NO. 90222-4

SUPREME COURT OF THE STATE OF WASHINGTON

APL LIMITED, AMERICAN PRESIDENT LINES, LTD., and EAGLE MARINE SERVICES, LTD.,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Retail sales tax applies to the lease of tangible personal property, but it does not apply to the lease of real property or fixtures. To determine whether leased property is tangible personal property or a fixture, the Department of Revenue and the courts apply the common-law fixtures test. Under this test, property is a fixture only if there is: (1) actual annexation to the realty, or something appurtenant thereto; (2) its use or purpose is applied to or integrated with the use of the realty to which it is attached; and (3) the annexing party intended a permanent accession to the freehold. *See Department of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975). Although each element must be met before the property may be classified as a fixture, it is well-established that the annexing party's intent is the most important element, and "when the intent is discovered it is generally controlling." *W.R. Ballard v. Alaska Theater Co.*, 93 Wash. 655, 662, 161 P. 478 (1916).

Since the mid-1980s American President Lines, Ltd. ("APL") has leased from the Port of Seattle five large container cranes that APL uses to load and unload cargo ships at Port Terminal number 5. The Port treated the container cranes as tangible personal property, not fixtures. Consistent with that treatment, the Port collected from APL retail sales tax on the lease payments and remitted that retail sales tax to the Department. APL, after paying retail sales tax on the lease payments for more than 20 years, now contends that the container cranes were attached to the Port's

terminal facility as fixtures and that the Port incorrectly collected retail sales tax on the lease of the cranes.

After a three-day trial, the superior court rejected APL's assertion that the container cranes were fixtures. The trial court found that the cranes were not actually annexed to the Port facilities, as required by the first element of the common-law test, and found that the Port did not intend for the cranes to become a permanent addition to the freehold, as required by the third element. Because APL failed to prove both the first and third elements of the common-law test, the trial court denied its refund claim.

In an unpublished decision, Division I of the Court of Appeals affirmed, concluding that substantial evidence supported the trial court's finding that the Port did not intend the cranes to be permanently attached to the realty. APL seeks discretionary review of that decision. However, this appeal does not satisfy any of the criteria for discretionary review in RAP 13.4(b). Consequently, the Court should deny review.

II. IDENTITY OF RESPONDENT

Respondent is the Washington State Department of Revenue.

III. COUNTERSTATEMENT OF THE ISSUE

If the Court were to accept review, this appeal presents a single issue: Did the trial court correctly determine that the Port-owned container cranes leased to APL were tangible personal property, not fixtures?

IV. COUNTERSTATEMENT OF THE CASE

A. The Trial Court Ruled That The Port-Owned Container Cranes At Issue Were Personal Property, Not Fixtures.

As the Court of Appeals recognized, the "historical facts [of this case] are largely undisputed." Slip Op. at 2.[1] In September 1985, the Port entered into a 30-year lease with APL for use of a Port-owned terminal facility known as Terminal 5 and for use of Port-owned container cranes to load and offload cargo containers from ships. CP at 199 (FOF 5). Under the lease agreement, the Port provided to APL four container cranes "more particularly identified as Port designated Crane nos. 61, 62, 63 and 64, or their equal or better." CP at 200 (FOF 7). Roughly one year later APL exercised an option to lease a fifth crane. *Id.* That fifth container crane is designated Crane no. 68. *Id.* All five cranes (the "T5 cranes") have remained at Terminal 5 since they were commissioned. CP at 200 (FOF 8).[2]

The T5 cranes are large items of equipment, weighing more than 800 tons and standing close to 200 feet tall with the boom lowered. CP at 201 (FOF 14). They are powered by a dedicated high-voltage electrical substation and are connected to the electrical substation by an electrical cable. CP 200 (FOF 10). The T5 cranes operate on wheels positioned on

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[1] APL has not challenged Findings of Fact 1-12, 14-22, 28, 32, 33, 35, 38, or 39. *See* Br. of Appellants at 3 (Assignments of Error). Those findings, therefore, are verities on appeal. *In re Dependency of MSR*, 174 Wn.2d 1, 9, 271 P.3d 234 (2012). In addition, the findings of fact APL has challenged are all supported by substantial evidence and APL has not presented any cogent argument otherwise.

[2] The Port moved a sixth container crane, crane number 66, from Terminal 30 to Terminal 5 in 2004 and leased it to APL. CP 201-02 (FOF 19). That sixth crane is not at issue in this appeal because APL has not sought a refund of the retail sales tax it paid to the Port on the lease of crane number 66.

100-foot-gauge rails connected to the terminal apron. CP at 200-01 (FOF 11). The crane rails extend approximately 2900 feet from one end of the Terminal 5 apron to the other, and the cranes traverse along the length of the rails as part of their normal operation. *Id.* Gravity alone holds the container cranes on the crane rails. CP at 200-01 (FOF 11, 15).

Container cranes such as the T5 cranes are movable and can be relocated from one terminal to another. CP at 201 (FOF 18). There has been a history of moving Port-owned container cranes between terminals at the Port to meet tenant needs. *Id.* In addition, tenant-owned container cranes also are moved occasionally to and from the Port facilities. For instance, in 1992, APL relocated one of its container cranes from Oakland, California to Terminal 5 at the Port. CP at 202 (FOF 21). Two years later, APL removed that container crane from Terminal 5. *Id.*[3]

In 2006, after paying retail sales tax on the lease of the T5 cranes for more than 20 years, APL filed a refund action in Thurston County Superior Court seeking a refund of the retail sales taxes it paid from January 1997 through May 2005 on the lease of those cranes. CP at 199 (FOF 4). In its complaint, APL alleged that the T5 cranes were attached to the Port's terminal facility as fixtures and that the Port had incorrectly collected retail sales tax on the lease payments. CP at 6.

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[3] Container cranes can also be moved from port to port. The Port of Seattle has sold several of its container cranes to other ports. CP at 202 (FOF 22). Because these large container cranes can be moved from port to port, there is a domestic and international market for used container cranes. *Id.*

The Department moved for summary judgment, asserting that the Port had correctly treated its container cranes as tangible personal property, not fixtures. The superior court granted the Department's motion, concluding that the cranes were not actually annexed to the real property as required under the first element of the common-law fixtures test. CP at 15 (quoting part of superior court's colloquy). The superior court also reasoned that because APL had to satisfy all three elements of the common-law test, there was no need to decide the "intent" element. *Id.*

APL appealed. CP at 11. The Court of Appeals, in an unpublished opinion, reversed the superior court and remanded the case for further proceedings. CP 14-18. The Court of Appeals determined that the trial court erred in granting summary judgment after considering only the "annexation" element. CP 18.

After remand, the case was reassigned to the Honorable Judge Thomas McPhee and consolidated for trial with a second, subsequent, refund action filed by APL. CP 19-21. After a three-day bench trial, the trial court held that the T5 cranes were personal property, not fixtures. CP at 197-238. The court found that the T5 cranes were not annexed to the Terminal 5 facilities and that the Port intended the T5 cranes "to be equipment in inventory (tangible personal property), not fixtures." CP at 203 (FOF 27); *see generally* CP 201-07 (FOF 13-43). Significantly, the trial court found that the lease agreement between the Port and APL contained direct evidence that the Port intended the container cranes to be

personal property. CP at 203-04 (FOF 30). Specifically, section 1(d) of the lease agreement, and Exhibits B and C to that agreement, listed the Port-owned container cranes separately from the Terminal 5 "premises and improvements." *Id.*[4] Other provisions in the lease were consistent with the Port's objective intent to treat the cranes as personal property, not improvements to the realty. CP at 204 (FOF 31-32).

In addition, the trial court found objective evidence of the Port's intent in other statements and actions that were consistent with treating the cranes as tangible personal property. Specifically, the Port had classified its container cranes as "inventory" in resolutions and other documents. CP at 205-06 (FOF 37-40). Also, instead of paying sales tax on the purchase of the T5 cranes, the Port collected sales tax on the lease of those cranes to APL. CP 206-07 (FOF 41-43). As the trial court noted, the Port "did not pay the sales tax on the purchase of the cranes because they were purchased for resale *as tangible personal property* in the ordinary course of business and, therefore, were exempt" under the "purchase for resale" exemption set out in RCW 82.04.050(1)(a)(i). CP 206 (FOF 42) (emphasis added). Had the cranes been purchased for the purpose of affixing them to real property as fixtures, the "purchase for resale" exemption would not have applied and the Port would have owed retail sales tax on its purchase of the cranes. The Port's treatment of the T5

[4] Exhibit B to the lease listed the improvements to Terminal 5. The T5 cranes were not listed as improvements. CP 204 (FOF 30 (last sentence)); *see also* Tr. Ex. 101 at 32-37. Instead, the T5 cranes were listed on Exhibit C of the lease as "Equipment Rental." Tr. Ex. 101 at 40.

cranes as a tax exempt purchase was "persuasive circumstantial evidence" of the Port's intent to treat the cranes as tangible personal property, not fixtures. CP 207 (FOF 43).

B. The Court Of Appeals Affirmed The Trial Court.

APL sought direct review of the trial court's decision. This Court denied the petition and transferred the appeal to the Court of Appeals. *See* Order issued January 8, 2013 (Sup. Ct. No. 86977-4). The Court of Appeals affirmed the trial court's judgment, holding that substantial evidence supported the court's findings and that APL had not established that the Port intended to permanently affix the T5 container cranes to the Terminal 5 realty. Slip. Op. at 17. Thereafter, APL filed a timely petition for discretionary review under RAP 13.4.

V. REASONS WHY THE COURT SHOULD DENY REVIEW

APL asserts that the unpublished decision issued by the Court of Appeals "conflicts with decisions of this Court and Court of Appeals," and that the decision "involves an issue of substantial public interest." *See* Pet. at 7; *see also* RAP 13.4(b)(1), (2), & (4).

APL is incorrect. The decision does not conflict with any prior decision of this Court or the Court of Appeals, and this appeal raises no issue of substantial public importance. Instead, the Court of Appeals followed and applied this Court's analysis in *Boeing* in concluding that the totality of the evidence supported the trial court's finding that the Port properly treated the T5 cranes as personal property, not fixtures. Nothing in the Court of Appeals' unpublished decision warrants further review.

A. The Court Of Appeals Decision Is Not In Conflict With Any Decision Of This Court.

APL claims that review is warranted under RAP 13.4(b)(1) because—according to APL—the Court of Appeals decision conflicts with "decisions of this Court." Pet. at 7. To support its claim, APL suggests that the Court of Appeals did not consider "all pertinent factors reasonably bearing on the intent of the annexor" including the "manner of annexation, and the purpose for which the annexation is made." *Id.* at 7-8 (quoting *Boeing*, 85 Wn.2d 668). APL's criticism is unfounded. The Court of Appeals applied the same analysis that this Court applied in *Boeing*. The decision is entirely consistent with *Boeing*, not in conflict with that case.

As the Court of Appeals correctly noted, *Boeing* is "the leading case in this state addressing the question of fixtures for tax purposes and is substantially similar to this case." Slip. Op. at 6. *Boeing* involved "immense tools" known as "fixed assembly jigs" that were used in manufacturing and assembling the Boeing 747. *Boeing*, 85 Wn.2d at 664. The jigs were bolted to the floor and weighed between 70 and 120 tons. *Id.* The jigs could be removed from the building without injuring the building and, over time, they had been moved from plant to plant. *Id.* at 665. Boeing argued the jigs were fixtures and therefore eligible for a manufacturing tax credit. *Id.* at 664. The Department asserted that the jigs were equipment (i.e., personal property) and ineligible for the tax credit. *Id.* This Court agreed with the Department that the jigs were personal property. *Id.* at 670-71.

In reaching this conclusion, this Court considered various facts and "surrounding circumstances" relating to Boeing's intent, including "the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for which annexation is made." *Id.* at 668. Two factors supported Boeing's contention that the jigs were fixtures. First, since it was undisputed that the jigs were annexed to the Boeing realty, this Court explained that "it arguably could be presumed that the intent of the annexation was to benefit the freehold and not to preserve the jigs as personalty." *Id.* at 669.[5] Second, this Court noted that the jigs were "necessary to the production of the Boeing 747 and the record does not disclose any plans by Boeing to end the production of such aircraft." *Id.*

Other evidence, however, convinced this Court that Boeing did not intend for its fixed assembly jigs to become permanent attachments to the real property. That other evidence consisted of: (1) the feasibility of using the premises for a different purpose "in which case the present jigs would have to be discarded and new ones brought into the plant," (2) the manner in which the jigs were secured to the floor, (3) the feasibility of disassembling and moving the jigs "without undue difficulty or harm to the jigs," (4) whether Boeing considered the jigs to be personal property

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[5] In *Boeing*, the Department had conceded that the jigs were annexed to real property owned by Boeing. *See Boeing*, 85 Wn.2d at 668 n.3. In contrast, the Department has not conceded that the T5 cranes were annexed to the Port's real property, and the trial court found that the T5 cranes were not annexed. CP at 201 (FOF 13). Thus, the first of the two facts supporting Boeing's claim that its fixed assembly jigs were fixtures is not present here.

for tax purposes, and (5) "documentary" evidence that Boeing distinguished the jigs from real property fixtures. *Id.* at 669-70. While none of those factors was, by itself, determinative of Boeing's intent, the totality of the circumstances indicated that Boeing had not intended the jigs to be a permanent accession to the freehold. *Id.* at 670-71.

Here, the Court of Appeals, like the trial court and this Court in *Boeing*, considered all the pertinent facts and circumstances supported by the record. The Court of Appeals discussed the uncontested evidence pertaining to "the movability of the cranes," the "Port's categorization of the cranes for tax purposes," and the documentary evidence indicating that the Port considered the T5 cranes to be personal property, not fixtures. Slip Op. at 8-13. Based on its review, the Court of Appeals summarized:

> [T]here is substantial evidence to support the trial court's challenged findings. Additionally, these findings, along with the unchallenged findings, show that most of the factors considered pertinent in Boeing are also present in this case. The cranes could be easily removed, the cranes could be readily moved and transformed back into personalty, the Port considered the cranes personalty for tax purposes, and the Port did not list the cranes as improvements in the lease. Looking at this evidence, and considering the totality of the circumstances, the findings support the trial court's conclusion that the Port did not intend for the cranes to be treated as fixtures.

Slip Op. at 13-14.

In *Boeing*, this Court mentioned that there were two facts in the record that supported Boeing's contention that the jigs were fixtures, but concluded that the "cumulative effect" of the other evidence was sufficient to uphold the trial court's finding that the jigs were personalty. *Boeing*, 85

Wn.2d at 669. The Court of Appeals applied a similar analysis, concluding that none of APL's countervailing evidence or arguments were persuasive. Slip Op. at 14-16.

Specifically, the Court of Appeals rejected APL's argument that the Port's intent to permanently affix the T5 cranes should be *presumed* from the fact that the cranes were adapted for use at the Terminal 5 facility. According to APL, evidence pertaining to the cranes' adaption for use on the owner's land is sufficient to support both the "adaptation" element and the "intent" element of the common law fixtures test, and is sufficient to establish an evidentiary presumption of "intent." Relying in part on *Boeing*, the Court of Appeals explained that even if the presumption relied on by APL were to apply in this case, it was only one factor that could be considered in the overall analysis. Slip Op. at 15-16. This is entirely consistent with the analysis in *Boeing* where this Court concluded that evidence supporting Boeing's position that the jigs were fixtures, even if sufficient to establish a presumption of intent, was insufficient to overcome the other evidence in the record that Boeing intended its jigs to remain personal property.

In determining whether chattel becomes a fixture, "the cardinal inquiry is into the intent of [the person] making the annexation." *Ballard*, 93 Wash. at 662. And "when the intent is discovered it is generally controlling." *Id.* Here, as in *Boeing*, there is ample evidence supporting the trial court's finding of intent. CP 203-07 (FOF 26-43). Moreover, as in *Boeing*, APL's failure to establish the "intent" element of the common

law test is sufficient to decide the case. *See Boeing*, 85 Wn.2d at 668 ("We agree with the Department of Revenue that the third prong, *i.e.*, the intent of Boeing to make a permanent annexation to the freehold is lacking in the instant case."). The decision of the Court of Appeals is not in conflict with *Boeing* or any other decision of this Court and does not warrant further review under RAP 13.4(b)(1).

B. The Court Of Appeals Decision Is Not In Conflict With Any Prior Court Of Appeals Decision.

APL next contends that discretionary review is required in order to resolve an alleged conflict between two Court of Appeals cases, neither of which the Court of Appeals relied on in deciding this case. *See* Pet. at 10-14. According to APL, a 1986 case established the "correct" rule of law pertaining to the annexation element of the common law fixtures test, and the later decision applied a "conflicting and incorrect rule." Pet. at 10 (citing *Western Ag. Land Partners v. Dep't of Revenue*, 43 Wn. App. 167, 716 P.3d 310 (1986) and *Glen Park Associates, LLC v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.3d 664, *review denied*, 152 Wn.2d 1016, 101 P.3d 107 (2004)).

As the Department has previously explained, there is no genuine conflict between *Western Ag.* and *Glen Park*. *See* Department's Answer to Statement of Grounds for Direct Review at 7-12 (Sup. Ct. No. 86977-4, filed March 9, 2012). Those two cases involved significantly different facts, and neither case established a "mandated" approach that must always be followed when determining if personal property has been

actually annexed to the land. To the contrary, both cases implicitly recognize what Division III recently explained in another fixtures case: "[D]etermining what constitutes a fixture as opposed to personal property is a difficult task that depends on the particular facts of each case." *Union Elevator & Warehouse Co., Inc. v. Department of Transportation*, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008).

Western Ag. and *Glen Park* are consistent with the inherent nature of fixtures cases, which are always fact specific. *See, e.g.*, *Philadelphia Mortg. & Trust Co. v. Miller*, 20 Wash. 607, 610, 56 P. 382 (1899) (the law of fixtures is fact-specific and a finding that chattel is personal property will normally not be disturbed on appeal "unless we were compelled to say that, as a matter of law, the property sued for was a part of the realty"). There is no one "correct" or mandated approach to analyzing fixtures cases, and APL's claim to the contrary is simply incorrect.[6]

In any event, as discussed above, the Court of Appeals decision in this case relied on this Court's analysis in *Boeing*, and did not rely on either *Western Ag.* or *Glen Park.* Consequently, there is no conflict between the Court of Appeal's decision in this case and another decision of the Court of Appeals. Discretionary review under RAP 13.4(b)(2) is not warranted.

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[6] Moreover, this Court implicitly rejected the argument that APL is making here when it denied review in *Glen Park.*

C. The Court Of Appeals Decision Does Not Present Issues of Substantial Public Importance That Should Be Determined By This Court.

Given the substantial evidence supporting the trial court's finding that the Port properly treated the T5 cranes as personal property, this case does not present an issue of substantial public importance requiring review by this Court. APL contends, however, that this Court should accept review in order to decide whether the presumption of intent—which may arise when the owner of personal property actually annexes that property to that owner's realty—shifts the burden of proof to the party opposing the presumption. Pet. at 14-16. In short, APL seeks review so that this Court can decide whether the presumption of intent shifts only the burden of going forward with the evidence (the "Thayer" theory), or shifts the ultimate burden of proof (the "Morgan" theory). *See generally* Karl B. Tegland, *Wash. Prac., Evidence Law and Practice* §§ 301.13 through 301.15 (5th ed. 2013) (discussing the Thayer and Morgan theories of evidentiary presumptions) (copy attached as Appendix A).

For a number of reasons, this case is not a good candidate for deciding whether the presumption of intent that sometimes applies in fixtures cases shifts the burden of producing evidence or shifts both the burden of production and the burden of persuasion. First, the trial court found that the Port had not actually annexed the T5 cranes to Terminal 5. CP 201 (FOF 13); CP 202 (FOF 23). Thus, the presumption of intent did not apply in this case.

Second, as both the trial court and the Court of Appeals noted, applying the presumption of intent would serve no useful purpose where, as here, the evidence of annexation is not clear. CP 203 (FOF 25); Slip Op. at 14-15. Intent is the most important factor under the common law fixtures test, and it makes no logical sense to impose a presumption of intent in those cases where there is very little if any evidence that the property at issue was actually annexed to the real property.

Third, even if the presumption were to apply in this case, it is only one factor supporting APL's claim for a tax refund and is easily rebutted by other substantial evidence in the record showing that the Port did not intend the T5 cranes to be permanently affixed to the Terminal 5 facilities. *See* CP 203-07 (FOF 26-43). Thus, regardless of who had the burden of proof at trial, the substantial evidence in the record clearly established the Port's intent. Even under the Morgan theory of evidentiary presumptions, the substantial evidence in the record relating to the Port's intent would be sufficient to rebut the presumption.

Finally, it is well established that the Legislature may by statute change a rule of common law. *See State ex rel. Madden v. Public Utility Dist. No. 1*, 83 Wn.2d 219, 221, 517 P.2d 585 (1973) ("A statute which is clearly designed to substitute for the prior common law must be given effect."). RCW 82.32.180, which permits a taxpayer to sue for a refund of overpaid excise taxes, clearly provides that the "burden shall rest upon the taxpayer to prove that the tax as paid . . . is incorrect . . . and to establish the correct amount of the tax." This provision would likely impose the

burden of proof on APL in this tax refund lawsuit even if a different common-law rule applied in fixtures cases generally.

The common law fixtures test has been employed in Washington for more than 100 years without any need to decide whether the presumption of intent merely shifts the burden of going forward with evidence rebutting the presumption or shifts the burden of proof pertaining to intent. It is not a matter of substantial public importance for this Court to consider or decide the issue in this case.

D. APL's Contention That There Is No Objective Evidence Supporting The Trial Court's Finding Of Intent Is Incorrect And Insufficient To Merit Discretionary Review By This Court.

APL's final argument in support of its petition theorizes that if the presumption of intent had applied in this case, no objective evidence could support the trial court's finding that the Port intended the T5 cranes to be personal property, not fixtures. Pet. at 17-20. APL's argument, even if true, would not justify discretionary review. In short, APL simply disagrees with the decisions of the trial court and the Court of Appeals, which is not one of the listed criteria in RAP 13.4(b) governing the acceptance of discretionary review.

More importantly, APL's contention that the facts in the record would be insufficient to overcome the presumption of intent is incorrect. APL first argues that the uncontested fact that the T5 cranes could be moved from Terminal 5 without undue difficulty or harm is irrelevant in overcoming the presumption of intent because, according to APL, the

"intent" element is concerned only with the "intent that [the property] be moved or removed before the end of its useful life." Pet. at 18; *see also* CP 201-202 (uncontested FOF 18-22 explaining that the Port's inventory of container cranes were movable and could be relocated to another terminal or even another port). To support this argument, APL incorrectly asserts that in *Boeing* this Court concluded that Boeing "*planned* to remove the jigs" from the real property at some point before the end of their useful lives and it was this "plan" that would have been relevant had that presumption applied. Pet. at 18.[7] But that is not what *Boeing* says. Instead, this Court explained that "the record does not disclose *any plans* by Boeing to end the production of" the 747 aircraft for which the fixed assembly jigs were used. *Boeing*, 85 Wn.2d at 669 (emphasis added). Nonetheless, the fact that the jigs were designed so that they could be removed without undue effort or harm was relevant objective evidence of Boeing intent. *Id.* Moreover, nowhere did this Court assert that the "intent" element is concerned with the owner's intent to keep the jigs in place for their "useful lives." Instead, the Court explained that the cumulative effect of all the evidence (including the movability evidence) "convinces us that the annexation was not intended to be *a permanent benefit to the freehold.*" *Id.* (emphasis added).

[7] This Court in *Boeing* did not directly address the presumption of intent, holding instead that "since Boeing is the owner of the freehold, it *arguably* could be presumed that the intent of the annexation was to benefit the freehold and not to preserve the jigs as personalty." *Boeing*, 85 Wn.2d at 699 (emphasis added).

APL also argues that the "classification evidence" in the record is not the correct "kind of subjective classification evidence" to "rebut the presumption of intent." Pet. at 19-20. According to APL, the fact that the Port treated its purchase of the T5 cranes as a tax exempt purchase for resale, and characterized the cranes as "equipment rental" and not "improvements" in the lease agreement, is not meaningful.

Again, *Boeing* says just the opposite. In *Boeing*, the fact that Boeing treated the jigs as personal property for tax purposes and did not list the jigs as "fixtures" in its internal records was relevant evidence of intent. *Boeing*, 85 Wn.2d at 670. If anything, the objective documentary evidence is even stronger in this case. The Port had treated the T5 cranes as personal property from the inception of the lease and had documented its intent in the lease agreement itself, and in other contemporaneous documents. CP 203-07 (FOF 29-43). Thus, even though APL waited roughly 20 years to bring its claim that the T5 cranes were fixtures, the Port had preserved documentary evidence sufficient to demonstrate that it did not intend for its cranes to become a permanent part of Terminal 5. *See* CP 200 (FOF 8, T5 cranes commissioned at Terminal 5 in 1986); CP 199 (FOF 4, APL filed its refund action in 2006). APL's claim to the contrary is incorrect and was properly rejected by the trial court and the Court of Appeals.

VI. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals does not merit review under RAP 13.4(b), and APL's petition should be denied.

RESPECTFULLY SUBMITTED this 30th day of May, 2014.

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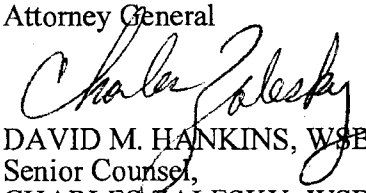

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CERTIFICATE OF SERVICE

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

DATED this 30th day of May, 2014, at Tumwater, WA.

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APPENDIX

5 Wash. Prac., Evidence Law and Practice § 301.13 (5th ed.)

Washington Practice Series TM
Evidence Law and Practice
Database updated June 2013

Karl B. Tegland [a0]

Chapter 3. Burden of Proof and Presumptions
Rule 301. Presumptions in General in Civil and Actions and Proceedings [*Reserved*]
Author's Commentary
B. Presumptions

§ 301.13 Effect of challenged presumptions in civil cases—Generally

What becomes of a presumption when the presumed fact is challenged by evidence to the contrary? This seemingly straightforward question "has literally plagued the courts and legal scholars." [1] One theory, often attributed to James Thayer, is that a presumption merely shifts the burden of producing contrary evidence to the party against whom it operates. If that party produces contrary evidence, the presumption disappears like a "bursting bubble" and has no further application on the case. The jury is told nothing about the presumption. [2] The theory obviously minimizes the importance of a presumption.

A second theory, often attributed to Edmund Morgan, gives presumptions far more vitality. Under the Morgan theory, a presumption actually shifts the burden of proof as to the presumed fact. The jury is instructed that the party against whom the presumption operates has the burden of proving that the presumed fact is not true or does not exist. [3]

Washington has three lines of cases. One line follows the Thayer approach, while the other follows the Morgan approach. A third line consists of cases which either fail to articulate an underlying theory or seemingly draw upon both theories. The result is unfortunate confusion, for of the hundreds of presumptions mentioned in the appellate opinions, only a handful can be described with certainty as having the Thayer or Morgan effect.

In the sections that follow, the two theories are discussed in more detail, and presumptions recognized in Washington are classified to the extent feasible. Thayer presumptions are discussed in § 301.14. Morgan presumptions are discussed in § 301.15. Presumptions not clearly associated with either theory are discussed in § 301.16.

The discussion in this section and in the three subsequent sections pertains largely to presumptions in civil cases. In a criminal case, the effect of a presumption is nearly always determined by reference to statutes and constitutional law. [4]

a0 Member Of The Washington Bar.

1 **Literally plagued**
Broun, McCormick on Evidence § 344 (two-volume 6th ed.).
The Washington Supreme Court has stated candidly that presumptions operate differently dependent upon their reasons and the exigencies of the trial situations in which they are used. Burrier v. Mutual Life Ins. Co. of New York, 63 Wash. 2d 266, 387 P.2d 58 (1963).

2 **Bursting bubble**
Broun, McCormick on Evidence § 344 (two-volume 6th ed.).

3 **Has the burden**
Orland, Presumptions: Reflections on Washington's Proposed Rule 301, 13 Gonz.L.Rev. 935, 938–939 (1978).

4 **Criminal cases**
See § 301.18.

End of Document

5 Wash. Prac., Evidence Law and Practice § 301.14 (5th ed.)

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Chapter 3. Burden of Proof and Presumptions
Rule 301. Presumptions in General in Civil and Actions and Proceedings [*Reserved*]
Author's Commentary
B. Presumptions

§ 301.14 Effect of challenged presumptions in civil cases—When presumption only shifts the burden of producing evidence

Generally. It has been urged that once evidence contrary to the presumed fact is introduced, the presumption disappears like a "bursting bubble" and no longer operates for any purpose. [1] The party relying upon the presumption must then carry on without it.

Under this theory, which is often called the Thayer theory, the only effect of a presumption is to shift the burden of producing evidence to the party against whom the presumption operates. [2] If that party produces contrary evidence, the presumption disappears. In more practical terms, the presumption allows the party relying upon it to survive a motion for a directed verdict at the close of its own case. Once the opposing party presents contrary evidence, the presumption has no other value in the trial. [3] The proponent of the "presumed" fact (no longer actually presumed) must rely upon inferences from the basic fact giving rise to the presumption, inferences from other facts, or direct evidence.

Under this theory, at least in its pure form, the presumption is never mentioned to the jury if contrary evidence has been introduced. [4] (In a judge-tried case, the court would presumably not consider the presumption in deciding the fact issue to which it relates.)

Washington cases. Many Washington opinions acknowledge and apply the Thayer theory, but the cases reveal no general test for determining the presumptions to which it should apply. If this is the present situation—and it seems to be—the subject of presumptions is one of impossible difficulty for lawyers, and trial judges as well. Without a controlling appellate decision, classification of a particular presumption is difficult. It would be preferable to follow the Thayer rule generally with definite exceptions, or to reject it generally, with definite exceptions.

This Thayer theory should probably be followed in criminal cases as to the presumption that ownership once proved continues, [5] and as to the presumption of defendant's knowledge of falsity from the mere uttering of a false deed. [6] There is some authority that the Thayer theory applies to the presumption of negligence that arises when property not perishable is delivered to a bailee and is returned damaged or is not returned at all. [7]

The doctrine of *res ipsa loquitur* seems to embody the Thayer theory of presumptions. [8] In *Chase v. Beard* [9] the trial court refused to instruct upon the doctrine. On appeal the court said there was no necessity for an instruction—that the primary purpose of the doctrine was to withstand defendant's motion for nonsuit. It approved a Georgia instruction that the jury would be authorized to draw inferences of negligence though not required to do so by law. [10] Under such an instruction the jury is not informed about any *presumption*. [11] The burden of proof remains upon the plaintiff. [12] The Washington Pattern Jury Instruction on *res ipsa loquitur* follows this approach. [13]

Other cases are illustrative. [14]

The appellate courts seem to have a greater tendency to apply the Thayer theory to bench trials than to jury trials. [15] Likewise, the Thayer theory seems to be applied when a presumption arises in the context of determining a motion for summary judgment. [16]

It is tempting to think that the theory described in this section is the "general rule" in Washington and that it thus governs with respect to presumptions whose procedural effect has not been articulated by the appellate courts. There has been occasional dictum to this effect, [17] and as evidenced by the citations in this section, most of the newer opinions seem to apply the theory or at least are written in terms consistent with the theory. And yet as indicated in the following two sections, enough decisions have rejected the instant theory, either expressly or impliedly, to make generalizations hazardous. Decisions rejecting the instant theory and adopting the view that the presumption in question shifts the burden of proof are discussed in § 301.15. Presumptions for which the procedural effect has not been articulated are then taken up in § 301.16.

Washington Pattern Jury Instructions. With reference to jury instructions, the committee that drafts the Washington Pattern Instructions takes the position that while Washington law does follow the Thayer theory for some presumptions, it does not follow the theory in "pristine" form. [18] The committee thus rejects the view that once the presumed fact is challenged, the presumption should not be mentioned to the jury in any form whatsoever.

Instead, when the presumption is of the sort given the Thayer effect, the committee recommends the following instruction: "[If you find] [Because] (the basic fact), the law presumes (the presumed fact), and you are bound by that presumption unless you find that (contrary of the presumption)." [19]

Although the pattern instruction is widely used, other views giving less emphasis to the presumption are possible. [20] And, of course, the pattern instruction should not be given if the court can rule, as a matter of law, either way on the presumed fact. [21]

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1

Bursting bubble
See § 301.13.

2

Shift the burden
Broun, McCormick on Evidence § 344 (two-volume 6th ed.).
"Presumptions are the bats of the law flitting in the twilight but disappearing in the sunshine of actual facts. The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue." Taufen v. Estate of Kirpes, 155 Wash. App. 598, 604, 230 P.3d 199, 202 (Div. 3 2010), review denied, 169 Wash. 2d 1019, 238 P.3d 503 (2010).
But see the seemingly contrary statement in Gould v. Mutual Life Ins. Co. of New York, 95 Wash. 2d 722, 629 P.2d 1331 (1981) (after stating that the presumption against suicide must be overcome by a preponderance of the evidence, the court states "the presumption did not act to shift either the burden of coming forward with the evidence, or the burden of persuasion.").

3

No other value
Broun, McCormick on Evidence § 344 (two-volume 6th ed.).

4

Never mentioned
Broun, McCormick on Evidence § 344 (two-volume 6th ed.).

5

Ownership
State v. Lew, 26 Wash. 2d 394, 174 P.2d 291 (1946) (this case could be distinguished).

6

False deed
State v. Hatfield, 65 Wash. 550, 118 P. 735 (1911).

7

Negligence of bailee
Chaloupka v. Cyr, 63 Wash. 2d 463, 387 P.2d 740 (1963) (dictum).

8

Res ipsa loquitur

A more detailed discussion of res ipsa loquitur quickly becomes a discussion of tort law and is beyond the scope of this volume. As to the current status of the doctrine in Washington, see Pacheco v. Ames, 149 Wash. 2d 431, 69 P.3d 324 (2003), and Robison v. Cascade Hardwoods, Inc., 117 Wash. App. 552, 72 P.3d 244 (Div. 2 2003).
The Washington case law is reviewed in 6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 22.01 (5th ed.) (commentary following WPI 22.01).

9

Chase v. Beard
Chase v. Beard, 55 Wash. 2d 58, 346 P.2d 315 (1959) (overruled by, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984)).

10

A Georgia instruction
Chase v. Beard, 55 Wash. 2d 58, 346 P.2d 315 (1959) (overruled by, Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984)).
But there can be no complaint by plaintiff on appeal if there has been an instruction favorable to him. Crippen v. Pulliam, 61 Wash. 2d 725, 380 P.2d 475 (1963).

11

Not informed
In ZeBarth v. Swedish Hospital Medical Center, 81 Wash. 2d 12, 499 P.2d 1 (1972), the court approved an instruction which stated that the rule "is that when an agency or instrumentality which produces injury is under the control of a defendant or its employees, and the injury which occurred would ordinarily have resulted if those in control had used proper care, then, in the absence of satisfactory explanation, you are at liberty to infer, though you are not required to so infer, that the defendant, or its employees, were at some point negligent, and that such negligence produced the injury complained of by the plaintiff." This was a suit against a hospital, involving complicated medical issues.
But an instruction upon *res ipsa loquitur* cannot state that upon making certain findings the jury "shall find" the defendant negligent. Bean v. Stephens, 13 Wash. App. 364, 534 P.2d 1047 (Div. 1 1975).
See also Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).
Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968).

12

Remains on the plaintiff
Hufford v. Cicovich, 47 Wash. 2d 905, 290 P.2d 709 (1955).
Shoberg v. Kelly, 1 Wash. App. 673, 463 P.2d 280 (Div. 1 1969) (affidavit and statements submitted on motion for summary judgment).

13

Pattern instruction
6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 22.01 (5th ed.). The Washington case law is reviewed in the commentary following WPI 22.01.

14

Illustrative cases
In re Indian Trail Trunk Sewer, 35 Wash. App. 840, 670 P.2d 675 (Div. 3 1983) (presumption that an improvement is a benefit to land located within the LID was rebutted; "A presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary .... Presumptions are the 'bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' ... The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue.").
Seggern v. Washington State Dept. of Social and Health Services, 28 Wash. App. 332, 622 P.2d 1307 (Div. 2 1981) (presumption that recipient of public assistance who misstates or fails to reveal a material fact affecting eligibility does so intentionally; presumption said to have no further operative effect once prima facie evidence to the contrary is introduced).
The presumption of unseaworthiness from the unexplained sinking of a vessel was regarded as a "Thayer" presumption in Sprague v. Snug Harbor Marina, Inc., 13 Wash. App. 246, 534 P.2d 583 (Div. 1 1975).
In re Cunningham's Estate, 19 Wash. 2d 589, 143 P.2d 852 (1943) (presumption that when one pays the consideration for real property deeded to another and there is no evidence of intent, a resulting trust is presumed in favor of the person who pays the consideration).

15

Bench trials

Bank of Washington v. Hilltop Shakemill, Inc., 26 Wash. App. 943, 614 P.2d 1319 (Div. 1 1980) (judge-tried case involving presumption of community liability; "A presumption is not evidence; its purpose is only to establish which party has the burden of first producing evidence on a matter in issue .... Once the Starrys had presented evidence to overcome the presumption of community liability, the presumption had served its function. The trial court was then required to disregard the presumption, evaluate the evidence presented by both sides, and reach its conclusion. Our review of the record shows the court did just that.").

To the same effect see Tire Towne, Inc. v. G & L Service Co., 10 Wash. App. 184, 518 P.2d 240 (Div. 2 1973) (judge-tried case involving presumption of ownership arising from possession).

State v. Fitzpatrick, 5 Wash. App. 661, 491 P.2d 262 (Div. 2 1971) (judge-tried criminal case involving statutory presumption).

16

Summary judgment

Bates v. Bowles White & Co., 56 Wash. 2d 374, 353 P.2d 663 (1960).

Key v. Cascade Packing Co., Inc., 19 Wash. App. 579, 576 P.2d 929 (Div. 3 1978).

Possibly illustrative is Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977) (presumption of agency when employee drives employer's car; "A presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary ... the presumption had become a nullity;" the evidence to the contrary, however, was "clear, convincing, and uncontradicted," so the analysis may be distinguishable from the pure Thayer theory which does not require an overwhelming showing of contrary evidence before the presumption disappears).

17

General rule

In Chaloupka v. Cyr, 63 Wash. 2d 463, 387 P.2d 740 (1963), the court said, "One bailment case states that presumption [of negligence of bailee] is sufficient *only* to get the plaintiff past a nonsuit .... *This is the usual result reached when dealing with presumptions.*" [italics added].

And see concurring opinion in Burrier v. Mutual Life Ins. Co. of New York, 63 Wash. 2d 266, 387 P.2d 58 (1963).

18

Not in pristine form

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.03 (5th ed.) (commentary following pattern instruction).

19

Recommended instruction

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.03 (5th ed.) (commentary following pattern instruction).

20

Other views possible

Broun, McCormick on Evidence § 344 (two-volume 6th ed.).

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.03 (5th ed.) (commentary following pattern instruction).

21

Should not be given

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.03 (5th ed.) (Note on Use following pattern instruction).

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5 Wash. Prac., Evidence Law and Practice § 301.15 (5th ed.)

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Chapter 3. Burden of Proof and Presumptions
Rule 301. Presumptions in General in Civil and Actions and Proceedings [*Reserved*]
Author's Commentary
B. Presumptions

§ 301.15 Effect of challenged presumptions in civil cases—When presumption affects the burden of proof

Generally. The Thayer theory, discussed in the previous section, has been denounced by many as giving presumptions far less effect than they deserve. [1] A second theory, often called the Morgan theory, gives presumptions far more vitality. Under the Morgan theory, a presumption actually shifts the burden of proof as to the presumed fact. [2]

Thus, like the Thayer theory, the Morgan theory would enable the party relying upon the presumption to survive a motion for a directed verdict at the close of its own case. But unlike the Thayer theory, the Morgan theory holds that the presumption does not disappear upon the introduction of contrary evidence. The presumption continues throughout the trial, and the jury is instructed that the party against whom the presumption operates has the burden of proving that the presumed fact is not true or does not exist. [3] In deciding whether or not the presumed fact is true, the jury may consider the basic fact which gave rise to the presumption, inferences from the basic fact, evidence contrary to the presumed fact, and any other evidence in the case.

The Morgan theory has been rejected with respect to some presumptions. [4] These cases, including the "bursting bubble" cases in the previous section, say that the presumption does not affect the burden of proof but rather affects only the burden of going forward with the evidence. The court has also indicated that a presumption will not shift the burden of proof to a party who already has the overall burden of proof in the case. It is thought that a presumption having this effect would place a double burden on the party against whom it operates. [5]

Nevertheless, the theory that a presumption shifts the burden of proof has been acknowledged and applied in some Washington opinions. The Supreme Court has stated, for example, that as to the presumption that all property acquired by spouses during coverture is community property, "the burden is upon the party who contends that it is separate property to prove otherwise." [6]

Still other opinions, without articulating one theory or the other, are written in terms of the quantum of proof necessary to overcome the presumption. It is arguable that these opinions also follow the Morgan theory, and they are treated as such in this volume and in the Washington Pattern Jury Instructions. [7]

In any event, the theory that a presumption shifts the burden of proof should not be confused with the view that a presumption is evidence to be weighed against contrary evidence. In some states jury instructions are phrased in this way, but the theory is disfavored among most modern authorities. The Washington opinions uniformly reject the theory that a presumption is evidence. [8]

Quantum of evidence necessary to overcome presumption. Assuming a particular presumption can be identified as one that shifts the burden of proof as to the presumed fact, there remains the question of whether the presumption is overcome when the opponent produces a preponderance of the evidence, clear and convincing evidence, or some other quantum of evidence contrary to the presumed fact.

If the evidence contrary to the presumed fact is so overwhelming that the presumed fact is disproved as a matter of law, no issue concerning the effect of the presumption arises. The fact issue to which the presumption related is simply no longer an issue for the jury. [9] But what quantum of evidence short of the overwhelming evidence just described is sufficient to overcome the presumption?

No single test or standard is expressed in the opinions, although in the interest of certainty a universal standard would be most desirable. On the other hand, logic and fairness occasionally demand different treatment of different presumptions. A 1936 opinion seems to describe appropriately the present state of the case law:

> The quantum and quality of proof sufficient to rebut a presumption differs widely in different classes of cases. For instance, in a murder case, where the killing is admitted and the presumption follows that defendant is guilty of murder in the second degree, it is error not to instruct the jury on the presumption of innocence ... And it is proper to instruct the jury that the presumption of innocence attends the defendant until overcome by the evidence ... and guilt is proven beyond a reasonable doubt ... In fraud cases, the presumption of honesty and fair dealing must be rebutted by evidence that is clear, cogent, and convincing, and it is proper to so instruct the jury ... The sum and substance of all that has been written on the force and effect of presumptions is that, in the first instance, it is for the court to say whether or not the evidence is sufficient, as a matter of law, to overcome a presumption. If not, the question may be left to the jury, under proper instruction. [10]

Unfortunately, in most instances the "proper instructions" are not readily apparent. The Washington opinions do not indicate any general guidelines or standards. There are no approved general tests, and to add to the possibility of error on the part of counsel and judges, the opinions do not indicate the pertinent factors to be considered in solving the problem.

An attempt is made here to identify (to the extent case law makes it feasible) the quantum of evidence necessary to overcome various presumptions. To repeat what has been said earlier, the discussion assumes the evidence contrary to the presumed fact is not so overwhelming as to be established as a matter of law, and that the jury must thus determine whether the presumption is rebutted.

Clear and convincing evidence. The court has stated generally that certain presumptions are not overcome (that is, that the presumed fact is not to be considered rebutted) unless the evidence to the contrary is clear and convincing. Such presumptions usually have a strong policy basis and are sometimes called "enhanced" presumptions. It seems clear that such presumptions shift the burden of proof on the issue of the presumed fact to the party against whom the presumption operates. [11]

A presumption may be overcome by clear, cogent, and convincing evidence despite the presence of evidence to support the presumed fact. [12]

A presumption may be overcome by clear, cogent, and convincing evidence even though the evidence is largely circumstantial. The courts have rejected the argument that the presumption of delivery can be overcome only by direct evidence. [13]

Presumably, if the contrary evidence is so overwhelming that the presumed fact could not be true, the judge should not submit the issue of the existence of the presumed fact to the jury and should decide that it is not true as a matter of law. [14]

Presumptions that can be rebutted only if the contrary evidence is clear and convincing include the following presumptions: the presumption that when the manager of the community incurs a debt, it is presumptively a community obligation; [15] the presumption that property acquired after marriage is community property; [16] the presumption that where a will is rational on its face and is executed in legal form, the testator had testamentary capacity and the will speaks his wishes; [17] and the presumption that notarial or other certificates of acknowledgment import verity. [18]

Miscellaneous other examples are included in § 301.10 (Example Presumptions).

Preponderance of the evidence. Distinguishable from the above presumptions are those that shift the burden of proof as to the presumed fact but that may be rebutted by some quantum of evidence short of clear, cogent, and convincing evidence. In most instances, the quantum of evidence necessary for rebuttal is unclear from the decisions.

In a few situations, it is settled that the presumption is overcome only when the opponent disproves the presumed fact by a preponderance of the evidence. Logically at least, these presumptions should be regarded as shifting to the opponent the burden of proof as to the presumed fact, and they are treated as such in the Washington Pattern Jury Instructions. [19]

In a products liability action, for example, the product is presumed to have a useful safe life of twelve years, but the presumption may be rebutted by a preponderance of the evidence. [20] In a suit upon a life insurance policy, there is a presumption against suicide that places upon the insurance company the burden of proving suicide by a preponderance of

the evidence.[21] The same rule is probably applicable to the presumption of agency between the owner and driver of an automobile.[22]

Presumptions for which the court has specified neither a "clear and convincing" nor a "preponderance" test are discussed in § 301.16.

Jury instructions. The Washington Pattern Instruction for presumptions that shift the burden of proof as to the presumed fact states: "[If you find] [Because] (the basic facts), the law presumes (the presumed fact), and your are bound by that presumption unless you find [by a preponderance of the evidence] [by clear, cogent, and convincing evidence] that (contrary of presumption)."[23]

The Note on Use and other commentary following the pattern instruction offer guidance on selecting among the various optional words and phrases.[24]

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1

Has been denounced

Broun, McCormick on Evidence § 344 (two-volume 6th ed.).

2

Morgan theory

Orland, Presumptions: Reflections on Washington's Proposed Rule 301, 13 Gonz.L.Rev. 935, 938–939 (1978).

3

Has the burden

Orland, Presumptions: Reflections on Washington's Proposed Rule 301, 13 Gonz.L.Rev. 935, 938–939 (1978).

4

Has been rejected

See § 301.16 The Thayer or "bursting bubble" cases cited in § 301.14 are also on point.

5

A double burden

Lappin v. Lucurell, 13 Wash. App. 277, 534 P.2d 1038 (Div. 1 1975) (refusal to adopt presumption of gift from transfer of property by uncle to niece, giving double burden as one reason for refusal).

Peacock v. Piper, 81 Wash. 2d 731, 504 P.2d 1124 (1973) (refusal to recognize presumption that physician properly applied degree of skill and learning required of physicians, giving double burden as one reason for refusal).

Graving v. Dorn, 63 Wash. 2d 236, 386 P.2d 621 (1963) (refusal to adopt rebuttable presumption of capacity of a minor between ages of 6–14 years, giving double burden as one reason for refusal).

Mills v. Pacific County, 48 Wash. 2d 211, 292 P.2d 362 (1956) (abolishing presumption of due care when there is an issue of contributory negligence).

Hutton v. Martin, 41 Wash. 2d 780, 252 P.2d 581 (1953) (same).

6

Community property

In re Smith's Estate, 73 Wash. 2d 629, 440 P.2d 179 (1968).

Graham v. Radford, 71 Wash. 2d 752, 431 P.2d 193 (1967).

A detailed discussion of presumptions relating to community property can be found in Weber, 19 Washington Practice: Family and Community Property Law With Forms §§ 10.1 to 10.7.

7

Pattern instructions

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.00 to 24.05 (5th ed.).

8

Uniformly reject

Gould v. Mutual Life Ins. Co. of New York, 95 Wash. 2d 722, 629 P.2d 1331 (1981) (presumption against suicide).

Scarpelli v. Washington Water Power Co., 63 Wash. 18, 114 P. 870 (1911).

Nicholson v. Neary, 77 Wash. 294, 137 P. 492 (1914).
McMullen v. Warren Motor Co., 174 Wash. 454, 25 P.2d 99 (1933).
Selover v. Aetna Life Ins. Co., 180 Wash. 236, 38 P.2d 1059 (1934).
Morris v. Chicago, M., St. P. & P.R. Co., 1 Wash. 2d 587, 97 P.2d 119 (1939) (overruled in part by, Hutton v. Martin, 41 Wash. 2d 780, 252 P.2d 581 (1953)).
Sullivan v. Associated Dealers, 4 Wash. 2d 352, 103 P.2d 489 (1940).
Bradley v. S.L. Savidge, Inc., 13 Wash. 2d 28, 123 P.2d 780 (1942).
Gardner v. Seymour, 27 Wash. 2d 802, 180 P.2d 564 (1947).
Kay v. Occidental Life Ins. Co., 28 Wash. 2d 300, 183 P.2d 181 (1947).
Burrier v. Mutual Life Ins. Co. of New York, 63 Wash. 2d 266, 387 P.2d 58 (1963).
Bank of Washington v. Hilltop Shakemill, Inc., 26 Wash. App. 943, 614 P.2d 1319 (Div. 1 1980).
Tire Towne, Inc. v. G & L Service Co., 10 Wash. App. 184, 518 P.2d 240 (Div. 2 1973).
State v. Fitzpatrick, 5 Wash. App. 661, 491 P.2d 262 (Div. 2 1971).

9

No longer an issue

In some cases it has been said that the court may find as a matter of law that the presumed fact does not exist and withdraw the issue from the jury when the opponent introduces "competent evidence from either *interested or disinterested* witnesses whose testimony is uncontradicted, unimpeached, clear, and convincing. When evidence of that degree and character is submitted by the defendant the presumption disappears entirely from the case, casting upon the plaintiff [in whose favor the presumption operated] the burden of producing *competent evidence* to meet the evidence of the defendant [the opponent], and of establishing by a preponderance of the evidence the [presumed fact]." Bradley v. S.L. Savidge, Inc., 13 Wash. 2d 28, 123 P.2d 780, 787 (1942) (matter in brackets is added or substituted for material in the quoted sentences).

Consistent cases:

Pickering v. Hanson, 28 Wash. 2d 603, 183 P.2d 487 (1947).
Carlson v. Wolski, 20 Wash. 2d 323, 147 P.2d 291 (1944).
Hanford v. Goehry, 24 Wash. 2d 859, 167 P.2d 678 (1946).
Callen v. Coca-Cola Bottling Inc., 50 Wash. 2d 180, 310 P.2d 236 (1957).
Nawrocki v. Cole, 41 Wash. 2d 474, 249 P.2d 969 (1952).
McGinn v. Kimmel, 36 Wash. 2d 786, 221 P.2d 467 (1950).
Murray v. Corson Corp., 55 Wash. 2d 733, 350 P.2d 468 (1960).
Heber v. Puget Sound Power & Light Co., 34 Wash. 2d 231, 208 P.2d 886 (1949).
Under these circumstances it appears that a rebuttable presumption has no operation as a matter of law, and cannot take the presumed fact to the jury in a jury case. In particular cases there may be a question whether testimony is uncontradicted, unimpeached, clear, and convincing. Whether the testimony is convincing to such a degree is largely in the discretion of the trial judge. Hanford v. Goehry, 24 Wash. 2d 859, 167 P.2d 678 (1946). See comment on this point in In re Shaner's Estate, 41 Wash. 2d 236, 248 P.2d 560 (1952).

10

A 1936 opinion

Luna De La Peunte v. Seattle Times Co., 186 Wash. 618, 59 P.2d 753 (1936).

11

Shift the burden

Broun, 2 McCormick on Evidence § 344 (two-volume 6th ed.).

12

May be overcome

Matter of Estate of O'Brien, 46 Wash. App. 860, 733 P.2d 235 (Div. 1 1987), judgment rev'd, 109 Wash. 2d 913, 749 P.2d 154 (1988) (see § 66, note 25).

13

Largely circumstantial

Matter of Estate of O'Brien, 46 Wash. App. 860, 733 P.2d 235 (Div. 1 1987), judgment rev'd, 109 Wash. 2d 913, 749 P.2d 154 (1988) (see § 66, note 25).

14

So overwhelming

See footnote 9, above.

15

Community obligation

Malotte v. Gorton, 75 Wash. 2d 306, 450 P.2d 820 (1969).

Dizard & Getty v. Damson, 63 Wash. 2d 526, 387 P.2d 964 (1964) (and see cases cited therein).

Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wash. App. 351, 613 P.2d 169 (Div. 2 1980).

But see Bank of Washington v. Hilltop Shakemill, Inc., 26 Wash. App. 943, 614 P.2d 1319 (Div. 1 1980), seemingly applying the Thayer theory.

16

Community property

See cases cited in In re Dewey's Estate, 13 Wash. 2d 220, 124 P.2d 805 (1942). Many other cases are illustrative.

See also McCoy v. Ware, 25 Wash. App. 648, 608 P.2d 1268 (Div. 3 1980) (increase in value of separate property presumed community property when community services or funds were used; presumption rebuttable by "clear and satisfactory" evidence).

A detailed discussion of presumptions relating to community property can be found in Weber, 19 Washington Practice: Family and Community Property Law With Forms §§ 10.1 to 10.7.

17

Testamentary capacity

Matter of Estate of Eubank, 50 Wash. App. 611, 749 P.2d 691 (Div. 1 1988) (presumption was overcome and will was declared valid).

In re Meagher's Estate, 60 Wash. 2d 691, 375 P.2d 148 (1962) and cases cited therein.

18

Import verity

Whalen v. Lanier, 29 Wash. 2d 299, 186 P.2d 919 (1947).

Chaffee v. Hawkins, 89 Wash. 130, 154 P. 143 (1916).

19

Pattern instructions

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.05 (5th ed.).

But see the seemingly contrary statement in Gould v. Mutual Life Ins. Co. of New York, 95 Wash. 2d 722, 629 P.2d 1331 (1981) (after stating that the presumption against suicide must be overcome by a preponderance of the evidence, the court states "the presumption did not act to shift either the burden of coming forward with the evidence, or the burden of persuasion.").

20

Products liability

RCWA 7.72.060.

The presumption concerning the safe life of a product is discussed at length in Schroeder, Washington's Useful Safe Life: Snipping Off the Long Tail of Product Liability?, 57 Wash.L.Rev. 503–523 (1982).

21

Against suicide

Gould v. Mutual Life Ins. Co. of New York, 95 Wash. 2d 722, 629 P.2d 1331 (1981) and authorities cited therein (extended discussion; jury instructions quoted and approved).

The jury instructions quoted in *Gould* seem to waiver between the bursting bubble theory and the theory that the presumption shifts the burden of proof. The drafters of the Washington Pattern Jury Instructions recommend a simplified instruction stating: "If you find that deceased died of a gunshot wound [or other cause of accidental death], the law presumes that his death was not suicidal (or was accidental), unless you find by a preponderance of the evidence that his death was suicidal." 6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.05 (5th ed.) (Note on Use following pattern instruction).

Law reviews

Fennelly, John E., Florida's Anti-Suicide Presumption: An Evidentiary Chameleon, 26 Stetson L. Rev. 299–321 (1996).

22

Agency

Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933) (the burden is cast upon the defendant to overcome the presumption by a fair preponderance of the evidence).

At least one case, however, could be interpreted to mean that the Thayer theory is applicable. Bradley v. S.L. Savidge, Inc., 13 Wash. 2d 28, 123 P.2d 780 (1942).

Several cases which applied the rule that contrary testimony of interested witnesses would not overcome the presumption are overruled by *Bradley v. Savidge, Inc.*, above.

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Pattern instruction

6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.05 (5th ed.).

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Guidance

See commentary following pattern instruction in 6 Washington Practice: Washington Pattern Jury Instructions—Civil, WPI 24.05 (5th ed.).

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Please file the attached Answer to Petition for Discretionary Review. Thank you.