

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

JOSHUA L. FAW,
a single person,

Appellant,

v.

KYLE S. PARKER, individually; and KYLE S. PARKER and "JANE
DOE" PARKER, husband and wife, and the marital community composed
thereof; and TARA MILLAM, individually; and TARA MILLAM and
"JOHN DOE" MILLAM, wife and husband, and the marital community
composed thereof,

Respondents.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

Both the respondent in their responsive brief and the trial court below have completely ignored two issues of material fact in the present case that establish that the trial court erred in granting the Millam's Motion for Summary Judgment.

First, Kyle Parker's testimony strongly suggests that Tara Millam knew Parker's privilege to drive in Washington was suspended when she purportedly gave the Toyota to Mr. Parker. She knew he was unlicensed in Washington. Thus, Mr. Parker was statutorily incompetent to drive in Washington in July and in August of 2009, yet Ms. Millam provided the vehicle which Mr. Parker used to seriously injure Mr. Faw, knowing that he was immediately driving the vehicle to Washington. This very cogent testimony certainly creates an issue of material fact about whether Tara Millam knew that Mr. Parker was statutorily incompetent to drive in Washington at the time the Toyota was purportedly gifted to Parker.

Secondly, the "evidence" that Tara Millam gave the Toyota to Mr. Parker and the basis of her argument that she was no longer the owner of the Toyota at the time of the accident consists of 1) Mr. Parker and Ms. Millam's self serving statements, and 2) a copy of "Bill of Sale" which is inadmissible

pursuant to ER 1002, 1003, and 1004. However, even if the copied document is admissible, ER 1008 requires that the fact finder at trial determine whether the original ever existed. Thus, even if admitted, the purportedly copied "Bill of Sale" does not resolve the issue. Only the trier of fact, per ER 1004 and ER 1008, has that responsibility.

The self serving statements of Mr. Parker and Ms. Millam coupled with a copy of a purportedly now destroyed original "Bill of Sale" simply cannot overcome the statutory requirements necessary to be accomplished in either Oklahoma and Washington in order for a vehicle transferor to be shielded from liability to an injured third party pursuant to a post transfer automobile accident.

At a very minimum, under both Oklahoma and Washington law, there remains a rebuttable presumption that Tara Millam owned the Toyota at the time of the accident on August 3, 2009. That rebuttable presumption establishes an issue of material fact about the vehicle's ownership which requires a factual resolution by the trier of fact.

The Appellant has argued that the state statutory schemes of Washington and Oklahoma require some level of strict compliance with those state's licensing statutes in order for a vehicle transferor to avoid post-transfer

liability to a third party for a collision involving a transferee.

The respondents have also not adequately explained why they allowed the purported original of the “Bill of Sale” to be destroyed in December of 2010, well after the present case had been filed in Pierce County Superior Court and even after their first Motion for Summary Judgment was filed in November of 2010. Respondents provide no evidence, as required by ER 1004 of a “reasonable and diligent” search for the original. They simply cannot provide the required evidence of a “reasonable and diligent” search when the original document was purportedly destroyed while their Motion for Summary Judgment was pending. At that time, the Toyota which allegedly contained the “Bill of Sale” remained titled in Tara Millam’s name.

Since the vehicle remained titled in Tara Millam’s name, she (or her attorney) could have easily retrieved the original “Bill of Sale” from the Toyota before December 2010. Yet, this was not done. No explanation has been provided for this dereliction of a duty to preserve relevant documents for the then pending case.

Both Oklahoma and Washington have detailed statutory requirements that establish how a car is validly conveyed.¹ Neither state’s statutory scheme

¹ VRP 9, lines 2-5; VRP 11, line 23 through VRP 12, line 5; VRP 14, lines 15-25; and VRP 15, lines 1-2.

was complied with and, under both state's laws, the only proper conclusion was that the vehicle was not legally transferred to Mr. Parker.

Ms. Millam had extensive knowledge about Mr. Parker's prior criminal history, which included four felonies that he had committed before he reached twenty years of age.² Mr. Parker's criminal record speaks of his recklessness and heedlessness and provides additional evidence to support Mr. Faw's contention that Ms. Millam was negligent in entrusting her vehicle to Mr. Parker.³ Ownership of a vehicle, or lack thereof, is not dispositive in a Negligent Entrustment case.

Negligence is plead as a result of their ownership of the vehicle Mr. Parker was driving. Negligent Entrustment is plead because Ms. Millam had knowledge that Mr. Parker was reckless, headless or incompetent in the operation of a vehicle. Thus, in choosing the appropriate state law to apply, this court must analyze choice of law principles that apply to each cause of action.

The trial court did indicate it was relying upon Oklahoma law in making her ruling.⁴ It seems clear that the trial court had chosen Oklahoma law for the issue of ownership of the vehicle. The choice of law issue has

² CP 48, line 5 through CP 53, line 8.

³ CP 355-356.

⁴ VRP 25, lines 20-21.

some pertinence to the resolution of the case, although it is the plaintiff's position that under either Oklahoma or Washington law, the Millams were, at a minimum, presumed to be the legal title owner of the vehicle at the time of the accident and, thus, were potentially liable to Mr. Faw pursuant to the negligence cause of action.⁵

Respondents have made a very strained argument that they have no obligation to comply with the State Motor Vehicle Transfer Laws of Oklahoma and/or Washington. Both Washington and Oklahoma provide specific statutory mechanisms that must be accomplished in order for a transferor of a vehicle to be shielded from liability to a third party as a result of a purportedly post-transfer collision involving the transferred vehicle. Respondent's position is undercut by the specificity of the law of both states that require specific steps to shield a transferor from post-transfer liability. Self-serving statements and a suspicious and inadmissible "Bill of Sale" cannot result in a summary judgment order terminating Mr. Faw's case.

Mr. Parker could not have titled the vehicle in his name in either state based solely on the proffered copy of the purported "Bill of Sale."

Neither Oklahoma or Washington law should be applied in a manner to shield the defendants at summary judgment from Mr. Faw's tort case.

⁵ VRP 14, line 21 through VRP 15, line 2.

It is unclear from the record what choice of law the trial court made in regard to the Negligent Entrustment cause.

In regards to any choice of law issue regarding the Negligent Entrustment cause of action, it is clear that Washington law should apply. Washington clearly has the most significant contacts to the parties and to the automobile collision which spawned this litigation. Thus, Washington law should apply to the Negligent Entrustment case.

The Millams are liable to Mr. Faw for the tort of negligent entrustment independent of whether Ms. Millam owned the vehicle at the time of the accident. Thus, Oklahoma law pertaining to vehicle ownership has no application in regard to the Negligent Entrustment case.

Regardless of what state's law should be applied to resolve the issue of the Toyota's ownership, it is important to look critically at the evidence proffered by respondents to establish their claim of a completed inter vivos gift and a transfer of ownership to Mr. Parker. The evidence proffered by the respondents consists of the self-serving statements of Mr. Parker and Tara Millam, together with a purported copy of a "Bill of Sale." Based upon this flimsy evidence, the Trial Court concluded the Millam's should be shielded from post-transfer liability.

The trial court's reasoning is illogical because it fails to account for the very specific statutory requirements prescribed by both Oklahoma and Washington that must necessarily be accomplished if a transferor desires a post-transfer shield from liability as a result of the transferee's use of the vehicle.

The trial court is essentially authorizing scheming defendants, such as Tara Millam and Kyle Parker, to defeat specific state statutory vehicle transfer requirements by simply ignoring them and then testifying that the transfer of the vehicle was complete. If this logic is accepted by this court, any non-title holder of a vehicle could absolve the title holder from liability simply by reporting, after an accident, that the vehicle had been given to him. It is unlikely that the legislature of either Washington or Oklahoma intended such a result.

The standard of review for an order of summary judgment is de novo. As stated by this court in *Humleker v. Gallagher Bassett Services Inc.*, 159 Wn.App. 667, 674, 159 Wn.App. 667 (Wn.App. Div. 2).

¶ 12 When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate if the pleadings, depositions, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law. See CR 56(c). " A material fact is one upon which the outcome of the litigation depends." Clements v. Travelers Indem. Co., 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). We must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Clements, 121 Wash.2d at 249, 850 P.2d 1298. Summary judgment is proper only if, from all the evidence, reasonable persons could reach but one conclusion. Stenger v. State, 104 Wash.App. 393, 398, 16 P.3d 655 (2001).

II. ARGUMENT

A. THE BEST EVIDENCE RULE RENDERS THE "BILL OF SALE" INADMISSIBLE.

The respondents relied upon a purported copy of a destroyed original "Bill of Sale" to support their self-serving statements about ownership. The trial court initially erred by admitting the document. The trial court compounded the error by then substituting its resolution of the ownership issue for that of the trier of fact.

The defendant is relying upon ER 1003 and ER 1004 to overcome the evidentiary bar of the "Best Evidence Rule", as set forth in ER 1002, which would ordinarily render the document inadmissible. In actuality, the entirety of Article 10 of the Evidence Rules (1001-1008) define what is commonly known as the Best Evidence Rule. Wn.Practice, 5C, Evidence, 1000.1 (2007).

After overruling plaintiff's objection to the admissibility of the

purported copied "Bill of Sale" offered by the Defendants Millam to establish that the vehicle driven by Mr. Parker was gifted to Mr. Parker by Tara Millam, the court committed clear error by substituting its factual resolution for the trier of fact on the issue as to whether the vehicle had been gifted or not. Therefore, the trial court clearly erred in entering summary judgment. The factual resolution of that issue has been reserved to the trier of fact by virtue of ER 1004 and ER 1008.

The trial court improperly exercised its' discretion and allowed a purported copy of a purportedly destroyed original of a Bill of Sale into evidence. As a matter of law as this evidence is insufficient to overcome a rebuttable presumption that Tara Millam owned the Toyota.

Pursuant to ER 1008, the document itself, even if admissible, is not dispositive evidence of the purported gift. Instead, ER 1008 requires the trier of fact to determine all factual issues pertaining to the Bill of Sale. Thus, the issue of whether or not the original of the Bill of Sale ever existed must be determined by the trier of fact. Likewise, the issue of whether the Toyota was gifted to Parker by Tara Millam is a jury question. Consequently, the ownership of the vehicle at the time of the accident on August 3, 2009 is a question for the jury, and the trial court erred by making a factual

determination of this contested issue of material fact.

ER 1008 reads, in pertinent parts, as follows:

Rule 1008 -- FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfilment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (1) whether the asserted writing ever existed, or (2) whether another writing, recording, or photograph produced at the trial is the original, or (3) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Appellant has challenged the authenticity and genuineness of the Bill of Sale. Appellant specifically challenged whether the proffered Bill of Sale ever existed and argued the circumstances strongly point to a fraudulent document created after the fact to excuse the liability of the Millams.

In their responsive brief, the defendants argue that ER 1003 and/or ER 1004 render the challenged document admissible. Yet, as a result of ER 1008, neither ER 1003 or ER 1004 is dispositive on the issue of whether or not the trial court made an error by substituting its judgment on an issue of material fact which is reserved by operation of ER 1008 for the judgment of the jury.

The trial court did, however, err by admitting the "Bill of Sale" into evidence. ER 1003 reads as follows:

Rule 1003 -- ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

It is the appellant's position that ER 1003 does not render the challenged document admissible. This is because both 1) a genuine issue has been raised as to the authenticity of the original and 2) under these circumstances, it would be unfair to admit the duplicate in lieu of the original. The bad faith of defendants in destroying the original "Bill of Sale" (if it ever existed) is discussed further in Section (B) below.

The more specific rule cited by the defendants is ER 1004. ER 1004 reads as follows:

Rule 1004 -- ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (a) Original Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

- (b) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

- (c) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

- (d) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

The Treatise, Washington Practice, explains ER 1004 as follows:

§ 1004.2 – Original lost or destroyed-Generally

Secondary evidence is admissible if all originals have been lost, or destroyed, unless the proponent lost or destroyed them in bad faith. The rule is consistent with prerule Washington law, and prerule cases should continue to be controlling.

Implicit in the notion of the original being *lost or destroyed* is an assumption that the original once existed. When a party seeks to introduce secondary evidence on the theory that the original was lost or destroyed, it seems logical that the party should be required to show, as a matter of foundation, that the original once existed. *However, even if the judge rules that secondary evidence is admissible, the opponent is still allowed to challenge the underlying assumption that an original once existed, and ultimately the decision on the existence or nonexistence of the original-and the accuracy of the secondary evidence-is made by the trier of the fact. This rule is a variation on a rule that runs consistently through the rules known collectively as the best evidence rule-that even if evidence is ruled admissible under the best evidence rule, the opposing party is free to challenge the evidence by attacking its credibility, or by offering evidence to the contrary.* (Emphasis added.)

The proponent must also show that the original was misplaced or lost and that a reasonable and diligent search had been made for it. The search must include search of places where it would be likely to be found. Whether a search has been diligent will depend upon all the surrounding circumstances such as the importance of the original, the lapse of time since it was last seen, and the like.

Wn. Practice, Vol. 5C, § 1004.2, Evidence, 5th Ed., 2007.

The treatise specifically states that even when the trial judge admits secondary evidence the opponent may challenge the “underlying assumption” that the original ever existed. The secondary evidence consisting of Mr.

Parker and Tara Millam's self-serving statements and the copied "Bill of Sale" may be challenged at trial.

As is demonstrated from the emphasis added portion of the above cited quotation, the trial court clearly erred by substituting her own opinion on an issue of material fact that has been, by virtue of ER 1004 and ER 1008, reserved for the jury.

B. THE BILL OF SALE WAS DESTROYED WHILE IT WAS IN DEFENDANTS POSSESSION AND UNDER THEIR CONTROL IN BAD FAITH.

The last paragraph in the above cited Treatise quotation and ER 1004(a) both point to another problem with the admissibility of the Bill of Sale into evidence. The Millams have made no showing that a reasonable and diligent search had been made for the original. The only evidence adduced by the Millam's to address the necessity of a "reasonable and diligent search" was made through the deposition transcript of Kyle S. Parker wherein he testified that the Bill of Sale was located in his impounded vehicle, which had subsequently been destroyed. There is no further evidence of any search whatsoever for the supposedly destroyed document. There has been no inventory of evidence from the police impound of the vehicle produced for the court. There has been no showing whatsoever by the Millams of a diligent search for the original document.

The Bill of Sale, according to respondents, was destroyed in December of 2010.⁶ This was almost one year after the action was filed in Pierce County Superior Court. It was also after defendants Millam's filed their first Motion for Summary Judgment.

Despite knowing where the original Bill of Sale purportedly was the Millam's allowed the original, if it existed, to be destroyed, according to their version of the events. At the time the Bill of Sale was purportedly destroyed the Millam's could have easily recovered the Bill of Sale, if it indeed existed.

The Millian's chose not to search for and locate the original, instead relying upon a purported copy of the Bill of Sale and allowing the purported original Bill of Sale to be destroyed while their Motion for Summary Judgment was pending. This defies any reasonable explanation. The only possible conclusion is that the destruction of the Bill of Sale was accomplished as a result of the Millam's bad faith, or, more probably, the original never existed.

The Millam's cannot show the requisite "reasonable and diligent" search for the original Bill of Sale when they allowed the purported original Bill of Sale to be destroyed while their first Motion for Summary Judgment was pending. In fact, no search was made by the Millams, let alone a reasonable and diligent search.

⁶ Respondents' Responsive Brief, Page 25.

The certificate title holder of the vehicle when it was destroyed was Tara Millam. She could have easily retrieved the purported original Bill of Sale had she, or her attorney, made any efforts to do so. No such efforts were made. Consequently the copied Bill of Sale is inadmissible pursuant to Rule 1004.

Under the circumstances it would be entirely unfair to allow the use of the purportedly copied Bill of Sale at trial. ER 1003. The “Bill of Sale” was destroyed in bad faith, if it ever existed. ER 1004(a).

C. THE REBUTTABLE PRESUMPTION OF VEHICLE OWNERSHIP SHIFTS THE BURDEN OF PROOF TO DEFENDANT.

There are essentially two ways of looking at presumptions of fact. One theory holds that, once evidence contrary to a presumed fact is introduced, the presumption disappears. This theory is called the Thayer Theory. Wn. Practice, Vol. 5, Evidence Law and Practice, § 301.15, 5th Ed. 2007.

A second theory pertaining to presumptions of fact is referred to as the Morgan Theory. Under this theory, a presumption actually shifts the burden of proof as to the presumed fact. *Id.*, § 301.15.

Washington apparently uses both approaches, depending upon the presumption. *Id.*, § 301.14, § 301.15. It would seem that the presumption at issue in the present case, the presumption of vehicle ownership, that accompanies the title holder of a vehicle is an “enhanced presumption” that

shifts the burden of proof on the issue of presumed fact to the party against whom the presumption operates. *Id.*, § 301.15. Thus, the presumption in the present case is akin to the Morgan Theory type, resulting in a shift in the burden of proof on the issue.

Such an “enhanced” presumption can only be overcome by clear, cogent and convincing evidence. *Id.*, § 301.15. *Carlson v. Wolski*, 20 Wn.2d 323, 333, 147 P.2d 291 (1944). It would seem that the appropriate jury instruction pertaining to the presumption of vehicle ownership in the title holders name is WPI 24.05⁷, which shifts the burden of proof on this issue to the party contesting the presumed fact. Thus, in this case, Tara Millam has the burden of proof on that issue and it remains an issue for the jury.

The trial court clearly erred in ruling as a matter of law that Tara Millam was not the owner of the vehicle. She has the burden of proving that contention by clear, cogent and convincing evidence. That issue remains an issue for the trier of fact. The suspicious and self-serving evidence offered to rebut the presumption is not so overwhelming as to render the issue closed in favor of Tara Millam as a matter of law. That would ordinarily be the case as “. . . jurors are free to reject contrary evidence and inferences or to accept contrary evidence and inferences depending on their view of the

⁷ **WPI 24.05 Presumptions—Rebuttable Mandatory—Which Affect the Burden of Proof (When Presumed Fact Constitutes a Jury Question)**

1. [If you find] [Because] _____, the law presumes _____, and you are bound by that presumption unless you find [by a preponderance of the evidence] [by clear, cogent, and convincing evidence] that _____.

reasonableness and credibility thereof under all the circumstances.” *Wn Practice, vol 5, evidence law and practice.*, § 301.16. The testimony of an interested witness should be viewed suspectly and is subject to discount by a trier off fact. *Hanford v. Goehry*, 24 Wn.2d 859, 167 P.2d 678 (1946). The weight and credibility of an interested witness is for the trier of fact. *In re Shaner’s Estate*, 41 Wn.2d 236, 248 P.2d 560 (1952). Thus, the trier of fact may specifically reject the testimony of interested parties. RCW 5.60.030.

D. WASHINGTON LAW CONTROLS THE ISSUE OF OWNERSHIP AS IT PERTAINS TO MR. FAW.

The rebuttable presumption of ownership defeats respondents’ summary judgment argument.

Respondents make a strained argument that Oklahoma Law pertaining to “chattels” controls the issue of ownership of the Toyota. Respondent has to take this tack because if the focus of respondent’s argument is on Washington or Oklahoma statutory law concerning the transfer of a vehicle it is clear that respondent is left with, at a minimum, a rebuttable presumption that Tara Millam owned the vehicle on August 3, 2009.

Respondent also does not grasp the distinction between the rights of parties to a transfer transaction which only effect those parties as opposed to the actions of those parties to the transfer transaction (or gift) and the affect of those actions upon a third party.

The statutes specifying a rebuttable presumption of vehicle ownership in the vehicle title holder is for the protection of third parties, such as Mr.

Faw. The presumption is given less effect as between parties to a transfer transaction and clear, cogent and convincing evidence to rebut the presumption is not required between the parties to the transfer transaction. *Wildman v. Taylor*, 46 Wn.App. 546, 731 P.2d 541 (1987). See also *Jankin v. Anderson*, 12 Wn.2d 58, 74-76, 120 P.2d 548 (1941) reh'g, 12 Wn.2d 58, 123 P.2d 759 (1942), *Hartford v. Stout*, 102 Wash. 241, 172 P.1108 (1918).

Clear, cogent and convincing evidence is required to rebut the presumption of vehicle ownership in the present case.

Thus, based upon this record where both Kyle Parker and Tara Millam testify to a gift of the Toyota; as to them, as parties to this transaction in a legal dispute between them only, they would ordinarily be held to their testimony. However, the present case does not concern a controversy between a purported donee and donor of a gift as to ownership. In that situation the parties interests are not aligned and the parties would be left with a dispute over whether a gift occurred or not.

In the present case, both Millam and Parker's interest are aligned and it is in their interest to fabricate evidence of a gift of the Toyota to Parker. The controversy in the present case is not a contest between Parker and Millam over who owns the vehicle as would ordinarily be the case in a contract (or gift) case involving only the parties to that transaction. After the collision on August 3, 2009, the Toyota had little value. Neither the Millams or Parker took any steps to assert possession over the vehicle as it was

allowed to be sold and destroyed by the impounder of the vehicle. The protestation of Tara Millam that she was not the owner of the Toyota only arose after the present case was filed.

Respondents cite several cases in their responsive brief for the proposition that, "Being named on a vehicle certificate of title is not dispositive of legal ownership in Oklahoma."⁸ The respondent then cites several Oklahoma cases which, with one exception, pertain to contests between transferor and transferee over ownership, with no discussion of the effect of the transfer upon third parties.

None of the cases cited by respondent have any potential application to the present case except *Green v. Harris*, 70 P.3d 866 (Okla. 2003) but that case was merely cited as a citation to the case of *In re Foster*, 611 P.2d 232 (Okla. 1980). *Foster, Id.*, concerned a dispute in bankruptcy court between GMAC, a secured lender, and Mr. Foster, a defaulting borrower. The issue was whether the secured party had properly secured their interest in a vehicle in New York, but located in Oklahoma so as to allow them to reach the collateral, a vehicle.

Both parties to the purported transfer were before the court. *Foster, Id.*, did not concern an issue of ownership of the vehicle.

Lepley v. State, 1-3 P.2d 568 (Okla. Crim. App. 1940) concerned a criminal prosecution by the state against a vehicle reposessor named,

⁸ Respondents' Responsive Brief, Page 25.

Lepley. Mr. Lepley worked for a lender who financed a vehicle sold to the “victim” pursuant to a conditional sales contract. The court said the repossession by *Lepley* was not a crime, despite the “victim” being the certificate title holder. Again, as in *Foster, Id.*, the *Lepley* case concerns a financing contract issue between vendor and purchaser and whether the secured lender had the right to repossess.

Likewise, *Hardware Mutual Casualty Co. v. Baker*, 445 P.2d 800 (Okla. 1968) was a dispute between a car dealer and his insurance company over whether the insurance company should cover the car dealer’s loss on a stolen vehicle. *Hardware, Id.*, is not applicable to the present case.

The *Medico Leasing Co. v. Smith*, 457 P.2d 548 (Okla. 1969) case also concerned an issue of ownership between a transferor and transferee where the transferor was a “bona fide” purchaser of a vehicle a lender claimed was subject to a reserved security interest.

Green v. Harris, 70 P.3d 866 (Okla. 2003) has some applicability to the present case to the extent that the Appellate Court reversed the trial court’s grant of summary judgment in a negligent entrustment case. In that case, the mother and father, together with their son, claimed that a vehicle titled in the father’s name was actually owned by the son. The Appellate Court held that, because ownership of a vehicle is not an element of negligent entrustment, ownership was not an issue in that case. The issue was whether the father and mother had furnished the vehicle to their son and that is an

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issue, the Court said, for the jury. Like *Green, Id.*, the issue of Tara Millam's negligent entrustment of the Toyota to Mr. Parker is a jury issue.

In the present case, Tara Millam, like the father in *Green, Id.*, was the certificate title holder on the vehicle driven by Mr. Parker at the time of the accident. Thus, as in *Green, Id.*, material issues of fact remain for the trier of fact to determine. Most particularly, the trier of fact must determine whether Ms. Millam furnished the vehicle to Mr. Parker when the evidence suggest she knew his privilege to drive was suspended in Washington or that he was reckless or heedless in the operation of vehicles. So, therefore, *Green, Id.*, provides support to Mr. Faw's argument that issues of material fact remain for resolution by the trier of fact.

E. THE ISSUES RAISED BY DEFENDANTS MUST BE RESOLVED AGAINST THEM.

Respondents cite four issues in their responsive brief.⁹ They claim in their brief that: 1) Oklahoma Law governs the ownership of the Toyota; 2) the evidence establishes a completed "inter vivos" gift of the Toyota; 3) Ms. Millam had no reason to believe Kyle Parker was reckless, heedless, or incompetent in the operation of automobiles; and 4) the facts before the judge establishes that the Millams owed no duty to Mr. Faw to protect him from the heedless or reckless acts of Kyle Parker.

To accept respondents suggested resolution of the first two issues posited issues would require a court to accept Tara Millam and Kyle Parker's

⁹ Respondents' Responsive Brief, Page 1.

self serving statements as to ownership of the vehicle whole ignoring the complete lack of compliance by Tara Millam or Kyle Parker with the detailed vehicle transfer statutes of either Oklahoma or Washington.

The evidence of the purportedly completed "inter vivos" gift of the Toyota consist of the self serving statements of Tara Millam and Kyle Parker and a purported copy of a "Bill of Sale" of very questionable authenticity. This "evidence" is insufficient to rebut the presumption of ownership and/or overcome the statutory requirements of either Oklahoma or Washington, depending upon how the Appellant Court rules on that choice of law issue.

Respondents suggestion that Oklahoma law applies as the issue of ownership ignores the evident fact that neither Mr. Millam or Mr. Faw had any contacts with the state of Oklahoma. Kyle Parker, Mr. Millam and Mr. Faw all currently live in Washington and Ms. Millam has very significant life-long contacts with the State of Washington. Respondents also completely ignore the fact that this is a tort action stemming from an accident within Washington. Clearly, in any choice of law analysis, Washington has the most significant contacts with the cause of action and with the parties. Washington law pertaining to vehicle ownership should be applied to this tort case. However, under either Washington or Oklahoma law the claimed "completed gift" remains a jury issue.

The trial court erred in granting summary judgment on the negligent entrustment case.

Respondent ignores Kyle Parker's testimony that strongly suggests Tara Millam knew Kyle Parker's privilege to drive in Washington was suspended. An out of state license does not excuse a Washington license suspension. RCW 46.20.345. Parker was statutorily incompetent to drive in Washington on August 3, 2009. A court needn't even weigh the evidence of heedless and reckless behavior to conclude that evidence exists that Tara Millam knew of Parker's incompetence to drive in Washington. The term "reckless, heedless or incompetent" provides three alternative ways of accomplishing that one element of negligent entrustment and clearly Parker was incompetent to drive in Washington.

In New York, it has recently been reported that parents of an unlicensed seventeen year old involved in a fatal collision are subject to criminal charges. New York Post, Nov. 16, 2012 - Appendix.

Respondent impliedly concedes that Washington law should be applied as it pertains to the tort of negligent entrustment because that issue was not raised by respondent.

There is evidence of Parker's recklessness and heedlessness in addition to his incompetency. Tara Millam did know by virtue of her general knowledge of Mr. Parker's background and criminal history that he was chronically irresponsible and was, at twenty (20) years of age, a career criminal. He had been convicted of car theft. Those facts would have put

any reasonable person on notice that Mr. Parker was likely reckless or heedless in the operation of any vehicle.

III. CONCLUSION

Had Ms. Millam truly intended to complete a gift of the Toyota to Mr. Parker, she should have done so by following the statutory procedures available to her to properly title the vehicle in Mr. Parker's name or to simply report the transfer to the vehicle licensing authorities. Having failed to do so, Tara Millam remains, under the law of either Oklahoma or Washington, exposed to liability based upon her presumed ownership of the vehicle at the time of the collision.

The Defendants Millam have narrowly focused on the issue of contractual ownership between two parties to a purported agreement to gift a vehicle to Mr. Parker in an effort to absolve themselves from the liability in the present case. But, ownership as between the two parties to a gift, or lack thereof, of a vehicle is not dispositive in this case because of the effect of the alleged transfer on the third party, Mr. Faw. What is dispositive is the licensing statutes of either Oklahoma and Washington, which require strict compliance with statutory vehicle transfer laws if a transfer occurs and the transferor desires to escape a presumption of ownership and a subsequent liability as an owner of the vehicle.

Even if this court relies upon a rebuttable presumption of ownership pursuant to a less strict interpretation of Washington or Oklahoma law, than

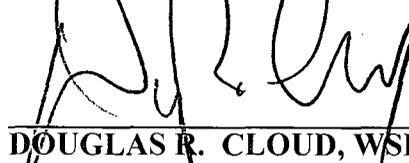
urged by plaintiff, a jury issue remains, because the Certificate of Title provides a rebuttable presumption of ownership by Tara Millam. There is another rebuttable presumption that applies to this case. An owner of a vehicle is rebuttable presumed to be liable for injuries resulting from the driver's negligence. *Finney v. Fanes Ins. Co.*, 92 Wn.2d 748, 600 P.2d 1272 (1979).

Plaintiff's cause of action for negligence against the Millams under Restatement (Second) of Torts § 302(b) (1965) are not dependant upon ownership of the vehicle. Neither is the more specific tort of Negligent Entrustment. That is the case under both Washington and Oklahoma law. The trial court had no basis to dismiss these causes of action.

Mr. Faw requests that this court reverse the Court's Order on Summary Judgement entered herein and remand this case for trial with instructions to not allow the purported bill of sale to be admitted into evidence in the trial court. He further requests that the purported "Bill of Sale" be ruled inadmissible as a matter of law.

RESPECTFULLY SUBMITTED this 21st day of November, 2012.

LAW OFFICE OF DOUGLAS R. CLOUD



DOUGLAS R. CLOUD, WSBA #13456
Attorney for Plaintiff

APPENDIX

1. Article from the New York Post titled "Prosecutors charge parents of teen whose high-speed LI crash killed four of his friends" posted on November 16, 2012.

NEW YORK POST

Prosecutors charge parents of teen whose high-speed LI crash killed four of his friends

By KIERAN CROWLEY, DANA SAUCHELLI and DAN MACLEOD

Last Updated: 3:38 AM, November 17, 2012

Posted: 4:14 PM, November 16, 2012

Long Island prosecutors took the extraordinary step of holding a mom and dad responsible for their teen son's high-speed car wreck that killed four of his friends.

Aaditia and Patricia Beer of Queens allowed their son Joseph, 17, to drive their 2012 Subaru on Oct. 8 even though he only had a learner's permit, prosecutors said.

Joseph (pictured, in court yesterday) was high on marijuana and going more than 110 mph on the Southern State Parkway when he lost control on a section called "Dead Man's Curve" at around 4 a.m. and skidded into the woods, prosecutors said.

Beer was the only survivor.

His parents were charged with unlicensed operation of a vehicle and face up to 15 days in jail and a \$300 fine.

"They allowed their son to drive a vehicle they owned, and they knew he did not possess a driver's license," said Nassau County District Attorney Kathleen Rice. "The result is four young lives being taken from their families and their friends.

"He was driving a souped-up, 305-horsepower sports car at twice the legal limit while he was high on marijuana. The consequences of his choices are unspeakable tragedy."

Joseph Beer faces 25 years in prison for aggravated vehicular homicide, vehicular manslaughter, four counts of manslaughter, driving under the influence, and unlicensed operation of a motor vehicle.

Supreme Court Justice David Ayres refused to unshackle Beer during his appearance and doubled the bail requested by prosecutors, ordering \$1 million cash or \$2 million bond.

Beer's somber father sat silently beside his wife, who wept openly when her son's name was called.

His mom later ripped prosecutors for trying to pin the blame on her and her husband.

"It's not like we give him the key and say, 'Go kill somebody,'" she told The Post last night. "Nobody wants their kids to go out there in the middle of the night without your consent."

The Richmond Hills HS student's passengers — Chris Khan, Peter Kanhai and Darian Ramnarine, all 18, and Neal Rajapa, 17 — were killed in the crash.

All of the passengers were flung from the car. Joseph was initially hospitalized for minor injuries.

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

JOSHUA L. FAW,
a single person,

Appellant,

v.

KYLE S. PARKER, individually; and KYLE S. PARKER and "JANE
DOE" PARKER, husband and wife, and the marital community composed
thereof; and TARA MILLAM, individually; and TARA MILLAM and
"JOHN DOE" MILLAM, wife and husband, and the marital community
composed thereof,

Respondents.

2012 NOV 26 AM 9:27
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE

Douglas R. Cloud (WSBA #13456)
Law Office of Douglas R. Cloud
901 South I Street, Suite 101
Tacoma, WA 98101
253-627-1505
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I am an employee of Douglas R. Cloud, Attorney at Law.

On the 21st day of November, 2012, I mailed via United States regular mail, postage prepaid, the documents titled (1) Appellant's Reply Brief and (2) Certificate of Service to the following:

Washington State Court of Appeals (the original and one copy)
Division II
950 Broadway, Ste 300
Tacoma, WA 98402-4454

C. Joseph Sinnitt, Esq., WSBA #6284
SINNITT LAW FIRM
2120 North Pearl Street, Suite 302
Tacoma, WA 98406

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

DATED this 21st day of November, 2012.



CARRIE L. MARSH