Company* when there was no agency relationship between DK and Dimension and the vehicle itself was misappropriated?
3. Did the Superior Court err in applying the comparative innocence doctrine when Dimension's interest in the vehicle was not voluntarily relinquished?
4. Did the Superior Court err in applying the entrustment doctrine and the voidable title doctrine to benefit Twin Star

Credit Union when entrustment is used to restore possession to a buyer and title was void from the outset?

## II. STATEMENT OF THE ISSUES

1. Whether the Court should have entered an order of replevin under RCW 10.79.050 when a vehicle was “sold” by larcenous means, divesting the true owner of its title and interest in the vehicle?
2. Whether *Harris v. Northwest Motor Company* was factually distinguishable when there was no agency relationship and the vehicle was misappropriated from its owner?
3. Whether the comparative innocence doctrine does not apply when a vehicle’s owner did not voluntarily release its interest in the vehicle?
4. Whether the entrustment doctrine and the voidable title doctrine are inapplicable because entrustment is only applied to restore property to a bona fide purchaser and title was void from the outset?

### III. STATEMENT OF THE CASE

#### A. Factual Statement

Dimension Funding, LLC (hereinafter “Dimension”) finances computer and business equipment to small to mid-sized corporate entities. CP at 96. Dimension has also provided vehicle lending and financing services on a limited basis. CP at 96. In the course of its existence over the past twenty-five years, Dimension has financed somewhere between five and ten transactions involving vehicles in the State of Washington.

Defendant DK Associates, Inc. d/b/a Triad Marketing, Inc (hereinafter “DK”) is a Delaware corporation. CP at 20. Its registered agent, Darrel Kempf, is currently wanted and under the investigation of the Federal Bureau of Investigation for dozens of actions involving larceny, theft, fraud, and forgery of vehicle title documents throughout Western Washington. CP at 5.

On or about April 25, 2006, Dimension and DK entered into an Equipment Financing Agreement (hereinafter known as the “Agreement”) for the use of a 2004 Volkswagen Touareg, VIN No. WVGVC67L64D006592, License No. 850RTV ( hereinafter the “Vehicle”). CP at 96, 102. Before entering into the Agreement, Dimension had never financed or leased a Vehicle to DK before. CP at 96. Dimension had a valid and perfected security interest in the Vehicle

under the terms of the Agreement and rightfully held legal title to the Vehicle as filed with the Washington State Department of Licensing. CP at 96, 100.

Pursuant to Section 6 of the Agreement, the Vehicle was leased to DK “solely for commercial and business purposes.” CP at 103. DK was not authorized to place the Vehicle on its lot for resale. CP at 96. No agency relationship was granted to DK to resell the Vehicle. CP at 97. Section 3 of the Agreement expressly excludes agency relationships between the parties. CP at 102.

On or about December 18, 2006, Defendant DK, without knowledge or authority from Dimension, sold the Vehicle to Defendant Edward Seabold (“Seabold”). CP at 97. The Vehicle sale transaction to Seabold was financed by non-party CU Dealer Direct, LLC, who is believed to have subsequently sold the loan to Defendant Twinstar (“Twinstar”), now listed as the legal owner and title holder to the Vehicle in violation of the secured rights of Dimension. CP at 97.

Commencing in January of 2007, DK failed to make the payments due under the Agreement and remains in default under its terms. CP at 56. Pursuant to the Agreement, Dimension is entitled to possession of the Vehicle in the event of default. CP at 103.

On or about January 5, 2007, Defendant Darrel Kempf (“Kempf”), an officer for DK, is believed to have forged a Release of Title in the name of Michael Wagner, the managing member of Dimension. CP at 97. The Release of Title was recorded with the Washington State Department of Licensing and divested Dimension’s true rights to the Vehicle. CP at 97. Michael Wagner never signed the Release of Interest nor authorized or agreed for anyone to execute the document on his or Dimension’s behalf. CP at 97. Similarly, Dimension never authorized DK to sell the Vehicle or hold it out for resale. CP at 96-97.

The forged Release of Title purports to be notarized by Jessica Nordike, a notary public for the State of Washington. CP at 97. However, Mr. Wagner has never met Ms. Nordike and has therefore never retained her services for any notarizations. CP at 97. Mr. Wagner, a resident of California, was not in the State of Washington on January 5, 2007, the date the Release of Title was executed. CP at 97. Mr. Wagner’s actual signature does not match his purported signature on the Release of Title. CP at 97 - 98, 110 - 112.

**B. Procedural History**

On July 20, 2007, Dimension filed its complaint for conversion, damages, declaratory relief and replevin, along with a motion and declaration for an order requiring Twin Star Credit Union, Edward

Seabold and Jane Doe Seabold to appear and show cause why an Order putting Dimension in possession of the Vehicle should not be entered. CP at 23 - 26. The same day, the Court entered the Order to Show Cause. CP at 27 - 29.

On August 30, 2007, a pro tem Court Commissioner denied Dimension's Motion for Replevin. CP at 51. Dimension filed a motion for revision of the Commissioner's denial of the motion for replevin. CP at 54 - 94.

On September 28, 2007, the Superior Court denied Dimension's motion for revision. CP at 128 - 129.

This appeal by Dimension follows.

#### **IV. STANDARD OF REVIEW**

A trial court's interpretation of a statute is a question of law that is reviewed de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). The right to replevin is controlled by RCW 7.64 *et seq.*, and in this case, RCW 10.79.050. Accordingly, the proper standard of review is a de novo standard.

## V. ARGUMENT

### 1. The Superior Court should have entered an order of replevin because divestment of a title resulting from larceny triggers application of RCW 10.79.050.

The Supreme Court of Washington in *Richardson v. Seattle-First National Bank*, 38 Wn.2d 314, 229 P.2d 341 (1951) has upheld the granting of the right of replevin as a remedy to a party whose title to a vehicle has been wrongfully divested through larceny by applying RCW 10.79.050 (Old Rem. Rev. Stat. § 2129).

In *Richardson*, Ms. Richardson, after holding her vehicle out for sale, was divested of her title in the vehicle by the initial buyer after he was permitted to obtain possession of the vehicle, but forged Ms. Richardson's name on the certificate of title in the context of his subsequent sale of that vehicle to a good faith purchaser. *Id.* at 315. The Court properly applied Old Rem. Rev. Stat. § 2129, now codified as RCW 10.79.050, which states in pertinent part:

All property obtained by larceny, robbery or burglary, **shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property . . .** (emphasis ours).

RCW 10.79.050.

This statute is an exception to the general rule that a vendee may pass good title to a bona fide subsequent purchaser. The *Richardson* Court reasoned that if goods are obtained from the true owner by false impersonation or larceny, Old Rem. Rev. Stat. § 2129 (now RCW 10.79.050) carves out an exception to the common law rule. *Id.* at 317. Consequently, the comparative innocence doctrine protecting bona fide or good faith subsequent purchasers is inapplicable in situations involving larceny, such as unequivocally exist in the matter at hand. *Id.* at 316 - 17. Ms. Richardson was granted authority to secure possession of her vehicle through replevin, as should Dimension. *Id.*

Similarly, in *Frye & Co. v. Boltman*, 182 Wash. 447, 47 P.2d 839 (1935), the plaintiff sold a team of horses to a person who falsely represented himself as another person. *Frye & Co.*, 182 Wash. at 448. The plaintiff unknowingly accepted a forged check as payment for the horses. *Id.* at 448. The buyer then sold the horses to an innocent purchaser for value. *Id.* at 448. The Washington Supreme Court held that since the horses had been obtained by larceny, they must be returned to the owner under Old Rem. Rev. Stat. § 2129 even though the horses had eventually been sold to an innocent purchaser. *Id.* at 448 – 450.

Finally, in *Stohr v. Randle*, 81 Wn.2d 881, 505 P.2d 1281 (1973), an innocent purchaser for value of a stolen vehicle challenged the Superior

Court's award of damages to the car's original owner. The Supreme Court of Washington rejected application of the comparative innocence doctrine, holding that RCW 10.79.050 "provides for the return of the stolen automobile to the original owner apparently regardless of the appellant's alleged 'good faith' purchase . . . ." *Id.* at 882, 885.

Here, as in *Richardson*, Dimension's property was divested through a forged document and false impersonations perpetrated by Kempf, resulting in the good faith purchaser Seabold obtaining possession and title to the Vehicle. CP at 97 – 98. The comparative innocence doctrine does not apply, as in *Frye & Co.* and *Stohr*, because larceny was used to divest Dimension of its possession and title to the Vehicle. *Id.*

The terms "larceny" and "theft" are legally equivalent. *State v. Casey*, 81 Wn. App. 524, 528, 915 P.2d 587 (1996). Under RCW 9A.56.020 (b) the following acts constitute a "theft": using "color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services. . . ." RCW 9A.56.020 (b).

Here, Kempf's actions fit squarely within the definition of theft: he "sold" the Vehicle to Seabold by falsely claiming to be its legal owner, then forged a Release of Interest and recorded it with the Department of Licensing. These actions deprived Dimension of its right to title and

possession of the Vehicle. But for the forged Release of Title bearing Michael Wagner's false signature and subsequent "sale" of the Vehicle to Seabold, Dimension would have remained in possession of its title since DK had several years remaining on its contractual repayment obligations for the vehicle. CP at 102 – 103. Since Dimension was divested of its title by larceny, the Vehicle must be restored to Dimension's possession under RCW 10.79.050.

**2. The Superior Court erroneously relied on the factually inapposite case of *Harris v. Northwest Motor Company*.**

*Harris v. Northwest Motor Company*, 116 Wash. 412, 413-14, 199 P. 992 (1921), a case thirty years junior to *Richardson*, is wholly inapposite to the facts before this Court and readily discernible. In *Harris*, the original owner traded her vehicle to an agent for an auto dealer in exchange for a new vehicle. *Id.* at 413. The dealer agent resold the traded car to a second automobile dealer, who in turn sold the vehicle to a bona fide purchaser. *Id.* The dealer agent, however, did not account for the sale of the vehicle to his employer and instead embezzled the proceeds he personally received from the sale of the traded vehicle. *Id.* The dealer employer, noticing that the traded car was missing from its inventory and had not been accounted for on its books, found and repossessed the vehicle from the bona fide purchaser. *Id.* at 414. *Harris* is completely

dissimilar from this case where Kempf committed larceny to divest Dimension of its interest in the vehicle.

- a. Unlike in *Harris*, there was no actual or apparent authority to sell the Vehicle.

The *Harris* Court held that Wash. Rev. Stat. § 2129 was inapplicable for two reasons: first, there was actual or apparent authority to transfer the traded vehicle to the second dealer because it was sold by an employee of the dealer. *Id.* at 420. However, unlike in *Harris* where the dealer agent had actual or apparent authority to sell the vehicle, DK never had actual or apparent authority to resell the Vehicle.

An agent's authority to bind their principal may be either actual or apparent. *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994), *superceded by statute on other grounds*, *In re Dependency of Q.L.M.*, 105 Wn. App. 532, 540, 20 P.3d 465 (2001). Actual authority can be either express or implied. *King*, 125 Wn.2d at 507. Actual authority is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent act on the principal's behalf. Implied actual authority exists when the principal actually intended the agent to have such authority. *King*, 125 Wn.2d at 507.

DK lacked actual authority to bind Dimension because the

Agreement between the parties expressly disclaimed any agency relationship. CP at 102. Further, the Vehicle was not for resale and was to be used by DK solely for commercial and business purposes, pursuant to the terms of the parties' Agreement. CP at 103. Under the circumstances, there was no actual authority for DK to sell the Vehicle to a third party.

Further, DK lacked apparent authority to sell the Vehicle.

Apparent authority requires that objective manifestations be made to a third party. *Smith v. Hansen, Hansen & Johnson Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991), *review denied*, 118 Wn.2d 1023, 827 P.2d 1392 (1992). Apparent authority may be inferred only from the acts of the principal, not from the acts of the agent (emphasis added). *Hansen v. Horn Rapids O.R.V. Park of the City of Richland*, 85 Wn. App. 424, 430, 932 P.2d 724 (citing *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989)), *review denied*, 133 Wn.2d 1012 (1997).

There is no evidence that Dimension communicated in any way with the third party purchaser, Seabold, much less that any representative of Dimension represented to Seabold that Kempf had authority to act on its behalf, nor can this be inferred. There is simply no evidence of any agency relationship between Dimension and DK, unlike in *Harris* where it was clear that the dealer's employee was an agent of the dealer. The

*Harris* case can clearly be distinguished on these grounds.

b. In *Harris*, the proceeds, not the vehicle, were embezzled.

The *Harris* Court's second reason for rejecting Wash. Rev. Stat. § 2129 was because the dealer agent embezzled only the proceeds from the vehicle sale and did not transfer the vehicle itself. *Id.* at 420. The *Harris* Court stated that if the dealer agent had embezzled the vehicle and not merely the proceeds, it would not have reached the same conclusion. *Id.*

However, in our case the Vehicle itself was larcenously transferred by DK. This is significant because RCW 10.79.050 only applies to "property obtained by larceny, robbery or burglary." (emphasis added). Wash. Rev. Stat. § 2129 therefore did not apply in *Harris* because only the proceeds of a bona fide sale were embezzled by the dealer's agent. The vehicle itself was not taken by larceny, robbery or burglary. *Id.* at 420. This is inapposite to our case where the vehicle itself was divested through larceny. For these reasons, *Harris* is distinguishable and the Superior Court's reliance on this decision was misplaced.

**3. The Superior Court should not have relied on the comparative innocence doctrine when Dimension did not voluntarily relinquish title.**

The doctrine of comparative innocence does not apply because Dimension was divested of its title by larceny rather than by voluntary

means. The doctrine of comparative innocence was set out by the Supreme Court of Washington in *Ketner Bros. v. Nichols*, 52 Wn.2d 353, 356, 324 P.2d 1093 (1958):

[W]here one of two equally innocent persons must suffer, that one whose act or neglect made the fraudulent act possible must bear the loss occasioned thereby. This maxim is applied where two parties make claim to the same property, the conflict in claims having arisen as a result of the fraud of a third party.

*Id.* at 356.

However, in order for the comparative innocence doctrine to apply it must be clear that the "act or neglect" of that party was voluntary. In *Linn v. Reid*, 114 Wash. 609, 611, 196 P. 13 (1921), the Court stated that:

The basis of protection to the bona fide purchaser, in cases such as the present one, is the voluntary act of the original vendor in parting with both the title to and possession of the property. Unless this difference in the manner in which property is acquired from its lawful owner is kept in mind - that is, whether by trespass, or by the voluntary act of the lawful owner -- a misunderstanding of the well-reasoned cases may follow (emphasis added).

*Id.* at 611.

The comparative innocence doctrine does not apply to this case because Dimension never willingly parted with its title or right to possession of the Vehicle. CP at 97. A forged release was the sole means used to divest Dimension of its title and an illegitimate sale was used to transfer vehicle possession to Seabold. CP at 97. Therefore, the

comparative innocence doctrine should not have been applied by the Superior Court.

**4. The Superior Court erred in applying the entrustment doctrine and the voidable title doctrine to the benefit of Twin Star Credit Union when entrustment is a buyer's remedy and title was void, not voidable.**

Neither the entrustment doctrine nor the voidable title doctrine apply in any way to the facts at hand. To hold in this case that an entity or an individual dealing in the sale of vehicles has the authority, simply by nature of its business, to go forth and sell any vehicle in its possession in derogation of the rights of the proper title holder, flies in the face of Washington law, common sense, and time-tested remedies to the contrary. There is simply no authority for Washington courts to apply the entrustment doctrine to prevent a vehicle from being restored to its rightful owner, as the Superior Court did here. Further, since DK's title was void from the outset the Court should not have relied on the voidable title doctrine in any way.

The seminal Washington case involving the entrustment and voidable title doctrines is *Heinrich v. Titus-Will Sales*, 73 Wn. App. 147, 868 P.2d 169 (1994). The entrustment doctrine is a buyer's remedy that is used to protect "persons who buy in ordinary course out of inventory." *Heinrich*, 73 Wn. App. at 155. For instance, in *Heinrich* the Superior

Court properly applied the entrustment doctrine in granting replevin and damages to a good faith purchaser who paid a dealer for a truck, yet the truck was later taken from him under false pretenses. *Id.* at 152 - 57.

Since the doctrine of entrustment is used to restore possession to a good faith purchaser, this remedy is simply unnecessary and inapplicable when the purchaser has possession of the vehicle, as is the case here. There is no support in Washington for application of the entrustment doctrine where the Vehicle was being leased for business or commercial purposes; after several months the lessee DK placed the vehicle on his lot for "sale" without any authorization from the lessor Dimension; and DK eventually "sold" the Vehicle to a third party who remains in possession of the same. The entrustment doctrine is properly applied as a sword to restore stolen property, not as a shield to prevent the rightful owner from obtaining possession and title. The Superior Court erred in applying the entrustment doctrine to the benefit of Twin Star Credit Union and the detriment of Dimension.

Finally, to the extent the Superior Court's decision was based on the voidable title doctrine, this was erroneous because title was void, not voidable. In *Heinrich*, the Court stated that "[v]oidable title exists only if the title claimant has some legal interest in the property. Thus, a subsequent purchaser acquires no title to stolen goods, despite the

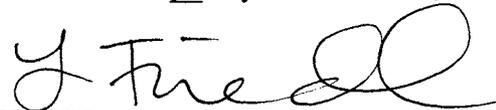
consideration paid or good faith of the later transaction pursuant to RCW 10.79.050.” *Id.* at 159 (emphasis added). Here, DK’s “sale” of the Vehicle to Seabold constituted theft under RCW 9A.56.020 (b) and thus Seabold acquired no title to the stolen Vehicle. Therefore, title was void, not voidable and the voidable title doctrine should not have been applied to this case.

## VI. CONCLUSION

The Superior Court incorrectly applied *Harris* and *Heinrich*, disregarded RCW 10.79.050, the *Richardson* case and the written contract between the parties. An order of replevin should have been entered in favor of Dimension.

Accordingly, Dimension respectfully requests this Court reverse the Superior Court’s order on revision and enter an order of replevin returning the Vehicle to Dimension.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of December, 2007.



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**PROOF OF SERVICE**

The certifies that on this day I caused to be delivered a true and correct copy of the (1) APPELLANT DIMENSON FUNDING LLC's BRIEF, by ABC Legal Messengers to the following:

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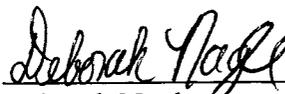
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I filed the **original** plus one copy of APPELLANT DIMENSON FUNDING LLC's BRIEF with the below court:

Washington Court of Appeals Division II  
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Tacoma, WA 98402-4454

I declare under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

DATED this 31<sup>st</sup> day of December 2007, at Seattle, Washington.

  
\_\_\_\_\_  
Deborah Nagle