

65336-9

65336-9

NO. 65336-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KENNETH HOUSE,

Appellant,

v.

THE ESTATE OF MICHAEL L. MCCAMEY,

Defendant, and

THE ESTATE OF WILLIAM C. MCCAMEY,

Respondent.

BRIEF OF RESPONDENT ESTATE OF WILLIAM C. McCAMEY

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TABLE OF CONTENTS

	<u>Page</u>
I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
II. COUNTERSTATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Michael McCamey’s Pre-Accident Criminal and Driving Records.....	3
C. Michael McCamey’s Parole from Prison in April 2006 and William McCamey’s Entrustment of a Pickup Truck to Him in November 2006.....	5
D. The Trial Court Proceedings.....	13
III. SUMMARY OF ARGUMENT.....	14
IV. ARGUMENT.....	15
A. Standard of Review.....	15
B. Michael McCamey’s <i>Criminal</i> Record is Not Probative of His Driving Habits.....	15
C. Even if Michael’s <i>Criminal</i> Record Were Probative of His Driving Habits, House Failed to Present Evidence of the Extent to Which William McCamey Knew About That Criminal Record.....	18
D. As a Matter of Law, Michael’s <i>Driving</i> Record Before December 2006 Would Not Permit a Reasonable Jury to Find Him to Be an Incompetent, Heedless, or Reckless Driver to Whom It Was Negligent to Entrust a Motor Vehicle.....	21

E. Even if Michael’s *Driving* Record Were Sufficient to Establish that He Was a Heedless, Reckless, or Incompetent Driver to Whom It Would Be Negligent to Entrust a Motor Vehicle, House Failed to Present Admissible Evidence that William Knew or Should Have Known What Michael’s Driving Record Was.....23

V. CONCLUSION.....28

TABLE OF AUTHORITIES

	<u>Page(s)</u>
STATE CASES	
<i>Almanza v. Bowen</i> , 155 Wn. App. 16, 230 P.3d 177 (2010).....	15
<i>Cameron v. Downs</i> , 32 Wn. App. 875, 650 P.2d 260 (1982).....	16, 24
<i>Caouette v. Martinez</i> , 71 Wn. App. 69, 856 P.2d 725 (1993).....	16, 24
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	25
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	18
<i>Howell v. Spokane & Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991).....	25
<i>Jones v. Harris</i> , 122 Wash. 69, 210 Pac. 22 (1964).....	16, 24
<i>Laguna v. Washington State Dep't of Transp.</i> , 146 Wn. App. 260, 192 P.3d 374 (2008).....	25
<i>McCormick v. Dunn & Black, P.S.</i> , 140 Wn. App. 873, 167 P.3d 610 (2007), <i>rev. denied</i> , 163 Wn.2d 1042 (2008).....	18, 20, 21
<i>Mejia v. Erwin</i> , 45 Wn. App. 700, 726 P.2d 1032 (1986)...	16, 17, 21, 22-23, 24, 25, 28
<i>State v. Logan</i> , 102 Wn. App. 907, 10 P.3d 504 (2000).....	18
<i>Vikelis v. Jaundalderis</i> , 55 Wn.2d 565, 348 P.2d 649 (1960).....	16-17, 21

STATE STATUTES

RCW 46.20.01517
RCW 46.61.190(2).....2, 12
RCW 46.61.502(1)(a)8
RCW 46.63.0202, 12

RULES

CR 54(b).....14
CR 56(c).....15

I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly grant summary judgment dismissing plaintiff Kenneth House's negligent entrustment claim against the Estate of William McCamey where plaintiff failed to present sufficient evidence that William McCamey's son, Michael McCamey, a 49-year old emancipated adult who had obtained a valid Washington State driver's license two months before he negligently ran a stop sign and collided with House's van, was an incompetent, heedless or reckless driver, much less that William McCamey knew or reasonably should have known that Michael was an incompetent, heedless or reckless driver at the time he entrusted his pickup truck to Michael a month before Michael's collision with House's van?

2. Did the trial court properly conclude that Michael McCamey's record of child molestation, assault, and other criminal offenses unrelated to the operation of motor vehicles did not create a genuine issue of material fact from which a reasonable jury could find that Michael McCamey was an incompetent, heedless, or reckless driver?

3. Did the trial court properly conclude that no reasonable jury could find that an adult like Michael McCamey, who had obtained a valid Washington State driver's license two months before the accident in question, was nevertheless an incompetent, heedless, or reckless driver

because more than ten years earlier he had been ticketed four times for speeding and once for DUI?

4. Did the trial court properly conclude that plaintiff Kenneth House failed to present admissible evidence that, when he entrusted his pickup truck to Michael on November 6, 2006, or before Michael negligently ran a stop sign and collided with House's van on December 6, 2006, Michael's father, William McCamey, knew or should have known that Michael was an incompetent, heedless, or reckless driver?

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

At about noon on December 6, 2006, Michael McCamey, age 49, a paroled Level III sex offender and admitted alcoholic who was licensed to drive and sober, was driving a pickup truck owned and insured by his father, William McCamey, when he ran a four-way stop sign and collided with the passenger side of a van being driven by Ken House. CP 1620-30. Michael admitted fault and was cited for failure to stop at the stop sign, a civil infraction. CP 1620-21, 1623-24; *see* RCW 46.63.020; RCW 46.61.190(2).

In August 2008, House sued Michael for personal injuries. CP 1864-65. Michael died in September 2008. CP 1563, 1565-66. After Michael's death, House amended his complaint to assert claims against the

estates of both Michael and William McCamey. CP 1859-61. William had died in January 2007. CP 1860. House sought to hold William McCamey's estate liable under theories of vicarious liability and negligent entrustment. CP 1860 (¶¶ 5, 9). Both claims were dismissed on summary judgment. CP 29-31 (negligent entrustment), 1666-68 (vicarious liability). House appeals from the summary judgment dismissal of his negligent entrustment claim, but not his vicarious liability claim, against William McCamey's estate. *App. Br. at 2-3.*

B. Michael McCamey's Pre-Accident Criminal and Driving Records.

Michael McCamey was born March 13, 1957. CP 64, 1852. He had not lived in his parents' home after about 1975, when he left home, married, established a home of his own, raised a family of three sons, and later divorced. CP 1852-53. At the time of the December 6, 2006 accident, Michael was 49 years old and it had been about 31 years since he had last lived in his father's house. CP 1853.

During the 29 years before he ran the stop sign on December 6, 2006, Michael had been convicted of five felonies,¹ three gross

¹ The five felony convictions were for malicious mischief in 1986, indecent liberties in 1989 (for which he was sentenced to 15 months' imprisonment), possession of marijuana with intent to deliver in 1994, and two counts of first degree child molestation in February 1997 (for which he was sentenced to 132 months in prison). CP 345, 352, 354, 1526-34.

misdemeanors,² six misdemeanors,³ and two unclassified drug offenses,⁴ CP 345, had received a deferred prosecution for DUI,⁵ CP 1467, and had been ticketed four times for speeding and seven times for nonmoving violations of motor vehicle laws, CP 1465, 1467. Michael served prison time in 1989 for indecent liberties and was incarcerated again starting in February 1997 after pleading guilty to two counts of child molestation, for which he received a sentence of 132 months, and was incarcerated until April 2006.⁶ CP 345, 352, 354, 1526-34.

Of his four speeding tickets, Michael got one speeding ticket per year from 1992 through 1995. CP 1465. Four of his seven tickets for non-moving violations also occurred between 1992 and 1995, three for driving without liability insurance, and one for driving without a valid driver's license.⁷ CP 1465. Michael's one and only arrest for DUI

² The three gross misdemeanor convictions were for criminal trespass in 1986, simple assault in 1987, and assault in 1995. CP 345.

³ The six misdemeanor convictions included two for driving without a valid operator's license in 1977, one for obstructing a public servant in 1980, one for resisting arrest in 1981, one for violation of a restraining order in 1985, and one for failure to appear in 1987. CP 345.

⁴ The two unclassified drug offenses were for possession of marijuana of unknown amount in 1980, and malicious mischief in 1993. CP 345.

⁵ The DUI for which he received the deferred prosecution occurred on September 2, 1995. CP 1415-16, 1467.

⁶ While incarcerated, Michael was convicted in 2004 of manufacturing a controlled substance, marijuana. CP 107, 170.

⁷ It appears that Michael received the four speeding tickets and the four nonmoving violation tickets between 1992 and 1995 in six traffic stops. CP 1465. The driving without a valid license ticket was issued on the same date in 1993 as one of the speeding

occurred in September 1995, for which he received a deferred prosecution in early 1996.⁸ CP 1513-17, 1550-51. Michael's remaining three tickets for nonmoving violations, which consisted of driving a vehicle without proper tabs, driving without proper liability insurance, and driving without a valid driver's license, were issued on August 9, 2006, when Michael was stopped because of the lack of tabs, not for any moving violation or any rules-of-the-road violation. CP 1467, 1476 (p. 32). Those three tickets were the only ones Michael received after being paroled from prison in April 2006, and before running the stop sign on December 6, 2006. There is no evidence in the record that Michael had ever been involved in, much less caused, any motor vehicle accident before the accident on December 6, 2006.

C. Michael McCamey's Parole from Prison in April 2006 and William McCamey's Entrustment of a Pickup Truck to Him in November 2006.

In late 2005, with Michael due to be paroled from prison in the spring of 2006, his father, William, who lived in Republic, Ferry County, CP 296, 301, 1793 (p. 45), 1797 (p. 71), advised the Department of

tickets, and one of his driving without liability insurance tickets was issued on the same date in 1993 as another of his speeding tickets. CP 1465.

⁸ House asserts, *App. Br. at 5*, that Michael was arrested for reckless driving in 1995, citing "Exhibit 4 & 14 to Mechtenberg Dec.," which would be citations to CP 1465-67 and CP 1543-48. Neither of those citations reflects an arrest, much less a conviction, for reckless driving, nor has counsel for the Estate of William McCamey found any other indication in the Clerk's Papers that Michael ever had a reckless driving arrest or conviction.

Corrections (DOC) that Michael could live at a rental house William owned on Camano Island and that he would get Michael a vehicle. CP 141. Michael authorized the DOC to provide William with its files on him. CP 1536. The plan for Michael to live on Camano Island, however, never came to fruition. CP 141-42, 321-25. There is no evidence in the record that the DOC ever actually gave Michael's file to William, or that William ever read anything in that file if he received it from DOC.

Michael was released from prison on parole on April 12, 2006, and moved in with his girlfriend, Terry Dahlin, who lived in an Everett apartment and who let him use one of her cars on many occasions to run errands and drive to work. CP 142, 1854. As a paroled Level III sex offender, Michael was subject to an 8 p.m. curfew and supervision that included periodic polygraph examinations and random urinalysis, and was prohibited from leaving Snohomish County without a parole officer's permission, having contact with minors, using or possessing unprescribed controlled substances, or consuming alcohol. CP 137, 140, 150, 312, 318.

Dahlin testified that Michael resumed drinking in June 2006. CP 1473 (p. 18), CP 1475 (pp. 27-28). She testified that, during a telephone conversation or conversations in June 2006, she mentioned to William that Michael was drinking, using drugs, and abusing her. CP 1474 (pp. 24-25), CP 1480 (p. 57). Dahlin testified that she told William that Michael was

drinking beer about twice a week but did not tell him how much beer Michael was drinking, CP 1480-81 (pp. 57-58), and soon she quit talking about drinking issues with William, CP 1476 (p. 31). She testified that, on one or two occasions, Michael drove off in one of her vehicles after drinking and abusing her, but that she did not tell William about that. CP 1477 (p. 34), CP 1481 (p. 61). Dahlin did not testify that Michael had driven erratically, or had appeared intoxicated, or had consumed an amount of beer that would permit an inference of driving impairment on those occasions.

On August 9, 2006, Michael was ticketed for driving a vehicle without proper tabs, driving without liability insurance, and driving without a valid driver's license. CP 1467. According to Dahlin, Michael was stopped because of the lack of tabs, not for a moving violation. CP 1476 (p. 32). Indeed, Michael's driving record lists no moving violation citation on August 9, 2006 (or any other day in 2006 before December 6), CP 1467. There is no evidence that William learned of the traffic citations Michael received on August 9, 2006.

From August 15 to August 30, Michael was jailed for violating parole after he failed a breathalyzer administered by a parole officer and

admitted drinking several beers.⁹ CP 298, 1538.

On October 4, 2006, Michael obtained a driver's license. CP 472. Dahlin testified that Michael took and passed written and road tests to get the license. CP 1652 (¶ 1). The DOC parole supervision records reflect awareness that Michael had obtained his driver's license, CP 293, but no question as to his fitness to be entrusted with and operate a motor vehicle.

House asserts, *App. Br. at 5, 18* (apparently referring to CP 1545), that Michael admitted during a lie detector test on October 26, 2006 that "he committed minor traffic violations." There is no evidence that Michael was referring to moving violations or any infractions other than those for which he had been ticketed on August 9, or that William knew anything about Michael's lie detector test admission.

On October 26, 2006 William McCamey bought a 1973 Dodge pickup truck. CP 458, 1577. William insured the truck. CP 1489 (p.26), 1620 (midpage).

Before November 6, 2006, William and Michael's brother, Steve McCamey, had delivered the Dodge pickup truck that William had

⁹ The breathalyzer was not administered in connection with a traffic stop. When Michael reported to his parole officer's office, the parole officer noted that Michael smelled of alcohol. CP 298. The record does not indicate whether Michael had driven to the office. Even if he had driven to the office, he could not have been charged and convicted of driving under the influence of alcohol based on the breathalyzer reading, which was .006. CP 298; see RCW 46.61.502(1)(a).

purchased and insured to Michael.¹⁰ CP 289, 458, 1488 (pp. 22, 25), 1489 (p. 26), 1853. After they delivered the truck to Michael, then William, Steve, and Michael all went to Denny's for lunch. CP 1600. Steve rode in the pickup truck while Michael drove it to and from Denny's. CP 1600-01. William followed in the car he was driving. CP 1600-01. Steve observed that Michael drove the pickup truck carefully and did not do anything while driving it that was reckless or not careful in any way.¹¹ CP 1601. Steve considered Michael a careful driver. CP 1601.

So did Terry Dahlin.¹² CP 1606-07, 1651-53. When Dahlin rode with Michael driving her truck, he always seemed to her to drive carefully and safely. He would fully stop at stop signs, did not run red lights, often stopped on yellow lights, checked his mirrors, used his turn signal before changing lanes, and carefully looked where he was driving, kept the truck under control and did not accelerate or stop suddenly. She observed nothing about his driving that she considered dangerous or likely to cause an accident. CP 1651-52. On the one occasion that she rode with him when he was driving the 1973 Dodge pickup truck that William had given

¹⁰ Michael needed something to drive to be able to work. CP 1488 (p. 22).

¹¹ Steve observed that Michael had fastened his seatbelt, had checked his mirrors, had stopped at every stop sign, and had looked both ways before proceeding. CP 1600-01.

¹² Even Dahlin, who, having suffered Michael's abuse, had good reason to think ill of him, thought he was a careful driver.

him, she observed that he drove as carefully and safely then as he had when she observed him driving her truck. CP 1653.

Even Michael's ex-wife, Toni Fitzgerald, who knew that Michael did not have a good driving record when he was younger, did not recall ever being in a car with him driving erratically, and noted that, after Michael's release from prison in 2006, their children were amazed at how extremely careful Michael was when driving, as Michael did not want a violation that would send him back to prison. CP 1611-15.

By November 6, 2006, Dahlin had accused Michael of assault and kicked him out of her Everett apartment. CP 289-90. On November 8, 2006, Michael was jailed pending hearing on a parole violation charge stemming from Dahlin's assault complaint. CP 289.

Toni Fitzgerald maintained a close relationship with William even after she divorced Michael, and testified that William would not have provided the truck to Michael if William had been concerned about Michael's driving ability. CP 1509 (p. 57), 1510 (p. 82). Michael's brother Steve also testified that their dad, William, would not have given Michael the pickup to use while Michael was getting himself up on his feet, if William had thought Michael was a bad driver.¹³ CP 1602.

¹³ When asked if she had any information from any source about what William thought about Michael as a driver, Dahlin noted that William must have thought Michael "was trustworthy enough to purchase a vehicle for Michael." CP 1607. She also noted that

Michael's parole officer knew before December 6, 2006 that William was providing Michael with a truck, CP 289, and recorded no concerns about Michael's fitness to drive.

On November 26, 2006, William bought an umbrella liability insurance policy. CP 1433, 1439 (Resp. to Request No. 3). Neither the policy nor William's application for it is of record. There does not appear to be any evidence in the record as to the amount of the umbrella coverage. Although House's counsel asked Dahlin at her deposition whether she had been aware of William's purchase of an umbrella policy "for a million dollars," she answered no. CP 1481 (pp. 59-60). Michael's brother, Steve, was also unaware of the umbrella policy. CP 1489 (p. 26). There is no evidence in the record of how much primary auto liability coverage William had, or the reason(s) why William bought umbrella coverage.

After Dahlin retracted her assault complaint, Michael was found not guilty of a parole violation stemming from that complaint and was released from jail on December 5, 2006. CP 285, 287. With the DOC having disapproved his father's Ferry County home as a residence due to

when she mentioned to William that Michael was driving her vehicles, William did not get upset or seem concerned about it or tell her that she should not let Michael do that. CP 1607. Dahlin also testified that she had no reason to discuss Michael's driving habits with William, as there was nothing to discuss – she thought Michael was a safe and careful driver, and knows of nothing that would lead her to believe William thought differently. CP 1653.

its proximity to the homes of children, CP 286-87, Michael registered as homeless for parole supervision purposes. CP 285.

On December 6, 2006, the day after Michael was released from jail, en route to his ex-wife's house to pick up some of his belongings, Michael ran a stop sign and collided with the passenger side of House's van. CP 1620-30. Michael admitted fault and was cited for failure to stop for the stop sign, CP 1620-21, 1623-24, a civil infraction, *see* RCW 46.61.190(2) and RCW 46.63.020. House told the investigating officer that he was not sure if he was injured. CP 1625. There is no evidence that Michael was driving under the influence of drugs or alcohol.¹⁴

In opposition to William McCamey's estate's motion for summary judgment, House presented a declaration by licensed chemical dependency professional Cindy Brown, who opined that, on December 6, Michael was suffering from "post acute withdrawal" or "dry drunk" that made him distractible while driving. CP 1418, 1427. Brown's retrospective diagnosis was based on her review of Michael's drug-abuse history as reflected in various court, criminal history, and DOC records, which she summarized. CP 1424-26. There is no evidence that, before providing Michael with the Dodge pickup truck, William had reviewed such records

¹⁴ Indeed, Michael's ex-wife, Toni Fitzgerald, whom he called after the accident, and who came to the scene, testified that she did not smell any alcohol on Michael's breath, he did not have any slurred speech or trouble moving or walking, he wasn't "stoned", "[h]e was totally all right." CP 34, 1850-51.

or had become aware of the extent of Michael's drug-abuse history by other means. There is no evidence that William understood what post-acute withdrawal or dry drunk is, that he knew or suspected that Michael might have such conditions, or that he had been advised, understood, or expected that Michael, even when sober, would be susceptible to distraction while driving that would cause him to run a stop sign.

D. The Trial Court Proceedings.

In August 2008, House filed this personal injury lawsuit against Michael in Snohomish County Superior Court. CP 1864-65. Michael's supervision by DOC ended on September 4, 2008. CP 191. On September 7, 2008, Michael was found dead. CP 1565-66. House then amended his complaint to assert claims against the estates of both Michael and William. CP 1859-61. House sought to hold William McCamey's estate liable under theories of vicarious liability and negligent entrustment. CP 1860 (¶¶ 5, 9).

William McCamey's Estate moved for partial summary judgment, seeking dismissal of House's claim that William had been vicariously liable for Michael's negligence. CP 1837-48. That motion was granted, CP 1666-68, and House does not appeal that dismissal, *see App. Br. at 2-3*.

William McCamey's estate then moved to dismiss House's negligent entrustment claim. CP 1654-65 (motion); *see* CP 1596-1653

(supporting declarations and exhibits); *see also* CP 32-55 (declarations and memorandum in reply). Over House's opposition, CP 1578-93 (opposition memorandum); *see also* CP 56-1577 (declarations and exhibits submitted with House's opposition), the trial court granted the motion, CP 29-31; *see also* CP 9-25 (transcript of summary judgment hearing and oral ruling). After entry of final judgment based on CR 54(b) findings, CP 26-28, House filed this appeal. CP 1-8.

III. SUMMARY OF ARGUMENT

William McCamey entrusted his pickup truck to Michael, and Michael negligently caused injury to Ken House on December 6, 2006. The trial court correctly dismissed House's negligent entrustment claim on summary judgment because the evidence would not permit a reasonable jury to find that William negligently entrusted Michael with the truck. To establish a *prima facie* negligent entrustment claim, House had to establish that, when William entrusted his pickup truck to Michael, William knew or reasonably should have known that Michael was an incompetent, heedless or reckless driver.

While Michael was not a model citizen, his *criminal* convictions are irrelevant to the issue of negligent entrustment because none of them involved driving offenses. Even if one were to treat the 1995 deferred prosecution for DUI arrest as a conviction for a driving crime, House does

not and cannot cite authority for the proposition that a person who had one DUI eleven years ago, even if that person committed all the other crimes of which Michael had been convicted, is an incompetent, heedless, or reckless driver.

Even if William had known everything the record discloses about Michael's *driving* record, that record, as a matter of law, would not permit a jury to find negligent entrustment because, as of December 2006, all of Michael's rules-of-the-road violations were more than ten years old, and Michael, just two months before the December 2006 accident, passed both written and road tests and obtained a valid driver's license.

IV. ARGUMENT

A. Standard of Review.

An appellate court reviews a trial court's grant of summary judgment *de novo*, engaging in the same inquiry as the trial court, and "will affirm a summary judgment if there are no issues of material fact and the moving party is entitled to judgment as a matter of law." *Almanza v. Bowen*, 155 Wn. App. 16, 19, 230 P.3d 177 (2010); *see* CR 56(c).

B. Michael McCamey's *Criminal* Record is Not Probative of His Driving Habits.

To prevail on his negligent entrustment claim, House had to prove not only that William entrusted his pickup truck to Michael and that House was injured by reason of Michael's negligent operation of the pickup

truck, but also that, when William entrusted his pickup truck to Michael, William “knew, or should have known in the exercise of ordinary care, that [Michael was] reckless, heedless, or incompetent” as a driver. *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993); *Mejia v. Erwin*, 45 Wn. App. 700, 704, 726 P.2d 1032 (1986); *Cameron v. Downs*, 32 Wn. App. 875, 879, 650 P.2d 260 (1982). As the Washington Supreme Court explained as far back as 1964:

While an automobile is not regarded in law as an inherently dangerous instrumentality, and the owner thereof is not generally liable for its negligent use by another, to whom he loans or intrusts it for that other’s purposes, yet there is an exception to the rule. If the owner loans or intrusts his automobile to another person, even for that person’s purposes, who is so reckless, heedless, or incompetent *in his operation of automobiles* as to render the machine while in his hands a dangerous instrumentality, he is liable if he knows, *at the time he so intrusts it*, of the person’s character and habits in that regard.

Jones v. Harris, 122 Wash. 69, 74, 210 Pac. 22 (1964).

Here, Michael must be presumed to have been a *competent* and qualified driver, because he passed written and road tests and was issued a driver’s license on October 4, 2006, just two months before the accident on December 6, 2006. CP 472; CP 1652 (¶ 1); *Vikelis v. Jaundalderis*, 55 Wn.2d 565, 570, 348 P.2d 649 (1960) (noting, in negligent entrustment case, that “in view of the fact that Talis had a valid and subsisting driver’s license, at the time, we must presume as a matter of law, that he was

competent and qualified to operate his parents' car"). Thus, the issues are whether House presented admissible evidence from which a reasonable jury could find both that Michael was a reckless or heedless driver even though he was presumed to be a competent and qualified one, and that William knew or should have known that Michael was reckless and heedless in his driving at the time William entrusted Michael with his pickup truck.

House seeks to make much of the fact that Michael had been convicted of 16 adult criminal offenses during the 1980s and 1990s. But the only one of those that had to do with how Michael operated a motor vehicle was the 1995 DUI for which Michael received a deferred prosecution in 1996.¹⁵ There is no evidence of Michael having been involved in, much less having been at fault for, any traffic accident before the one with House on December 6, 2006. House cites no authority that holds that a person's record of the types of crimes that Michael had committed that show nothing about how he operated motor vehicles, even if considered together with a single DUI that occurred more than ten years

¹⁵ Michael was ticketed twice in 1977 for not having a valid driver's license, and his criminal record shows them as convictions for misdemeanors. CP 345. Appellate counsel for the Estate of William McCamey has not undertaken to determine whether the violations for which Michael received those 1977 tickets would be noncriminal infractions under current law, *see* RCW 46.20.015, or under the law in effect in 2006. The point is that neither of the violations for which Michael was cited in 1977 involved the manner in which he drove a vehicle. And both violations occurred at least 29 years before the collision with Ken House's van. *See Mejia*, 45 Wn. App. at 705-06, and discussion of that case at pp. 22-23 *infra*.

earlier, makes it reasonable to find that the person was a reckless or heedless driver. “Where no authorities are cited in support of a proposition, the [appellate] court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 883, 167 P.3d 610 (2007), *rev. denied*, 163 Wn.2d 1042 (2008) (quoting *State v. Logan*, 102 Wn. App. 907, 911, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962))).

C. Even if Michael’s **Criminal** Record Were Probative of His Driving Habits, House Failed to Present Evidence of the Extent to Which William McCamey Knew About That Criminal Record.

There is no evidence that William knew the full extent of the adult criminal record that House showed Michael had. Thus, there is no basis for finding William negligent for entrusting his pickup truck to Michael even if that criminal record, taken *in toto*, made Michael someone likely to be a reckless or heedless driver, which it did not.

Even if one plausibly could suppose that Michael was never incarcerated without William knowing or finding out about it, and that William would have known or learned why Michael had been sent to prison, the fact remains that Michael had never been incarcerated for a driving-related offense as of the fall of 2006, when William loaned Michael the pickup truck.

House argues, *App. Br. at 12*, that William knew how bad an actor Michael had been as an adult because William received, in preparation for Michael's release on parole, the DOC files that detailed Michael's criminal and substance abuse history and DOC's assessment of his psychological status and propensity to reoffend. House bases his assertion that William received the DOC file on Exhibit 11 to the Mechtenberg Declaration, a one-page document that is CP 1536. That document is Michael's October 10, 2005 authorization for DOC to release its files on him to William. It does not prove that DOC actually sent Michael's files to William or that William received or read the DOC files.¹⁶ And even if William did receive and read the DOC files, House points to no entries that speak to Michael's skills and habits as a driver as of 2006.

House asserts that William "had an obligation to read the [DOC] file" because William was proposing to house Michael during Michael's parole. *App. Br. at 20*. House cites no authority for that assertion, nor is

¹⁶ As of October 10, 2005, Michael, William, and DOC were contemplating Michael being paroled in the spring of 2006 and taking up residence at a rental house William owned on Camano Island. CP 325. But that plan did not come to fruition and, by early February 2002, William had decided to sell the Camano Island house and Michael and DOC began planning for him to move in with Terri Dahlin, CP 321 (who later, and despite having broken up with Michael because he abused her, would testify after his death that he had been a careful driver, CP 1651-52). In opposition to William's estate's motion for summary judgment, House's counsel obtained a declaration from a DOC records custodian who explained which documents DOC had provided to House's counsel at which times in 2008 pursuant to public records requests. CP 56-57. House's counsel did not provide any DOC records custodian's declaration to support his assertion that DOC had provided Michael's DOC files to William in 2005, 2006, or any other time.

there any. *See McCormick*, 140 Wn. App. at 883 (“Where no authorities are cited in support of a proposition, the [appellate] court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”) William had no obligation to read any files, and owed no duty to Ken House to do so.

House asserts, *App. Br. at 13*, that William knew Michael had been arrested for drunk driving in 1995 because the police report for that arrest states that Michael was “released to his father Mr. William C. McCamey” about two hours after the arrest occurred. CP 1551. But the report does not state or establish that William was told or knew the reason for Michael’s arrest or was apprised of the evidence gathered to support a charge of DUI. Nor is there evidence as to what, if anything, Michael told William, what William learned or believed about the 1995 DUI arrest, or that William knew Michael essentially admitted the DUI offense in his 1996 Petition for Deferred Prosecution, CP 1513-17.

Even if the 1995 DUI arrest report did permit an inference that William knew or believed Michael had driven under the influence, House does not cite nor can he cite any decision that stands for the proposition that a reasonable jury can find negligent entrustment based on the fact that the trustee was once arrested for DUI more than ten years earlier. As explained below, a reasonable jury as a matter of law could not find

William liable for negligent entrustment even if House had proven that William knew about the DUI and all four of Michael's speeding tickets, because Michael's rules-of-the-road violations, including the 1995 DUI, all occurred more than ten years before William provided him with the pickup truck in November 2006. *See Mejia*, 45 Wn. App. at 705-06, and discussion of that case at pp. 22-23 *infra*.

D. As a Matter of Law, Michael's *Driving* Record Before December 2006 Would Not Permit a Reasonable Jury to Find Him to Be an Incompetent, Heedless, or Reckless Driver to Whom It Was Negligent to Entrust a Motor Vehicle.

Michael received seven tickets during the years from 1992-2006 for "nonmoving" violations (not having a valid driver's license on his person, not having proof of insurance, not having current license plate tabs). CP 1465. House offers no argument, much less argument supported by citation to authority, *see McCormick*, 140 Wn. App. at 883, that it is permissible for a jury to find negligent entrustment based on such a history of non-moving motor vehicle infractions. Those tickets do not establish that Michael's driving skills were deficient. Indeed, under *Vikelis*, 55 Wn.2d at 570, it has to be presumed that Michael was competent and qualified to drive, having passed written and road tests and obtained a driver's license only 64 days before his collision with House's van. CP 472, 1652 (¶ 1).

Even with respect to Michael's four speeding tickets, one each year from 1992-1995, and his 1995 arrest for DUI, summary judgment dismissal of House's negligent entrustment claim was proper under *Mejia*. There the court recognized that, even when the entrustor of a car is the parent of an emancipated child who knew of the child's moving traffic violations when the child was much younger, "[a]fter some period of time, knowledge of an trustee's previous reckless acts should have little bearing on the entrustor's present perception of the trustee's competence to drive at the time of the entrustment," because "[l]ife experience suggests that in many cases persons become more prudent in their driving habits" *Id.* at 705. Because of that, the *Mejia* court held that traffic infractions and an accident for which an adult was responsible 11 years before being entrusted with his parent's car, *as a matter of law*, are too remote in time to permit the question of negligent entrustment to go to a jury. *Id.* at 706.

The holding of *Mejia* does not mean that all past driving violations must have occurred more than ten years earlier for a negligent entrustment claim to be subject to summary dismissal but, even if that were what *Mejia* means, the Estate of William McCamey was entitled to dismissal because all of Michael's speeding infractions and his DUI arrest *had* occurred more than ten years before William entrusted Michael with his pickup

truck in November 2006.¹⁷ Thus, as a matter of law, Michael's driving record was not one that could make William's entrustment of the pickup truck negligent. *Mejia*, 45 Wn. App at 705-06.

Conceivably, one might try to distinguish *Mejia* and argue that it can be negligent to entrust a motor vehicle to someone who has driven drunk and been cited four times for speeding regardless of how long ago those offenses were committed if the trustee then causes an accident while driving drunk and speeding. But, even if House could establish that William knew about all four of Michael's past speeding tickets and the DUI arrest, that would not help House's case against William's estate because Michael McCamey was neither drunk nor speeding when he ran the stop sign in Marysville on December 6, 2006 and collided with the passenger side of House's van. CP 1620-30.

E. Even if Michael's *Driving* Record Were Sufficient to Establish that He Was a Heedless, Reckless, or Incompetent Driver to Whom It Would Be Negligent to Entrust a Motor Vehicle, House Failed to Present Admissible Evidence that William Knew or Should Have Known What Michael's Driving Record Was.

For purposes of a negligent entrustment claim, it was incumbent upon House to prove that Michael not only had shortcomings as a driver so severe as to make him a reckless, heedless, or incompetent driver, but

¹⁷ What's more, Michael had never caused an accident before December 6, 2006, and the trustee in *Mejia* once had.

also that William knew or should have known of those shortcomings. *Caouette*, 71 Wn. App. at 78; *Mejia*, 45 Wn. App. at 704; *Cameron*, 32 Wn. App. at 879; *Jones*, 122 Wash. at 74. One adult is not deemed to know of another adult's shortcomings as a driver by virtue of being the other adult's parent. *Mejia*, 45 Wn. App. at 704 ("It is not reasonable to expect a parent of an emancipated child to be intimately acquainted with all aspects of his grown child's personal life."). There is no evidence that William ever rode as a passenger in a motor vehicle driven by Michael, much less that William observed Michael driving badly or recklessly firsthand. There is no record of Michael ever having run a stop sign before December 2006, or having been involved in, much less having caused, any traffic accident. There is no evidence that William knew Michael had ever been ticketed for speeding.¹⁸ There was, however, evidence that those who had information about Michael's driving habits, or had ridden with Michael and observed his driving after his release on parole – Steve McCamey, Terry Dahlin, and Toni Fitzgerald – considered him to be a safe driver. *See* CP 1600-01, 1606-07, 1611-15, 1651-53.

¹⁸ As noted above, the police report indicates that, about two hours after Michael was arrested for DUI in 1995, he was released to William, CP 1551, but the report does not indicate whether William was told or knew the reason for Michael's arrest and, even assuming that William was told the reason for Michael's arrest, there is no evidence that William ever learned how the DUI charge was resolved.

None of them had any reason to believe that William thought otherwise.¹⁹

See CP 1510 (p. 82), 1602, 1607.

Thus, even if *Mejia v. Erwin* did not establish that ten-year-old driving offenses are too remote in time as a matter of law for purposes of a negligent entrustment claim, and even if there was evidence that Michael's driving during the years after his 1992-95 speeding infractions and 1995 DUI arrest reflected shortcomings in his driving habits serious enough to

¹⁹ Although House argued below that issues of credibility concerning Dahlin's, Fitzgerald's, and Steve's testimony precluded summary judgment, see CP 1590-93, House has not renewed such credibility arguments in his opening brief, and should be precluded from renewing them in his reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised or argued for the first time in a reply brief is too late to warrant consideration."). Even if House were permitted to raise his credibility arguments on appeal for the first time in his reply, such arguments would not warrant reversal of the summary judgment dismissal of his negligent entrustment claim. As the court explained in *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627, 818 P.2d 1056 (1991) (citations omitted):

It is true that a court should not resolve a genuine issue of credibility at a summary judgment hearing. . . . An issue of credibility is present only if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue. . . . A party may not preclude summary judgment by merely raising argument and inference on collateral matters:

[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to summary judgment, or refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, "Credibility," and have a trial on the hope that the jury may disbelieve factually uncontested proof. . . .

Moreover, "[i]mpeachment of a witness does not establish the opposite of his testimony as fact." *Laguna v. Washington State Dep't of Transp.*, 146 Wn. App. 260, 267, 192 P.3d 374 (2008) (reversing and remanding for entry of summary judgment in favor of appellant defendant). Ultimately, it was House's burden to prove that Michael was an incompetent, reckless, or heedless driver and that William knew it. Impeachment of Dahlin, Fitzgerald, or Steve for credibility or bias does not establish that Michael was not a careful driver, much less that William knew or reasonably should have known that about Michael.

make him a reckless, heedless, or incompetent driver, dismissal of the negligent entrustment claim against William's estate was proper because there is no evidence from which a reasonable jury could find that William knew, or had reason to know, of those shortcomings.

Even treating as admissible and taking as true for purposes of summary judgment the testimony of Cindy Brown, who was offered by House as an expert on chemical dependency, that Michael failed to stop at the Marysville stop sign at noon on December 6, 2006 because he was distractible due to "post acute withdrawal," CP 1418, there is no evidence that William McCamey appreciated or should have appreciated that Michael's driving would be so impaired by *lack* of alcohol, even if Michael *wasn't* speeding, as to make him a reckless, heedless, or incompetent driver to whom he should not have entrusted his pickup truck.

House argues, *App. Br. at 21*, that William's purchase of \$1 million in umbrella liability insurance on November 26, 2006 (ten days before Michael ran the Marysville stop sign) permits an inference that William "understood the unreasonable risk from Michael's behavior," because nothing in William's life changed between November 6 and 26 to explain the purchase of umbrella insurance.

Any such inference is tenuous at best, and certainly not compelling enough to provide a basis for distinguishing or refusing to follow *Mejia*.

While House *asserts* that William purchased \$1 million of umbrella coverage, there is no actual *evidence* of the amount of umbrella coverage William purchased.²⁰ There is also no evidence of the terms of the umbrella policy, or whether it even covered liability associated with operation of the pickup truck. Nor is there any evidence as to whether William purchased umbrella coverage on his own initiative (as opposed to purchasing it because he couldn't say "no" to an aggressive agent). The record does not contain whatever application William filled out or any information about what communication William had with the agent who sold him the umbrella policy.

Thus, House has no basis for asserting that only concern on William's part about "the unreasonable risk from Michael's behavior" could explain the purchase of umbrella coverage because nothing else was going on in William's life at the time. House offered no competent testimony to rule out other reasons why William might have chosen to buy umbrella coverage when he did. And, even if William *did* buy the umbrella coverage solely to protect himself against liability for Michael's possible acts or omissions while driving William's pickup truck, as of November 26, 2006 (when William bought the umbrella policy),

²⁰ House's counsel asked Dahlin at her deposition whether she had been aware of William's purchase of an umbrella policy "for a million dollars," and she answered no. CP 1481 (pp. 59-60). Steve McCamey was not aware of any umbrella policy. CP 1489 (p. 26).

Michael's driving record and habits, based on the evidence of record and under *Mejia v. Erwin*, still were not ones from which a reasonable jury could find that it was negligent for William to entrust the pickup truck to him.

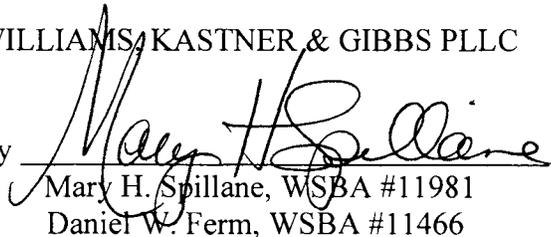
V. CONCLUSION

For the foregoing reasons, because House failed to present sufficient evidence to establish that Michael McCamey was an incompetent, heedless, or reckless driver at the time that his father, William McCamey entrusted him with the pickup truck, much less that William McCamey knew or reasonably should have known that about Michael, the trial court properly granted summary judgment dismissal of House's negligent entrustment claim against the Estate of William McCamey. This Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 20th day of September, 2010, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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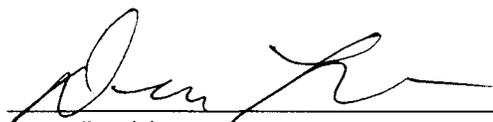
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