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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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ANNE E. OMAN and KRAIG G. OMAN, husband and wife, and the
marital community composed thereof,

Plaintiffs/Appellants,

v.

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/Respondents.

REPLY OF APPELLANTS OMAN

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A. INTRODUCTION

The trial court erred when it granted summary judgment to BMW of Bellevue because the Omans presented more than enough evidence to support the legitimate inference that the dealership's negligence was the proximate cause of the fire. In its response, BMW of Bellevue's attempt to dismiss or refute this evidence only further underscores the reality that genuine issues of material fact exist in this case. This body of evidence, while circumstantial, is strong enough that even without considering the opinions of the Omans' expert Trevor Newbery, the Court should overturn the trial court's grant of summary judgment to BMW of Bellevue. Mr. Newbery's opinions, based on the overwhelming physical evidence that the fire originated in the BMW 335xi, provide additional support for finding that the trial court erred in dismissing the dealership.

As for BMW NA, the trial court incorrectly evaluated the *res ipsa loquitur* method of proof as applied to the Omans' claim against BMW NA by failing to consider the Washington Supreme Court's recent holdings in *Curtis v. Lein*. Moreover, the Omans have met the three elements necessary to rely on *res ipsa*. Common experience teaches that car fires do not normally occur under the specific circumstances of this case in the absence of negligence. BMW NA has the legal responsibility for ensuring the proper functioning of the N54 engine, the instrumentality

that probably caused the fire, and thus the control element of the doctrine is met. Finally, since the fire started in the BMW, not in the Omans' Pontiac, the Omans did not contribute to their own harm. Because the trial court incorrectly evaluated whether the Omans can bring a claim against BMW NA under the *res ipsa loquitur* method of proof, the Court should reverse the trial court's grant of summary judgment to BMW NA as well.

B. ARGUMENT

(1) Genuine Issues of Material Fact Exist Over Whether BMW of Bellevue Negligently Serviced Mr. Thorne's Car

(a) BMW of Bellevue's Interpretation of the Facts in Its Response Shows That Genuine Issues of Material Fact Are in Dispute

The issue of proximate causation is a generally question for the jury. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn.App. 326, 330, 966 P.2d 351, 353 (1998)(citing *Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 935, 653 P.2d 280 (1982)). Because the question of proximate cause is for the jury, "it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." *Id.* (quoting *Bernethy*, 97 Wn.2d at 935, 653 P.2d 280 (internal citations omitted)). In *Attwood*, the court held that medical testimony, considered in the light most favorable to the non-moving party, showed there was a

disputed issue of material fact as to whether Albertson's negligence caused Mr. Attwood's death. *Id.* at 332, 354.

BMW of Bellevue's substantially response undermines its own position in support of summary judgment by repeatedly referencing disagreements with the Omans over material facts. For example, attempting to justify its failure to fix Mr. Thorne's car on October 26, 2009, BMW of Bellevue repeatedly claims that its service department could not have relied upon a bulletin, SI B13 04 09, that did not yet exist. *See* Resp. of BMW of Bellevue, at 7, 31; *see also* RP at 5:17-19 ("...he misreads a service bulletin which wasn't issued until way after"); at ("That bulletin wasn't in existence at that time....")

In doing so, the dealership ignores the evidence in the record that an earlier version of this same bulletin existed when Mr. Thorne brought his car in for service. The Software Error Bulletin, SI B12 06 09, entitled "Engine Electrical Systems," is dated July 2009. CP 450. On page two, the July 2009 Software Error Bulletin directly references the Cold Start Bulletin:

IMPORTANT NOTE:

For N54 misfire faults occurring during a cold start, **refer to SI B13 04 09** for additional diagnostic information.

CP 451 (emphasis supplied). Thus the Cold Start Bulletin must have existed when Mr. Thorne brought his car into BMW of Bellevue for repairs, otherwise the July 2009 Software Error Bulletin could not have referenced it. The trial court correctly understood this, and accepted that the Cold Start Bulletin was in fact available for BMW of Bellevue to consult at the time.

Moreover, BMW of Bellevue's only explanation for its reliance on the July 2009 Software Error Bulletin instead of the Cold Start Bulletin is to claim its mechanics read the Software Error Bulletin, found it inapplicable, and asked Mr. Thorne to return a week later after the software update. Resp. at 31-32, citing CP 130, 259. While BMW of Bellevue claims this interpretation of the facts is "undisputed," the record supports no such conclusion. The October 26, 2009 invoice, CP 130, reads, "A customer states that the car is running rough and service engine soon light is on. Performed diagnostics... ...Performed short test. Has misfire faults. Follow bulletin. SI B12 06 09. Per foreman we are waiting for a week for proper update software to avoid hardware crashing."

The discrepancies between how the Omans and BMW of Bellevue view the evidence are fundamental differences in interpreting material facts. A "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. *Lamon v. McDonnell Douglas Corp.*, 91

Wn.2d 345, 349, 588 P.2d 1346, 1348 - 1349 (1979)(citations omitted.)

The Omans' theory of negligence against BMW of Bellevue centers on the dealership's failure to consult the correct service bulletin on October 26, 2009. Thus, the bulletin's existence and the dealership's specific analysis of the Thorne's car are obviously facts material to the outcome of the case.

The weight of this evidence should be evaluated by the jury, not the trial court. As in *Attwood*, the facts are disputed and the inferences therefrom are obviously capable of reasonable doubt and difference of opinion. Rather than supporting its argument, BMW of Bellevue's own interpretation of these key facts actually strengthens the Omans' basis for challenging the trial court's grant of summary judgment to the defendant. Accordingly, the Court should conclude the trial court erred in granting BMW of Bellevue's motion for summary judgment.

(b) The Omans' Evidence Supports the Legitimate Inference that BMW of Bellevue Was Negligent.

In its response, BMW of Bellevue spends two thirds of its argument addressing points the Omans have already conceded, *i.e.* there is no Washington Product Liability Act (WPLA) claim against the dealership, and the *res ipsa loquitur* method of proof is unnecessary. As counsel explained during oral argument, the Omans' essential claim against BMW of Bellevue is straight negligence. The ultimate question this Court must

answer as to BMW of Bellevue is whether the Omans' proof of the dealership's negligence relies merely on conjecture, or whether their circumstantial evidence against the dealership, considered in the light most favorable to the Omans, could reasonably lead the jury to conclude there is a greater probability that BMW's negligence caused the fire than that it did not.

In the cases BMW of Bellevue relies upon, courts have held that plaintiffs improperly speculated about proximate cause only when there is no evidence supporting plaintiffs' causation theories. For example, in *Garner v. Seymour*, the court held the judgment in favor of the plaintiff was improper because it relied on conjecture, not on evidence rising to the level of adequate circumstantial proof of proximate cause. 27 Wn.2d 802, 180 P.2d 564 (1947). But in *Gardner*, there was "absolutely no evidence" to explain how Mr. Gardner fell down a freight elevator shaft and became fatally injured. *Id.* at 805. See also *Whitehouse v. Bryant Lumber & Shingle Mill Co.*, 50 Wn.563, 565, 97 P. 751 (1908)(No evidence existed of the employer's negligence as to the proximate cause of Mr. Whitehouse's death because there was "...no testimony whatever tending to show in what manner he came in contact with the saw."); *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953)(The plaintiff, injured in an auto collision while riding as a passenger in a cab, offered no evidence

supporting her theory that the accident was caused by the negligence of the cab driver who was killed in the accident, and thus did not rise above the level of conjecture.)

In 1981, the court in *Sanchez v. Haddix*, citing *Arnold v. Sanstol*, again applied the rule that, “Where causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one which a defendant would be liable and under the other which there would be no liability, a jury is not permitted to speculate on how the accident occurred.” 95 Wn.2d 593, 627 P.2d 1312 (1981). But in the *Sanchez* case, as in *Whitehouse*, *Gardner* and *Arnold*, the plaintiffs offered no evidence to support their theories of negligence against the defendant, and the *Sanchez* court affirmed the trial court’s dismissal of the action.

Thus, the facts in the cases BMW of Bellevue cites for authority that the Omans are merely speculating about the dealership’s negligence are easily distinguishable from the facts in this case. Here, the established evidence points to malfunctions in the BMW’s fuel system as the culprit, malfunctions which BMW of Bellevue failed to diagnose and correct. It is undisputed that the BMW 335xi was experiencing rough starts, reduced power, rough idle and an engine light warning in the days leading up to the fire. CP 122. It is undisputed that on October 26, 2009, nine days

before the fire, Mr. Thorne brought his car into BMW of Bellevue for service to correct these problems. CP 130. No one disputes that the Cold Start Bulletin, SI B13 04 09, describes precisely the same problems Mr. Thorne was experiencing with his car, *i.e.* misfires during and shortly after startup, CP 453, whereas the Software Error Bulletin, SI B12 06 09, describes problems his car was not experiencing, *i.e.* misfire faults occurring at full operating temperatures, most frequently after driving for extended periods of time, CP 450. It is undisputed that the Cold Start Bulletin, SI B13 04 09, states high pressure fuel pump malfunctions are the cause of the symptoms in the BMW 335xi, and recommends replacement of high-pressure injectors and any fuel soaked spark plugs, CP 453. No one challenges the fact that the N54 engine like the one in Mr. Thorne's BMW had a history of high pressure fuel pump and fuel injector failures. CP 447. Finally, it is undisputed that BMW of Bellevue made no repairs to the rough running vehicle on October 26, 2009, that its service slip references only the Software Error Bulletin, SI B12 06 09, and that BMW of Bellevue returned the car to the Thornes without fixing it, telling him there was "...no fix and that the car was fine (sic) to drive until software was available..." CP 138.

In *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, another case BMW of Bellevue cites as authority for its position, the Washington Supreme Court articulated the probative effect of circumstantial evidence:

Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.

But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent *with known facts or conditions*, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is *evidence* which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

5 Wn.2d 144, 163, 106 P.2d 314, 322 - 323 (1940)(quoting *Georgia Power Co. v. Edmunds*, 233 Ala. 273, 171 So. 256, 258 (1936)(italics the Washington Supreme Court's.) Notwithstanding BMW of Bellevue's refrain that the Omans can offer only speculation to back up their theory of negligence, in reality, the evidence in their case falls into the latter category of cases described in *Prentice Packing*. The well documented malfunctions in the 335xi – the same type as those described by BMW itself as stemming from problems with the car's fuel system – coupled

with BMW of Bellevue's failure to diagnose and fix these rough running problems only nine days before the fire, are ample evidence pointing to the Omans' theory of the dealership's negligence. The Omans' unchallenged evidence supports a logical sequence of cause and effect, beginning with BMW of Bellevue's failure to fix Mr. Thorne's car and ending with the unfortunate conflagration on November 4, 2009.

(c) The Omans' Expert Testimony About Ultimate Issues of Fact Also Precludes Summary Judgment

The Court may consider the two declarations by the Omans' expert, Mr. Trevor Newbery, even though the second one was in support of their motion for reconsideration. When considering an appeal of a trial court's grant of summary judgment, the appellate court considers all the evidence before it, making all inferences in the light most favorable to the nonmoving party. *Callahan v. Walla Walla Housing Authority*, 126 Wn. App. 812, 815, 110 P.3d 782, 784 (2005). In the context of summary judgment, unlike a trial, there is no prejudice to any findings if additional information is considered. *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 77, 872 P.2d 87, 90 (1994). Therefore, the Court may properly consider both of Mr. Newbery's declarations supporting his opinions.

An affidavit containing expert opinion on an ultimate issue of fact is generally sufficient to create a genuine issue of fact precluding summary judgment. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346, 1350 (1979). An expert's affidavit submitted in opposition to a motion for summary judgment must be factually based and must affirmatively show competency to testify to the matters stated therein. *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 34, 991 P.2d 728, 731 (2000)(citation omitted). An expert's factual basis may consist of information in the record or information not in the record but reasonably relied on by others in the field. *Id.* (citation omitted.)

Contrary to BMW of Bellevue's allegations that Mr. Newbery's opinions are purely speculative, his opinions are based on personal examination of the burnt BMW at the destructive testing on December 3, 2010, as well as on all of the factual evidence in the record. *See* CP 442-443; 621. Like the plaintiff's expert in *Lamon*, who personally compared the airplane galley hatches on a DC-10 with those on a Boeing 747, Mr. Newbery carefully compared the Thornes' destroyed BMW to an undamaged BMW with the same N54 engine. Thus, Mr. Newbery's opinions are based on first-hand knowledge, not mere conjecture. In *Lamon*, the expert's comparison informed and justified his view that the DC-10 hatch cover created an unreasonably dangerous condition. *Id.* at

352, 1350. Similarly, Mr. Newbery's personal observations of the burn patterns, fire damage and precise location of engine components informed his opinions that the fire was caused by a malfunction in the N54's fuel pump, fuel injectors and/or positive battery cable. CP 446, 448. As in the *Lamon* case, where the defendant McDonnell Douglas Corporation failed to file a motion to strike the plaintiff's expert's affidavit, the defendants here never filed motions with the trial court to strike Mr. Newbery's declaration. *See Lamon*, 91 Wn.2d at 352, 588 P.2d at 1350. Consistent with Washington Supreme Court's holding in *Lamon*, the Court should find that Mr. Newbery's declarations, viewed in the light most favorable to the Omans, offer further evidence that genuine issues of material fact precluding summary judgment remain in this case. *Id.*

The Court should disregard BMW of Bellevue's and BMW NA's arguments discrediting Mr. Newbery's opinions for relying in part on Lieut. Todd McLean's first-hand observations at the scene of the fire. *See* Resp. BMW of Bellevue at 32; Resp. BMW NA at 14-15. Under Evidence Rule 703, experts may rely on inadmissible facts or data when forming their opinions, if the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 703. Therefore, Mr. Newbery, a certified vehicle fire investigator and professional engineer who has worked in the field of

vehicle accident reconstruction for 18 years, CP 433-434, may reasonably rely on the fire fighter's descriptions of the fire, regardless of whether the fire incident reports themselves are independently admissible.

Moreover, BMW NA already tried unsuccessfully to exclude the Bellevue Fire Department Fire incident reports in its response to Plaintiff's Motion for Partial Summary Judgment. CP 262-263. In their reply, the Omans corrected any possible defect precluding their admissibility under ER 902 and RCW 5.44.040. CP 281-282. Considering all evidence in the record *de novo*, and in the light most favorable to the Omans, the Court should view the Bellevue Fire Department Incident Reports as conclusive evidence that the Thornes' BMW 335xi was both the cause and origin of the fire destroying the Omans' new Pontiac Vibe and its contents on November 4, 2009.

(2) The Omans May Rely on Res Ipsa Loquitur as Proof of BMW NA's Negligence

(a) BMW's Do Not Ordinarily Suddenly Burst Into Flames in the Absence of Negligence

In its response, BMW NA argues that the Omans fail to meet the first element of res ipsa loquitur because in normal experience, vehicle fires supposedly occur often, even without negligence. BMW NA Resp. at 18. The Omans disagree. General experience and observation teaches that the spontaneous combustion of a vehicle like Mr. Thorne's two year

old, high performance BMW 335xi – which had been experiencing engine trouble in the days before the fire – would be unexpected without negligence or a specific defect. As the trial court observed during oral argument on the Omans’ motion for partial summary judgment, “...cars are not supposed to just burst into flames.” RP at 12:3-4, October 10, 2010. At the time, BMW of Bellevue’s counsel even agreed. *See id.* at 12:5.

Although fires in general may occur even without negligence, such as the mobile home fire described in *Voorde Poorte v. Evans*, *see* BMW NA response at 18, common experience teaches that car fires do not normally occur under the specific circumstances of this case, without someone’s negligence. Only when the fact of a fire, **plus surrounding circumstances**, gives rise to an inference of negligence, is *res ipsa loquitur* applicable. 65A C.J.S. Negligence § 907 (citing *McGuckin v. Chicago Union Station*, 191 Ill. App. 3d 982, 139 Ill. Dec. 76, 548 N.E. 2d 461 (1989); *Shannon v. Welch*, 858 S.W.2d 748 (Mo. 1993.))(Emphasis supplied.) “Only if facts are presented from which it is reasonable to conclude that a particular fire is an event that will not normally occur absent negligence is the initial requirement for the application of *res ipsa loquitur* satisfied.” *Id.* (citing *Lanza v. Poretti*, 537 F. Supp. 777, 10 Fed. R. Evid. Serv. 1104 (E.D. Pa. 1982.) *See also Collgood, Inc. v. Sands*

Drug Co., 5 Ill.App.3d 910, 914, 284 N.E.2d 406, 408 (1972)(“...a fire such as this is not of a type which ordinarily happens in the absence of negligence.”)

In this case, the significant surrounding circumstances suggesting negligence on the part of BMW NA are the car’s sudden and surprising combustion on the morning of November 4, 2009 after having only been driven a short distance. On that morning, as in the days leading up to the fire, the car was experiencing precisely the same problems that are described in the Cold Start Bulletin, CP 453-454, and in the NHTSA report of a defect investigation, CP 572.¹ There is absolutely no evidence in the record that road hazards, arson, mice, leaves or Jiffy Lube caused the fire originating in the BMW. Also telling is BMW NA’s rapid response in an attempt to keep Mr. Thorne as a loyal BMW customer, notwithstanding the fact that Mr. Thorne’s relatively new 335xi had just gone up in flames. CP 140. Under the specific circumstances in this case, the Court should conclude that this fire was an event of a type that normally does not occur absent negligence.

No Washington court has specifically addressed the issue of whether the *res ipsa* method of proof may apply to a case involving

¹ Appellants ask the Court to take judicial notice of a more recent, and complete, summary of the current status of the NHTSA’s investigation into BMW fuel system defect, attached as Appendix A.

spontaneous combustion of a vehicle. Only three Washington cases address the doctrine in the context of fires. See *Voorde Poorte v. Evans*, 66 Wn. App. 358, 832 P.2d 105 (1992); *Hufford v. Cicovich*, 47 Wn.2d 905, 290 P.2d 709 (1955); *Cambro Co. v. Snook*, 43 Wn.2d 609, 262 P.2d 767 (1953).

Contrary to BMW NA's claims, the legal reasoning articulated in these cases actually supports the Omans' reliance on circumstantial evidence and the *res ipsa loquitur* method of proof. In *Cambro Co. v. Snook*, the Washington Supreme Court held that *res ipsa loquitur* did not apply because there was no evidence, either direct or circumstantial, suggesting that the defendant's purported use of an acetylene torch in a negligent manner caused the fire. 43 Wn.2d 609, 616-617, 262 P.2d 767, 771-772 (1953). The Court explained, "There is no substantial tangible evidence to support the... ..finding... ..that an unidentified employee of appellant was careless and negligent in allowing the flame from an acetylene torch to come in contact (sic) with the building. We must, therefore, hold that the court erred in so finding." *Id.* at 617, 772.

In reaching this conclusion, the Court relied on the same body of authority discussed above with regard to BMW of Bellevue, to decide whether the trial court's finding was based on legitimate inferences from established facts or was based on mere speculation or conjecture. See *id.*

at 615-616, 770-772. *Hufford v. Cicovich* also relies on the same authority, 47 Wn.2d 905, 290 P.2d 709. Likewise, *Voorde Poorte*, which is persuasive only, relies directly on *Snook* for its terse conclusion that res ipsa was not applicable. 66 Wn. App. 358, 365, 832 P.2d 105, 109. As discussed, these same rules when applied to BMW of Bellevue require the conclusion that sufficient evidence of negligence and causation exists to overcome summary judgment.

Just as the circumstantial evidence in this case supports the inference that BMW of Bellevue negligently serviced the car, which proximately caused the fire, so too does the evidence support the reasonable inference that BMW NA negligently supplied a defective vehicle to the Thornes. Most significant, the evidence in the record is that the malfunctions in the BMW were caused by a known defect in the N54 engine's fuel system. CP 572.

Moreover, the holdings from *Snook*, *Hufford* and *Voorde Poorte* addressing the correct application of res ipsa loquitur should now be re-evaluated considering *Curtis v. Lein*, the most recent binding authority governing application of this method of proof. In response to the Omans' appeal, neither BMW of Bellevue nor BMW NA makes any attempt to reconcile these earlier cases with the holdings from *Curtis*. The Court should conclude that the Omans have met the first element of res ipsa

because a fire like the one that consumed their Pontiac was an event that will not normally occur absent negligence.

(b) BMW NA Had Responsibility for the Proper Functioning of the BMW's N54 Engine

BMW NA further maintains that the Omans' reliance on *res ipsa loquitur* is insufficient under the second element of actual or constructive control. As explained in the Omans' appellate brief, the control element of *res ipsa loquitur* may be met by showing the defendant had responsibility for ensuring the proper and efficient functioning of the instrumentality which caused the injury. *Kind v. City of Seattle*, 50 Wn.2d 485, 489, 312 P.2d 811, 814 (1957)(citing *Hoglund v. Klein*, 298 P.2d 1099). Like the City of Seattle in *Kind*, BMW NA did not have actual physical control of the instrumentality which caused the harm, but clearly had the responsibility for ensuring its proper functioning. Although BMW NA did not have physical control of Mr. Thorne's car when it caught fire, it had the responsibility for ensuring that the N54 engine in Mr. Thorne's car was not defective.

However, the evidence in this case is that BMW NA supplied to the Thornes a car with a defective fuel system in the N54 engine. Although the NHTSA has closed its investigation into this problem, "The closing of this investigation does not constitute a finding by NHTSA that a

safety-related defect does not exist.” Appendix A. Considering the evidence in the light most favorable to the Omans, and as discussed already, it is reasonable to infer that the defective fuel system in the BMW created leaks that ultimately caused the fire.

Additionally, BMW is clearly in “...a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury,” which further provides a sufficient basis for application of res ipsa’s second element. *Hogland v. Klein*, 49 Wn.2d 216, 219, 298 P.2d 1099, 1101 (1956). Unlike the Omans and their expert, BMW NA surely understands precisely how malfunctions in the high pressure fuel pumps and other fuel system components could have caused the BMW fire.² CP 405, 622. The Court should find that the Omans have met the second element of the res ipsa method requiring control over the element which caused the harm.

(c) The Omans’ Pontiac Did Not Cause the Fire, and a Spoliation Inference is Unwarranted

BMW NA argues that the Omans cannot meet the third element of res ipsa loquitur because the Pontiac supposedly could have caused the fire. At the same, BMW NA alleges the Omans engaged in improper

² Although the Omans asked the trial court for a continuance under Civil Rule 56(f) to allow additional discovery in this case, the trial court declined this invitation when it granted BMW NA’s motion for summary judgment. CP 405.

spoliation of the vehicle. These arguments fail because they are wholly inconsistent with both the physical evidence in the case and the applicable legal standard.

BMW NA's allegations of spoliation against the Omans are without merit under the two controlling factors established by *Henderson v. Tyrrell*. 80 Wn.App. 592, 607, 910 P.2d 522, 532 (1996.) The Pontiac is irrelevant to this case, and the car's destruction was not the Omans' fault.

The record contains overwhelming physical evidence that the blaze started in the BMW. *See Gillmore and McLean Decs, CP 410-420.* Therefore, the Pontiac is entirely irrelevant as to proximate cause. As a result, the Omans' claim also meets the third element of *res ipsa loquitur*. Even if there were some chance that the fire originated in the Pontiac, the Omans are entirely without fault for the destruction of the vehicle by their insurance company, Farmers Insurance Company of Washington.

There is no need for destructive testing or physical examination of the Pontiac in this case. The *origin* of the fire has been well established: the BMW's engine compartment on the driver's side of the car. BMW NA's disingenuous attempts to shift blame for the fire to Omans' car is outrageous in light of the strong physical evidence to the contrary.

BMW of Bellevue and BMW NA's assertion that the Pontiac must be inspected and analyzed to rule it out as the source of the fire is simply a

red herring. Although their paid consultants may be willing to state this under oath, Lieut. McLean will not agree that the Pontiac needs further examination to conclude that the fire started in the BMW, not in the Pontiac. What he saw that day, along with his written and photographic documentation, are more than enough. The Omans' expert also rebuffs the claims that the destruction of the Pontiac now makes it impossible to finally conclude that the BMW caused the fires:

Given the photographs of the Pontiac and the statements made by Lieutenant McLean on 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. Likewise, the Thornes' own expert, Michael Schoenecker of MDE, Inc., similarly concluded, long before the destructive testing of the BMW, that the fire started in that car, not the Pontiac. CP 482. Considering that it is unnecessary to examine the Pontiac to know that the fire began in the 335xi, BMW NA's allegations that the Omans engaged in spoliation fail on this prong alone.

Even if the Pontiac *were* crucial evidence in this case, the charges of spoliation would fail for the sole reason that the Omans are not at fault. The Omans did not destroy the car – their insurance company did, even though it was aware that this case was headed towards litigation as of

November 20, 2009. CP 456, 524. Farmers, undoubtedly no newcomer to litigation brought by and against its auto insurance customers for auto-related causes of action, should not have needed the specific instruction from counsel to preserve the Pontiac while litigation was pending. The Omans can offer no explanation for Farmers' unfortunate decision to so quickly dispense with their car by selling it for salvage, but under no uncertain terms should the Omans be held responsible for this choice. Neither the Omans nor their attorney committed spoliation under this prong of the analysis, either.

The Omans thus easily meet the third element permitting an inference of negligence under *res ipsa loquitur*, for their car did not cause the blaze, and there is no basis for a spoliation inference that it did.

(3) Appellants Properly Brought Claims Against BMW NA Under the Washington Product Liability Act

The Omans' single product liability claim brought against BMW NA under Washington Product Liability Act is not new. Rather, the company's breach of an express warranty is further justification for why the Omans' product liability claim under the Act should survive summary judgment. Even if this were a new, separate claim as BMW NA suggests, the Court has discretion to decide whether it will consider it on appeal. RAP 2.5(a).

Furthermore, the Court should disregard BMW NA's position that the Omans may not sue them under WPLA at all. BMW NA Resp. at 26-27. In fact, the Act permits claimants to sue product sellers under circumstances present in this case. Under RCWA 7.72.040(1)(a) and (b), a product seller other than a manufacturer may be liable to a claimant when the claimant's harm was proximately caused by the seller's negligence or the seller's breach of an express warranty. BMW NA cannot escape liability by pointing the finger at the German manufacturer because BMW NA negligently distributed a defective vehicle which caused harm to the Thornes and Omans.

C. CONCLUSION

Summary judgment dismissing appellants' claims against BMW NA and BMW of Bellevue was improper because the Omans provided more than enough evidence supporting their theories of recovery to overcome the respondents' motions. This Court should reverse the trial court's decisions and remand for trial. Costs on appeal should be awarded to appellants Annie and Kraig Oman.

DATED this 28th day of March, 2012.

Respectfully submitted,



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Attorney for Appellants Annie & Kraig
Oman

APPENDIX A



Defects - Search Results

1 Record(s) Displayed.

Report Date : March 6, 2012 at 01:08 PM

NHTSA Action Number : PE08032

NHTSA Action Number : PE08032

NHTSA Recall Campaign Number : N/A

Vehicle Make / Model:

BMW / 335i

Model Year(s):

2007

Manufacturer(s) :

BMW OF NORTH AMERICA, LLC

Component(s) :

FUEL SYSTEM, GASOLINE

FUEL SYSTEM, GASOLINE:DELIVERY

FUEL SYSTEM, GASOLINE:DELIVERY:FUEL PUMP

Date Investigation Opened : April 28, 2008

Date Investigation Closed : August 15, 2008

Summary:

IN RESPONSE TO ODI'S INFORMATION REQUEST FOR PE08-032 BMW STATED THAT "DURING FAILURE OF THE HIGH PRESSURE PUMP THE CUSTOMER SHOULD INITIALLY EXPERIENCE LONGER ENGINE STARTING TIMES OR ROUGH ENGINE RUNNING. AFTER A DISTANCE OF APPROXIMATELY 1 TO 2 MILES THE PUMP- AND ENGINE-EMERGENCY OPERATION PROGRAM IS ACTIVATED, AND THE MALFUNCTION INDICATOR LAMP IS ILLUMINATED." DESPITE REDUCED ENGINE POWER BMW BELIEVES THAT SAFE VEHICLE OPERATION IS POSSIBLE AND THAT VEHICLE DRIVEABILITY, STEERING, AND BRAKING SYSTEMS ARE NOT AFFECTED AND FUNCTION IN A NORMAL MANNER. BMW INDICATED THAT ONLY IN VERY RARE CASES COULD THE ENGINE STALL. ODI'S ANALYSIS OF WARRANTY DATA CLAIMS INDICATING POSSIBLE STALL INCIDENTS ESTIMATES THAT THE RATE AT THREE YEARS IN SERVICE WOULD BE LESS THAN 1.0% OF THE POPULATION (NOTE THAT SOME OF THE CLAIMS INDICATING STALL DO NOT APPEAR TO INVOLVE ACTUAL ENGINE STALLS, BUT RATHER OPERATION AT REDUCED ENGINE POWER). ODI'S ANALYSIS OF CONSUMER COMPLAINTS DETERMINED THAT ABOUT HALF DESCRIBE THE CONSEQUENCE OF THE FAILURE AS OPERATION IN LIMP MODE, 27 PERCENT INDICATE THE PROBLEM RESULTED IN A HARD START OR NO START CONDITION AND 19 PERCENT STATE THAT THE PROBLEM WAS DETECTED BY ILLUMINATION OF THE MALFUNCTION INDICATOR LAMP OR A MINOR DRIVEABILITY SYMPTOM. ONLY FOUR PERCENT OF THE COMPLAINTS TO ODI AND BMW INDICATE THAT AN ENGINE STALL OCCURRED. BMW INDICATED THAT A SERVICE ACTION WAS INITIATED IN APRIL 2008 TO ADDRESS THE PROBLEM AND IT IS CONTINUING TO MONITOR THE FIELD SITUATION AND ANALYZE FIELD DATA. FURTHER INVESTIGATION OF THIS MATTER WOULD NOT BE AN EFFICIENT ALLOCATION OF AGENCY RESOURCES. ACCORDINGLY, THIS INVESTIGATION IS CLOSED. THE CLOSING OF THIS INVESTIGATION DOES NOT CONSTITUTE A FINDING BY NHTSA THAT A SAFETY-RELATED DEFECT DOES NOT EXIST. THE AGENCY WILL CONTINUE TO MONITOR COMPLAINTS AND OTHER INFORMATION RELATING TO THE ALLEGED DEFECT IN THE SUBJECT VEHICLES AND TAKE FURTHER ACTION IN THE FUTURE IF WARRANTED.

1200 New Jersey Avenue, SE, West Building Washington DC 20590 USA
1.888.327.4236 TTY 1.800.424.9153



No. ~~67446-8-I~~
674608

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ANNE E. OMAN and KRAIG G. OMAN, husband and wife, and the
marital community composed thereof,

Plaintiffs/Appellants,

v.

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/Respondents.

DECLARATION OF SERVICE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 28 PM 4:49

I, Diana Linde, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.

2. On the 28th day of March, 2012, I caused to be served true and correct copies, of:

- (1) Reply of Appellants Oman; and
- (2) Declaration of Service, on the following:

I. Via ABC Special Legal Messenger:

Counsel for BMW of BELLEVUE

August G. Cifelli
LEE SMART, P.S., INC.
701 Pike Street, Suite 1800
Seattle, WA 98101

Counsel for BMW of NORTH AMERICA, LLC

Peter Steilberg
MERRICK HOFSTEDT & LINDSEY, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

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

DATED at Seattle, Washington this 28th day of March, 2012.

BERGMAN DRAPER LADENBURG



Diana Linde