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

(King County Cause No. 08-2-30068-4 SEA)

GRETCHEN WEBER,

Plaintiff-Appellant,

vs.

BUDGET TRUCK RENTAL, LLC, a Delaware corporation,

Defendant-Appellee.

OPENING BRIEF OF APPELLANT

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(WSBA No. 30391)
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I. INTRODUCTION

Timothy Turner was still “burning out” following a methamphetamine bender when he ran over plaintiff/appellant Gretchen Weber in a marked crosswalk with a cargo van he had rented from defendant/appellee Budget Truck Rental the day before. He was charged criminally with vehicular assault and driving under the influence in connection with the accident, and he has since pled guilty to both crimes. Turner, an admitted drug addict, told the sentencing judge that he was “strung out” on methamphetamine when he ran over Weber. Turner has also admitted fault in this civil case.

The question is: How did this drug addict, who was high at the time he walked into the Budget rental office, end up with the keys to an 8,600 pound cargo van? The record shows that Budget should have known, in the exercise of ordinary care, that Turner was reckless, heedless, or otherwise not competent to drive a vehicle based on the following facts:

- (1) Turner had used methamphetamine on the morning of the rental and was still high at the time of the rental;
- (2) Turner was exhibiting characteristic signs of impairment, including restlessness, agitation, nervousness, licking of lips, rapid, repetitive speech, and dilated pupils, at the time of rental;

- (3) Turner was wearing a sleeveless shirt that revealed tattoos on his arms depicting drug manufacture and glorifying drug use;
- (4) Turner had track marks on his left arm and blackened, burnt fingertips on his left hand;
- (5) Turner had no credit card;
- (6) Turner was not asked for, and did not present, two forms of identification, as required by Budget policies;
- (7) Turner's driver's license was suspended; and
- (8) Turner's signature on the rental agreement did not match the signature from his driver's license.

Weber sued Turner and Budget in King County Superior Court.

Weber's sole cause of action against Budget – negligent entrustment – was dismissed by the trial court on Budget's motion for summary judgment. The trial court entered judgment in favor of Budget and made findings pursuant to Civil Rule 54(b). It also stayed the case still pending against Turner.

Weber takes this appeal, pursuant to RAP 2.2(d), from the trial court's dismissal of Budget because Weber believes that, when viewing all facts in the light most favorable to Weber, a reasonable jury could conclude Budget should have known that Turner was reckless, heedless or incompetent when it entrusted him with the keys to an 8,600 pound cargo van.

II. ASSIGNMENTS OF ERROR

1. Under Washington law, Budget may not entrust a vehicle to someone it should have known was impaired by drugs, and therefore not competent to drive. Did the trial court err in granting Budget summary judgment where Turner had used methamphetamine that morning, was still high at the time of rental, was exhibiting outward signs of impairment, and was so impaired that he could not even sign his own name on the rental agreement?
2. Under Washington law, Budget may not entrust a vehicle to someone it should have known was likely to become impaired (and be rendered incompetent) in the near future. Did the trial court err in granting Budget summary judgment where Turner, an admitted drug addict, had visible tattoos depicting drug manufacture and glorifying drug use, visible track marks on his left arm, and visible blackened, dark fingertips on his left hand?
3. Under Washington law, Budget may not entrust a vehicle to someone it should have known, in light of the totality of circumstances, was reckless, heedless or incompetent. Did the trial court err in granting Budget summary judgment where, in addition to the physical and behavioral signs of impairment Turner displayed and the various visible signs that Turner was an addict,

Turner also lacked the proper identification, had no credit card, and carried a suspended driver's license?

4. Under King County Local Rules, Budget may not rely on testimony from witnesses never disclosed or examined prior to the court-imposed discovery cutoff. Did the trial court err in granting Budget's request for reconsideration based on testimony Budget offered from two witnesses never disclosed by Budget in court-ordered witness disclosures or at any time before the court-imposed discovery cutoff and whom Weber was never given the opportunity to examine?

III. STATEMENT OF THE CASE

A. The Budget office that rented the van to Turner is an agency-operated office, meaning that the operators get paid based on the number of vehicles they rent; the office is located in a part of Seattle that tends to attract "different sorts of customers."

The Budget office that rented to Turner is an "agency operated" office. CP 21. The operators, Brenda and Duane Guiranovich, are paid a commission by Budget for every vehicle they rent. CP 335-337. There is no salary. They get paid only by renting trucks. *Id.*

The office itself is on the second floor of a two-story walk-up located at 2724 – 4th Avenue South in Seattle's "SoDo" neighborhood. In

order to reach the office, you must enter through a side door in the parking area and climb a set of stairs. CP 238, ¶ 2.

Lori Luzader, the Budget employee who handled the transaction with Turner, had transferred to the SoDo location from a location in Silverdale. CP 119. When she arrived, she was given additional training on only one topic – the neighborhood. The neighborhood apparently tended to attract “different sorts of customers” – angry customers, customers without identification, transients, and people who appeared “out of sorts.” CP 119.

B. Budget requires that operators refuse to rent to anyone showing *any* evidence of consumption of alcohol or drugs, but Budget does not train its operators on how to recognize if someone has consumed alcohol or drugs.

Budget’s written policies address those situations in which an operator should refuse to rent. The policies state that an operator should refuse to rent to anyone who shows any evidence of consumption whatsoever. But, Budget does not conduct any training of its personnel on how to recognize someone who is impaired by drugs or alcohol.

Budget’s “Truck Policies and Procedures Manual” in effect at the time of this rental begins with this statement:

It is a requirement to become and to remain a dealer that you also follow these policies.

Section 11: Safety of your Manual sets forth the general qualification requirements for renters. Do not rent to any customer who does not meet these requirements *or who you reasonably believe or suspect is not properly qualified to safely drive the vehicle they wish to rent* and / or intends to use the truck for an illegal or improper purpose.

CP 311 (emphasis added).

Section 11 of the Manual, entitled “Safety,” describes those conditions under which a person should not be rented to. According to the Manual, “[t]he first step in upholding safety standards is to evaluate the customer as you begin the Rental transaction.” CP 312. That process includes “Qualifying the Customer,” which requires, among other things, the following:

- That the customer present a valid driver’s license;
- That there be “no evidence of consumption of alcohol or drugs” by the renter;
- That there be “no excessive nervousness or abnormal behavior” by the renter; and
- That the renter “be able to operate the vehicle in a safe manner.”

CP 313. The Manual then admonishes the operator as follows:

If the renter / driver does not meet these requirements, or if you have any reasonable doubts about the driver’s ability to safely operate the vehicle, DO NOT RENT THE VEHICLE.

CP 313. The Budget policy can be thus summed up: Do not rent to anyone you believe, or even suspect, may be unsafe or where there is any evidence whatsoever of alcohol or drug consumption.

Budget's training on its policies is conducted online, by written examination. CP 383. Seventy percent is passing. CP 385. The training focuses on Budget's systems; it does not address how to recognize an impaired or unfit driver. CP 385-387. Luzader, the person who interacted with Turner, had no training whatsoever from Budget on how to recognize if someone has consumed alcohol or drugs.¹

C. Timothy Turner rents a cargo van from Budget while high on methamphetamine; he has track marks, drug-related tattoos, and blackened fingertips; he has a suspended license, no credit card, and his signature on the rental forms does not match the signature on his license.

Turner spent the morning of May 20, 2008, smoking methamphetamine with some "unsavory people." CP 360-361. Specifically, Turner recalls smoking with some friends at about 5:00 a.m. CP 363.

Later that day, around noon, Turner went to rent a van. CP 181. Turner went into the Budget office and spoke with the desk clerk, Lori Luzader. CP 121-122. Turner then left the office after being told that, because he had no credit card, he would need one hundred fifty dollars in

¹ In the 30(b)(6) deposition of Budget, Ulrike Higginson testified that Budget does not provide training on how to recognize someone who is intoxicated, impaired, or likely to become intoxicated or impaired. CP 386. Brenda and Duane Guiranovitch, having had no training from Budget on the issue, likewise did not train their employee, Lori Luzader. CP 346-349. Luzader testified, however, that she did have a conversation at one point with Brenda and Duane Guiranovitch about what to look for in someone who might be intoxicated. CP 121.

cash for the deposit. CP 122, 172. Later, Turner returned with the cash, and the rental agreement was signed. CP 123. That was approximately 2:00 p.m. CP 485.

Turner came into the Budget office without a reservation. CP 338. He presented Luzader with an out-of-state (Oregon) driver's license. CP 25. The license was invalid, as it had been suspended. CP 26, 179. Luzader did nothing to confirm the validity of the license other than to look it over. CP 123. She did not check available online databases, and Budget does not subscribe to any of the paid information services that check driving records nationally. CP 100, 123.

Also, Turner did not have a credit card. CP 338. Under Budget policies, a second form of identification is therefore required. CP 388. Luzader admits she did not ask Turner for a second form of identification and that he did not present one. CP 25, 122-123, 388.

Moreover, Turner's signature from his Oregon driver's license does not match – even slightly – the signature contained on the Budget Rental Agreement and related documents. *Compare* CP 192-193 *with* CP 485-487.

Luzader testified that all she could recall about Turner was that he had tattoos all over his arms. CP 122. Turner was wearing a sleeveless shirt on that day. CP 338-339.

The tattoo on Turner's right forearm shows a woman wearing a gas mask, holding a long needle, with fumes rising around her. CP 301. The tattoo on Turner's left forearm has the words "WASTED YOUTH CREW" written in large lettering. CP 300. Turner explained in his deposition that the phrase was meant to refer to a group of young people who liked getting high. CP 355-356.

In addition, there were track marks on Turner's left forearm. Those track marks were noted by a Seattle Police Officer who interacted with Turner following the accident. CP 304, 417, 421. Turner told Seattle Police and testified in this case that he did not use again between the time of the rental (May 20) and the time of the accident (May 21). CP 183, 304, 366-374. Thus, the track marks observed at the time of arrest were there to be seen by Luzader at the time of the rental.

Last, Turner had black, darkened fingertips on his left hand. CP 304, 417, 421. Turner appears to have initialed or signed his name (presumably in the presence of Luzader) in numerous different places on the various rental documents. CP 485-487.

Though Luzader testified that Turner did not appear impaired, Weber's expert toxicologist testified that, based on a retrograde analysis from the methamphetamine found in Turner's system after the accident, Turner probably "would have displayed characteristic effects of

methamphetamine” including “restlessness, agitation, nervousness, licking of lips, rapid, repetitive speech, and dilated pupils” at the time of the rental. CP 253.

In the end, Luzader handed over the keys to a Budget cargo van. The vehicle is 8,600 pounds. CP 308. Before renting, Luzader required that Turner initial several “safe driving tips” unique to large vehicles with limited sight lines. CP 486.

D. Turner runs over Weber in a crosswalk; he has methamphetamine in his system; he pleads guilty to vehicular assault and driving under the influence.

The day after the rental, Turner was driving the cargo van with his girlfriend riding in the back. CP 373-374. He was “burning out,” but still had significant methamphetamine in his system. CP 130-131, 136, 157, 296, 367-368. He made a left turn onto South Jackson Street, and ran right over Weber without having ever seen her. CP 23, 130-131, 152-153. He dragged Weber beneath the van until a pedestrian signaled for him to stop. CP 130.²

Seattle Police Officer Ed Harris, who investigated Turner for driving under the influence, observed that Turner was still exhibiting

² Weber was taken by ambulance to Harborview Medical Center where she was treated for serious injuries, including a traumatic brain injury, a fractured vertebra in her neck, four broken ribs, internal injuries to her spleen and liver, and severe skin damage on her back and left arm.

residual effects from his prolonged methamphetamine usage at the time of arrest. Officer Harris observed that Turner had bloodshot eyes, droopy eyelids, unequal pupil size, and fresh track marks on his left forearm. CP 264-265, 304-305, 417, 421-422. Furthermore, the police video of the interview and field tests that Officer Harris conducted shows Turner struggling to put on his sweatshirt, fidgeting excessively, and with dark finger tips (from the burn of a meth pipe). CP 332, 474.

Following the Seattle Police investigation, Turner was charged with Vehicular Assault (a felony) and Driving Under the Influence (a misdemeanor). Turner consented to a blood draw on the date of the accident. The results of testing performed by the Washington State Toxicology Laboratory showed the presence of methamphetamine and amphetamine in Turner's system. CP 130-131, 136.

On January 8, 2009, Turner pled guilty to Vehicular Assault and DUI. CP 155-158. In his Statement on Plea of Guilty to the DUI charge, Turner said:

On 5/21/08 in King County, WA, I drove a motor vehicle while under the influence or affected by a drug, to wit; methamphetamine.

Then, in a letter written to the sentencing judge, Turner admitted the role methamphetamine played in the accident. CP 296-297. He wrote:

On May 21st, 2008, I was driving a rented moving van and accidentally [sic] struck a pedestrian name [sic] Gretchen Weber. At the time of the accident I was strung out on meth and groggy and should not have been driving at all.

Turner has also accepted responsibility in this case. CP 296.

IV. ARGUMENT

A. Standard of Review

The trial court's order granting Budget summary judgment is reviewed *de novo*. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 610 (2009). Thus, the court must engage in the same inquiry as the trial court, and summary judgment in favor of Budget was improper if, after considering all evidence in the light most favorable to Weber, there is a genuine issue as to any material fact. *Haueter v. Cowles Pub. Co.*, 61 Wn. App. 572, 584 (1991).

B. Legal Standard

Budget is liable for negligent entrustment if it "knew, or should have known in the exercise of ordinary care," that Turner was "reckless, heedless, or incompetent" at the time of rental. *Cameron v. Downs*, 32 Wn. App. 875, 878 (1982) (reversing trial court's summary judgment dismissal of negligent entrustment claim); *Mitchell v. Churches*, 119 Wash. 547 (1922) (affirming trial court's decision to provide the jury with a negligent entrustment instruction); *see also* Restatement (Second) of

Torts § 390 (1965). What constitutes “incompetence” can be any number of things. Courts have found that a person may be incompetent if he is “inexperienced, immature (too young being the usual immaturity), physically or mentally handicapped, unlicensed, intoxicated or reasonably to be expected to become so, or a user of drugs, or habitually careless, known to be of a violent nature or disposition, etc.” See THE AMERICAN LAW OF TORTS § 4.10 at pp. 591-92 (1983).

Here, there is evidence in the record that (1) Turner was high on meth at the time of the rental and should have been identified as impaired, (2) Turner was a drug addict who should have been identified as someone likely to use drugs, and (3) Turner should have been identified as not competent to drive based on the totality of the evidence, including the fact that Turner lacked a valid driver’s license, credit card, or proper identification. In reviewing the evidence in the record, the Court must consider the “totality of the evidence” and determine whether, when considered together, it creates an issue of fact. *Cf. Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 894 (2009) (A trier of fact in a negligence action may consider the “totality of the circumstances established by the evidence” in determining whether there has been a breach of a duty of care). The Court must reverse the trial court unless, after considering all of the evidence in the light most favorable to Weber, reasonable people

could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494-95 (1974).

Thus, the salient issue for the purposes of this Court's de novo review of record is whether, after reading all inferences in Weber's favor, a question of material fact exists as to whether Budget (a) should have recognized Turner as impaired, (b) should have recognized Turner was an addict, or (c) should have recognized, based on the totality of evidence, that Turner was otherwise reckless, heedless, or incompetent. If the answer is Yes, then the trial court erred in summarily dismissing Weber's claim against Budget.

C. The record contains ample evidence from which a jury could conclude that Budget should have recognized that Turner was high on meth.

Turner was high at the time of his rental. This fact is not in dispute. Budget's argument is, however, that its operators did not recognize that Turner was high on methamphetamine at the time of the rental. But, even assuming the Budget witnesses are giving truthful testimony, (i) there is ample evidence from which a jury could conclude Budget should have, in the exercise of ordinary care, recognized Turner was impaired, and (ii) Weber should be permitted to argue that Budget staff, if properly trained on Budget's own policies, would have been able to recognize that Turner was under the influence.

1. Luzader should have recognized that Turner was high.

The mere fact that Luzader denies that Turner showed visible signs of impairment is not enough to entitle Budget to summary judgment. Self-serving testimony should not be permitted to prevail over independent evidence of impairment, particularly when – as here – all inferences from the evidence must be viewed in the light most favorable to Weber. *See, e.g., Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929 (1982) (triable issues of fact existed in negligent entrustment of firearm case notwithstanding the fact that the gun store owner and a gun store customer both testified that the prospective gun purchaser did not display symptoms of intoxication).

Here, (1) Turner admits he used methamphetamine the morning of the rental, (2) Predmore has testified that, more probably than not, Turner would have displayed outward signs of impairment at the time of the rental, (3) Officer Harris observed residual outward effects of Turner's methamphetamine usage on the day of the accident, and (4) Luzader should have discovered Turner's impairment from the fact that he was unable to sign his own name, had she followed Washington law and compared the signature from Turner's driver's license with the signature on the Rental Agreement.

First, Turner used meth the morning of the rental. CP 36-363. Because Turner often remains “high” for eight hours after using meth, he would still have been “high” when he entered the Budget office. CP 110-111.³

Second, Weber submitted expert testimony from David Predmore, a longtime forensic toxicologist from the Washington State Toxicology Lab, stating that, more probably than not, Turner would have displayed various signs of impairment, including several of those specifically mentioned by Luzader as things she was told to be on the watch for. Predmore testified that, based on his analysis of Turner’s probable methamphetamine levels at the time of the rental, Turner “would have displayed characteristic effects of methamphetamine including: restlessness, agitation, nervousness, licking of lips, rapid, repetitive speech, and dilated pupils.” CP 253, ¶ 7. Budget did not offer any expert testimony in rebuttal.

Third, Officer Harris observed Turner still showing residual outward signs of impairment at the time of Turner’s arrest on May 21. CP

³ The Rental Agreement appears to have been signed at about 2:00 p.m., though Turner was in the rental office for some period of time before that because he came into the office, asked questions, left for a short while, returned with cash, and then proceeded with the rental. CP 122-123. Moreover, Turner probably smoked methamphetamine sometime later than 5:00 a.m. because, according to his testimony, the only thing he did between smoking meth and walking from the Silver Cloud Hotel, where he had been partying, to the rental office located a few blocks away was to eat some breakfast. CP 363-365.

264-266, 417, 421-423.⁴ In addition, the video of Turner taken from Officer Harris' police cruiser shows him struggling to put on his jacket and acting in a hyper and scattered manner. CP 332, 474.

Fourth, it is a reasonable inference from the evidence that Turner was too impaired at the time of the rental to sign his own signature.

Washington law states:

It shall be unlawful for any person to rent a motor vehicle to another person until he has inspected the vehicle driver's license of such other person and compared and verified the signature thereon with the signature of such other person written in his presence;

RCW 46.20.220(2). Here, the scrawled signature Turner placed on the Rental Agreement (at various locations) looks nothing like the elaborate

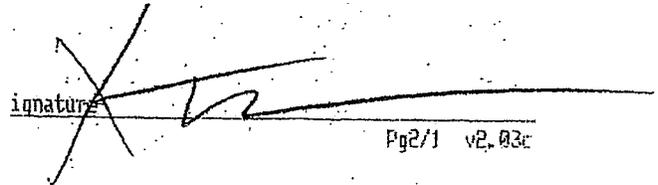
⁴ Turner's deposition was taken at the Monroe Correctional Center on August 26, 2009. In his deposition, Turner testified to having used the morning of May 20 (the day of the rental) and not again before the accident. CP 183. That testimony is consistent with what he reported to Seattle Police at the scene of the accident. CP 264. Following his deposition, Turner sent a Change Sheet from his prison cell calling into question his testimony on the issue of whether he used again post-rental. CP 184-185. Subsequently, Turner was re-deposed. CP 187. The testimony he gave in his second deposition (November 30, 2009) was confusing and scattered, but appeared to materially contradict his original testimony on the issue of whether or not he used again following the rental. It is irrelevant, for the purpose of summary judgment review, whether Turner's original testimony [*i.e.*, that he used on the morning of the rental and not again before the accident] or his revised testimony [*i.e.*, that he used on the morning of the rental and possibly again before the accident] is the truth. This Court *must* "consider all evidence and all reasonable inferences therefrom in a light most favorable to [Weber]." *Morris*, 83 Wn.2d at 494. The fact that Turner revised his testimony is something that Weber can, and will, present to the jury. *Seattle-First Nat'l Bank v. Rankin*, 59 Wn.2d 288, 293-94 (1962). For purposes of review on summary judgment, the Court must consider that the jury could find Turner's original testimony to be the more credible testimony.

signature that exists on the face of Turner's driver's license. *Compare* CP 192-193 with CP 485-487.

[Signature on Driver's License]



[Signature on Rental Agreement]



Under RCW 46.20.220(2), Luzader was required to undergo the process of matching up Turner's signature from his driver's license with his signature on the Rental Agreement. The jury could conclude that the signatures are not similar and that either Luzader should have refused the rental on that basis or, at a minimum, asked Turner to re-sign the Rental Agreement with a signature matching the one from his driver's license. Had Luzader done the later, it is a fair inference from the evidence that the reason Turner's signature is mere scrawl is because he lacked the motor coordination at that time to accurately sign his own name and would not have been able to reproduce his complete signature on demand.⁵ At that point, no reasonable person could have failed to identify that Turner was impaired.

⁵ Because this is an appeal from the trial court's grant of Budget's motion for summary judgment, this Court must "consider all evidence and all reasonable inferences therefrom in a light most favorable to [Weber]." *Morris*, 83 Wn.2d at 494.

2. Budget's failure to train its staff on how to recognize an impaired renter, when viewed against Budget's strict policy against renting to impaired persons, is also evidence of negligence.

Budget has a strongly-worded written policy against renting to drivers who display *any* signs of alcohol or drug consumption. The policy is, however, hollow because Budget does nothing to train its operators on how to identify someone who consumed alcohol or drugs.

The extent of Budget's training is to require operators to read a book and take an online test. CP 383-385. There are periodic "webinars" that are encouraged, but not required. CP 379-382. There is no training whatsoever on how to recognize if a person is intoxicated, impaired, or likely to become intoxicated or impaired. CP 385-387.

The issue, then, is not merely whether Luzader did or did not recognize the evidence that Turner had consumed drugs, it is whether she *should* have recognized Turner as someone who had recently smoked methamphetamine. Because Budget maintains a strict policy against renting to persons who show *any* signs of having consumed alcohol or drugs, it is, at a minimum, evidence of negligence that Budget provides no training on how to recognize someone who has consumed alcohol or drugs. This is particularly so here, where the signs of consumption are not necessarily intuitive to the lay person.

Budget's strict policy of refusing to rent to someone showing *any* signs of consumption, coupled with the fact that Budget gives its operators *no* training on how to recognize whether someone has consumed, is further evidence of Budget's negligence.

D. The record contains ample evidence from which a jury could conclude that Budget should have recognized that Turner was a drug user.

In addition to the evidence of actual impairment at the time of the rental, the record also contains evidence that Turner's appearance signaled that he was someone who either recently used or commonly used drugs. In other words, a reasonable jury could find that Budget should have realized that Turner (even if not visibly impaired) was incompetent because he was someone who was likely to become impaired, *i.e.*, a drug user.

It has long been recognized in Washington and in other jurisdictions that negligent entrustment can be found even where the trustee is not incompetent at the time of entrustment but is only likely to become so. *See Mitchell v. Churches*, 119 Wash. 547 (1922); 91 A.L.R. 5th 1 (2001). Because a drug user is reasonably likely to drive the vehicle he is renting in an impaired state, if the jury could reasonably conclude that Budget should have known that Turner was a drug user, summary judgment was improper.

The record contains ample evidence from which a jury could conclude that Budget should have recognized Turner as a drug user.

First, Turner had tattoos on his arms showing drug use. One tattoo depicts a woman in a gas mask holding a long needle. CP 301. Another has the words “WASTED YOUTH CREW” written in bold lettering. CP 300. Luzader admits she saw the tattoos. CP 122.

Second, Turner had track marks on his left arm. CP 264, 304, 417, 421. Because Luzader recalls seeing the tattoos on Turner’s forearms [CP 122], and because Turner was asked to sign several documents in front of Luzader [CP 485-487], when construing all facts in the light most favorable to Weber, it must be inferred that Luzader did in fact see the track mark on Turner’s left forearm.

Third, Turner’s fingertips on his left hand were darkened and burnt – a hallmark sign of a drug user who makes use of a glass pipe to ingest drugs. CP 264, 307, 417, 421. Again, in light of the time of interaction and the number of documents Turner was asked to sign in Luzader’s presence, it can be inferred (for summary judgment review purposes) that the jury could conclude that Luzader did in fact see Turner’s fingertips.

Because Luzader was trained to be on the lookout for “different sorts of customers,” these facts give rise to a genuine issue of material fact

that makes the trial court's dismissal of Weber's claim against Budget error.

E. Budget violated its own policies by failing to obtain the requisite forms of identification, failing to confirm that Turner was "duly licensed," and by ignoring other red flags, including the fact that Turner lacked a credit card.

In addition to containing evidence of Turner's visible impairment and his physical appearance as a drug user, the record also contains evidence that Budget violated its own policies (i) in failing to obtain proper identification from Turner, and (ii) in failing to confirm whether Turner held a valid driver's license. Moreover, Budget ignored other red flags, including Turner's lack of a credit card, before renting to Turner. These failures are additional evidence from which a jury may conclude that Budget should have recognized that Turner was not competent to drive and, therefore, should have declined to rent to him.

1. Budget violated its own policies by failing to get two forms of identification from Turner.

Budget admits it violated its own policies in renting to Turner. CP 25, 388. Evidence of Budget having violated its own internal policies is probative of negligence and is yet another reason why the trial court erred in refusing to submit this case to the jury. *See, e.g., Joyce v. Department of Corrections*, 155 Wn.2d 306, 324 (2005). Under Budget's policies, it

was required to get two forms of identification from Turner. CP 167, 388.

It did not do that. CP 388.

Interestingly, Budget Truck's rental requirements (which were not followed) pale in comparison to its car counterpart. Budget Rent-A-Car (the car rental business) requires two forms of identification *with matching addresses*. CP 318. Here, even if Turner had had a second form of identification and had presented it, the addresses do not match, and he would not qualify to rent a car from Budget. CP 192. In addition, Budget Rent-A-Car policies state that:

Budget will check renters' and additional drivers' licenses to ensure that they are valid. If the driving history reveals any of the following issues, Budget is unable to rent:

- Invalid, suspended or revoked license;
- ...
- Possession of stolen vehicle or use of a vehicle in a crime.

CP 319.

Had Budget Truck checked Turner's driving history, as Budget Car would have, it would have discovered that Turner had multiple convictions for possession of stolen vehicles and crimes involving the use of vehicles. CP 179, 239-240, 248-249. The jury may fairly ask, why are the rental requirements stricter for renting a car than for renting a heavier van or truck?

In any event, Budget's failure to adhere to its own policies, inadequate as they are, is evidence of Budget's failure to exercise ordinary care from which, taken together with other evidence, the jury could reasonably conclude Budget should have recognized Turner to be reckless, heedless, or incompetent.

2. Budget failed to confirm that Turner was "duly licensed" as required by Washington statute, or confirm that Turner held a "valid license" as required under Budget's policies.

Turner did not have a valid driver's license at the time of the rental. CP 26, 179. This fact is not in dispute in this case.

RCW 46.20.220 makes it unlawful to rent a vehicle to a person who is not "then duly licensed" as a driver. Similarly, Budget's policies require that the customer present "a valid driver's license" before renting. CP 313. The issue, then, is whether Budget (either under Washington law or pursuant to its own policies) must take steps to confirm that Turner is "duly licensed" or holds a "a valid driver's license" beyond simply visibly inspecting the license presented.

Neither RCW 46.20.220 nor Budget's own policies say anything about a driver's license that *appears* valid; they both require a driver's license that *is* valid.

Whether Budget's failure to take any additional steps to inquire about Turner's license status or driver history is negligent is an issue of fact for the jury. While several courts around the country have held that a rental car company's failure to do more than visibly inspect the face of the license is not negligence *per se* and is not – by itself – adequate evidence of negligence,⁶ the question of whether the rental car company's failure to do more than a visual inspection can be *evidence* of negligence appears to be an open question.

In *Snyder v. Enterprise Rent-A-Car Company*, a federal court in California concluded that a rental car company's failure to discover that a renter's license was suspended was evidence of negligence that precluded entry of summary judgment. 392 F. Supp. 2d 1116 (N.D. Cal. 2005). In *Snyder*, the rental car company was not presented with the same sort of red flags as exist in this case (*e.g.*, an impaired renter who shows signs of drug use and addiction and lacked proper identification or a credit card). Instead, the plaintiff argued that defendant should have checked an electronic license verification database before renting. The defense argued

⁶ See, *e.g.*, *Cousin v. Enterprise Leasing*, 948 So.2d 1287, 1289 (Miss. 2007) (denying plaintiff's claim of negligence *per se* where the renter presented a facially valid, but suspended, license); *Cowan v. Jack*, 922 So.2d 559, 562 (La. App. 2005) (plaintiff's only evidence of negligence was that the driver of the rented U-Haul truck that killed her husband had a history of moving violations and a suspended license); *Nunez v. A&M Rentals, Inc.*, 822 N.E.2d 743, 745 (2005) (the plaintiff's only evidence of negligence was the fact that the renter had a suspended license at the time of rental).

that it did not employ such a system and was not required to do so. The Court concluded that the defendant was not entitled to summary judgment because “whether a person of ordinary prudence, in the same situation, would have taken the same or different action cannot be resolved as a matter of law.” *Id.* at 1127.

The status of a Washington driver’s license can be instantly determined through a simple free online search.⁷ The license verification process in other states (including Oregon) is, admittedly, not as easy. But, Washington law and Budget’s policies are clear: Budget cannot (and will not) rent to anyone who is not duly licensed and who does not present a valid driver’s license. Budget violated Washington law and its own policies in this case.⁸

Last, the jury could reasonably conclude that fact that Turner was driving on a suspended license is causally linked to the accident. The Washington Legislature has made findings that link suspended drivers with accidents in this state. In connection with the passage of

⁷ Washington’s Department of Licensing maintains, on its website (www.dol.wa.gov), an online license verification feature. Any user can, free of charge, get an instant result on the status of a driver’s license simply by entering the driver’s license number into the dialogue box marked “Check the status of a driver license” on the DOL website at: <https://fortress.wa.gov/dol/dolprod/dsdDriverStatusDisplay/>.

⁸ Budget will argue that, even if it had checked a special subscriber-only database that Budget Car maintains, that database would not have revealed that Turner’s license was suspended. This argument was presented with evidence procured after the discovery cutoff and without Weber having had an opportunity to examine Budget’s witnesses. The fact that the trial court relied on Budget’s untimely, undisclosed witnesses is addressed below in Section IV(F).

Second, Turner's license was from out of state, though he gave a local address. The local address Turner provided did not match the address listed on Turner's driver's license or even the identification card that Budget contends was on Turner's person. *Compare CP 484 with CP 192.*¹²

F. Budget relied on the testimony of two previously undisclosed witnesses in connection with its motion for reconsideration; despite her objections, the trial court relied on the two witnesses' statements and did not permit Weber the opportunity to depose the witnesses.

The trial court initially denied Budget's motion for summary judgment. CP 424-426. But, after considering Budget's motion for reconsideration, the trial court reversed its position and granted Budget summary judgment. CP 445-447, 457-459.

Budget's motion for reconsideration included declarations from two people Budget had never before disclosed. CP 438-442. Weber objected under King County Local Rule 26(b)(4), which forbids a party from relying on undisclosed witnesses absent a showing of good cause. CP 449. Here, Budget had been on notice for over a year prior to the discovery cutoff that Weber's claim of negligence was founded in part on Budget's failure to confirm whether Turner held a valid driver's license. CP 139. In addition, Weber objected on the grounds that she was not

¹² As noted above, this is a second example of where Budget Rent-A-Car would have refused to rent to Turner. CP 318.

given the opportunity to depose or otherwise examine the two new witnesses.

Although the issue of the exclusion of a witness's testimony is usually reviewed under an abuse of discretion standard, *Lancaster v. Perry*, 127 Wn. App. 826, 830 (2005), the trial court's decision to rely on witnesses who had not been disclosed and who Weber was not afforded leave to examine should be reviewed *de novo* because Weber's objections were in the nature of a motion to strike. See *Southwick v. Seattle Police Officer John Does 1-5*, 145 Wn. App. 292, 297 (2008) (“[W]hen a motion to strike is made in conjunction with a motion for summary judgment, we review *de novo*.”).

Notwithstanding her objections, the trial court reversed its prior ruling on the basis of the two new declarations, and it made no finding of good cause excusing Budget's late disclosure. Weber never got the opportunity to ask questions about the TML Information Service Report that was attached to the Declaration of Mr. Sellers. CP 443. The trial court erred in granting summary judgment, where it had previously decided not to, apparently based solely on the two new declarations that Budget submitted. Under these circumstances, where the declarations apparently controlled the outcome of the issue, the trial court's refusal to

exclude the declarations or, at a minimum, to permit examination of the declarants, was error.

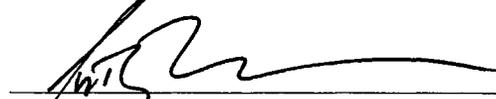
V. CONCLUSION

The evidence in the record needs not only to be viewed by this Court in the light most favorable to Weber, but it needs to be viewed together – as part of a constellation of facts and circumstances from which a reasonable jury *could* conclude that, had Budget exercised ordinary care, it *should* have discovered that Turner was reckless, heedless, or incompetent. Here, there is an abundance of evidence which, taken together and viewed in the light most favorable to Weber, may convince a jury that Budget did not exercise ordinary care in concluding that it was safe to entrust Turner with an 8,600 pound cargo van. For that reason, the trial court erred in granting Budget's request for summary adjudication on the merits.

This court should reverse the trial court's order dismissing Budget and remand this case for trial.

RESPECTFULLY SUBMITTED this 14 day of April, 2010.

PETERSON YOUNG PUTRA

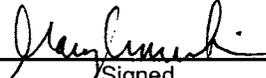


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CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Seattle, Washington, sent to the attorneys of record for defendant/respondent a copy of this document by ABC Messenger Service. I certify under the penalties of perjury under the laws of the State of Washington that the foregoing is true and correct.

4/14/10
Date


Signed