IN THE COURT OF APPEALS OF TENNESSEE

MIKE T. HUNTER, Plaintiff-Appellee, v. DAMIAN V. BURKE; and DONNIE WEAR and JOE GUFFEY, individually and doing business as J&D AUTO SALES, Defendants-Appellants, and EDWIN THOMPSON, also known as EDWARD THOMPSON, Defendant.	))))))))))))))))))))	C/A NO. 03A01-9606-CV-00207 FILED June 27, 1997 Cecil Crowson, Jr. Appellate Court Clerk APPEAL AS OF RIGHT FROM THE BRADLEY COUNTY CIRCUIT COURT HONORABLE JOHN B. HAGLER, JR., JUDGE

OPINION ON PETITION FOR REHEARING

The appellants Wear and Guffey have filed a petition for rehearing in which they argue that our opinion overlooks material facts in the record. They contend that these "overlooked" facts made out a question for the jury; hence, so the argument goes, the trial judge committed error when he directed a verdict against them. They also argue that we were wrong when we held that the failure of the trial judge to

instruct the jury regarding the principles of comparative fault was harmless.

Specifically, the appellants contend that we failed to consider the fact that Guffey, one of the owners of the car lot, reported "the theft of the car to the local police department." They also assert that we were wrong when we said that the period of time Burke was in possession of the car did not give rise to an inference that Burke had stolen the car or had taken it out merely for a joyride. We disagree on both points. We did consider that Guffey reported the car stolen; however, in this case, that report does not prove or lead to a reasonable inference that the car was in fact stolen. On the second point, there is simply no evidence that *prior to the accident* Burke had had the car out for an unusual length of time. A rehearing is not warranted on these two points.

On the issue of comparative fault, the jury found that Thompson was guilty of *no* negligence. Therefore, there was no fault on the part of Thompson to which the fault of Burke/Wear and Guffey could be compared. The petition for rehearing on this point is likewise found to be without merit.

Finally, the appellants contend that we overlooked Burke's deposition testimony, read to the jury, wherein he stated that he did not go onto the car lot of Wear and Guffey. They argue that this testimony made out a jury question as to whether Burke was driving "with the knowledge and consent" of Wear and Guffey. *See* T.C.A. § 55-10-311(a). We agree that we overlooked

this testimony; however, we disagree with the appellants' assertion that it precludes a directed verdict for the plaintiff.

Burke did not testify in person at the trial; however, the jury did "hear" from him in two different ways. First, it listened to a tape of Burke's unsworn confession to the police following the accident, in which he said that both he and Thompson went on the lot and took possession of the car for a test drive. Following that testimony, portions of Burke's sworn-to deposition were read to the jury. In the deposition, Burke testified that only Thompson went on the lot; he further testified that Thompson picked him up at some point away from the car lot, apparently out of the sight of Guffey. Thus it can be seen that Burke said *he went on the lot* and then he testified that *he did not go on the lot*. He testified "both ways." At no point in the record does Burke attempt to explain away this inconsistency.

The appellants urge us to find that Burke's deposition testimony is evidence from which a jury could find that Burke did not go on the car lot and hence could not have been driving "with the knowledge and consent" of Wear and Guffey. *See* T.C.A. § 55-10-311(a). They argue that if a jury so found, then it would have to conclude that the vicarious liability pursuant to T.C.A. § 55-10-311(a) does not apply to this case.

We believe the trial judge was correct in ignoring Burke's deposition testimony. Since Burke testified, without explanation, both to the affirmative and the negative of the matter at issue--presence on the car lot--"[t]hese

contradictory statements effectively eliminate[d] any testimony from this witness on that fact." *Cooper v. Austin*, 837 S.W.2d 606, 612 (Tenn.App. 1992). *See also Bowers v. Potts*, 617 S.W.2d 149, 154 (Tenn.App. 1981); *Taylor v. Nashville Banner Pub. Co.*, 575 S.W.2d 476, 482-83 (Tenn.App. 1978). When Burke's inconsistent statements on this point are eliminated, we are left with the testimony of others to the effect that Burke and Thompson both went on the lot, got the keys from Guffey, and left the lot for a test-drive. Therefore, the elements of the statute are satisfied, and there is no evidence to take this case out of the ambit of the vicarious liability of T.C.A. § 55-10-311(a).

If, as the testimony of the other witnesses shows, (1) Burke and Thompson both went on the lot; (2) one asked to take a car out for a test-drive; and (3) both left the lot in the car, we do not believe it is important who asked for the keys or who was handed the keys. In the absence of any evidence to the contrary, both would have had the permission of Guffey to test-drive the car.

The petition for rehearing is denied at the appellants' costs.

IT IS SO ORDERED.

ENTER:

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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William H. Inman, Sr.J.