

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ARDEN E. FREDEKING and  
GEICO INDEMNITY COMPANY

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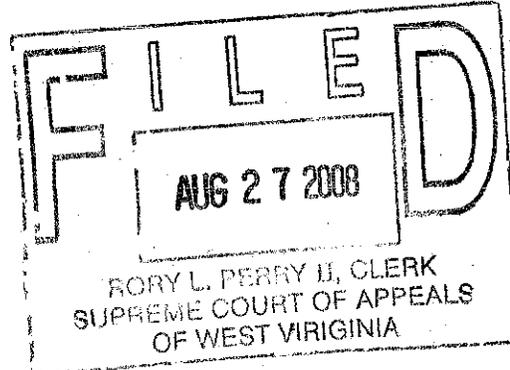
Appellees,

APPEAL NO. 073805

v.

MARLISE TYLER and BRADFORD TYLER  
as parents and next friends of ARIANA TYLER,  
an infant under the age of eighteen (18) and  
MALISE TYLER AND BRADFORD TYLER,  
individually,

Appellants.



APPELLANTS' REPLY TO BRIEF OF APPELLEE

Brian D. Morrison, Esquire (WV State Bar No. 7489)  
BAILEY & WYANT, P.L.L.C.  
500 Virginia Street, East, Suite 600  
Charleston, West Virginia 25301  
(304) 345-4222  
Fax (304) 343-3133

*Counsel for Appellants Arianna Tyler,  
Marlise Tyler and Bradford Tyler*

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ARDEN E. FREDEKING and  
GEICO INDEMNITY COMPANY**

**Appellees,**

**APPEAL NO. 073805**

**v.**

**MARLISE TYLER and BRADFORD TYLER  
as parents and next friends of ARIANA TYLER,  
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**Appellants.**

**APPELLANTS' REPLY TO BRIEF OF APPELLEE**

The Appellants submit this Brief in reply to the Brief of the Appellee regarding the appeal of the underlying matter. In their appeal, the Appellants contend that the trial court committed reversible error and abused its discretion in usurping its own judgment for that of the jury following a jury trial of this matter. Further, the Appellants assert that the trial court committed error in finding, as a matter of law, that the motor vehicle made the basis of this civil action was owned by the Appellee, Arden Fredeking, at the time of the subject accident. In addition, the Appellees maintain that the trial court committed reversible error in not applying Florida law to the alleged transaction by and between Fredeking & Fredeking Legal Corp. and Arden Fredeking.

Meanwhile, the Appellee asserts that the trial court did not abuse its discretion in granting the Appellee's Motion to for Judgment as a Matter of Law or in the Alternative for a New Trial in first setting aside the jury's verdict and then in holding, as a matter of law, that the Appellee was the owner of the subject vehicle on the date of the accident made the basis of this civil action. In

particular, the Appellee argues that (1) the trial court correctly applied West Virginia law to the transfer of ownership of the vehicle from Fredeking and Fredeking, LC to Arden Fredeking or, if the trial court did commit an error, said error was harmless and (2) the trial court was well within its discretion by setting aside the jury verdict and finding that the vehicle was owned by Arden Fredeking based upon the clear weight of the evidence. However, the Appellee's arguments fail for the following reasons.

**A. TRIAL COURT COMMITTED ERROR IN SETTING ASIDE JURY VERDICT**

1. **The BMW could not have been transferred to Ms. Fredeking in 1998, as the transferor had dissolved some 6 years earlier.**

The Appellee contends that the vehicle was transferred to her by Fredeking and Fredeking Legal Corporation in February 1998. However, the Appellants dispute that the vehicle could even be legally transferred to her by the law firm, as the law firm had dissolved in April 1992.

Throughout her Response Brief, Ms. Fredeking states, on multiple occasions, that the law firm could not have owned the car in 2003, as it was dissolved. See, Appellant's Brief at 3, 5, 20, 27, 30, and 34. More particularly, the Appellee asserts "the law firm was non-existent at both the time of the accident, and at the time of filing the Complaint. It was impossible for the law firm to own the vehicle." *Id.* at 30. In fact, a review of public records retained at the West Virginia Secretary of State's office confirms the Appellee's position that the law firm did not exist at the time of the accident. Moreover, a closer look at those public records reflect Fredeking and Fredeking Legal Corp. dissolved on April 22, 1992. As such, the law firm ceased to exist in 1992.

Meanwhile, the Appellee contends she obtained title to the vehicle in 1998 from the law firm. However, based upon the Appellee's argument that it would have been impossible for the law firm

to own the vehicle in 2003, it was equally impossible for the dissolved and thus non-existent law firm to transfer ownership to Ms. Fredeking in 1998, as the law firm had ceased to exist for nearly six years! Thus, while there is no direct evidence that Mr. Fredeking did not sign the back of the Certificate of Title in February 1998 or that Mr. Biser did not notarize Mr. Fredeking's signature, there is evidence that Mr. Fredeking could not have properly endorsed the back of the Certificate of Title on behalf of the law firm showing a transfer of ownership from the law firm to Ms. Fredeking in 1998, as the law firm did not exist!

The relevant statutory provision regarding the dissolution of corporations rests in *West Virginia Code* § 31D-14-1401, et seq. By dissolving, the law firm was essentially representing to the State of West Virginia, the state of its incorporation, that no debt of the corporation remained unpaid and that the net assets of the corporation remaining after winding up had been distributed. In other words, as of April 22, 1992, the corporation represented to the State of West Virginia that it no longer owned any assets and was no longer conducting any business. Yet, the Appellee contends that she obtained title to the vehicle in February 1998, nearly 6 years after the alleged transferor had dissolved and ceased to exist. In that regard, the Appellee is correct at page 30 of her Brief that the law firm could not legally own the vehicle, as it had dissolved in 1992. However, for that same reason, the law firm could not have transferred ownership of the vehicle in 1998, as it did not exist and therefore legally owed the vehicle such to convey ownership. Accordingly, even assuming that Mr. Fredeking signed the back of the Certificate of Title in February 1998, the Appellee cannot assert title to property from a transferor which does not exist. Thus, the Appellee's initial claim to title to and ownership of the vehicle are founded upon an improper and illegal transfer.

2. **Ms. Fredeking's actions in representing to the State of Florida and State of West Virginia that the vehicle was owned by the Fredeking law firm preclude her from now maintaining ownership.**

In support of her position that she owns the vehicle, the Appellee also contends that she exclusively drove the vehicle, washed and waxed it and, as such, treated it as her own such to show her ownership of the vehicle. See, Appellee Brief at 6. The Appellee maintains that the Appellants' primary evidence in refutation of the issue of ownership was Ms. Fredeking's failure to register the vehicle in her name. While failure to register the vehicle in her name is certainly evidence which the jury considered when determining the issue of ownership, the jury likely looked as much or more at what Ms. Fredeking did rather than what she did not as it pertains to the registration of the vehicle. It is this evidence which created the question of fact for the jury's consideration.

Seemingly to avoid paying West Virginia personal property taxes for the BMW, Ms. Fredeking, a West Virginia resident, affirmatively represented to the State of Florida for each year between 1998 and the date of the accident in 2003 not that she owned the vehicle but, rather, that the law firm owned the vehicle. Ms. Fredeking's representations to the State of Florida were manifested by renewing the license and registration in the name of the law firm for each year between and including 1998 and 2003. It is believed that the law firm, at one time, had an office in Florida. However, as indicated in her Response Brief, the law firm was a West Virginia corporation. See, Appellee's Brief at 5, 16.<sup>1</sup>

Since the purported transfer of title to the vehicle in February 1998, Ms. Fredeking expressly

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<sup>1</sup>As a West Virginia corporation, and because the vehicle was garaged, stored, used and maintained here in West Virginia, Fredeking & Fredeking L.C. violated *West Virginia Code* § 17A-3-1a which requires residents, including corporations whose principle place of business is in the State of West Virginia, to apply for and obtain registration and title to the vehicle, through the West Virginia Department of Transportation, Division of Motor Vehicles.

represented to the State of Florida annually on at least five occasions that the owner of the subject vehicle was and continued to be the Fredeking & Fredeking law firm. Thus, while she is allegedly the only driver of that vehicle, and regularly washes and waxes the same, she continued to affirmatively represent to the State of Florida during that time that the law firm owned the vehicle.

Further, the fact that she represented to the State of Florida that the law firm owned the vehicle on not an isolated occurrence but over a span of five years is telling of her "belief" of who owns the vehicle and her "intent" to assert ownership of the vehicle. Indeed, jurors likely realized that a reasonable person wishing to assert ownership of a vehicle would have taken steps to put the title in his or her name and would not have made affirmative representations to government agencies that another party owned the vehicle. In that regard, if a jury were to believe that title to the vehicle were transferred to her in 1998, then Ms. Fredeking intentionally misrepresented to the State of Florida that the law firm, and not she, owned the vehicle. She continued to operate the motor vehicle with a Florida license plate registered to the law firm listing a Florida address for that law firm. She continued to operate the BMW with the registration listing the law firm as the owner of the vehicle. Every year, she placed the decal which accompanied the renewed registration listing the law firm as the owner of the BMW on the Florida license plate registered to the law firm, and then stuck the paper registration listing the law firm as the owner of the BMW in the vehicle. These facts, admitted to by Ms. Fredeking, are more than just a failure or neglect to do something required of her. Rather, these are affirmative actions taken by Ms. Fredeking evidencing her lack of ownership of the BMW.

In response to the evidence that Ms. Fredeking had not only failed to obtain a Certificate of Title in her name but had also affirmatively renewed the registration to the vehicle in the name of

the transferor law firm, the Appellee contends that it was her "habit"<sup>2</sup> to simply send in the registration renewal in the name of the law firm to the State of Florida and there was no need to change the registration. See, Appellee's Brief at 3. In support thereof, the Appellee references page 112 of the Transcript.<sup>3</sup>

However, evidence of Ms. Fredeking's "habit" never made its way into the trial. No party introduced evidence that Ms. Fredeking habitually renewed the registration of her vehicles in the name of another party or entity. Indeed, such an argument overlooks and perverts the facts of this case. This vehicle was purportedly given to Ms. Fredeking in 1998 for her sixteenth birthday. It was her first vehicle. There is no evidence to suggest that she had ever sent in a registration form, initial or renewal, for any other vehicle prior to 1998. In order for Ms. Fredeking to have a "habit" of doing something in 1998, she must have been doing that act prior to 1998; otherwise, there can be no "habit". Thus, because there is no evidence to suggest or even imply that she had sent the registration for the BMW in to the State of Florida in years prior to 1998, it could not have been her "habit" to renew the title in the name of the law firm after 1998. Accordingly, to the extent that the Appellee wishes to indicate that the registration was renewed in the name of the law firm as a result of her habit in doing so, such argument clearly fails.

Further, the Appellee contends that there was no need to change the registration of record, as testified to by Mr. Fredeking. See, Appellee Brief at 3. Of course, there would be no need to

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<sup>2</sup>Interestingly, the Appellee seems to be asserting that it is her "habit" to purposefully deceive and misrepresent facts to government agencies. Assuming that it is her "habit" to so deceive, credibility regarding her testimony is certainly now at issue.

<sup>3</sup>Contrary to her assertion, page 112 of the Trial Transcript makes no mention of "habit" or any synonym thereof.

change the registration of record to the vehicle if the vehicle were still owned by the law firm! Thus, in light of the circumstances of this case, and given the ongoing representations made by the Appellee to the State of Florida that the law firm still owned the vehicle, the Appellee is correct that there would be no need to apply for a new registration in her name, as she did not own the car. However, if Ms. Fredeking wished to assert ownership of the vehicle, then it would be necessary for her to apply for and obtain a Certificate of Title to the vehicle in her name. Indeed, the jury needed to look no further than the back of the very Certificate of Title from which Ms. Fredeking was claiming title and ownership of the vehicle to see that even the State of Florida requires a transferee to apply for and obtain title to the vehicle in his or her name.<sup>4</sup>

Still further, implicit in her representations to the State of Florida that the law firm still owned the vehicle were her representations to the State of West Virginia that she did not own the vehicle. Otherwise, Ms. Fredeking, allegedly a West Virginia resident,<sup>5</sup> would also be required to obtain title and register the vehicle in her name in the State of West Virginia. *W. Va. Code* § 17A-3-1, et seq.; *W. Va. Code* § 17A-4-3. By not registering the vehicle in her name in West Virginia, Ms. Fredeking avoided paying personal property taxes on that vehicle for at least four years during which

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<sup>4</sup>West Virginia has a similar statute, *West Virginia Code* § 17A-4-3, which requires a transferee, before operating or permitting the operation of a motor vehicle upon a highway to apply for and obtain a registration in the name of the new owner.

<sup>5</sup>At the time of the alleged transfer in February 1998, the Appellee was living in Florida, attending school. Thereafter, she moved back to Huntington, West Virginia to complete her high school education before attending Dartmouth College. Thus, she may not have been required to register the vehicle in West Virginia initially in 1998, but would have been so required when she then moved back to West Virginia sometime thereafter. However, thi

time she had lived in West Virginia.<sup>6</sup> Accordingly, had the jury found that Ms. Fredeking owned the vehicle, then the jury would also be required to find that Ms. Fredeking committed a crime by violating *West Virginia Code* § 17A-3-1, et seq. regarding the improper registration of that vehicle, and further find that she improperly avoided paying personal property taxes for such vehicle.

3. **Ms. Fredeking alleged in her Complaint that the law firm owned the vehicle.**

In her original Complaint, Ms. Fredeking alleged that the Fredeking law firm owned the BMW. For her own claims, Ms. Fredeking asserted that she sustained a personal and/or bodily injury claim, said claim ultimately resolved prior to the trial of this matter. Meanwhile, the law firm asserted a property damage and third-party bad faith claim.

In her Response Brief, Ms. Fredeking attempted to explain how it is that her original Complaint alleged that the law firm owned the BMW. Ms. Fredeking contends that the “only reason that Fredeking and Fredeking law offices was listed as a plaintiff was because that was the name on the registration. Upon realizing that Fredeking and Fredeking LC was only listed on the registration as the record owner at the time of the accident but was not the actual owner, the plaintiff immediately, within two (2) months of filing the Complaint, sought to amend the Complaint to reflect the proper owner.” See, Appellee’s Brief at 7-8.

Factually, the Complaint was filed by Paul Biser, an attorney licensed to practice law in West Virginia who worked for the plaintiff law firm at the time of the filing of the Complaint. Mr. Biser filed the Complaint asserting the property damage claim on behalf of his employer, the plaintiff law

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<sup>6</sup>Similarly, the law firm avoided paying personal property taxes on the subject vehicle for at least seven years when it owned the same from 1985 through 1992 until its dissolution, and then, assuming *arguendo* it still existed and was able to own the vehicle after its dissolution, possibly for an additional six years through 1998 until the purported transfer to Ms. Fredeking.

firm, as well as the personal and/or bodily injury claim on behalf of Ms. Fredeking. Further, in addition to serving as counsel for Ms. Fredeking and the Fredeking law firm, Mr. Biser also served as witness to and notarized the signature of R.R. Fredeking, II on the back of the Certificate of Title.

These undisputed facts again raise several questions regarding the Appellee's response argument: (1) if Ms. Fredeking believed that she owned the vehicle, since 1998, how did she also not have this belief at the time of the filing of the original Complaint in 2003; (2) if Ms. Fredeking believed she owned the vehicle since 1998, how could she not realize that the title to the vehicle is in the name of the law firm and that the registration card which she put in her car every year from 1998 to 2003 listed the law firm as the owner of the vehicle; (3) if Ms. Fredeking believed she owned the car, why would she renew the registration to the vehicle in the name of the law firm for five years; and, more incredibly, (4) how did Mr. Biser not know of the alleged transfer between the Fredeking law firm and Ms. Fredeking given that he (a) must have conducted a reasonable investigation prior to filing suit as required by Rule 11(b) of the *West Virginia Rules of Civil Procedure* and (b) notarized Mr. Fredeking's signature in February 1998?

The Appellee's argument regarding her "realization" of the ownership of the vehicle is telling. Combining the procedural facts with the facts pre-suit, Ms. Fredeking did not "realize" that she owned the vehicle until after she had filed suit in 2003, when her ownership of the same was better suited for a tort recovery in a lawsuit rather than such a claim to be presented by her father's law firm. Further, if Mr. Biser actually witnessed and notarized the signature of R.R. Fredeking, II in 1998 on the back of the Certificate of Title, it would stand to reason that he would have not only information regarding the ownership of the vehicle following his investigation, but would have first-hand knowledge of the alleged transfer. Thus, any "realization" on the part of the Appellee or her

attorney would have occurred well before the filing of the original Complaint not two months after as asserted by the Appellee. Of course, if neither Ms. Fredeking nor Mr. Biser "realized" that Ms. Fredeking owned the vehicle until after the filing of the Complaint, as asserted by the Appellee in her Brief, then it would only stand to reason that she either never knew she owned the vehicle and/or her claim to ownership is nothing more than a thin disguise. In either instance, this Court should not permit the Appellee to benefit from her deceptive actions.

4. **The issue of ownership was a question of fact best left for the jury**

The Appellee further contends that the issue of ownership should not have been presented to the jury, as it was not a question of fact. Rather, the Appellee asserts that there is no evidence contradicting the February 2, 1998 transfer of title to the vehicle from the law firm to the Appellee. However, as the Appellee accurately pointed out, registration (and thus, title) are not synonymous with ownership. See, Appellee Brief at 19.

The Appellee inaccurately portrays the evidence against her ownership as simply her failure to properly register the vehicle in her name. Ms. Fredeking relies upon the fact that the title had been purportedly signed over to her and that she had been the exclusive driver of the vehicle since the same was delivered to her in Florida, where she attended school at the time. In support of her position, the Appellee references West Virginia law finding that a certificate of title is not conclusive proof of ownership but is merely evidence in establishing title which may be rebutted by other evidence. *Keyes v. Keyes*, 182 W. Va. 802, 392 S.E.2d 693 (1990); *State ex rel. Castle v. Perry*, 201 W. Va. 90, 491 S.E.2d 760 (1997). She contends that the three-part test, based upon both Florida and West Virginia law, provides that transfer of ownership is accomplished if the following factors are present: (1) a bona fide sale, bona fide gift or transfer of title or interest; (2) delivery of the

vehicle to the buyer or recipient's possession; and (3) delivery of the properly endorsed certificate of title to the buyer or recipient. Appellee Brief at 19. However, and for reasons discussed below, not only is the Appellee's reliance upon these cases misplaced, but the Appellee misstates this Court's holding in *State ex rel. Castle and Keyes*.

In *State ex rel. Castle*, the Court was faced with a question of owner/transferor liability for an accident occurring after the owner/transferor had signed the back of the Certificate of Title but before the transferee had obtained new title in her name. In that case, Ms. Castle sold a vehicle to Sally Jude. In doing so, Ms. Castle endorsed the certificate of title, dated it, and handed it to Ms. Jude. However, Ms. Castle did not put Ms. Jude's name on the back of the certificate of title. Ms. Castle then removed her motor vehicle tags from the vehicle. The following day, Ms. Jude was involved in an accident while driving the vehicle she had just purchased from Ms. Castle.

The issue before this Court in *Castle* case was whether Ms. Castle's failure to put the name of the transferee on the back of the title, in violation of *West Virginia Code* § 17A-4-9, exposed her to liability for a subsequent accident. Contrary to the Appellee's representative argument contained in her Brief, this Court did not, in either *State ex rel. Castle*, at syllabus point 2 or anywhere else in the body of the opinion, or in *Keyes*, at syllabus point 2 or anywhere else in the body of that opinion, hold that transfer of ownership of a vehicle is accomplished if the factors set forth in *West Virginia Code* § 17A-4-9 were present. Importantly, *State ex rel. Castle* did not even pertain to the status of the transferee as the owner of the vehicle under *West Virginia Code* § 17A-4-2, as that statutory provision was never directly addressed by the *Castle* Court in resolving the legal issues presented therein. Rather, this Court's decisions focused solely upon § 17A-4-9. In fact, this Court actually distinguished § 17A-4-2 from § 17A-4-9 by stating, in the facts at issue in *Castle*, although the

requirements necessary to effectuate a transfer of title pursuant to *West Virginia Code* § 17A-4-2 may not have been met, this did not create liability under *West Virginia Code* § 17A-4-9. *State ex rel. Castle*, 201 W. Va. at 95, 491 S.E.2d at 765. Thus, one could possibly satisfy the requirements of one section without having satisfied the other. In holding as it did, the Court drew a bright line distinction between the statutory provision relating to transferor liability (§ 17A-4-9) and transfer of ownership (§ 17A-4-2). Of course, this goes hand in hand with the Appellee's argument noted throughout her Brief that registration and ownership are two separately distinct concepts. Accordingly, *State ex rel. Castle* is not instructive on the issue before the Court.

Meanwhile, in *Keyes*, the Court was faced with a situation when Maude Keyes was listed as the only lienholder on the title issued to George Keyes. George Keyes died intestate, creating a question as to who owned the vehicle. In holding that Maude Keyes owned the vehicle, the Court found she held a purchase money resulting trust in the vehicle arising by operation of law tantamount to outright ownership. *Keyes*, 182 W. Va. at 804, 392 S.E.2d at 695. Neither *West Virginia Code* § 17A-4-2 nor § 17A-4-9 were decided or even discussed by the Court in *Keyes*. The issue in *Keyes*, upon which the Court ultimately determined ownership, pertained not to a transfer of interest in the vehicle, but, instead, upon a purchase money resulting trust which trust created ownership as a matter of law in the lienholder.

In the instant matter, there is no lienholder, and no purchase money resulting trust to discuss. As such, other than the holding which provides that certificate of title is not equal to ownership, to which both parties to this appeal seemingly agree, the *Keyes* decision provides no guidance for this Court's consideration.

But even if *State ex rel. Castle* and *Keyes* are applicable in showing what is necessary to

evidence ownership or the transfer thereof, the Appellee's argument and reliance upon this case nonetheless fails, as the evidence does not conform to the requirements necessary to show a transfer of title to her. First, the evidence introduced at trial suggested that the vehicle was a bona fide gift to Ms. Fredeking. Further, Mr. Fredeking testified that he delivered the vehicle to the Appellee in Florida. Accordingly, this evidence suggests that the first two elements of the three-part test suggested by the Appellee have been met.

However, the third element of the "test" is whether a properly endorsed Certificate of Title was delivered to Ms. Fredeking. In the instant matter, there was no evidence regarding the third element, delivery of the properly endorsed Certificate of Title to the buyer or recipient. In fact, evidence suggests the contrary, as the Certificate of Title was notarized by Mr. Biser in West Virginia while Ms. Fredeking was living in Florida. There was no evidence that the Certificate of Title accompanied the vehicle to Florida, or that the Certificate of Title was later provided to Ms. Fredeking. Instead, testimony indicated that the Certificate of Title was kept in a lock box. Transcript at 111.

Further, the Appellee's test requires a "properly endorsed" Certificate of Title. As indicated above, the alleged transferor, Fredeking & Fredeking L.C., dissolved in 1992. The alleged transfer occurred in 1998. As such, Fredeking & Fredeking, L.C. could not properly endorse the back of the title in 1998, as that entity did not legally exist. Accordingly, even if the Certificate of Title had been delivered to Ms. Fredeking, it could not have been properly endorsed, thereby once again defeating the Appellee's argument regarding transfer of ownership.

The question of fact presented to the jury was properly addressed by the trial court both prior to and during trial. When responding to the motions for directed verdict, the trial court held up the

Certificate of Title, the front of which lists the Fredeking law firm as the owner, the back of which shows the signature of Mr. Fredeking on behalf of the non-existent law firm purportedly transferring title. Thus, the Certificate of Title, by its contrasting and competing references to different owners, creates a question as to the owner of the vehicle.

The trial court's rulings during trial refusing to grant a directed verdict on the issue of ownership are consistent with *Commercial Credit Corp. v. Citizens Nat'l Bank of Point Pleasant*, 148 W. Va. 198, 205, 133 S.E.2d 720, 725 (1963), wherein this Court held "[a] certificate of title is not a warrant of ownership. It does not convey title or determine or affect ownership, but is merely evidence in establishing title, which may be rebutted by other evidence." In other words, the title (either front or back) does not tell the whole story as to ownership, and it is important to also obtain evidence and information as to what representations have been made and actions committed.

In addition, and possibly more important than her failure to register the vehicle in her name is Ms. Fredeking's affirmative representation to the State of Florida. These factors, although overlapping, do have separate implications and effect. Had Ms. Fredeking simply not renewed the annual registration to the BMW (and thus have driven the vehicle with an expired registration), this would be akin to a possible oversight on her part. Her argument that she simply failed, without more, to register the vehicle in her name may carry at least some persuasion.

However, rather than simply not registering the vehicle in her name, Ms. Fredeking actually took the affirmative step in registering the vehicle in the name of the law firm during the annual registration process. Further, she did this not only just one occasion, but on multiple occasions, each time representing to the State of Florida that the law firm owned the vehicle during the relevant time period from 1998 to 2003. In addition, and implicit in her actions is her representation to the State

of West Virginia, her alleged state of residency, that she did not own the vehicle; otherwise, she would have been required to register the same in her name pursuant to *West Virginia Code* § 17A-4-1, et seq. Most certainly, the jury drew upon their own experience in owning vehicles and found that any reasonable person wishing to assert ownership of a vehicle would not (1) renew the registration in the name of the transferor for multiple years and (2) would have, instead, applied for and obtained a new certificate of title showing her ownership of the vehicle. It is these affirmative actions and representations, as well as the Ms. Fredeking's failure to properly register her vehicle, which ultimately lends support for the jury's verdict.

Undoubtedly, ample evidence exists to create a question of fact regarding the ownership of the vehicle. In the very least, there was sharply contrasting evidence regarding the issue of ownership. The fact that Ms. Fredeking had affirmatively represented to the State of Florida for at least five years that the law firm owned the vehicle was more than enough to create a question of fact so that the issue should have been submitted to the jury. This, when combined with the Certificate of Title which, on the front, showed the titled owner as the Fredeking law firm, most certainly created a question of fact as to the actual owner of the vehicle. According, pursuant to this Court's recent holding in *Neely v. Belk, Inc.*, – W. Va. –, – S.E.2d –, 2007 WL 4897200 (June 26, 2008), the trial court's decision to set aside the jury's verdict and interject its conclusion of fact for that of the jury in resolving this question of fact was improper. Thus, the jury's deliberation regarding the issue of ownership, and its finding that the plaintiff had not sustained her burden of proving ownership of the vehicle, must be supported and reinstated.

5. **Florida law must apply to the purported transaction.**

Finally, the Appellee argued that the trial court correctly applied West Virginia law to the transfer of ownership of the motor vehicle and, alternatively, if the trial court did commit error, it was harmless. In support hereof, the Appellee contends that at least a portion of the elements necessary to transfer ownership, the signing of the title, occurred in West Virginia. The Appellee further argues that the law firm was a West Virginia corporation, and that although she did not realize full beneficial ownership until the car was delivered to her in Florida, the transfer nonetheless took place in West Virginia. See, Appellee's Brief at 16-17.

First and foremost, Ms. Fredeking did not sign or otherwise endorse the Certificate of Title through which she claims ownership. Rather, her father signed the same, purportedly on behalf of a dissolved and thus non-existent West Virginia-based law firm operating out of Florida. At that time, it seems Ms. Fredeking was living in Florida. She did not obtain the vehicle until the same was delivered to her in Florida. See, Appellee's Brief at 17. In light of the fact that Ms. Fredeking never sought to have the vehicle titled in her name until after the subject accident, the only connection to West Virginia as to the vehicle is that it owned by a law firm which had an office in West Virginia. However, the law firm office from which the Appellee purportedly obtained title to the vehicle was located in Florida, not West Virginia. The car was licensed, titled and registered in Florida. Further, the car was ultimately delivered to Ms. Fredeking while she was living in Florida. During that time, Ms. Fredeking obtained a Florida driver's license (evidencing her residency in Florida). Further, after the accident and after her lawsuit had been filed, Ms. Fredeking sought to have title to the vehicle placed in her name not from the State of West Virginia but, rather, from the State of Florida. In obtaining the Certificate of Title, Ms. Fredeking provided a Florida address for herself for the

registration of the BMW. Interestingly, the address Ms. Fredeking provided to the Florida Division of Motor Vehicles for the Certificate of Title to the vehicle in 2004 was the same address listed for the law firm in the accident report.

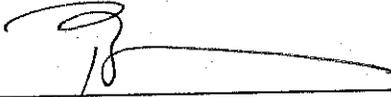
Thus, the operative facts which mandate that Florida law apply to the alleged 1998 transaction by and between the law firm, as transferor, and Ms. Fredeking, as transferee, include: (a) the seller/transferor was a law firm with a location or office in Florida; (b) for every year between 1985, when the law firm purchased the vehicle, and 1998, when the law firm allegedly transferred the vehicle, the BMW was licensed and registered in Florida and, thus, at the time of the alleged transfer, the vehicle was licensed and registered in Florida; (c) at the time of the alleged transaction, Ms. Fredeking was residing in and attending school in Florida; (d) when she turned 16 at about the time of the alleged title transfer, Ms. Fredeking obtained a Florida driver's license; (e) for every year between 1998 and the date of the accident in 2003, the vehicle continued to be licensed and registered in Florida; (f) at no time prior to the accident in 2003 had the vehicle ever been licensed, registered or titled in the State of West Virginia; and (g) the Appellee sought and obtained title to the vehicle in 2004, after the accident, from the State of Florida. Accordingly, the laws of the State of Florida must apply in this civil action as it pertains to the alleged transaction between the Fredeking & Fredeking law firm and Arden Fredeking.

#### **B. SUMMARY**

In summary, the Appellants request that this Honorable Court find that the Circuit Court of Cabell County abused its discretion by setting aside the verdict of the jury and not only awarding the Appellee a new trial in the face of conflicting evidence but also that the trial court abused its discretion in finding, as a matter of law, that the Appellee was the owner of the vehicle at the time

of the accident made the basis of this civil action. The Appellants further request that this Honorable Court reinstate the jury's verdict which was legitimately reached at the lower court.

**ARIANNA TYLER, MARLISE  
TYLER and BRADFORD TYLER**  
By Counsel



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Brian D. Morrison (WV Bar 7489)  
Bailey & Wyant, PLLC  
P.O. Box 3710  
Charleston, WV 25337  
304/345-4222

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APPEAL NO. 073805

v.

MARLISE TYLER and BRADFORD TYLER  
as parents and next friends of ARIANA TYLER,  
an infant under the age of eighteen (18) and  
MALISE TYLER AND BRADFORD TYLER,  
individually,

Appellants.

CERTIFICATE OF SERVICE

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I, Brian D. Morrison, do hereby certify that on this 27<sup>th</sup> day of August, 2008, I served the "APPELLANTS' REPLY TO BRIEF OF APPELLEE" upon counsel by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

William L. Mundy, Esq.  
P. O. Box 2986  
Huntington, WV 25728  
*Counsel for Plaintiff*

Stuart A. McMillan, Esq.  
Bowles Rice McDavid  
Graff & Love, PLLC  
P O. Box 1386  
Charleston, WV 25325-1386  
*Counsel for Defendant GEICO  
Indemnity Company*



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Brian D. Morrison, Esquire (WV Bar No. 7489)  
BAILEY & WYANT, P.L.L.C.  
500 Virginia Street, East, Suite 600  
Post Office Box 3710  
Charleston, West Virginia 25337-3710  
(304) 345-4222