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No. 64164-6 I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

TAWNIE BEARWOOD

Plaintiff/Appellant,

v.

JANE THURIK

Defendant/Respondent.

APPELLANT'S AMENDED REPLY BRIEF

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

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FILED
COURT OF APPEALS DIV. ONE
STATE OF WASH.
2010 FEB 16 AM 10:38

ORIGINAL

Table of Contents

Table of Authorities	<i>i</i>
INTRODUCTION	1
REPLY TO COUNTERSTATEMENT OF THE CASE.....	2
REPLY TO ARGUMENT	7
1. “ARIELLE WAS THE SOLE REGISTERED OWNER”... 7	
2. “MS. THURIK DID NOT MAINTAIN THE VEHICLE”.. 8	
3. “ARIELLE THURIK’S CAR WAS NOT A CUSTOMARY CONVEYANCE OF FAMILY MEMBERS	9
4. “ARIELLE THURIK DID NOT NEED EXPRESS OR IMPLIED CONSENT TO DRIVE HER OWN CAR”....	10
5. “THE FAMILY CAR DOCTRINE DOES NOT APPLY ... INDEFINITELY”	11
CONCLUSION.....	12

Cases

Foran v. Kalio, 56 Wn. 2d 769, 355 P.2d 544 (1960)..... 11

Kaynor v. Farline, 117 Wn. App. 575, 72 P.3d 262 (2003).... 12, 15

INTRODUCTION

Respondent Thurik's counsel states that "Jane Thurik should never have been a party to this case", presumably because she was not driving the car that struck and injured Appellant Bearwood. This does not constitute legal analysis of the family car doctrine.

The truth is that Jane Thurik is a party to this case because--and only because---her own lawyer chose to "sit on" the Answer to the Complaint until it was too late for Plaintiff's counsel to file and serve an Amended Complaint correctly naming Arielle Thurik as the driver of the car that injured Plaintiff Bearwood.

(One wonders if Jane Thurik herself were consulted about and agreed to this "hardball" approach by her own lawyers, whereby she remained the named defendant and potential judgment debtor, for the sole financial benefit of California Casualty Indemnity Exchange Insurance Company.)

That said: The evidence cast in the light most favorable to Bearwood supports application of the family car doctrine. Thurik's Brief does nothing but argue the evidence and inferences most beneficial to Thurik, the moving party. Not only does this

approach flout the rules of summary judgment, it also serves to demonstrate why summary judgment was improper in the first place.

REPLY TO COUNTERSTATEMENT OF THE CASE

Regrettably, Respondent's Brief contains several statements of "fact" that are directly contradicted by the accompanying citations to the record, most notably:

"ALTHOUGH MS. THURIK SECURED THE INSURANCE POLICY, ARIELLE WAS RESPONSIBLE FOR PAYING FOR HER COVERAGE, WHICH WAS THEIR STANDARD COURSE OF CONDUCT. CP 44".

Respondent's Brief, P.4 (emphasis added)

With all due respect, this is an egregious misrepresentation of the record. Here is the actual testimony from "CP 44", Arielle's deposition:

Q. "To the best of your knowledge, has [Arielle] ever regularly made payments towards insurance on the car?

A. She did make some payments on the insurance for the car in two different ways: She made payments where she repaid someone, either me or her dad, for payment we made. And I

believe, but I don't remember for sure because she's had a number of cars, too, on this particular car whether she—but I believe that she did. I believe she was making insurance payments before the policy with California Casualty [that was in effect at the time of the accident].”

This testimony absolutely cannot be said to support the assertion that the Thurik's “standard course of conduct” was for Arielle to be “responsible for paying for her coverage”. She made, at most, some payments. Indeed, the one part of this testimony that isn't pure gibberish is Jane Thurik's statement that Arielle “may” have been making payments before the policy in question, but not after!

And, notably, Arielle Thurik's declaration (CP 68-70) says:

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

Beyond Jane Thurik's tortured “memory”, there is no solid, credible evidence of a single payment Arielle ever made for her car insurance. And there isn't even any testimony, from Jane or from

Arielle, that she made any payments toward the policy that was in effect at the time of this accident.

“FROM 1999 TO THE PRESENT THE TOYOTA WAS USED SOLELY BY ARIELLE...” CP 57-58, 69”.

(Respondent’s Brief, p. 4) (emphasis added).

In fact, “CP 57-58”---Thurik’s deposition testimony--- confirms that the Toyota was NOT used “solely” by Arielle, and will be quoted in its entirety:

BY MS. CHURAS:

Q. “Just with regard to the occasions that you’ve driven Arielle’s car, let’s go with 2005, that part of the year just prior to the collision, can you tell me how many times you remember driving her car?”

A. I wouldn’t be able to tell you how many times, but it wasn’t like anything more than occasionally; a few times.

Q. So like three times?

A. It could be three times, something like that.”

How does this testimony support as “undisputed fact” the assertion that from “1999 to the present” the Toyota was used “solely” by Arielle? It obviously doesn’t. On the contrary, this testimony---in response to questions from her own lawyer---was

that Jane Thurik used the car “occasionally” and at least three times “just prior to the accident”.

“CP 69” is the second page of Arielle Thurik’s Declaration. Does it say that “from 1999 to present” the Toyota was used “solely” by Arielle? On the contrary, the declaration specifically says:

“I was the primary driver of the Toyota. On rare occasions, my mother would drive my vehicle...”
(emphasis added)

And as Respondent admits, Jane Thurik was listed as a driver on the policy of insurance covering the car, on which she was the named insured. (Would Jane Thurik’s carrier insure a car she didn’t drive under her policy?)

“[JANE THURIK] STOPPED GIVING ARIELLE GAS MONEY WHEN ARIELLE STARTED WORKING.

CP 45”. Respondent’s Brief, P.6 (emphasis added)

Again, with respect: This is an egregious misrepresentation of the record. The actual testimony from “CP 45” is:

A. “As Arielle became older and had jobs and she would be----she would get her own gas.

Q. Can you tell me what the situation was in terms of buying gas for the car in June of 2005?

A. I don’t remember if she was working. I really can’t. I can’t recall.”

The obvious inference from this testimony---for purposes of summary judgment---is that when Arielle wasn't working, Jane Thurik gave her gas money for the car. And Jane Thurik (whose "memory" waxed and waned during her deposition in convenient ways) had already testified that Arielle was NOT working in June of 2005, or for that matter going to school. CP77.

"MOREOVER, EVEN IF ARIELLE WAS NOT EMPLOYED, WHICH HAS NOT BEEN ESTABLISHED, SHE DID RECEIVE UNEMPLOYMENT COMPENSATION THAT SHE COULD USE TOWARD HER EXPENSES.
CP 46".

Respondent's Brief, P.6 (emphasis added)

Another disheartening misrepresentation of the record.

Here is the actual testimony from "CP 46":

Q. "But if it happened to be a period when she was between jobs, then if she needed gas, you would either buy it or provide her money, is that fair?

A. Well, she was on unemployment for some time, so she might have gotten it from unemployment. Her dad did help her out, so the gas might have come from her dad, so I can't say for positive at that time that I was buying the gas for the car." (emphasis added)

Does this testimony---that because "for some [unidentified] time" Arielle was on unemployment, so she "might" have gotten

gas money there, and “might” have gotten some from her dad (who was living ACROSS THE STATE IN SPOKANE at the time) --- support the assertion in Respondent’s brief that “Ms. Thurik believed that if Arielle was unemployed at the time of the collision she likely used those funds for gas because she never asked Ms. Thurik for gas money...”? Obviously not.

Again, notably, Arielle Thurik’s Declaration says, simply:

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

Why, pray, doesn’t this Declaration just say that Jane Thurik didn’t give Arielle “gas money”?

The glaring misrepresentations of the record make one thing clear: Thurik’s counsel knows the actual evidence before the Court didn’t support summary judgment.

REPLY TO ARGUMENT

1. “ARIELLE WAS THE SOLE REGISTERED OWNER”

True and absolutely irrelevant. The family car doctrine applies when the car is owned or maintained by the parents, as Respondent acknowledges at page 12 of her Brief.

2. “MS. THURIK DID NOT MAINTAIN THE VEHICLE”

This section of Respondent’s Brief simply mischaracterizes and argues the evidence in the light most favorable to Thurik, thereby conclusively demonstrating that summary judgment was improper.

The only case Respondent cites is Foran v. Kalio, 56 Wn. 2d 769, 355 P.2d 544 (1960). In that case the Supreme Court upheld the trial court’s determination that “as a matter of fact, the family car doctrine is inapplicable to the instant case”. 56 Wn. 2d 770 (emphasis added). The court upheld this factual determination based upon the following evidence:

“ . . . He [respondent son] had acquired this car with funds earned by delivering papers, working part time in a hardware store and from earnings during the summer months when he was employed at Boeing and other places full time. He paid all cost of operation and maintenance and had affected insurance coverage on the vehicle in his own name and paid the premiums from his own earnings. . . .”

* * *

“The defendant Robert Kallio's parents released to the minor son his earnings and they were released from the duty of providing him a college education which the defendant son undertook to provide for himself out of his earnings. The earnings were treated by all defendants as his own and the car he purchased with his earnings as his car. All of these dealings concerning both the minor Robert Kallio's earnings and the car involved in the accident took place long before the date of the accident.”
(emphasis added)

The trial court concluded, merely, that based on this evidence the car in question was not a family car. Such a finding, while appropriate in that case, hardly controls here, where;

Arielle paid not one penny towards the purchase of the car;

The car was insured by her mother at the time of the accident;

No credible evidence exists that Arielle was paying or reimbursing her mother for the insurance;

She was living at home, rent free, unemployed.

3. “ARIELLE THURIK’S CAR WAS NOT A CUSTOMARY CONVEYANCE OF FAMILY MEMBERS

Respondent (correctly) cites Kaynor v. Farline, 117 Wn. App. 575, 72 P.3d 262 (2003) for the controlling proposition that:

“In sum, the issue as to what constitutes general use, pleasure and convenience of a family is a question of fact that may change from family to family....”

(emphasis added)

Respondent then goes back to arguing the evidence, again proving thereby that summary judgment was improper. It must be said, again with all due respect, that this section of Respondent’s brief egregiously misrepresents the record.

Thurik says at page 18 of her Brief that “The evidence is undisputed on this issue: Arielle alone used and controlled her vehicle”. This statement is, simply, false:

“I would let [Arielle] use my care and she would let me use hers” CP81. (emphasis added)

“I was the principal driver of the Toyota. On rare occasions my mother would drive my vehicle.”
CP69
(emphasis added)

4. “ARIELLE THURIK DID NOT NEED EXPRESS OR IMPLIED CONSENT TO DRIVE HER OWN CAR”

This is, simply, factually false. Arielle “owned” the car when Jane Thurik took it away from her at one point. CP80. In fact, Jane Thurik specifically testified that at the time she planned on selling the car. CP81.

This section of Respondent's Brief contains no citation of authority to contravene the significance of the evidence recounted in Appellant's Brief on this issue, namely:

Jane had previously taken the car away from Arielle;

Arielle was completely dependent upon her mother for room, board and living expenses as of the time of the accident;

Arielle was allowed to park the car at Jane's home;

Arielle could legally drive the car only by virtue of Jane buying insurance for it.

5. "THE FAMILY CAR DOCTRINE DOES NOT APPLY INDEFINITELY"

This statement makes no sense, cites no authority, and addresses no argument advanced by Bearwood.

The history of Jane and Arielle's interactions relative to the car is obviously relevant to the determination whether the family car doctrine applied as of the day of the accident in question.

Every case addressing the family car doctrine analyzes the history of the parties' relationship to and interactions with the vehicle in question.

For example, in Kaynor v. Farline, 117 Wn. App. 575, 72 P.3d 262 (2003) the court looked at the following:

The Defendant mother had originally allowed the car to be titled in her name;

She had bought tires for the car;

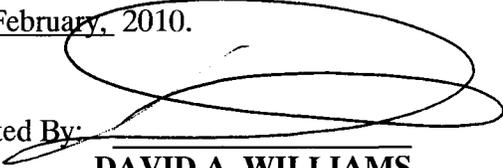
She had insured the car, for two months, well before the accident;

The Defendant father – who lived in Idaho – ‘occasionally’ bought gas for the car.”

CONCLUSION

Summary Judgment was improper. The Judgment should be reversed.

DATED this 10th day of February, 2010.

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