

NO. 36893-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Dimension Funding, LLC,

Appellant,

v.

D.K. Associates, Inc., dba Triad Marketing, Inc., et al.,

Respondents.

APPELLANT DIMENSION FUNDING, LLC'S REPLY BRIEF

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Sergio Armijo

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I. REPLY REGARDING FACTUAL STATEMENT

The following facts are not in dispute: first, there is no question that the Vehicle is at issue is the 2004 Volkswagen Touareg, VIN No. WVGVC67L64D006592, License No. 850RTV. This Vehicle is clearly identified by VIN number on the Vehicle Certificate of Ownership, at CP 12 and CP 100; in the Declaration of Michael Wagner, at CP 96; and in the Complaint, at CP 3.

Dimension Funding, LLC (“Dimension”) held legal title to the Vehicle until its title was wrongfully divested by Darrel Kempf (“Kempf”) and DK Associates (“DK”). CP at 12, 96, 100. Title was divested by the forged Release of Title which was subsequently recorded with the Washington State Department of Licensing, in conjunction with Kempf’s unauthorized sale of the Vehicle to Defendant Edward Seibold. CP at 97, 110. The Vehicle remains in the possession of Seibold as a result of the Superior Court’s denial of Dimension’s motion for replevin. CP at 128-29.

Twin Star’s factual assertions regarding the dates the Equipment Financing Agreement and associated documents were signed are red herrings and an attempt to focus the Court’s attention away from these undisputed facts: that Dimension has been deprived of its control over, title to and right to possession of the Vehicle by larceny, which entitles Dimension to the remedy of replevin under RCW 10.79.050.

II. ARGUMENT

1. **Since the Vehicle was obtained by larceny, the Superior Court should have granted Dimension's motion for replevin.**

The plain language of RCW 10.79.050 is clear: "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).

Twin Star Credit Union admits in its Response that in order for replevin to apply, the Vehicle must be "obtained by larceny." Respondent Twin Star's Brief, pp. 6 -7. Twin Star argues that no larceny occurred in this case because "Dimension voluntarily transferred possession of the vehicle . . . to DK Associates." *Id.* at p. 7. However, whether DK Associates had possession of the Vehicle at that time is irrelevant as to whether larceny occurred.

Larceny constitutes 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); *see also State v. Casey*, 81 Wn. App. 524, 528, 915 P.2d 587 (1996) (the terms "larceny" and "theft" are legally equivalent).

Under RCW 9A.56.020(b) it is the loss of control, not the loss of possession, that is relevant to whether larceny occurred. Dimension had

ultimate control over the Vehicle as its legal owner. CP at 96, 100. Kempf sold the Vehicle to Seabold by falsely representing that he had legal title and the right to sell the Vehicle and executing a fraudulent release of title. CP at 97, 110. It cannot be disputed that these actions deprived Dimension of all control over the vehicle. *Id.*

Since Kempf used deception to strip Dimension of all control over the Vehicle via a fraudulent sale, with the intent to deprive Dimension of its interest in the Vehicle, the Superior Court should have granted replevin. *Richardson v. Seattle-First National Bank*, 38 Wn.2d 314, 229 P.2d 341 (1951); *Frye & Co. v. Boltman*, 182 Wash. 447, 47 P.2d 839 (1935); *Stohr v. Randle*, 81 Wn.2d 881, 505 P.2d 1281 (1973).

2. Contrary to Twin Star's assertions, *Harris v. Northwest Motor Company* is distinguishable.

Harris v. Northwest Motor Company, 116 Wash. 412, 413-14, 199 P. 992 (1921), was decided thirty years prior to *Richardson* and is factually distinguishable. Twin Star does not dispute that DK lacked actual authority to sell the Vehicle. Twin Star claims that DK had apparent authority to sell the Vehicle to Seabold, an argument that is not supported by Washington law on agency. Respondent's Brief, pp. 8 – 9. 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). Since it is uncontroverted that Dimension had no involvement whatsoever in the sale to Seabold, there was no apparent authority.

This case is clearly dissimilar from *Harris* where the individual who sold the car and embezzled the proceeds had apparent, if not actual, authority to sell the vehicle at issue because he was the dealer's employee. *Harris*, 116 Wash. at 417- 418. While the dealer argued that its employee, Doty, lacked actual authority to sell the vehicle because it was a used car and he was in the new car sales department, the buyer knew Doty to be an agent of the principal based on prior dealings, and the principal had previously informed the buyer that Doty was their sales agent. *Id.* In contrast, it is undisputed that Kempf was not employed by Dimension.

In determining there was at least a jury question as to the existence of agency, the *Harris* Court stated that:

[W]henever a principal has placed an agent in such a situation that a person of ordinary prudence . . . is justified in assuming that such agent is authorized to perform on behalf of its principal . . . the principal is estopped from denying the agent's authority to perform it.

Id. at 418. The operative phrase here is "whenever a principal has placed an agent in such situation." *Id.* (emphasis added). Unlike in *Harris*,

where the principal-dealer placed its agent in the situation of selling vehicles and accepting trade-ins, Dimension never gave Kempf any authority to sell the Vehicle and the agreement between the parties expressly disclaimed any agency relationship. CP at 102, 103.

As to Twin Star's assertion that, under *Harris*, "secret instructions and restrictions [that] are not made known to an innocent third party do not then affect the third person who is ignorant thereof," this proposition only applies when there is an agency relationship. *Harris*, 116 Wash. at 418. In this case there was no agency relationship and no "secret instructions" between Dimension and Kempf, so this argument is irrelevant and inapplicable.

Finally, Twin Star's discussion of *Linn v. Reid*, 114 Wash. 609, 196 P. 13 (1921), is also misplaced. Twin Star argues that the Legislature did not intend to include embezzlement as a type of larceny when it enacted Old Rem. Rev. Stat. § 2129 (RCW 10.79.050). Respondent's Brief, pp. 9 – 10. However, unlike in *Harris*, where only the sale proceeds were embezzled, here the Vehicle itself was divested from its legal owner by a fraudulent release of title. This is not a case where only the proceeds were embezzled as in *Harris*. Dimension was divested of its control over, title to and right to possess the Vehicle, along with the proceeds of the unauthorized sale. Therefore, RCW 10.79.050 controls and the motion for

replevin should have been granted.

3. Contrary to Twin Star's assertions, the comparative innocence doctrine does not apply.

Twin Star contends that the doctrine of comparative innocence can only be invoked when the owner parted with title under circumstances not amounting to larceny under Old Rem. Rev. Stat. § 2129 (RCW 10.79.050). Dimension agrees. This is precisely why the Superior Court should not have applied the comparative innocence doctrine: Dimension was divested of its title by larceny rather than by voluntary means. The legal title to the Vehicle was fraudulently transferred by DK and the Vehicle itself was sold to a third party without Dimension's knowledge or authorization. Therefore, the comparative innocence doctrine protecting bona fide or good faith subsequent purchasers is inapplicable. *Richardson* at 316 – 17.

4. Dimension did not entrust the Vehicle to DK.

Twin Star, the current legal owner of the Vehicle, and Seabold, the current registered owner, were the beneficiaries of the Superior Court's erroneous application of the entrustment doctrine to the facts of this case. Despite Twin Star's efforts to muddle the facts, the record does not support the Superior Court's finding of entrustment.

First, Twin Star's assertion on page 5 of its brief that "Dimension Funding loaned monies to DK . . ." mischaracterizes the transaction and makes it sound like a flooring line. It was not. Dimension is not a "floor financier" for the automobile industry. CP at 96, ¶ 2. Dimension has only provided vehicle lending and financing services on a limited basis throughout its existence. *Id.* Dimension's finance of the Vehicle to DK was the first (and last) time it financed any Vehicle to DK. *Id.* The Vehicle was leased to DK "solely for business and commercial purposes" and DK was never authorized to hold the Vehicle out for resale. CP at 96, ¶ 4.

Twin Star and Seabold should not reap the benefits of the entrustment doctrine based on the unfortunate coincidence that Dimension financed a vehicle to DK strictly for business purposes and, at the same time, DK happened to be in the used car sales business and unlawfully sold the Vehicle to a third party. There was no nexus between the financing transaction and DK's unauthorized sale of the Vehicle, and thus, no entrustment.

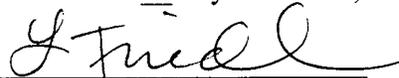
While the UCC definition of "entrusting" contained in RCW 62A.2-403(3) is broad, Dimension simply did not entrust the Vehicle to DK or Kempf as illustrated by the methods of entrustment set forth in *Heinrich*. A person can entrust goods to a merchant by a variety of

methods, “such as consigning them, creating a bailment, taking a security interest in inventory, leaving them with the merchant after purchase, and delivering them for purposes of repair.” *Heinrich v. Titus-Will Sales*, 73 Wn. App. 147, 154, 868 P.2d 169 (1994). While this list was surely meant to be illustrative and not all-inclusive, none of these methods of entrustment come anywhere close to what occurred in this situation: where Dimension financed a Vehicle to DK for use in its business; Dimension retained legal title to the Vehicle and the right to possession upon default; and Kempf ended up making an unauthorized sale of the Vehicle and forging a Release of Title. The Superior Court erred in applying the Entrustment Doctrine to benefit Twin Star and Seabold.

III. CONCLUSION

For the reasons set forth above and in its opening brief, 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 3rd day of March, 2008.



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DECLARATION OF SERVICE

The certifies that on this day I caused to be delivered a true and correct copy of the (1) REPLY BRIEF I deposited in the mails of FedEx via overnight delivery and addressed to the following:

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Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

DATED this 3rd day of March, 2007, at Seattle, Washington.


Deborah Nagle