**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

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| ANNE E. OMAN and KRAIG G. OMAN, husband and wife, and the marital community composed thereof,<br><br>Appellants,<br><br>v.<br><br>SEAN THORNE and GINA THORNE, husband and wife; NORTHWEST FINANCIAL GROUP, INC., a/k/a BMW OF BELLEVUE; and BMW OF NORTH AMERICA, LLC,<br><br>Respondents. | ) | No. 67466-8-I, consol. with No. 67467-6-I & No. 67468-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: December 3, 2012 |

Spearman, A.C.J. — Sean and Gina Thorne's BMW caught fire, as did the car parked next to the BMW, a Pontiac owned by Anne and Kraig Oman. The Omans sued the Thornes and BMW of North America, alleging claims of negligence via res ipsa loquitur and violations of the Washington Product Liability Act (WPLA). They later amended their complaint to add as a defendant BMW of Bellevue, who had serviced the Thornes' BMW shortly before the fire. The trial court dismissed all claims on summary judgment. Finding no questions of fact exist as to the Omans' claims, we affirm.

## FACTS

On June 28, 2007 BMW of North America received the BMW 335xi at issue in

this case from its German manufacturer. On June 29, 2007, BMW of North America sold the BMW wholesale to a dealership in Boulder, Colorado. BMW of North America had no contact or control over the car after June 29, 2007. On July 7, 2007, the Boulder dealership leased the car to Sean and Gina Thorne.

On October 26, 2009, Sean Thorne brought the car to BMW of Bellevue, complaining that the car was running rough, i.e., misfiring, and that the "service engine soon" light was illuminated. BMW of Bellevue mechanics attempted to perform a diagnostic check on misfires, but could not do so because their computer had not yet received a software update. BMW of Bellevue recommended that Mr. Thorne return in a week after the software upgrades had taken place. After that visit, BMW of Bellevue had no contact with the Thornes' car.

Nine days later, on November 4, 2009, the Thornes' car caught fire while parked at the South Bellevue Community Center. In the adjacent parking space, the 2010 Pontiac Vibe owned by Kraig and Anne Oman also caught fire. The Bellevue Fire Department could not conclude what started the fire, or why or how it occurred.

On January 25, 2010, the Omans sued the Thornes and BMW of North America for the damage that occurred to their Pontiac. On June 3, 2010, the Omans amended their Complaint to add claims against BMW of Bellevue. The Omans hired fire expert Trevor Newbery.

BMW of Bellevue and BMW of North America moved for summary judgment. Both defendants supported their motions with declarations that their experts were

unable to determine a cause of the fire. The Omans' response to the summary judgment motions relied primarily upon Mr. Newbery's declaration, which proposed multiple alternate possibilities as to what caused the fire. The trial court granted both motions, dismissing all claims against both defendants. The Omans moved for reconsideration, presenting a supplemental declaration of Mr. Newbery. The trial court denied the motion for reconsideration. Ultimately, the Thornes also successfully moved for summary judgment of all of the Omans' claims against them. The Omans appeal only the trial court's order granting summary judgment in favor of BMW of Bellevue and BMW of North America, and the order denying reconsideration.

## DISCUSSION

### I. Dismissal of claims against BMW of Bellevue.

Res ipsa loquitur negligence and WPLA claims. The Omans' amended complaint alleged two causes of action against BMW of Bellevue: negligence via res ipsa loquitur and violation of the WPLA. In the Omans' consolidated response to the summary judgment motions, they argued questions of fact precluded dismissal of both the res ipsa loquitur negligence and WPLA claims. They also argued dismissal was inappropriate because BMW of Bellevue had negligently read an incorrect service bulletin about fuel injectors. In their reply brief on appeal, the Omans indicate they are abandoning the res ipsa loquitur negligence and WPLA claims against BMW of Bellevue.

As such, the only issue remaining for us to address with regard to BMW of

Bellevue is whether the trial court erred in dismissing the negligence claim based on the service bulletin.

Service bulletin-based negligence claim. The Omans argue they presented evidence in response to summary judgment that BMW of Bellevue's alleged incorrect reading of a service bulletin proximately caused the fire in the Thornes' car. In general, the moving party on summary judgment bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). However, where a plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" the trial court should grant the motion. Id. at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). A moving defendant may meet the initial burden by "'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." Young, 112 Wn.2d at 225 n.1, (quoting Celotex, 477 U.S. at 325).

Negligence requires proof of four elements: (1) the existence of a duty to the person alleging negligence; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury. American Commerce Ins. Co. v. Ensley, 153 Wn. App. 31, 42, 220 P.3d 215 (2009) (citing Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991)). Here, BMW of Bellevue argued that the Omans had no evidence it breached any duty in servicing the BMW, and further, the Omans had no evidence that anything BMW of Bellevue did proximately

caused the fire.[1] In response, the Omans offered the declaration of expert witness Trevor Newbery, who opined that BMW of Bellevue consulted the wrong service bulletin, and thereby "misdiagnosed the true cause of the cold start misfires in the BMW." The Omans argued below and argue on appeal that Newbery's declaration and attached report show BMW of Bellevue's alleged failure caused the fire in the Thornes' BMW. We disagree for the reasons stated herein.

Newbery's declaration in opposition to summary judgment states that BMW of Bellevue consulted an incorrect service bulletin relating to misfire faults in engines operating at full temperatures, instead of the service bulletin relating to misfire upon cold starts:

> 6. BMW of Bellevue made an incorrect diagnosis regarding the problems Mr. Thorne was experiencing with his BMW 335xi on October 26, 2009 when he brought [sic] the vehicle to the dealership for service. BMW of Bellevue referenced a service bulletin, SI B12 06 09, which is for misfire faults due to a Digital Motor Electronics (DME) software calibration error. A true and correct copy of this service bulletin is attached as Exhibit 3. The bulletin states that the misfire faults occur at full operating temperatures – most frequently after driving for an extended period of time. In contrast, Mr. Thorne stated in his responses to plaintiffs' discovery, that he experienced a "mis-fire that occurred at the initial morning start up [which] caused a rough idle, reduced power and the engine light to come on. The car ran fine once it was warm."
>
> 7. BMW of Bellevue should have consulted BMW service bulletin SI B13 04 09, which is for cold start rough running with misfire faults, a true and correct copy of which is attached as Exhibit 4. The bulletin states that the customer may complain that during cold morning starts, the engine runs rough and the service engine soon light is illuminated. According to the bulletin, the possible cause of the problem is a fuel injector failure, either leakage or incorrect spraying pattern.

CP 434-35.

[1] BMW of Bellevue did not argue it had no duty to the Omans.

Newbery's declaration, however, does not state that any failure to consult the proper service bulletin was the cause of the fire, or that had BMW of Bellevue consulted the bulletin, the fire would have been prevented. Rather, the declaration states only that "the fire was caused by a malfunction of one of the vehicle components in the driver's side area of the BMW's engine compartment." Newbery's report, attached as Exhibit 2 to his declaration, likewise does not link the service bulletin to the fire:

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

CP 448.

Proximate cause "must be based on more than mere conjecture or speculation." Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). Newbery's declaration is little more than speculation; he listed three separate engine components and stated they were all "potential" causes of the fire.

The Omans also argue that they submitted a more detailed declaration from Newbery in support of their motion for reconsideration to the trial court. Regarding causation, the second declaration states:

> 5. More probably than not, a malfunction of one of the vehicle components in the driver's side area of the BMW's engine compartment caused the fire.
>
> 6. More probably than not, the specific malfunction that caused the fire was one or more of the following:
>
> > a. Fuel leaking from malfunctioning fuel injectors being ignited by the hot exhaust surface at the back of the engine.
> >
> > b. Fuel leaking from a malfunctioning high pressure fuel pump being ignited by the hot exhaust surface at the back of the engine.
> >
> > c. The positive battery cable arcing against a ground or melting and arcing [sic] due to a defect in the cable.
>
> 7. The fuel injector failure identified by service bulletin SI B13 04 09 could have caused this fire. The bulletin does not contain a detailed description of the failure. It is necessary to obtain more information from BMW about whether the fuel injector failures referenced in this bulletin can cause an external fuel leak.
>
> 8. The high pressure fuel pump failure identified by recall 10E-A02 could have caused this fire. The recall does not contain a detailed description of the failure. It is necessary to obtain more information from BMW about whether the high pressure fuel pump failures referenced in this recall can cause an external fuel leak.

CP 621-22.[2]

The second declaration nevertheless contains defects similar to those in the first declaration. Although Newbery uses the phrase "more probably than not" in the second declaration, he still cannot identify which of several components caused the fire. He

[2] The BMW respondents argue the panel should decline to consider this declaration because it was not before the trial court when it was deciding the motion for summary judgment, and Oman has not appealed the order denying reconsideration. Respondents are mistaken; Oman appealed the order denying reconsideration under a separate cause number, which has been consolidated with this case.

later states those components "could have" caused the fire, and that "[i]t is necessary to obtain more information" to determine whether an external fuel leak occurred. The declaration does not state that any failure to consult the proper service bulletin was the cause of the fire, or that had BMW of Bellevue consulted the bulletin, the fire would have been prevented. Like the first declaration, the second declaration provides little more than speculation regarding the cause of the fire.

In addition, the service bulletin Newbery claims BMW of Bellevue should have read (number SI B13 04 09) was not issued until after Bellevue of BMW serviced the Thornes' car on October 26, 2009. Indeed, that service bulletin, which was attached as exhibit four to Newbery's declaration in opposition to summary judgment, states: "This Service Information bulletin supersedes SI B13 04 09 **dated March 2010**." Oman argues this is irrelevant because the record shows "an earlier version of this same bulletin existed when Mr. Thorne brought his car in for service." Reply Brief at 3. It is undisputed, however, that no earlier version of the bulletin is in the record or was ever before the trial court.

But even if Bellevue of BMW failed to read the proper service bulletin, the bulletin placed in the record by Oman says nothing about fire or risk of fire. Rather, the bulletin, which is titled "N54 – Diagnosis of Cold Start Rough Running with Misfire Faults," states only that a fuel injector failure can cause spark plugs to misfire in their cylinders, making the engine run "rough" upon a "cold start":

> **SITUATION**
>
> The customer may complain that during the cold start in the morning,

> the engine runs very roughly and the Service Engine Soon lamp is illuminated.
>
> . . .
>
> The engine rough running complaint can be reproduced on a cold start in the workshop. During the course of diagnosis, the spark plugs, removed from the misfiring cylinders after the problem was reproduced, are found to be soaked ("wet") with fuel, while the injector tips are covered with a layer of carbon deposit.

CP 453. Again, the bulletin says nothing about the possibility of fire, and simply recommends replacing the faulty fuel injector to remedy rough starts in the morning.

In sum, the Omans failed to show BMW of Bellevue breached a duty by failing to read a service bulletin, and they failed to show any breach caused the fire. As such, the trial court did not err in dismissing the claims against BMW of Bellevue.

II. Dismissal of claims against BMW of North America.

Res ipsa loquitur-based negligence claim. The Omans argue the trial court erred by dismissing their negligence claim against BMW of North America. We disagree. The Omans sought to prove their claim by asserting a presumption of negligence under the doctrine of res ipsa loquitur. Res ipsa loquitur is a method of proof, not a separate form of negligence. Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 789, 929 P.2d 1209 (1997). This doctrine permits an inference of negligence if the plaintiff establishes three elements: (1) the occurrence producing the injury was of a kind that ordinarily does not occur in the absence of negligence; (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing occurrence was not due to any contribution of the injured party. Curtis v. Lein, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010). If any of these three elements is missing, a

presumption of negligence is unwarranted.

Regarding the first element, the Omans acknowledge there are no cases in Washington addressing whether car fires are a type of occurrence that do not occur but for negligence. In their reply brief,[3] however, they cite three cases involving other types of fires: Cambro Co. v. Snook, 43 Wn.2d 609, 262 P.2d 767 (1953); Hufford v. Cicovich, 47 Wn.2d 905, 290 P.2d 709 (1955); and Voorde Poorte v. Evans, 66 Wn. App. 358, 832 P.2d 105 (1992). See Reply Brief at 16. The Omans argue Cambro supports their claim because in that case, the Supreme Court declined to apply res ipsa loquitur only because there was no evidence that the defendant had negligently used an acetylene torch. (Citing Cambro, 43 Wn.2d at 616-17). The Omans contend that unlike the defendant in Cambro, BMW of North America was negligent. But the Omans never explain what act of BMW of North America was negligent; instead, they simply make the assertion with no explanation or citation to the record: "BMW NA negligently supplied a defective vehicle to the Thornes."

Contrary to the Omans' arguments, Cambro weighs against establishment of the first element. In that case, a defendant had been dismantling and removing equipment from a building by cutting the equipment into pieces using an acetylene torch. Two fires started when nobody was in the building, and the building was damaged. The plaintiff argued it could rely on res ipsa loquitur even if the proof was not sufficient to establish

[3] Oman does not directly address this issue in his opening brief. Instead, he correctly points out that to the extent respondents are arguing Oman was required to rule out all other potential causes of the fire, they are incorrect. See Curtis, 169 Wn.2d at 894 ("A plaintiff claiming res ipso loquitur is 'not required to eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply.")

a specific act of negligence on the part of the defendant. The supreme court disagreed and held the fire was not the type of occurrence that ordinarily does not occur without negligence:

> The use of a torch near a wooden surface creates a danger of fire even when adequate precautions are taken. Normal experience indicates that a fire could have resulted even in the absence of any negligence upon the part of the operator. Therefore, the doctrine of res ipsa loquitur is not applicable.

Cambro, 43 Wn.2d at 617.

The Omans provide no argument as to why Voorde and Hufford support their claim; they simply cite the cases without analysis. But like Cambro, the Voorde case weighs against Oman establishing the first element. In Voorde, the defendant purchasers of a mobile home trespassed by occupying the home early. While they were there, an electrical fire occurred. The plaintiff sought to establish an inference of negligence via res ipsa loquitur, and the Supreme Court declined, holding: "Normal experience indicates that a fire could result even in the absence of negligence." Voorde, 66 Wn. App. at 365 (citing Cambro, 43 Wn.2d at 617). As for Hufford, it is of no help to the Omans, because in that case, the Supreme Court declined to apply res ipsa loquitur on grounds there was no need for it, given the cause of the fire had been "definitively established[.]" Hufford, 47 Wn.2d at 909.

The second element, that the injury was caused by an agency or instrumentality within the exclusive control of the defendant, weighs even more heavily against application of res ipsa loquitur. It is undisputed that BMW of North America sold what would later become the Thornes' car to the selling dealership in June 2007, more than

two years before the fire. The Omans nevertheless contend BMW of North America had exclusive control, because exclusive control can be constructive. We reject the Omans' argument because the cases they cite do not support their argument.

They cite Tinder v. Nordstrom, 84 Wn. App. 787, 929 P.2d 1209 (1997), where the plaintiff was injured by an abrupt stop while riding on a regularly-serviced escalator in Nordstrom. But in Tinder, we declined to address the exclusivity element. Instead, we held (1) the first element did not apply: "The sudden stop of an escalator in this case was not the type of unusual situation which normally does not occur in the absence of negligence"; and (2) the third element, i.e., the injury-causing occurrence was not due to any contribution of the injured party, did not apply: "Nordstrom is not an insurer of the safety of its customers who choose to ride an escalator under circumstances similar to the facts of this case." Tinder, 84 Wn. App. at 793, 795.

Likewise, Ewer v. Goodyear Tire & Rubber Co., 4 Wn. App. 152, 480 P.2d 260 (1971) is of no help to the Omans. There, the plaintiff's employer purchased a new tire from a Goodyear distributor and stored it in a warehouse until the plaintiff retrieved it. Defects in the tire's beading caused it to explode when the plaintiff attempted to mount the tire on his car. We held that although the control was not exclusive, res ipsa loquitur could still apply, "provided plaintiff proves that the condition of the product had not been changed after it left defendant's control." Ewer, 4 Wn. App. at 157 (quoting Zentz v. Coca Cola Bottling Co., 247 P.2d 344 (1952). Here, not only did the Omans provide no proof that the car, the engine, or any of the engine components had not

changed since BMW of North America sold the car to the dealership, the evidence shows the car was driven for years after leaving the control of BMW of North America.

The Omans also claim that Hogland v. Klein, 49 Wn.2d 216, 298 P.2d 1099 (1956) stands for the proposition that the second element is satisfied where the defendant "had the responsibility for ensuring proper functioning." They misread the case. In Hogland, a building owner counterclaimed against a "house mover" for damages to the building incurred during moving operations. The mover argued the exclusivity element of res ipsa loquitur did not apply because although the mover provided supplies, equipment, and instruction, and supervised and controlled the work of moving the building, it was actually the owner's crew that physically loaded the building onto timbers and placed it onto dollies. The Supreme Court rejected the argument, holding that control "does not mean actual physical control but refers rather to the right of control at the time of the accident." Hogland, 49 Wn.2d at 219. Here, unlike Hogland, there is no evidence BMW of North America had the legal right to control any part of the car years after selling it.[4]

In sum, neither of the first two elements of res ipsa loquitur apply, and the trial court did not err in dismissing the negligence claim against BMW of North America.[5]

WPLA claim. The Omans also argue the trial court erred by dismissing his

[4] The Omans also cite Kind v. City of Seattle, 50 Wn.2d 485, 312 P.2d 811 (1957), but in that case, it was undisputed that the City of Seattle did, in fact, have exclusive control over a broken water main.

[5] In light of our decision on this issue, we need not address the third element, or BMW of North America's argument that spoliation prevented it from determining whether the Omans' Pontiac contributed to the fire.

WPLA claim against BMW of North America. We disagree for the reasons stated herein.

The Washington Product Liability Act (WPLA) "distinguishes between and imposes different standards of liability on manufacturers and product sellers for harm caused by defective products." Johnson v. Recreational Equipment, Inc. (REI), 159 Wn. App. 939, 946, 247 P.3d 18 (2011) (citing RCW 7.72.030, .040). "As a general rule, manufacturers of defective products are held to a higher standard of liability, including strict liability where injury is caused by a manufacturing defect or a breach of warranty." Id. (citing RCW 7.72.030(2)). By contrast, "product sellers are ordinarily liable only for negligence, breach of express warranty, or intentional misrepresentation." Id. at 946-47 (citing RCW 7.72.040(1)). "In limited circumstances, however, product sellers are subject to 'the liability of a manufacturer[.]'" Id. at 947 (quoting RCW 7.72.040(2)). This includes a circumstance where "[n]o solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington[.]" RCW 7.72.040(2)(a).

It is difficult to tell whether the Omans argue BMW of North America should be liable as a seller or as a manufacturer. In the amended complaint, they did not cite any specific provision of chapter 7.72 RCW, but instead alleged only that BMW of North America "distributed" a defective car in violation of "RCW 7.72 et seq." In the response to summary judgment, the Omans argued only that BMW of Bellevue should be held liable as a manufacturer under .040(2)(a) because the German manufacturer is not

subject to service of process. The summary judgment response makes no mention at all of liability as a seller.

The opening and reply briefs on appeal, by contrast, make no mention of liability as a manufacturer under .040(2). Instead, the Omans' sole argument in their opening brief is that BMW of North America is liable as a seller under RCW 7.72.040(1) for breach of an express warranty. In the reply brief, the Omans argue that BMW of North America is liable as a seller under .040(1) for breach of an express warranty and also under .040(1) for "negligence."

BMW of North America contends the Omans are precluded from arguing for the first time on appeal that BMW is liable as a seller for breach of an express warranty. We agree. We do not consider, for the first time on appeal, an issue not argued to the trial court. RAP 9.12; Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008). Under RAP 9.12, we will consider "only evidence and issues called to the attention of the trial court" in an appeal of an order on summary judgment. Here, the Omans did not argue to the trial court that BMW of Bellevue was liable as a seller under RCW 7.72.040(1) for breach of an express warranty. Indeed, the terms of express warranty quoted in the opening brief were not before the trial court on summary judgment.[6]

Likewise, the Omans did not argue to the trial court that BMW of Bellevue was

[6] The express warranty was produced by BMW of Bellevue through requests for production, which were attached to a declaration of counsel for the Omans in support of the Omans' earlier motion for partial summary judgment. The Omans did not appeal the trial court's order denying that motion for partial summary judgment. Nor did they attach the express warranty to any pleading in opposition to the summary judgment motions at issue in this appeal.

liable as a seller under RCW 7.72.040(1) for its negligence. Instead, they argued below only that BMW of Bellevue was strictly liable as a manufacturer. But even if we construed the complaint broadly and considered the argument, we would nevertheless reject it. As is described above in the res ipsa loquitur section, the Omans' argument is that "BMW NA negligently supplied a defective vehicle to the Thornes." The question is thus whether the Omans presented any evidence that the Thornes' BMW was defective at the time it sold the vehicle to the dealership, nearly two years before the fire.

Again, there is no such evidence in the record. On this issue, the Omans' expert does not say anywhere in either of his declarations, or in his report, that the BMW engine or any engine components were defective when BMW of North America sold the vehicle in 2007. The report indicates only that BMW of North America had documented fuel pump failures in a service bulletin years later, and as is described above, the bulletin says nothing about fire or risk of fire. Rather, the bulletin states only that a fuel injector failure can cause spark plugs to misfire in their cylinders, making the engine run "rough" upon a "cold start."

In short, the trial court did not err in dismissing the WPLA claim against BMW of North America.

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Becker, J.

Grosse, J.