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NO. 64466-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANNE E. OMAN and KRAIG G. OMAN,,

Appellants,

v.

BMW OF NORTH AMERICA,

Respondent.

BRIEF OF RESPONDENT BMW, N.A.

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I. INTRODUCTION

This case arises from a parking lot fire involving two vehicles: a 2010 Pontiac Vibe owned by Kraig and Anne Oman, and the 2007 BMW 335xi owned by Sean and Gina Thorne. The fire occurred in the parking lot of the South Bellevue Community Center. There were no known witnesses to the start of the fire. Both vehicles were fully involved when the fire department arrived. Both vehicles were declared a total loss.

The Omans, filed suit alleging that the BMW caused the fire. They named BMW of North America, LLC (“BMW NA”) who distributed the vehicle, BMW of Bellevue who serviced the vehicle, and the Thornes who owned the vehicle as defendants. The Omans alleged a cause of action under the Washington Product Liability Act (“WPLA”) against BMW NA and BMW of Bellevue. They also alleged negligence and *res ipsa loquitur* against all three defendants.

On March 11, 2011, BMW NA and BMW of Bellevue moved for summary judgment asserting that neither defendant could be held liable as a manufacturer under the WPLA; the Omans had failed to show either that the BMW started the fire or that there was any defect in the BMW that *could have* started the fire; that the doctrine of *res ipsa loquitur* did not apply; and finally, that Defendants were entitled to an evidentiary presumption because the Oman’s spoliated evidence.

The Honorable Suzanne Craighead granted summary judgment in favor of BMW NA and BMW of Bellevue on April 8, 2011. Subsequently, the Thornes filed a motion for summary judgment which was not opposed. Judge Craighead entered an order granting the Thornes' motion on July 1, 2011.

The Omans have appealed Judge Craighead's April 8, 2011 order. The Omans are not appealing the Court's dismissal of the Thornes.

II. COUNTERSTATEMENT OF THE ISSUES BEFORE THE COURT

1. Whether the trial court was correct when it found that the Plaintiffs experts failed to raise material issues of fact regarding whether a vehicle defect existed and whether the BMW was the cause of the fire.

2. Whether *res ipsa loquitur* is inapplicable in this case because: 1) vehicle fires are not typically the result of negligence on the part of a manufacturer; 2) BMW NA did not have exclusive control over the vehicle; and 3) Defendants were entitled to a spoliation inference regarding the cause of the fire.

3. Whether the Plaintiffs are foreclosed from proceeding against BMW NA under the WPLA because they have not established or alleged any of the prerequisite criteria necessary to recover from a non-manufacturer product-seller.

III. STATEMENT OF THE CASE

A. Procedural History

The Omans filed their Complaint on January 25, 2010 naming BMW NA and the Thornes as defendants. CP 1-7. BMW NA filed a motion to dismiss Plaintiffs' Complaint pursuant to Civil Rule 12(b)(6) because BMW NA was not the manufacturer of the vehicle and the Plaintiffs failed to allege facts necessary to allow BMW NA to be sued as a product-seller under the WPLA. CP 12-16. BMW NA's motion was denied on May 6, 2010. CP 70-71. The Omans requested and received leave of court to add BMW of Bellevue as a defendant on May 27, 2010. CP 72-74; CP 86-87. The Omans filed their First Amended Complaint on June 3, 2010 naming the Thornes, BMW NA and BMW of Bellevue as defendants. CP 90-95.

The Omans filed a Motion for Partial Summary Judgment on June 18, 2010. CP 98-105. In response to Plaintiffs motion, Defendants relied on *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967), and argued that summary dismissal of Plaintiffs claims was warranted instead because plaintiff lacked evidence of any vehicle defect, evidence that any defect in the BMW caused the fire; and evidence that the BMW even started the fire. Defendants submitted evidence that the Omans had destroyed the remains Pontiac Vibe which was a possible cause of the fire.

The trial court denied Defendants' cross motions without prejudice on October 1, 2010. CP 301-304. In doing so, Judge Craighead informed the Omans that they lacked sufficient evidence of the cause and origin of the fire. RP (October 1, 2010) 26-30. Judge Craighead advised that the question of liability could be revisited pending the results of the destructive testing of the Thornes' BMW requested by the Omans during oral argument. RP (October 1, 2010) at 30.

After the destructive testing of the BMW proved inconclusive, Defendants BMW NA and BMW of Bellevue filed their motions for summary judgment on March 11, 2011. CP 305-389. The court entered orders granting both motions on April 8, 2011. CP 601-606. The Omans filed a motion for reconsideration on April 18, 2011. CP 607-619. The motion for reconsideration was denied on April 27, 2011. CP 624-625.

B. Factual History

BMW of North America, LLC is a distributor of BMW vehicles. CP 1-7, 12-16; 50-54; 90-95. The 2007 BMW 335xi owned by the Thornes was manufactured by BMW Aktiengesellschaft ("BMW AG") in Munich, Germany. CP 12-16; 50-54. Although BMW NA informed Plaintiffs that BMW AG manufactured the vehicle and is subject to Washington jurisdiction, Plaintiffs refused to make BMW AG a party to this action. CP 50-54; 90-95.

The Thornes' BMW arrived at the Oxnard, California Vehicle Processing Center on June 28, 2007. CP 377-389. On June 29, 2007, the vehicle was sold wholesale to Gebhardt BMW in Boulder, Colorado. CP 377-389. BMW NA did not have any contact with or control over the vehicle after June 29, 2007. CP 377-389. On July 7, 2007, the vehicle was leased to Sean and Gina Thorne. CP 377-389.

Shortly before six a.m. on the morning of November 4, 2009, Anne Oman and Sean Thorne parked their vehicles in the South Bellevue Community Center parking lot. CP 98-105. Both Mrs. Oman and Mr. Thorne were in the Community Center when the fire started. CP 98-105. The fire department was not notified of the fire until approximately 6:55 a.m., and did not arrive on the scene until after 7:00 a.m. CP 285-292; CP 410-416. There are no witnesses to the start of the fire. When the fire department arrived at the scene, both vehicles were fully involved in the fire. CP 285-292; CP 410-416.

On November 20, 2009, the Omans retained attorney Anna Knudson to represent them for the November 4, 2009 fire. CP 297-298. Attorney Knudson immediately contacted Farmers Insurance Company of Washington ("Farmers") to notify the company of her representation. CP 293-298. The Omans failed to request that Farmers preserve the Pontiac Vibe or inform Farmers of the Pontiac Vibes' importance to the ongoing

investigation into the cause and origin of the November 4, 2009 fire. CP 293-296. On December 22, 2009, Mrs. Oman released her interest in the 2010 Pontiac Vibe to Farmers by signing the Farmers' Release. CP 293-296. The Omans filed their original Complaint in the underlying lawsuit against the Thornes and BMW NA on January 25, 2012. CP 1-7. Three days after the Omans filed their Complaint, the Pontiac Vibe was sold by Farmers for salvage. CP 293-296. The Omans allowed the vehicle to be sold and subsequently destroyed without providing the Defendants with an opportunity to inspect the vehicle.

1. Cause and Origin of the Fire

On August 12, 2010, the cause and origin experts retained by the respective parties participated in the non-destructive inspection of the remains of the BMW at the CoPart salvage yard in Arlington, Washington. CP 377-389. The inspection of the BMW was inconclusive, and the cause and origin of the fire could not be determined following the non-destructive testing of the vehicle. CP 390-391; CP 592-595.

The hearing on Plaintiff's summary judgment motion took place on October 1, 2010. During that hearing the Plaintiff asserted that she had not had the opportunity to conduct destructive testing on the vehicle and requested that her motion for summary judgment be continued to allow the destructive testing of the BMW. RP (October 1, 2010) at 27-28. The

parties thereafter agreed to conduct the destructive inspection of the BMW on December 3, 2010. CP 390-391; CP 592-595; CP 249-255.

On December 3, 2010, destructive testing took place at the salvage yard with all parties and experts present. CP 592-595. The vehicle was substantially destroyed by the fire. CP 592-595. The cause and origin of the vehicle fire could not be conclusively determined following the destructive testing of the vehicle by any of the experts. CP 592-595. The Pontiac Vibe owned by the Omans was already destroyed and could not be examined. CP 592-595. Defense experts could not rule out the Pontiac Vibe as the cause of the fire. CP 390-391; CP 592-595; CP 249-255.

The Omans retained engineer Trevor Newbery as their expert regarding the cause and origin of the fire. Mr. Newbery acknowledges that he never inspected the Omans' Pontiac Vibe. CP 433-454; CP 620-623. Although Mr. Newbery did not inspect the Pontiac Vibe, he contended the subject fire originated in the driver's side of the BMW's engine. CP 433-454. The only factual support for this allegation consists of Bellevue Fire Department Lieutenant Todd McLean's opinion contained in the fire incident report and Mr. Newbery's assessment of the photographs taken of the vehicles at the scene of the fire. CP 433-454. Mr. Newbery specifically stated:

Given the photographs of the Pontiac and the statements

made by Lieutenant McLean on the scene, there is sufficient evidence for me to conclude that the fire originated in the driver's side area of the BMW's engine compartment, and not in the Pontiac. It is not necessary to physically examine the Pontiac to reach this conclusion to a reasonable degree of engineering and scientific certainty.

CP 434.

Mr. Newbery also alleged that the fire that consumed the vehicles was caused by a vehicle defect in engine of the Thornes' BMW.

I concluded that the origin of the fire was in the driver's side area of the BMW's engine compartment and that the fire was caused by a malfunction of one of the vehicle components in the driver's side area of the BMW's engine compartment.

CP 434. To support this allegation, Mr. Newbery conducted an internet search for engine problems with 2007 BMW 335xis. CP 443, CP 446. His search of the websites of Wikipedia and E90post.com revealed that other BMWs with the N54 engine had prior failures with the High Pressure Fuel Pump (HPFP). CP 446. The only HPFP problem identified by the National Highway Traffic Safety Administration's investigation into the HPFP issue was that the affected vehicles stalled or suddenly lost engine power. CP 447. It is undisputed that there were no reported problems for the HPFP that pertained to a potential fire hazard. CP 447.

Mr. Newbery provided the following conclusions in his report:

Based on the above investigation, to a reasonable degree of engineering and scientific probability, the following

conclusions have been reached:

1. The origin of the fire was in the driver's side area of the BMW's engine compartment.
2. The fire was caused by a malfunction of one of the vehicle components in the driver's side area of the BMW's engine compartment.
3. The N54 engine installed in the BMW has a history of high pressure fuel pump failures.
4. The high pressure fuel pump, the fuel injectors, and the positive battery cable at the rear driver's side of the engine compartment are all potential causes of the fire.
5. BMW of Bellevue made an incorrect diagnosis. The service bulletin that they referenced does not apply to the cold start misfires reported by Mr. Thorne.

CP 447.

The lack of evidence for Mr. Newbery's contention that a malfunction or defect in the BMW's engine is readily apparent from his declaration submitted in support of Plaintiffs' motion for reconsideration.

CP 620-623. In his declaration Mr. Newbery states:

5. More probably than not, a malfunction of one of the vehicle components in the driver's side area of the BMW's engine compartment caused the fire.
6. More probably than not, the specific malfunction that caused the fire was one or more of the following.

- a. Fuel leaking from malfunctioning fuel injectors being ignited by the hot exhaust surface at the back of the engine.
- b. Fuel leaking from a malfunctioning high pressure fuel pump being ignited by the hot exhaust surface at the back of the engine.
- c. The positive battery cable arcing against a ground or melting and arcing due to a defect in the cable.

Despite Mr. Newbery's identification of possible malfunctions on a "more probable than not" basis, the remainder of his declaration highlights the paucity of supporting evidence for his contentions.

7. The fuel injector failure identified by service bulletin SI B13 04 09 **could have** caused this fire. The bulletin does not contain a detailed description of the failure. **It is necessary to obtain more information from BMW about whether the fuel injector failures referenced in this bullet can cause an external fuel leak.**
8. The high pressure fuel pump failure identified by recall 10E-A02 **could have** caused this fire. The recall does not contain a detailed description of the failure. **It is necessary to obtain more information from BMW about whether the high pressure fuel pump failures referenced in this recall can cause an external fuel leak.**

CP 620-623. (emphasis added). If Mr. Newbery is unaware of whether fuel injector failures or high pressure fuel pump failures can even cause external fuel leaks, it is clear that he cannot state on a more probable than not basis that fuel leaks caused by a failure in the either the fuel injectors

or the high pressure fuel pump caused the fire. Mr. Newbery also concluded that the fuel injectors were a potential cause of the fire. However, Defendants' expert submitted a declaration stating that the spark plugs and fuel injectors on the 2007 BMW 335xi are located on the passenger or right side of the engine compartment. CP 555-574.

Mr. Newbery has not provided a factual basis for his assertion that a malfunction or defect in one of the BMWs component parts caused the fire. CP 433-454; CP 620-623. Instead Mr. Newbery's conclusions are based merely on the fact that the fire occurred.

2. Allegations Against BMW NA

Plaintiffs assert a cause of action against BMW NA under the WPLA. CP 1-7; CP 90-95. Plaintiffs' only initial claim against BMW NA under the WPLA was for the distribution of a defective vehicle. CP 1-7; CP 90-95. It is undisputed that the Omans cannot identify a specific defect or part of the BMW that was not reasonably safe. *Brief of Appellants Oman* at 15; CP 594. Instead, the Omans seek to invoke the doctrine of res ipsa loquitur to prove their claim against BMW NA. For the reasons set forth below, the trial court properly refused to apply the doctrine of res ipsa loquitur to the facts of this case.

Plaintiffs assert for the first time in this appeal that they also have a claim against BMW NA under the WPLA is for the breach of an express

warranty. In support of this cause of action, the Omans contend that BMW NA's warranty to the Thornes stated in pertinent part:

BMW Delivery Quality Assurance

This BMW vehicle has been designed, engineered and manufactured under strict quality control guidelines. It has been prepared and inspected to ensure that it is free of defects in workmanship and materials in accordance with the New Vehicle Limited Warranty issued by BMW of North America, LLC.

Aside from the fact that Plaintiffs never alleged breach of warranty in their Complaint, CP 1-7, or in their Amended Complaint, CP 90-95, the Omans ignore one critical fact necessary to support their argument - the Omans did not own the BMW. The Omans are not beneficiaries of any warranty express or implied in this case, nor have they ever alleged so until this appeal.

IV. ARGUMENT

A. Summary Judgment Standard

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.9d 1065 (2000). Summary judgment is appropriate where the pleadings and evidence, viewed in a light most favorable to the nonmoving party, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Landberg v. Carlson*, 108 Wn.App. 749, 33 P.3d 406 (2001). When a motion for

summary judgment is made and supported as provided in Civil Rule 56 (“CR 56”), an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in CR 56, must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). Opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. CR 56(e). Oppositions to summary judgments cannot be supported by inadmissible evidence. *Id.*; *King Co. Fire Prot. Dist. No. 16 v. Housing Authority of King Co.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

B. Plaintiffs are Precluded From Asserting New Claims on Appeal.

Plaintiffs are precluded from raising new arguments or issues on appeal. RAP 2.5(a). (App. B). Plaintiffs assert for the first time on appeal that they have a viable claim against BMW NA for breach of express warranty under the WPLA. Brief of Appellants Oman at 6. The Omans never asserted a breach of warranty claim either in their pleadings, CP 1-7; CP 90-95, or in oral argument before the trial court. The Omans did not set forth any assignments of error pertaining to the dismissal of a breach of warranty claim. Brief of Appellants Oman at 7-8. Plaintiffs’ breach of warranty claim under the WPLA was not raised before the trial

court. This Court should refuse to review the breach of warranty claim or any other claim or argument not raised in the trial court. RAP 2.5(a).

C. The Conclusions in the Bellevue Fire Department Incident Reports are Inadmissible.

The extent of the Omans' proof that the subject fire started in the Thornes' BMW is that the Bellevue Fire department, specifically Lieutenant Todd McLean, came to that conclusion at the scene of the fire. CP 433-454. The conclusions contained in the Bellevue Fire Department Incident Reports are only admissible if they come under the public records hearsay exception codified at RCW 5.44.040. The Washington Supreme Court outlined the requirements for admissibility for reports as public records.

...[R]ecords of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records.

Steel v. Johnson, 9 Wn.2d 347, 357-58, 115 P.2d 145 (1941). The facts of an investigator's report are also inadmissible if the facts contain a residue of judgment or opinion. *Brunridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 451, 191 P.3d 879 (2008). Driving records, fingerprint records, and weather bureau records are examples of public records that are admissible under RCW 5.44.040. *Id.* Unlike those purely factual

records, the Fire Incident Reports are the product of an investigation, presumably involving interviews with the affected parties, and the investigator's evaluation of the evidence as a whole. *Id.*

The admission of Lt. McLean's findings and evaluation would be even more prejudicial in this case where the defendants were never given the opportunity to examine the Plaintiffs' Pontiac Vibe to challenge his factual conclusions. The conclusions and opinions contained in the Fire Incident Reports are inadmissible as hearsay and consequently could not be considered by the trial court in ruling on BMW NA's motion for summary judgment.

Plaintiff's expert Trevor Newbery never inspected the Omans' Pontiac Vibe. CP 433-434. Mr. Newbery testified in his declaration that his opinion that the fire originated in the driver's side area of the BMW is based solely on the Fire Incident Reports and the photographs of the vehicles taken at the scene. CP 433-434. Mr. Newbery's opinion is merely an adaptation of the inadmissible conclusions of Lt. McLean.

After Mr. Newbery assumed the fire started in the engine of the BMW, he conducted an internet search for reported problems in 2007 BMW 335xi vehicles and discovered reported problems regarding the HPFP. Although the NHTSA defect investigation of the HPFP issue clearly reveals that it was not fire related, CP 572, Mr. Newbery still relied

on the non fire-related defect as a potential cause of the November 4, 2009 fire. Similarly, Mr. Newbery referenced a voluntary emissions recall for the high pressure fuel pump that was issued in December 2010 regarding long-crank starting times and the illumination of the service engine light. CP 433-454. That recall was not fire related either. Moreover, Mr. Newbery mistakenly placed that component in the area of the fire. Mr. Newbery did not offer any explanation as to how a malfunction of a component in the still intact driver's side area of the BMW's engine compartment caused the fire. Ironically, he dismissed as irrelevant a recall pertaining to the Pontiac Vibe because it was not fire related. CP 433-454.

Simply said, the only evidence Mr. Newbery offered for his contention that a defect or malfunction in the BMW caused the fire was the fire itself. Mr. Newbery found the place in the BMW that appeared to have the most damage and speculated that a component located in that area must have been defective. CP 433-454. He then listed the components and opined that one of them probably caused the fire.

Washington courts have repeatedly held that this sort of circular logic does not constitute evidence.

In the final analysis, respondent's case hangs upon the evidence of its expert witnesses. The logic of their testimony is simply this: The pressure of the refrigerant could have caused the rupture if the pipe were worn to a thinness of approximately one ten-thousandth of an inch;

the rupture did occur; therefore, the pipe must have been worn to the required point. This, however, is but reasoning in a circle. It assumes a fact necessary to establish a cause of action, but concerning which assumed fact there is no evidence, and then employs the supposititious fact as the bases for a conjecture as to the possible cause of a particular physical result.

Theonnes v. Hazen, 37 Wn.App. 644, 649, 681 P.2d 1284 (1984). The opinions and conclusions of an expert are not admissible unless they are based upon facts and not conjecture. CR 56(e). Conclusory or speculative expert opinions are insufficient to preclude summary judgment. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

D. The Doctrine of Res Ipsa Loquitur Does not Apply to this Case.

Plaintiffs conceded that their expert is unable to identify the exact cause and origin of the subject fire. Plaintiffs sought to invoke the doctrine of res ipsa loquitur as a method of proof to prevent them from having to determine the exact cause and origin of the fire. Whether res ipsa loquitur applies to a given case is a question of law. *Zukowsky v. Brown*, 79 Wn.2d 586, 592, 488 P.2d 269 (1971). To invoke the doctrine of res ipsa loquitur, Plaintiffs must first establish that: 1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence; 2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant; and 3) the injury-causing accident or occurrence is not due to

any voluntary action or contribution on the part of the plaintiff. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). The doctrine does not apply to this case as a matter of law because Plaintiffs cannot establish the three criteria necessary to invoke the doctrine.

1. Fires are not ordinarily caused by negligence.

Plaintiffs mistakenly state that the trial court failed to properly apply the doctrine of *res ipsa loquitur* because Plaintiffs did not rule out all other potential causes of the car fire. This misstates the issue. The doctrine of *res ipsa loquitur* is inapplicable because vehicle fires (especially fires in *used* vehicles) can occur even without a manufacturing or design defect. This negates the first element necessary to invoke the doctrine. *Voorde Poorte v. Evans*, 66 Wn. App. 358, 365, 832 P.2d 105 (1992); *Cambro Co. v. Snook*, 43 Wn.2d 609, 617, 262 P.2d 767 (1953).

In *Voorde Poorte*, the Voorde Poortes and Evanses purchased a mobile home owned by the Voorde Poortes. The mobile home was vacant and the utility services had been disconnected. Prior to closing the sale, the Evanses took possession of the mobile home, moved employees into it, and restored electrical service. Evanses' employees had just finished lunch inside the mobile home when they noticed smoke. The fire department responded, but the home was destroyed. The Grant County Fire Marshal concluded that the fire probably started in the kitchen and

most likely involved the electrical system, but did not know the exact cause of the fire. He believed the fire was caused by an electrical device. The Voorde Poortes attempted to take the case to the jury on the theory of *res ipsa loquitur*. The trial court upheld the summary judgment holding that the doctrine was inapplicable because “[n]ormal experience indicates that a fire could result even in the absence of negligence.”

Used vehicle fires are not uncommon and in this case the Thorne’s BMW was over two years old and had been driven over 24,000 miles. It had been subject to maintenance, road hazards, and wear and tear. Defense experts posited that, *if the BMW had started the fire*, any number of issues could have caused the BMW to catch fire that were not related to its design or manufacture VRP 9:24 – 10:1; VRP 34: 9-15. Vehicle fires are not always the result of a manufacturing or design defect.

2. The instrumentality or agency causing the injury was not within the exclusive control of BMW NA.

Assuming *arguendo* that the fire originated in the BMW, BMW NA still did not have exclusive control of the vehicle. BMW NA sold the vehicle to the selling dealership in June 2007 approximately two and a half years before the fire. Since that time, it had no contact with the vehicle. The cases cited by Plaintiffs in support of their contention that exclusive control is unnecessary are inapposite.

In *Ewer v. Goodyear Tire and Rubber Co.*, 4 Wn. App. 152, 480 P.2d 260 (1971), the court held that exclusive control is satisfied even without recent control over a product if there is evidence that the condition of the product had not changed since leaving defendant's control. In *Ewer*, the plaintiff's employer purchased a new Goodyear tire from Goodyear's distributor. The employer stored tire in a warehouse until it was retrieved by the plaintiff to be mounted. Defects in the tire's beading caused it to explode when the plaintiff attempted to mount the tire. Goodyear acknowledged both the existence of the potential defects and that the storage procedures used by plaintiff's employer would not have damaged the tire. The court applied the doctrine of *res ipsa loquitur* because the plaintiff established that the tire was in the same condition as it had been when it left Goodyear's control.

The Omans' case is distinguishable because Plaintiffs have not established that a defect in the BMW caused the fire or that the Thornes' vehicle was in the same condition at the time of the fire as it was when it left the manufacturing plant in Germany.

In *Kind v. Seattle*, 50 Wn.2d 485, 312 P.2d 811 (1957), a water main pipe owned, maintained and operated by the city was buried 6.8 feet underground. The pipe broke causing property damage. The court held that the second requirement of *res ipsa loquitur* was met because "[l]egal

control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury provide a sufficient basis for application of the doctrine.”

Again, the Omans’ case is distinguishable because the Thornes’ BMW was not owned, operated or maintained by BMW NA at the time of the fire.

In *Hogland v. Klein*, 49 Wn.2d 216, 298 P.2d 1099 (1956), plaintiff Holland d/b/a Hogland Transfer Co., contracted with the Kleins to move the Kleins’ building from the Arlington airport to the Kleins’ farm. Hogland furnished the equipment necessary for the move and directed and supervised the move and Klein provided the employees. Klein’s employees were in the process of moving the building when one of the supporting timbers supplied by Hogland broke. Klein invoked the doctrine of *res ipsa loquitur* against Hogland. The court held that the second requirement of *res ipsa loquitur* was met because, even though Hogland did not have actual physical control of the building at the time of the accident, Hogland had legal control of the instrumentality which caused the injury due the supervision of the foreman.

Again, the Omans’ case is distinguishable because BMW NA did not have legal control of the Thornes’ BMW at the time of the fire.

In *Tinder v. Nordstom, Inc.*, 84 Wash. App. 787, 929 P.2d (1997), the Plaintiff was shopping at and was “loaded” with packages. Plaintiff boarded the down escalator and was not holding the handrail when the escalator came to a sudden stop. She invoked the doctrine of res ipsa loquitur in her action against Nordstroms. The court held that Tinder was *not* entitled to the inference of negligence under res ipsa loquitur. As it relates to the second element of res ipsa loquitur the court specifically stated that exclusive control is not established merely by showing that the defendant has a superior ability to investigate and possibly determine causation.

In this case, Plaintiff cannot establish the element of exclusive control. The BMW involved had been driven by the Thornes for two and a half years prior to the fire. The vehicle was not owned, operated or maintained by BMW NA. BMW NA did not have any control or the right of control over any aspect of the vehicle. The exclusive control requirement is not satisfied merely because BMW NA would have the superior ability to investigate various ways in which a potential defect in a component within BMW’s engine compartment *could* cause a fire. *Tinder*, 84 Wash. App. at 795. Plaintiffs cannot establish the second criterion of res ipsa loquitur and the doctrine does not apply as a matter of law.

3. BMW NA is Entitled to Spoliation Inference.

With regard to the third element of *res ipsa loquitur*, that plaintiff did not contribute to the incident; BMW NA contends that due to Plaintiffs' spoliation of evidence, it is entitled to an inference that evidence existed to show that the Pontiac Vibe started the fire. *Res ipsa loquitur* cannot be invoked if the plaintiffs contributed to the accident. Plaintiffs cannot establish that they did not contribute to the vehicle fire because BMW NA is entitled to a spoliation inference.

In general, spoliation is the intentional destruction of evidence. *Henderson v. Tyrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who disposes of the important evidence. The Supreme Court of Washington has held:

Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the find of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc. v. King Co., 89 Wn.2d 379, 573 P.2d 2 (1977). In deciding whether to apply a rebuttable presumption in spoliation cases, two factors are controlling: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. *Henderson*,

80 Wn. App. at 607.

Plaintiffs' vehicle is vital evidence in this case. One important consideration regarding the importance of evidence is whether the loss or destruction of the evidence results in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence. *Id.* Plaintiffs allowed their vehicle to be destroyed before BMW NA had the opportunity to inspect it. Plaintiffs' vehicle is the only source of evidence from which their liability could be determined. The destruction of the Pontiac Vibe has resulted in an investigative advantage for the plaintiffs because it prevents BMW NA from determining whether the fire started with the Pontiac Vibe. As such, the first prong of the spoliation test is satisfied.

The second factor of the spoliation test is also satisfied. The Omans acted with conscious disregard of the importance of their vehicle as evidence when Anne Oman released her right to the vehicle to Farmers. Although spoliation is the intentional destruction of evidence, it encompasses a broad range of acts beyond those that are purely intentional or done in bad faith. *Id.* There is no indication that the Omans requested that Farmers retain the vehicle when the lawsuit was filed. The Omans were compensated for the salvage value of the vehicle and they knew or should have known their vehicle would be relevant to any potential

defense of their lawsuit and still allowed the vehicle to be destroyed.

In *Henderson*, the court held that discovery sanctions should not be imposed against the plaintiff for the destruction of his automobile when the defendants had over two years to examine the vehicle. In *Marshall v. Bally's Pawcest, Inc.*, 94 Wn. App. 372, 382, 972 P.2d 475 (1999), the court declined to apply the discovery sanction presumption when a health club disposed of a treadmill four years after the plaintiff was injured while exercising on the treadmill. As in *Henderson*, the *Marshall* court declined to apply the presumption because the plaintiff had ample opportunity to obtain the evidence claimed to be essential to their case. *Id.*

In this case, however, Plaintiffs' vehicle was destroyed two days after the original Complaint was filed and less than three months after the fire occurred. Unlike the evidence in the *Henderson* and *Marshall* cases, BMW NA never had the opportunity to inspect plaintiffs' vehicle. It is undisputable that Plaintiffs' Pontiac Vibe is an essential piece of evidence in this case. BMW NA is entitled to the spoliation inference that the Vibe would reveal evidence unfavorable to the Omans. Plaintiffs cannot establish the third criterion of *res ipsa loquitur* and the doctrine is inapplicable as a matter of law.

E. Plaintiffs Have Not Established the Necessary Criteria to Assert a WPLA Claim Against BMW NA.

The Omans allege BMW NA is liable for the property damage to their vehicle under the WPLA in its capacity as the distributor of the Thornes' BMW. The WPLA clearly sets forth the criteria necessary to impose liability on a product seller other than a manufacturer. RCW 7.72.040(2) only imposes liability on a non-manufacturer in limited circumstances that the Omans have not alleged in this case.

Even if BMW NA were a manufacturer, which it is not, the plaintiffs are not entitled to relief under the WPLA. The WPLA sets forth the liability of a product manufacturer for a claimant's harm. A product manufacturer is subject to liability if the product was not reasonably safe as designed. RCW 7.72.030(1)(a). The statute reads in pertinent part:

[A] product is not reasonably safe as designed, if, *at the time of manufacture*, the likelihood that the product would cause the claimants' harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product.

(emphasis added) Plaintiffs have offered no evidence of a vehicle defect; Plaintiffs have offered no evidence that the vehicle was not reasonably safe as designed by way of an alternative design; and Plaintiffs have offered no evidence that the vehicle was not reasonably safe when it left

the manufacturer. The Thornes drove the vehicle for over two years without any problems and the vehicle had over 23,000 miles on it at the time of the fire.

Plaintiffs cannot establish that a defect in the 2007 BMW 335xi was the proximate cause of their damages. To survive summary judgment, the Plaintiffs' showing of proximate cause must be more than mere speculation and conjecture.

When reliance is placed on circumstantial evidence, there must be reasonable inferences to establish the fact to be proved. No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in a way, without further showing that reasonably it could not have happened in any other way. The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred.

Cambro Co. v. Snook, 43 Wn.2d at 616 (citing *Gardner v. Seymour*, 27 Wn.2d 564 (1947)). See also *Chaloupka v. Cyr*, 63 Wn.2d 463, 387 P.2d 740 (1963).

The cause and origin of the fire in the case is unknown. Any speculation or conjecture that the fire may have occurred a certain way is insufficient for submission to the trier of fact. BMW NA is also entitled to

the spoliation inference that the Pontiac Vibe would have produced evidence unfavorable to the Omans. In this case, the proper inference would be that the Vibe was the cause and origin of the fire. Plaintiffs cannot establish that any possible-yet-unidentified defect in the BMW was the proximate cause of the fire as a matter of law.

F. Plaintiffs' Cannot Assert WPLA Claim Against BMW NA for Breach of an Express Warranty.

Plaintiffs did not assert a WPLA claim for breach of warranty against BMW NA in their original Complaint or in their First Amended Complaint. To the extent they are deemed to have asserted a breach of warranty claim against BMW NA under the WPLA at the trial court level, any such claim was properly dismissed. The Omans did not purchase a vehicle from BMW NA, the Omans were not intended beneficiaries of the warranty, the Omans did not have any contractual privity with BMW NA, and the Omans did not even know the warranty existed prior to receiving the Thornes' discovery responses. Plaintiffs cannot assert a breach of warranty claim without showing that they purchased a product with an express warranty or relied on the representations of the product seller in using the product. *Thongchoom v. Graco Children's Products, Inc.*, 117 Wash. App. 299, 71 P.3d 214 (2003). Furthermore, the terms of the alleged warranty between BMW NA and the Thornes were never

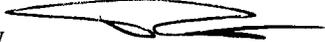
presented to the court.

V. CONCLUSION

For the reasons set forth above, the trial court properly granted BMW of North America, LLC's motion for summary judgment, thereby dismissing all of Plaintiffs' claims against BMW NA. BMW of North America, LLC respectfully submits that this Court should affirm the trial court's decision. Costs on appeal should be awarded to Defendant BMW of North America, LLC.

DATED this 27th day of February, 2012.

Respectfully submitted,

By 

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I hereby certify that on this 27th day of February, 2012, I served the foregoing Respondent's Brief via legal messenger to:

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APPENDIX

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANNE E. OMAN and KRAIG G. OMAN,)	
husband and wife, and the marital community)	
composed thereof,)	HON. SUSAN J. CRAIGHEAD
)	
Plaintiffs,)	NO. 10-2-04270-9 SEA
)	
v.)	<u>10-1-10</u>
)	
)	MOTION FOR SUMMARY JUDGMENT
SEAN THORNE and GINA THORNE,)	
husband and wife; NORTHWEST FINANCIAL)	
GROUP, INC., a/k/a BMW OF BELLEVUE;)	
and BMW OF NORTH AMERICA, LLC,)	
)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS

Proceedings had in the above-entitled cause before the Honorable Susan J. Craighead, Superior Court Judge, 7th Floor, King County Courthouse, reported by Kevin Moll, Certified Court Reporter, License No. 29906.

APPEARANCES:

FOR THE PLAINTIFFS:	ANNA D. KNUDSON, ESQ.
	Attorney at Law
FOR THE DEFENDANTS, THORNES:	SAMANTHA H. CREWS ESQ.
	Attorney at Law
FOR THE DEFENDANT, BMW OF NORTH AMERICA:	PETER STEILBERG, ESQ.
	Attorney at Law
FOR THE DEFENDANT, BMW OF BELLEVUE:	AUGUST G. CIFELLI, ESQ.
	Attorney at Law

1 (10-1-10)

2 THE COURT: I know some of you, but let me go around
3 and introduce yourselves.

4 MS. KNUDSON: Good morning, your Honor, my name is
5 Anna Knudson, here representing the plaintiffs, Anne and
6 Craig Oman.

7 THE COURT: Okay.

8 MS. CREWS: Samantha Crews for defendants Thorne.

9 MR. STEILBERG: Peter Steilberg, for BMW North
10 America.

11 MR. CIFELLI: August Cifelli, your Honor, for BMW of
12 Bellevue.

13 THE COURT: August, did you say?

14 MR. CIFELLI: Gus, August. I go by Gus.

15 THE COURT: Did the Thornes want to be heard today?

16 MS. CREWS: If necessary.

17 THE COURT: If necessary, but it's not counting on it?

18 MS. CREWS: Right.

19 THE COURT: Okay. So normally I give ten minutes per
20 side, and so you can come on up to the bar. I think
21 that's probably the easiest way, and, you know, you could
22 do it one at a time, whatever you want, whatever is
23 comfortable. My recommendation is that you stay at
24 counsel table, unless you're arguing. I think you'll be
25 more comfortable.

1 MS. KNUDSON: Thank you very much, your Honor. Your
2 Honor, as you have undoubtedly read from the facts in
3 this case, the facts really are very straightforward.
4 Just to quickly summarize, my client, on the morning of
5 November 4th, 2009, drove her brand new Pontiac Vibe over
6 to the South Bellevue Community College, where she was
7 about to teach an exercise class.

8 Now, keep in mind that this car was only one month
9 old, in fact, Monday will be the one-year anniversary of
10 when the Omans actually purchased this vehicle, the first
11 new car that they had bought together in 17 years.

12 Shortly after Mrs. Oman had entered the community
13 center and started teaching her Jazzercise class, she
14 learned, much to her horror, that her car was on fire.

15 So she promptly ran out of the community center, where
16 a small crowd had gathered, and saw not only her vehicle
17 on fire, but also the BMW 325xi, which was parked next to
18 her car, engulfed in flames.

19 Thank goodness no one was injured in this case. So
20 this is really a case only about property damages. But
21 the issue, the reason why we're here today, as you know,
22 is that plaintiff moved for summary judgment solely on
23 the issue of liability.

24 I think that notwithstanding the declarations from two
25 of the three -- attached to the responses from two of the

1 three defendants, I think in reality all parties agree
2 and recognize that there is no genuine issue of fact,
3 that the fire actually originated in the BMW, and not in
4 the Omans's Pontiac Vibe.

5 And so under the rule and rules and case law, it would
6 be very appropriate for your Honor to go ahead and grant
7 the plaintiff's motion for summary judgment as to
8 liability.

9 THE COURT: Well, I might be able to find that the
10 plaintiffs are not contributorily negligent, I think that
11 you may be right about that, but as between the two BMW
12 defendants, how can I -- I mean, BMW North America might
13 have nothing to do with this if it was all the fault of
14 the dealer for not catching the problem. On the other
15 hand, the situation could be reversed, and I don't think
16 I can resolve that based on the information I have.

17 MS. KNUDSON: I agree with you completely, your Honor,
18 and plaintiffs are not asking you to resolve liability as
19 between the different defendants in any way, shape, or
20 form. I agree with you that we don't have the facts to
21 do that.

22 All I'm asking is that you enter an order that the
23 Omans are not contributorily -- contributorily negligent
24 in any way, shape, or form, they have no liability here.

25 And so that's why I didn't get into the various claims

1 under different theories of liability in my motion, nor
2 did I in the reply.

3 So the reality is we, you know, we thought that --
4 plaintiff thought that there was going to be testing done
5 on the BMW that would be conclusive on August 12th.

6 Initially I had filed the motion back in June, and
7 then when BMW of Bellevue's counsel's filed a motion for
8 continuance, we worked something out to allow for testing
9 to take place. But it was nondestructive testing, so
10 it's not conclusive.

11 THE COURT: Is the plan to do destructive testing?

12 MS. KNUDSON: I don't -- that would be my plan, and I
13 know the Thornes' counsel is supportive of that, as well.
14 So should for any reason the court not wish to fully
15 grant the motion for summary judgment, my alternate, my
16 fallback request then would be to just continue the
17 motion until the destructive testing of the BMW has been
18 done.

19 But even considering the facts in the light most
20 favorable to the three defendants here, I do not think
21 that any reasonable jury would find that the Omans have
22 any liability, if you consider conclusive findings of the
23 Bellevue fire department, as well as the report done by
24 the consultants hired by the Thornes' insurance company,
25 and, additionally, the fact that within a week BMW of

1 North America was ready to turn around and pay goodwill
2 money to the Thornes in order to keep Sean Thorne as a
3 loyal BMW customer.

4 In reality, if BMW of North America really thought the
5 fire had originated in the Omans' vehicle, would they
6 have immediately agreed to pay Sean Thorne \$1,500 towards
7 his lease or purchase of a new vehicle? I think not.

8 But ultimately the declarations by the experts
9 attached to the two responses from BMW of Bellevue and
10 BMW of North America are merely speculative. The experts
11 say possibly perhaps somehow that the vehicle -- they
12 can't determine whether the fire originated from the
13 Omans' vehicle, but it's not based on any hard facts. So
14 thank you very much, your Honor.

15 THE COURT: Thank you. Who would like to address me
16 first?

17 MR. CIFELLI: At the brief pretrial conference they
18 nominated me, your Honor.

19 THE COURT: Fair enough.

20 MR. CIFELLI: Good morning, your Honor, August Cifelli
21 for BMW of Bellevue. This vehicle was brought in for
22 service nine days prior to the fire, and that service
23 date was October 26, 2009. The car had then about
24 24,000 miles on it.

25 THE COURT: It was also a brand new car.

1 MR. CIFELLI: Pardon?

2 THE COURT: It was also a brand new car.

3 MR. CIFELLI: Relatively, about two years' use on it,
4 22,500 miles when the car was brought in at that time.
5 Co-defendants Thorne were in control of the car for the
6 next nine days. Because the fault code that came up on
7 the service slip said we needed additional software, so
8 the Thornes took control of the car.

9 THE COURT: Can you explain what you mean by that? I
10 read that and I'm not a car person, so can you just
11 explain what that means?

12 MR. CIFELLI: Yes, your Honor. There is built into
13 almost every car since about 1996 a system called OBD II,
14 on-board diagnostic II. What it enables a service writer
15 or a service agency to do, an authorized service agency,
16 because to an extent it is proprietary for each type of
17 vehicle, they have a computer, a small diagnostic code,
18 they plug into a port below the steering wheel, it's
19 usually -- looks like a port for like an HD TV, one of
20 those types, a multiprong code, and it reads the fault
21 codes, you put in the right model number, et cetera, they
22 determine that by the VIN number, they put it in and it
23 comes up, it reads fault codes.

24 If something's wrong with the engine it says code 07,
25 09, 021, 094. Then they go to another program which

1 says, okay, number four, cylinder number four injector,
2 whatever, and that's what it does.

3 In this case they couldn't do that because they didn't
4 have the software and they had to get that from another
5 source. That's what the delay was here. The BMW was
6 subjectively complained of as running rough on start up
7 by the Thornes.

8 The on-board diagnostics says we need additional
9 software. It took a while to get. Everybody was still
10 waiting for the software. The car burned on
11 November 4th, 2009, and in the -- the suit was filed in
12 January of 2010.

13 BMW of Bellevue was not amended in as a defendant
14 until June 10th of this year. We appeared on the 15th of
15 June of this year, the motion for summary judgment was
16 served on the 18th of June, which accounted for our CR
17 56(f) motion for continuance.

18 THE COURT: Sure.

19 MR. CIFELLI: The allegations against BMW of Bellevue
20 are twofold, res ipsa loquitur and Washington Product
21 Liability Act, 772(c) RCW. With regard to those claims
22 and today's motion, I might point out to the court that
23 plaintiff actually in her motion, your Honor, as it has a
24 two-part request for relief, and it is right under the
25 relief requested on page one:

1 Number one, no dispute that a destruction of the 2010
2 Pontiac Vibe on November 4th was through no fault of
3 their own, rather, number two relief requested, the
4 unfortunate accident was caused by some act and/or
5 omission of the defendants in this case, and that's
6 principally why we're defending this matter.

7 THE COURT: As to point number one, what's your
8 position?

9 MR. CIFELLI: We don't know, your Honor, because we
10 have been unable to destruct test the car, and the
11 Pontiac is no longer available.

12 THE COURT: So you're not accepting -- I mean, the
13 fire department was very clear about where the fire
14 started.

15 MR. CIFELLI: Not -- well, your Honor, that's another
16 point of contention, and that is because there has been
17 no determination of cause origin of this fire. They
18 could share impressions, they could say, well, it looks
19 like this car was more involved than this car, but that's
20 all they can do, that's all they have.

21 They have no cause, no origin. In fact, we can't do a
22 cause origin -- we can't do it on the Pontiac, it's gone,
23 it's a metal cube somewhere, in somebody's paperweight or
24 something, but the BMW can't be destruct tested until
25 everybody got together.

1 We had a test date set up, and plaintiff, for whatever
2 reason, was not available to do the destruct testing. We
3 have to get into the code and lay open parts of the car
4 and the electronics to find out what the true cause
5 origin is. We'll never be able to do that with the
6 Pontiac, but we can do it with the BMW. But you only get
7 to do it once and you can't redo it, so everybody had to
8 be present. And the defendants in this case were certain
9 that they weren't going to do that without an expert --
10 plaintiff having an expert present.

11 THE COURT: So everybody needs to have their own
12 expert present, that would make sense to me.

13 MR. CIFELLI: That's correct. Now, going back to our
14 argument, there's no description in any part of
15 plaintiffs' motion as to what BMW of Bellevue did to
16 cause the fire.

17 On page two and page three of plaintiffs' motion there
18 two frank and candid acknowledgements that the actual
19 cause of the fire remains unknown. There's no evidence
20 of cause or origin that links with the BMW of Bellevue.

21 Ms. Knudson wants to advance an argument, well,
22 something had to happen because the car burned, but what
23 that was we don't know. The fire report does not list
24 cause origin and to some extent it's hearsay, it lacks
25 foundation, it's speculative and conjectural, but one

1 thing it is for sure is not inscrutable of cause origin.

2 THE COURT: No, it's very clear it doesn't know.

3 MR. CIFELLI: And the Oman photos do nothing to link
4 BMW of Bellevue to this fire. They're illustrative, they
5 may show a couple things to a trained eye, but there's
6 nothing in those photos that links an act or omission of
7 BMW of Bellevue to this fire.

8 Defendant Thorne's discovery responses do nothing to
9 link BMW of Bellevue to this fire, and BMW North America
10 discovery, there's nothing there that links BMW of
11 Bellevue to this fire.

12 Now, we have an expert by name of Adam Farnham of GT
13 Engineering, that is BMW of Bellevue, and he has opined
14 at this point that the cause is undetermined absent
15 further study, and for that reason we can't find -- well,
16 I would say that this court will search in vain for
17 anything in the file that links any -- any competent
18 evidence that goes around the requirement of -- is there
19 a triable issue of fact regarding BMW of Bellevue? Not
20 at this point, it's not there.

21 It's the plaintiffs' burden of proof to come up with
22 that, and plaintiff has failed to demonstrate the
23 evidence of triable issues, and we refer this court to
24 the Henry vs. Gill Industries authority at 983 F.2d.
25 They don't have the ability to -- plaintiffs can't just

1 come in and presume or infer negligence. They have to
2 move the ball forward, so to speak.

3 THE COURT: Well, I mean, cars are not supposed to
4 just burst into flames.

5 MR. CIFELLI: That's probably correct, your Honor.

6 THE COURT: You know, it's one of those things where
7 something was wrong, and if there weren't -- if the
8 Thornes had never come to BMW of Bellevue, so we don't --
9 and we didn't have that little fact in here, then it
10 might be easier to just say, well, look, cars aren't
11 supposed to explode and burst into flames, therefore,
12 there must be liability for a defendant.

13 I think the fact that there's two of you here and
14 there's arguments to be made about each defendant makes
15 it much more complicated to analyze.

16 MR. CIFELLI: Well, your Honor, let me submit this to
17 the court, and that is how do we know it's not vandalism?
18 How do we know something the operator of the car did or
19 didn't do? How do we know it's not theft? How do we
20 know it's not somebody reaching up, trying to get to the
21 fuel system? We don't, we don't know this. It's
22 plaintiffs' job to do that, and plaintiff hasn't done it.

23 They can -- we can name a couple other defendants and,
24 of course, the court's aware of the BMW of Bellevue CR 19
25 affirmative defense, that there should be necessary

1 parties to this litigation that aren't, and they're not
2 in there, and there are arguments that could be made
3 there, too.

4 The plaintiff has not given this court any competent
5 evidence, and the reason we bring this up now is because
6 our affirmative defenses are, both, 12(b) -- we have a CR
7 19 for the Product Liability Act, and a 12(b)(6) that
8 answers directly the issue of res ipsa loquitur.

9 Assuming the facts most favorable to them and assuming
10 that B -- I'm sorry, that the Omans' argument has some
11 efficacy, go to -- if we go to the res ipsa argument,
12 where's the exclusive control element? That's fatal to
13 that analysis. That claim is gone. They've admitted
14 that much, that's not contested. There's no serious fact
15 at issue, that -- that major component of the res ipsa
16 claim, which is a very narrowly drawn document,
17 acknowledged by case law, Washington Practice, you name
18 it, it has no application in this case, absent that one
19 crucial element. There's also no evidence of negligence,
20 but we move beyond that, we've already addressed that.

21 The other thing is the Washington Product Liability
22 Act. If you have a product liability claim, you have to
23 meet certain jurisdictional standards. Did you bring in
24 this defendant? Do they belong in the case? Is this the
25 properly named defendant? The answer's no.

1 THE COURT: As to you?

2 MR. CIFELLI: As to BMW of Bellevue, your Honor.

3 THE COURT: Right.

4 MR. CIFELLI: For that reason we seek, as set forth --
5 excuse me for not having this, Leland vs. -- it looks
6 like froggy (phonetic) but I think it's Frogge, 71 Wn.2d
7 at 201, acknowledges this court's ability to say, you
8 know, you're not there now, you're probably not going to
9 get there, there's no competent evidence supporting
10 either a res ipsa claim against BMW of Bellevue, and I'll
11 limit my argument to that, of course, and there's no RCW
12 772 claim, no product liability claim, because the claim
13 that you seek, they didn't design the car and it's not
14 contested, they didn't manufacture the car, that's not
15 contested, there's no evidence of any other negligence,
16 there's no declaration from an expert in a file, there's
17 not even a declaration by the Omans in the file, on file
18 with the court. There's nothing there to support either
19 one of those claims, and because they are affirmative
20 defenses, we request that the court -- as part of the
21 relief the court can dismiss those claims against BMW of
22 Bellevue on plaintiffs' motion.

23 Neither theory applies, and what's bothersome about
24 plaintiffs' claims is that plaintiff knows they don't
25 apply, plaintiff has been afforded the luxury of having

1 briefing showing that that's not an applicable argument
2 or an efficacious argument in this case, plaintiff
3 insists on moving forward with the claim.

4 THE COURT: Well, you know, my interpretation of all
5 this is the plaintiffs really just want to get a new car,
6 you know, they're impatient and I get that, but I'm also
7 concerned that we may not have sufficient facts to make
8 that decision today. I want to make sure that they
9 understand that I understand how they feel.

10 MR. CIFELLI: Thank you, your Honor. The plaintiffs
11 have maintained a cause of action that really has very
12 little -- probably no chance of success, and I think that
13 --

14 THE COURT: As to?

15 MR. CIFELLI: As to *res ipsa loquitur* against BMW of
16 Bellevue, or a product liability claim against BMW of
17 Bellevue. Those are the only two claims against BMW of
18 Bellevue, they're the only two I'm addressing, and there
19 is a complete -- well, I'd say paucity of evidence, but
20 it's worse than that, there's an absence of any competent
21 evidence to support either of those claims against BMW of
22 Bellevue.

23 We think summary judgment should be granted for BMW of
24 Bellevue on the two claims, and we come into the court --
25 just one other observation, is that the Pontiac was

1 disposed of. That's going to make proof in this case
2 exponentially more difficult for the plaintiff, because
3 as set forth in the declarations of -- in the
4 declaration, I'll limit it to Adam Farnham, he's
5 indicated, I can't rule out that the Pontiac had nothing
6 to do with this. If the fire company shows up and says
7 it looks like one car's probably more involved than the
8 other, that's probably a valid 602 obligation.

9 What she needs -- excuse me, your Honor. What
10 plaintiff needs is a 702, 703, 704, 705 expert coming in
11 and saying this is what they've got, because absent that
12 the plaintiffs' argument cannot overcome the deficiencies
13 in, both -- in the theories she's chose to go against
14 these defendants on, whether there's a cause of action,
15 the court with pontificate and say, well, plaintiffs can
16 bring this claim or that claim, that may be, but they're
17 not the claims that are at bar and on file with the
18 court, and we ask that they be dismissed. Thank you,
19 your Honor. I'll respond to any questions.

20 THE COURT: I think I get your perspective, but you
21 haven't actually brought a motion for summary judgment.

22 MR. CIFELLI: Which is why we cited the Leland vs.
23 Frogge case, your Honor, because Leland vs. Frogge stands
24 for the proposition as set forth in -- I think it's 4
25 Tegland, WASHINGTON PRACTICE, that's also cited in our

1 brief, that when we have an affirmative defense claim, a
2 proper remedy available to the court, the court can
3 choose to dismiss those claims.

4 THE COURT: I could do it.

5 MR. CIFELLI: Yes.

6 THE COURT: All right, thank you.

7 MR. CIFELLI: Thank you, your Honor.

8 THE COURT: Let me hear from Bellevue of North America
9 -- I mean BMW of North America.

10 MR. STEILBERG: Your Honor, I'm a car guy.

11 THE COURT: Okay, good.

12 MR. STEILBERG: I just wanted to relate to you an
13 experience that I had recently, where we had a Product
14 Liability Act not involving BMW, and the vehicle had had
15 some rough running problems and the plaintiff seemed like
16 a really, you know, honorable person, and I don't think
17 they had anything to do with it, but what we found,
18 believe it or not, was a cigarette butt had been stuffed
19 into a fuel line under the car, and this is on the
20 downside, on the engine side of the fuel filter.
21 Somebody had actually managed to get into the fuel
22 system, under the car, by reaching under and pulling off
23 a little fitting, and stuffed a cigarette butt into the
24 fuel line.

25 THE COURT: Wow. That person could have died, but

1 yes.

2 MR. STEILBERG: Yes, and the reason I'm saying that is
3 because my first feeling when I saw this case was, oh,
4 God, the BMW burned down and caught everything on fire
5 and that sort of thing, but when I started to look at it
6 more I realized that there is simply no way to tell.

7 I mean, the fire department records show that they
8 showed up, two cars were fully involved, you can see in
9 the writing, they were fully involved, and one of them
10 they had to cut the engine compartment open. If you look
11 at the BMW, you can see how they went into it with a
12 Sawzall to get the fire out on. That's the only one they
13 looked at, your Honor. They never looked at the Vibe.

14 So what you have, basically, I was talking with my law
15 partner about this, he said it's like you're walking in
16 the woods to go to your cabin, and you come around the
17 corner and your cabin and the neighbor cabin's on fire,
18 and you say, the neighbors started the fire and caught
19 mine on fire.

20 There's really no evidence, one way or other. So I'm
21 trying to get back to the whole root of this thing. Just
22 because the fire department showed up and made a, you
23 know, a guess, basically, they sort of looked it over,
24 they never did a detailed cause and origin analysis.

25 Just because they showed up and said, well, this looks

1 to be the hottest part of the BMW, without looking at the
2 Vibe, doesn't mean that the BMW actually caught this
3 thing on fire.

4 Both the cars are relatively new. The Pontiac Vibe,
5 one could argue, had been largely untested, because it
6 was so new, whereas the BMW managed to make it almost two
7 years without a problem. So this factually is incredibly
8 up in the air.

9 There is no admissible evidence, whatsoever, that can
10 support the Omans' claim that the BMW actually caused the
11 fire, it's merely conjecture. On the other hand, we have
12 Adam Farnham and Ryan Cram, and I was out there with
13 them, we went out to -- it was Arlington, CoPart, and
14 we're standing out there in this big field with a million
15 cars that have been involved in horrible accidents, and
16 Ms. Knudson, apparently she had got her signals mixed up
17 and didn't show up, she actually showed up at MDE
18 Engineering, which is in Seattle, I think, right, so we
19 couldn't do any testing.

20 But, frankly, I'm going to guess that when we do the
21 testing, it's going to be like every other cause and
22 origin thing with the car. There will be, well, we saw
23 that there was a wire melted, and did the wire melt
24 before the fire or was it melted because of the fire, you
25 know, that sort of thing.

1 Without actually seeing this Pontiac Vibe, we can't
2 tell. If we had the Pontiac Vibe, we might find that a
3 fuel line dropped off of it, or we might find that a rat
4 had crawled up next to the catalytic converter, which
5 runs at over 200 degrees, caused a fire, caused
6 insulation on fire, and that thing, you know, landed on
7 some combustibles, transferred over to the BMW, and
8 caught that on fire.

9 So what I'm trying to get at is we need to step back a
10 little bit instead of making just an easy presumption and
11 look at the whole thing and say, look, there's really no
12 way to tell, one way or other.

13 That's why, I mean, all of Mr. Cifelli's arguments
14 apply to BMW of North America, as well as to his client.
15 The last time BMW North America touched this BMW, and
16 they only did it once, was when it came into the United
17 States and it went to a facility in California, I think
18 it was, and then it was distributed to the dealerships.
19 That was it, there's no involvement, and we're not the
20 manufacturer. The manufacturer didn't touch it for over
21 that period of time.

22 So I was saying, well, why don't we just counterclaim
23 against them, saying the Pontiac Vibe started the fire?
24 The same amount of evidence applies to the Pontiac Vibe.
25 It was in the fire and we're saying it's -- it burned

1 down the BMW, and I thought, well, I can't really do that
2 because I don't have enough evidence.

3 Then I thought again, well, they don't have any
4 evidence either. It's really -- it's really almost a CR
5 11 thing. I mean, other than the fire department report
6 saying this in conjecture, there is nothing.

7 When you look at Ms. Knudson's brief and listen to
8 what she was talking about up here, about she came out,
9 the fire department told us this, told us that, there's
10 no declaration supporting that, not one.

11 THE COURT: It's actually primarily hearsay, is what
12 an expert might rely upon.

13 MR. STEILBERG: Right. No witness, whatsoever, nobody
14 saw these cars burn down. You know, this is going to be
15 a -- it's going to remain a mystery. Every expert that
16 looks at this thing, and we could spend -- we will spend,
17 if you don't grant -- we join in Mr. Cifelli's
18 counter-summary judgment motion. We're going to spend a
19 ton of money looking at things and everybody's going to
20 come to a different conclusion, but the one thing that's
21 missing, the one thing that is necessary, based on Adam
22 Farnham's declaration and Ryan Cram's declaration from
23 BMW NA, is the Pontiac Vibe. We don't know.

24 And Ms. Knudson's statements that it wasn't her
25 clients' fault that it was destroyed, that doesn't cut

1 the mustered. Ms. Knudson was on the case before the car
2 was destroyed.

3 Whenever I get a case, I find the car. Even before
4 it's filed, I will find the car. Don't destroy the car.
5 The plaintiffs had to sign a document saying this car's
6 going to be thrown away, they have to release interest in
7 that car, they did that, even though they knew that this
8 was going to litigation. That's spoliation. We are
9 entitled to the presumption that there was evidence
10 supporting our theory that the Vibe caused the fire.

11 Now, as far as what Ms. Knudson said when we were
12 starting this argument, she said, I just want a ruling
13 that my clients are not at fault, okay, we have about as
14 much evidence of her clients' actually being at fault as
15 she does of our clients being at fault.

16 It would be appropriate to just grant a motion that
17 there is no evidence that any of the parties are at
18 fault. That's really the true case here. But there's
19 absolutely no way and no evidence that would support any
20 finding that the defendants are at fault, there is no
21 evidence to support it.

22 This isn't some sort of market share liability thing,
23 you know, there's -- there's a dealership and a
24 distributor, therefore, and the car burned down,
25 therefore, you know, it was one of their faults. There's

1 lots of stuff in the car; the BMW was driven for two
2 years; service stations touched it; they had it at their
3 house; what kids drove it; where did they drive it; did
4 they take it off road; was the Vibe taken off road; was
5 it driven somewhere where there was grass that got caught
6 up in some hot part of the engine. We just don't know.

7 So I can get into a lot of the technicalities about
8 the admissibility of the fire department report.

9 THE COURT: No, I've thought about all that stuff.

10 MR. STEILBERG: Did you think about the notion that
11 plaintiffs are using the MDE report as an admission
12 against interest and applying it to BMW of North America
13 when it's not our expert? It only goes against the party
14 that made the statement. So that wouldn't apply against
15 us anyway.

16 Farnham, his report's good for us. BMW NA and BMW
17 Bellevue are in the same position, as far as that's
18 concerned, but Ryan Cram is our expert.

19 As far as the res ipsa loquitur argument is concerned,
20 I have never had a case where you could plead it in
21 alternative like this, it's kind of, you know, I didn't
22 do it --

23 THE COURT: By definition, it's not an easy thing to
24 plead in the alternative.

25 MR. STEILBERG: Yeah, you can't say there's three

1 defendants and they all have exclusive control, that just
2 doesn't work. There was no exclusive control in this
3 case, it's like the cigarette butt thing, you don't know.

4 There's vandalism all the time, somebody could have --
5 and without doing destructive testing and without having
6 the Vibe, which is -- the inability to do destructive
7 testing and the Vibe, that doesn't have anything to do
8 with the defendants, we had no part in that, whatsoever.

9 THE COURT: That's clear. Let me ask you this: What
10 does destructive testing cost, roughly speaking?

11 MR. STEILBERG: Are you trying to say why don't we
12 just pay her rather than --

13 THE COURT: I'm not going to try to get into the
14 middle of settlement, but it sure seems like it would be
15 a lot cheaper to just make up the difference for whatever
16 Farmers didn't cover and, you know, be done with it.

17 MR. STEILBERG: We've made settlement offers. So far
18 it's been, you know, this really isn't germane to the
19 case and I don't know whether it's appropriate to get
20 into it, but we've talked about settlement and made
21 offers, and so far the response has been, we want the
22 full value of the Pontiac Vibe at more than its -- at
23 more than its retail price, basically. So what we want
24 to -- you know, we're always willing to settle, your
25 Honor.

1 THE COURT: Maybe there's a different -- there are
2 different levels of sophistication dealing with some of
3 these things.

4 MR. STEILBERG: Right. And this -- I'm sure that the
5 -- and we haven't deposed the Omans yet. I'm sure they
6 have a car now. I'm sure their insurance company's
7 covered this, or something's happened. As far as the
8 goodwill gesture by BMW of getting the Thornes -- BMW of
9 North America didn't admit liability by doing that.
10 These guys, Mercedes, Chrysler, the big RV companies, you
11 know, Ford, Suzuki, all those people, they work hard to
12 keep a good customer.

13 The fact that they gave them \$1,500 rebate, that's
14 like something a salesperson could do on a floor in a
15 dealership, I mean, it can't be held against us. We had
16 no documentation, no analysis into the cause of the fire.
17 It's not an admission.

18 I suppose they could try to get it to a jury, but I
19 don't even know if it would be too prejudicial. But it
20 certainly has nothing to do with our feelings about the
21 car. We want to keep them as a BMW client.

22 THE COURT: I'm an Audi driver, so I know what those
23 companies do.

24 MR. STEILBERG: I have an S4. I love Audis.

25 THE COURT: You've been very helpful. Thank you very

1 much.

2 MR. STEILBERG: You're welcome.

3 THE COURT: Ms. Knudson.

4 MS. KNUDSON: Yes, your Honor.

5 THE COURT: Anything you want to add? Here's the
6 thing that I think --

7 MS. KNUDSON: May I approach the bench, your Honor?

8 THE COURT: Sure, of course. Ms. Knudson, you know,
9 as a layperson who, you know, my knowledge of cars is
10 really, I mean, it took me -- I drove a car for a year
11 before I found out I had to change the oil, so I'm like
12 pretty basic, you know.

13 There isn't a lot of expert evidence to support your
14 position at this point, even though as a layperson, if I
15 walked in the parking lot, I might see it exactly the
16 same way you and your clients do.

17 Does that make sense?

18 MS. KNUDSON: Well, your Honor, I respectfully point
19 back to the -- both, the fire department reports, which
20 have now been authenticated by the record of the records
21 custodian for the fire department.

22 THE COURT: I don't think anyone's questioning their
23 authenticity.

24 MS. KNUDSON: Right, but they do specifically say the
25 most likely area of origin is the engine compartment of

1 the BMW, so at no point do they even say that there's a
2 possibility that it originated with the Pontiac.

3 And then also the Thornes' expert said the fire
4 originated at the center of the left side of the engine,
5 below the air filter housing. So I submit to you that
6 those are two very good pieces of evidence pointing to
7 the fact that the fire did originate in the BMW.

8 THE COURT: How did the Thornes' expert reach that
9 conclusion?

10 MS. KNUDSON: Performed an inspection of the BMW on
11 January 27th, 2010.

12 THE COURT: Did that expert also examine the Vibe?

13 MS. KNUDSON: No, because the Vibe, as noted, had
14 already been --

15 THE COURT: That's what I thought, it had already been
16 destroyed.

17 MS. KNUDSON: Right.

18 THE COURT: You know, I'm not necessarily persuaded
19 that the fire did start in the Vibe, but at this point we
20 don't have any expert -- I mean, I just don't know that I
21 can -- I can find that the defendants are liable when
22 they haven't even had the destructive testing done.

23 MS. KNUDSON: In that case, your Honor, I would ask
24 that you postpone final ruling on the motion for summary
25 judgment until we've had the destructive testing done,

1 under CR 56(f).

2 THE COURT: I think you should think really hard about
3 whether -- I mean, what's the best use of funds at this
4 point.

5 MS. KNUDSON: Yes.

6 THE COURT: I really hope that you and your clients
7 will think about it. I mean, there is a very good chance
8 that there won't be a conclusive answer even after
9 destructive testing. I've seen that on a number of car
10 cases that are different from this one but the same
11 concept. It just may be that your clients can be made
12 whole without going through that. But that's for you
13 guys to decide. I'm just suggesting that.

14 MS. KNUDSON: Sure, and just to set the record
15 straight, your Honor, although settlement negotiations
16 are technically confidential, it is incorrect what Mr.
17 Steilberg said, that we're seeking greater than the full
18 value of the Vibe. That was absolutely not true.

19 THE COURT: I'm not worrying about those details. I'm
20 just suggesting that I know what a big deal it is to lose
21 your car, and so I really see where --

22 MS. KNUDSON: They have not bought another car, they
23 have made do. For a month they rented a car, which was
24 very expensive, and they have been borrowing a car from a
25 family member. Mrs. Oman's husband is a pastor, and so,

1 you know, they're on limited means. I should also
2 mention that recognizing what you just said about the
3 efficacy of settlement, I have moved to place the case
4 into arbitration. That's on your calendar for next
5 Friday, without oral argument, and I did seek a
6 stipulation among all of the parties last week to agree
7 that this case should be moved into arbitration.

8 For a technical reason it wasn't able to be placed
9 into the arbitration without me filing that motion. But
10 I have been unable to get agreement from BMW of North
11 America and BMW of Bellevue on that.

12 THE COURT: You may not be able to get a ruling from
13 an arbitrator without more evidence. I mean, you know,
14 the arbitrator's not going to be in too much of a
15 different position than I'm in right now, in terms of
16 what evidence there is.

17 MS. KNUDSON: Sure, and one final note, your Honor, I
18 think notwithstanding the very creative arguments about
19 cigarette butts and possibly vandalism and possibly a
20 lightening strike, I mean, the list could go on and on
21 and on, it could have been a pack of wild horses or
22 monkeys, I mean, this is all speculation on the part of
23 opposing counsel.

24 The facts here, I think, there's no dispute that the
25 fire started in the BMW, and it's very unfortunate that

1 the Pontiac Vibe was destroyed, but I don't think the
2 answer lies there.

3 THE COURT: You're probably right, but I'm just not
4 certain that that's -- that's not a basis for me to grant
5 your motion.

6 So what I'm going to do is I'm going to deny the
7 motion for summary judgment at this time, but without
8 prejudice, and you're certainly welcome to bring it back
9 to me after destructive testing has been done, if you go
10 that route. But we've talked -- I think we've all talked
11 about what -- where the problems are. They really are --
12 in my view just don't have strong enough evidence that
13 for sure it was that.

14 MS. KNUDSON: Thank you very much, your Honor.

15 THE COURT: Can somebody do an order for me.

16 (Hearing concluded)

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APPENDIX

B

RULE 2.5
CIRCUMSTANCES WHICH MAY AFFECT
SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b) (2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.
