The Provided Porsche

Was It A Gift Or A Loan?

The acclaimed Irish author John McGahern wrote in his 1974 novel, *The Leavetaking*, "Anything that is given can be at once taken away. We have to learn never to expect anything, and when it comes it's no more than a gift on loan."

Mr. McGahern probably would have appreciated the struggle to distinguish between a gift and a loan in *Whittington v. Indianapolis Motor Speedway Foundation*, decided on September 12, 2007 by the United States District Court for the Southern District of Indiana.

The Court's starting line: "This lawsuit is about a very fast, and valuable, race car."

According to the Court, in 1979 Reginald D. "Don" Whittington, Jr., his brother Bill, and Klaus Ludwig won the 24 Hours of Le Mans in a Porsche 935 K-3 (labeled to reflect the modifications of Kremer Racing). The 935 K-3 is "a rather famous car [which] is also worth considerable money. Don Whittington believes the Porsche could fetch $2,000,000 as a collectible."

"This litigation arises over its ownership. In the early 1980s, the Porsche was delivered to the Foundation, which operates the Indianapolis Motor Speedway Hall of Fame Museum ("Museum"). [Don] Whittington says he loaned the car; the Foundation says he donated it. Regardless, for more than twenty years, the Foundation maintained and insured the car, and sometimes displayed it."

In 2004, Whittington asked the Foundation to return the Porsche so he could show it at a vintage car event. The Museum responded that the Porsche had been donated. Whittington's attorney demanded documentation of a donation or the return of the car. Whittington subsequently sued, seeking the car and other relief. Both sides sought summary judgment, asking the Court to decide the case without trial.

The Court denied both motions: "It appears that this dispute can only be concluded by trial on the merits."

The Court examined the long factual history, including myriad alleged conversations and tangential documentation purportedly bearing on the nature of the provision of the vehicle to the Foundation.

"As the record makes clear, the circumstances surrounding the transfer of the Porsche 935 K-3 are vigorously disputed. Not only do the parties dispute whether the car was donated or loaned, they disagree about who made the offer to whom. Neither Whittington nor the Foundation can point to written records – either those made contemporaneously or later – that establish the nature and circumstances of the transfer, or its ownership.... For this reason, the court DENIES Whittington's cross-motion for summary judgment.

"The only remaining issues are the Foundation's claims that the statute of limitations and equitable doctrine of laches preclude this dispute from being litigated. Nearly a quarter of a century has passed. Some memories have dimmed. Others have been extinguished. Yet the passage of time in itself is not necessarily conclusive or even remarkable, particularly in cases involving museums.... Long-term loans, sometimes called 'permanent' loans, are not uncommon among museums."

"Whittington's conversion claim is governed by a two-year statute of limitations.... His replevin claim, which is an action to recover possession of personal property, is governed by a six-year statute of limitations.... [T]hese statutes of limitations do not begin to run until 'the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another.'"

"[V]iewing the facts and inferences in the non-moving party's favor [for purposes of deciding the motion and not as a ruling on the merits], the Foundation has not conclusively established that any of its actions – or those of others – alerted Whittington to its claim of ownership prior to 2004."

Thus, the Court denied the Foundation's motion for summary judgment based on the statute of limitations.

It also denied the Foundation's motion which asserted "that Whittington's claims are barred by laches, the long-standing doctrine that a court of equity will not come to the aid of persons who sleep on their rights and show no excuse for their neglect in asserting them.... To invoke this doctrine in defense, a party in Indiana must show the plaintiffs' (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party.'"

"It is on the first two elements of laches that the Foundation's summary judgment motion falters. The Foundation has not shown that a passage of twenty or more years was unreasonable if, as Whittington maintains, the car was given to the Museum as a long-term loan. Nor has the Foundation provided evidence that Whittington was aware of its claim of ownership until 2004. The mere passage of time did not amount to an implied waiver."

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The lesson of the case is that, if you intend to make a gift or a loan of a vehicle, make sure the precise nature of the matter is clearly spelled out in a contemporaneous written document agreed to and signed by the parties. Such precautions can help you avoid the fate of some of Mr. McGahern's characters, since, as one commentator noted, "There were no truly happy endings in his fiction."

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