

NO. 36893-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Dimension Funding, LLC

Appellant

v.

D.K. Associates, Inc., d/b/a Triad Marketing Inc., et al.

Respondents

RESPONDENT TWINSTAR CREDIT UNION'S BRIEF

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Sergio Armijo

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I. ASSIGNMENTS OF ERROR

Not Applicable

II. STATEMENT OF THE ISSUES

Respondent agrees with the statement of the Appellant regarding the four issues before the court.

III. STATEMENT OF THE CASE

A. Response to Factual Statement

In the third paragraph of Appellant's Statement of the Case on page 6 of the Brief of Appellant, Appellant states that "On or about April 25, 2006, Dimension and DK entered into an Equipment Financing Agreement . . .". CP at 96, 102. CP 96 is the second page from a Declaration of Michael Wagner, providing a narrative history. CP 102 is an Equipment Financing Agreement consisting of two pages. Nowhere at CP 102 or CP 103 is there a date, much less the date of April 25, 2006. Nowhere on CP 102, 103 is any equipment identified. Indeed, in the middle of CP 102 in a box entitled "Initial Payment Date" is the date July 26, 2005. Whatever the document identified as CP 102, 103 is, it certainly is not a document dated April 25, 2006 relating to the vehicle at issue in this proceeding.

CP 104, 105 is entitled "Guaranty (Equipment Financing Agreement)", but again contains no date. CP 106 is a "Delivery and Acceptance Certificate", referencing an Equipment Financing Agreement

dated 4-25-06 and stating in the middle thereof that a definition of the equipment in on Schedule "A". CP 107 is identified as Schedule "A" identifying an equipment location in Graham, Washington, and it is dated April 25, 2006. No description of the equipment is listed thereon. In fact, there is no identification of the vehicle in this proceeding on any documents filed by the Appellant, other than CP 100, which is a Vehicle Certificate of Ownership, and CP 110, the Release of Interest, which is purported to contain a forged signature.

B. Additional Factual Information

Sometime in 2005 or 2006 (date unknown), Dimension Funding loaned monies to DK Associates and in return became the legal owner of the 2004 Volkswagen Touareg. DK Associates, d/b/a Triad Marketing, was in the business of selling used cars. In conjunction with that business, Darrell Kempf, the primary owner of DK Associates, sold this vehicle to Mr. Seibold on or about December 18, 2006. CP 33. A Release of Interest was executed by someone on January 5, 2007. CP 110. Mr. Seibold borrowed the funds to purchase this vehicle from CU Dealer Direct, LLC. Said funds were tendered to and accepted by Darrell Kempf on behalf of DK Associates. CP 33.

The money that was paid to DK Associates by Seibold for the vehicle was embezzled by Mr. Kempf. Neither the vehicle nor the vehicle

title were stolen. The title was allegedly forged. The loan was provided for purchase of the vehicle. CP 34.

IV. STANDARD OF REVIEW

The Statement of Appellant is correct.

V. ARGUMENT

1. **The Superior Court properly denied an Order of Replevin in that RCW 10.79.050 does not apply to the actions of DK or its owner, Darrell Kempf.**

Appellant has correctly quoted RCW 10.79.050. The cases cited by Appellant do not support an Order of Replevin. In the case of *Richardson v. Seattle-First National Bank*, 38 Wn.2d, 229 P.2d 341 (1951), the vehicle itself was obtained through larceny as a result of a forged check. The seller did sign the Certificate of Title as Registered Owner. She neglected to also sign the line for "Legal Owner". The vehicle was subsequently sold through a series of sales, but ultimately was ordered returned to the original seller as a result of the vehicle itself being obtained through forgery, i.e., larceny.

Appellant cites the case of *Frye & Co., v. Boltman*, 182 Wash. 447, 47 P.2d 839 (1935). Again, the horses were obtained as a result of a forgery, i.e., a larceny. An Order of Replevin was entered.

The distinction between the factual scenario in the instant proceeding and those as cited in *Richardson* and *Frye* is that the vehicle itself was not ". . . obtained by larceny . . ." as required by RCW 10.79.050. Indeed,

Dimension voluntarily transferred possession of the vehicle at issue in this proceeding to DK Associates. DK Associates did not obtain title to the vehicle from Dimension. DK Associates turned around and sold the vehicle to an innocent third party, who borrowed funds and paid for the vehicle. Possession of the vehicle was transferred to defendant Seabold. It is true that defendant DK Associates forged the title.

Since the vehicle was not obtained by larceny, the statute does not apply. The case of *Harris v. Northwest Motor Company*, 116 Wash. 412, 413-14, 199 P. 992 (1921) stands for the proposition that when this statute was enacted, initially in 1854, the legislature had in mind the kind of larceny then defined by the statutes. Since there were no gas-operated vehicles in existence either in 1854, or when the statute was amended to some extent in 1873, the *Harris* case states that other offenses under the heading of larceny are not covered by this statute. More specifically, the case states that where an agent cloaked with the apparent authority to make the sale of an automobile embezzled the proceeds of the sale, this section was not applicable.

2. The facts in *Harris v. Northwest Motor Company* are not distinguishable and are controlling as precedential authority herein.

In *Harris*, Mrs. Grottle traded in an Oakland car for a Hudson car. The sales agent was an individual named Doty. Doty then sold the used

Oakland car to Compton, who re-sold the car to Harris. Whereas Northwest Motor Company, the employer of Doty, had knowledge of the sale of the Hudson car to Grottle and the receipt of the Oakland car as a trade-in, it did not know that Doty had re-sold the Oakland car, because Doty did not account for it. Upon Doty's re-sale of the Oakland car to Compton, Doty kept, or embezzled, the proceeds.

Appellant asserts that the Harris case is factually distinguishable because there was no agency relationship and the vehicle was misappropriated from its owner. Once again, the term "obtain" comes into play. The vehicle was not misappropriated from its owner. Funds were embezzled and a title subsequently forged. Darrell Kempf, the principal for DK Associates, was in the business of selling used cars, and had the apparent authority to sell the 2004 Volkswagen Touareg to Seabold. The Harris case stands for two specific propositions. The first is that whenever an individual has been placed into a situation wherein a third party, in this situation Seabold, a man of ordinary prudence conversant with business usages and the nature of the particular business, is justified in assuming that the agent is authorized to perform, and the particular act has been performed, the principal (Dimension) is estopped from denying the agent's authority to perform it. Certainly, Seabold appearing on or about December 18, 2006 at the used car lot of DK Associates, was entitled to assume that the selling

agent, Darrell Kempf, was entitled to sell the vehicles on the lot, including the 2004 Volkswagen Touareg. The sale transpired as virtually all sales do, Seabold borrowed funds and paid for the vehicle and drove off in it. This is precisely the situation that occurred in Harris.

Further, Harris goes on to state that as between a principal and agent, if there are secret instructions or restrictions contained in documents executed between the two of them, and those secret instructions and restrictions are not made known to an innocent third party, they do not then affect the third person who is ignorant thereof. It is not the actual authority conferred within any agreements existing, in this case, between Dimension and DK, it is the apparent scope of the agent's authority that controls.

The Harris case also cites the case of Linn v. Reid, 114 Wash. 609, 611, 196 P.13 (1921). The Linn case cited RCW 10.79.050. The Linn court held that when the predecessor of RCW 10.79.050 was enacted, the Legislature had in mind the kind of larceny then defined by the statutes, and the fact that the later statutes had included other offenses under the head of "larceny" would not authorize the court to enlarge the meaning of "larceny" as used therein. Citing from the Harris case, which cites the Linn case, the court stated:

It is our view that neither the Linn case nor Section 2129 Rem. Code have any bearing on this case. If it had been conceded in this case, or the jury had found, that Doty had embezzled the Oakland car, then

the Linn case might be applicable. The main question submitted to the jury was whether Doty had actual or apparent authority, as the Appellant's agent, to sell the Oakland car. If he had, his sale was perfectly valid and there could not be any question of embezzlement by him of the car. What Doty embezzled was the money, which he received from the sale of the car, and not the car itself.

The court should apply the holdings in the Linn case and in the Harris case and deny replevin.

3. The Doctrine of Comparative Innocence does apply to this proceeding, and by application thereof, defendant Seabold should retain the vehicle.

The Doctrine of Comparative Innocence, as cited by Appellant, is also discussed in the Richardson case previously discussed herein. Once again, the owner of the vehicle executed the title but received a forged check. Hence, the vehicle was "obtained" by larceny. The Harris case once again applies because, as stated in Richardson, "In other words, the Doctrine of Comparative Innocence of the parties can only be invoked where the owner parted with his title under circumstances which would not constitute larceny as it was defined at the time of the enactment of Rem. Rev. Stat., § 2129", now RCW 10.79.050. As set forth previously herein, embezzlement is not covered by that statute. Hence, the Doctrine of Comparative Innocence applies herein.

4. The Superior Court did not err in applying the Entrustment Doctrine to the benefit of defendant Seabold.

Appellant cites the case of *Heinrich v. Titus-Will Sales*, 73 Wn.App. 147, 868 P.2d 169 (1994). The Superior Court did not apply the Entrustment Doctrine for the benefit of TwinStar Credit Union. It applied the Entrustment Doctrine for the benefit of defendant Seabold, the possessor of the car. The Entrustment Doctrine provides that any entrusting of possession of goods to a merchant who deals in goods of that kind empowers that merchant to transfer all rights to a buyer in the ordinary course of business. RCW 62A.2-403(2). Entrustment includes any delivery or acquiescence of possession by the true owner, regardless of any condition expressed between the parties to the delivery or acquiescence. Risk of loss is on the entrustor (in this case Dimension), and protects an innocent buyer (Seabold) who believes that the merchant (DK) has legal title and can pass title. The *Heinrich* case further holds that public policy supports the Entrustment Doctrine in order that innocent buyers be protected, the flow of commerce is facilitated by allowing buyers to rely on a merchant's apparent right to sell the goods, and between the innocent buyer and entrustor, the entrustor is in a better position to protect against the risk. This is analogous to the Comparative Innocence Rule.

Heinrich further goes on to state that in order for RCW 62A.2-403(2),(3) to apply, the buyer must show that the owner entrusted the goods to the merchant and thus empowered the merchant subsequently to transfer

all rights to the owner in goods to the buyer; the merchant must be a merchant dealing in those goods; and the buyer must have bought the goods from the merchant as a buyer in the ordinary course of business. The statute declares that any delivery and any acquiescence in retention of possession constitutes entrustment.

VI. CONCLUSION

The Superior Court correctly applied the rules as set forth in Harris, Linn, and Heinrich, as well as correctly interpreted RCW 10.79.050. The Appellant is not entitled to an Order of Replevin, and defendant Seabold should be allowed to retain the vehicle.

Dated this 1 day of February, 2008.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this ____ day of February, 2008, I caused to be delivered a true and correct copy of the RESPONDENT TWIN STAR CREDIT UNION'S BRIEF via ABC Legal Messengers to the following:

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I also filed the **original plus one copy** of RESPONDENT TWIN STAR CREDIT UNON'S BRIEF via ABC Legal Messengers to:

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Dated at Olympia, Washington, this 1st day of February, 2008.



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