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NO. 65021-I

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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Budget does not dispute that it rented a cargo van to someone who was, at the time of renting, high on methamphetamine, a drug addict, and not licensed to drive, among other things. Nevertheless, Budget claims that its conduct should not be scrutinized by a fact-finder. Budget is wrong. Whether a jury will agree that Budget was negligent is for another day. But, based on the record before the Court, Budget's liability is a question that must be answered by a jury after a full and fair airing of the facts.

The principal flaw in Budget's response brief is that it asks this Court to weigh the evidence, rather than to simply consider whether the evidence creates a material issue of fact for the jury. Budget relies on disputed facts (*e.g.*, that Turner's testimony from his second deposition that he used methamphetamine between the time of the rental and the time of the accident is the truth) and self-serving inferences (*e.g.*, that the injection marks on Turner's arms must have been from after the rental because Officer Harris characterized them as "fresh") to support its arguments. But Budget forgets that this is an appeal from a dismissal of Weber's claim on summary judgment. Accordingly, evidence must be viewed in the light most favorable to Weber (*e.g.*, Turner's original testimony that he did not consume between the time of rental and the time

of the accident is the truth) and inferences must be drawn in Weber's favor (e.g., "fresh" does not necessarily mean within the last 24 hours and the injection marks were from two days before Turner's arrest, as Turner reported to Officer Harris).

Budget also fails to recognize that the evidence in this case cannot be parsed into individual components and serially addressed. The evidence must, rather, be examined as a whole. While certain pieces of evidence before the Court may not be sufficient to create a genuine issue of fact when viewed in isolation, the issue for the Court is whether an issue of fact exists based on the totality of the evidence examined. The Court should, therefore, decline Budget's invitation to separately ask whether each piece of evidence creates a question of fact, and, instead, the Court should ask whether the evidence, when viewed as a whole, creates an issue of fact. Because it does, the trial court erred in summarily dismissing Weber's claim of negligent entrustment.

II. LEGAL ARGUMENT

The issue on appeal is this: Is there sufficient evidence from which a reasonable jury, when viewing the evidence in the light most favorable to Weber and drawing all inferences in Weber's favor, could conclude that Budget, in the exercise of ordinary care, should have recognized that

Turner was reckless, heedless or otherwise not competent to drive a vehicle? The answer, as addressed below, is yes.

- 1. Weber is not required to produce contemporaneous observational evidence of impairment, but, in any event, there is substantial circumstantial evidence of Turner's actual appearance at the time of the rental.**

Budget contends that, under the Washington Supreme Court decision in *Faust v. Albertson*, 167 Wn.2d 531 (2009), Weber is required to produce “contemporaneous observational evidence of Turner’s alleged apparent intoxication.” Brief of Respondent at 18. But Budget provides no authority for its proposition that *Faust* – a dram shop case – applies in the context of a negligent entrustment claim based, in part, on impairment from methamphetamine. In any event, Weber has put forth both direct evidence (*e.g.*, Turner’s inability to sign his name) and circumstantial evidence (*e.g.*, Turner’s injection marks and darkened fingertips noted at the time of arrest) relating to Turner’s appearance at the time of the rental.

First, Budget suggests that Weber has “cavalierly dismissed and disregarded *Faust*” [Brief of Respondent at 24], but, respectfully, it is Budget that matter-of-factly maintains – without citation to authority – that *Faust* should be extended beyond actions brought under RCW 66.44.200 to those that do not in any way relate to the service of alcohol. Weber’s claim – negligent entrustment – comes from the common law, not

statute, and involves an entirely distinct set of elements of proof. Budget offers no explanation for why *Faust*, a case Budget correctly characterizes as “an alcohol overservice case” [Brief of Respondent at 20], applies here, short of Budget’s conclusory (and false) statement that “liability turns on apparent intoxication.” *Id.* at 24.

The *Faust* decision rests on an analysis of the evidentiary standard set forth in RCW 66.44.200. The holding is limited to causes of action brought under RCW 66.44.200 and no case in Washington has ever held that it extends to common law negligence cases that do not involve alcohol or the service of alcohol. Budget, in effect, asks this Court to make new law and extend *Faust* beyond the overservice context.

There are several good reasons why this Court should decline Budget’s invitation. RCW 66.44.200 was enacted after the end of Prohibition in 1933 and is essentially an effort to reconcile the tension between legalized sales of alcohol and the dangers that come from alcohol intoxication. The right to serve alcohol is subject to strict regulation in Washington,¹ and it is overseen by a state agency, the Washington State Liquor Control Board. It follows, therefore, that before civil liability can

¹ For example, there is an entire chapter in the Washington Administrative Code dedicated to mandatory training for servers of alcohol. *See* WAC 314-17.

attach to the legal and regulated act of pouring someone a drink, a relatively high evidentiary burden of “apparent intoxication” must be met.

Here, the jury’s evaluation of whether, in the exercise of ordinary care, Budget staff should have recognized Turner as reckless, heedless, or incompetent turns on a multiplicity of facts including Turner’s appearance. Whether Turner was apparently impaired or not, Turner’s appearance is relevant to Budget’s overall assessment of whether Turner was competent to safely operate a vehicle.

Liability under common law negligent entrustment is predicated on the entrustment of a thing (a chattel) to another when that person knows or has reason to know that the recipient may use it in a manner that creates an unreasonable risk of harm to himself or to others. *See, e.g.*, Restatement (Second) of Torts § 390.² What is negligent depends, therefore, on what is being entrusted, to whom it is being entrusted, and under what circumstances it is entrusted. Liability under RCW 66.44.200, in contrast, rigidly applies whenever an establishment serves alcohol to a person who is, at the time of service, apparently intoxicated. The particular characteristics of who is being served and under what circumstances are essentially irrelevant. Thus, the evidentiary mechanisms that pertain to a

² The Washington Supreme Court expressly adopted the Restatement (Second) of Torts § 390 in *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 933 (1982).

negligent entrustment analysis and a dram shop liability analysis are entirely distinct.

Conflating the evidentiary standard under RCW 66.44.200 with a common law negligence standard invites extreme results. Under Budget's formulation, it could rent vehicles to customers who reek of alcohol, but do not necessarily appear intoxicated. In essence, Budget asks for a rule of blanket immunity for any person who entrusts any chattel to another where impairment or intoxication is suspected, but may not be apparent. This Court should not adopt such a rule.

The issue, then, is not whether the evidence in this case would satisfy the requirements under RCW 66.44.200, it is whether a reasonable jury could conclude that Budget should have recognized that Turner was reckless, heedless or incompetent. In that respect, the testimony of David Predmore is helpful to the trier of fact and certainly among the evidence the Court may consider.³ So, too, is the various direct and circumstantial

³ Budget's objections to the Predmore declaration are misplaced. As it concedes, the trial court never ruled on Budget's motion to strike, and Budget never requested a ruling from the trial court. Accordingly, the issue is not ripe for review by this Court. See *Matheson v. Gregoire*, 139 Wn. App. 624, 637 (2007) ("Because the trial court did not rule on his motion to file a second complaint, this issue is not ripe for review."). In any event, Mr. Predmore's opinions are helpful to the trier of fact under ER 702 and are based on ample foundation, including (i) his experience at the Washington State Toxicology Laboratory and as a forensic toxicologist where he has, among other things, both written in the area of "testing for drugs and alcohol in a person" and gained experience in "examining the effects of drugs and alcohol on a person," [CP 251], (ii) his training in "Stimulant Induced Impairment," "Drug Recognition," and "Methamphetamine and Driving" [CP 258], and his reliance on published authority, including Dr. Baselt's

evidence of Turner's appearance – *i.e.*, his injection marks, his darkened fingertips, and his drug-glorifying tattoos. If this evidence, when taken together with the other evidence presented in this case and when viewed in the light most favorable to Weber, creates an issue of fact as to whether, in the exercise of ordinary care, Budget should have recognized Turner as reckless, heedless or incompetent, then the Court should reverse the trial court and remand this case for trial.

Second, even if this Court concludes that the particular evidentiary standard from *Faust* should be applied here, Weber has produced sufficient evidence to create an issue of fact. While, under the *Faust* standard, Predmore's opinions based on the toxicology screen do not alone create an issue of fact, they are "relevant as corroborative and supportive of the credibility of firsthand observations." 166 Wn.2d 653, 662 (2009). The Court in *Faust* further recognized that circumstantial evidence is equivalent to direct evidence. *Id.* at 658. Accordingly, Weber's circumstantial evidence of Turner's appearance – the injection marks, darkened fingertips, tattoos and unmatched signature – is sufficient to create an issue of fact, and the fact that Budget never trained its staff to

Disposition of Toxic Drugs and Chemicals in Man, 5th Ed., (Foster City, Calif., Chemical Toxicology Institute, 1995), which confirms both the half-life calculations used by Dr. Predmore and the outward effects methamphetamine has on an individual [CP 283].

recognize impairment is evidence relevant to the reasonableness of Luzader's conclusion that Turner was fit to drive.⁴

Moreover, the *Faust* standard is based on conclusions about the rate at which the body metabolizes alcohol that are not applicable here. The half-life of methamphetamine is substantially longer than that of alcohol and methamphetamine can have lasting residual effects on an individual, particularly if a user is "tweaking" or "crashing." CP 254, 283, 288. Accordingly, the requirement under *Faust* that observations be "within a short period of time" following service would need to be modified to account for the unique properties of methamphetamine.

In sum, this is not a dram shop case subject to the particular requirements of RCW 66.44.200. This is a common law negligence case, where the jury needs to examine the full facts and circumstances in order to reach a determination about whether there has been a breach. Even if this Court were to look at the evidence through the *Faust* prism, it would

⁴ Budget argues that the purpose behind the signature statute, RCW 66.20.220(2), "is to confirm the renter's identity, not the renter's sobriety." Brief of Respondent at 23. But, Budget provides no authority or legislative history supporting its assertion as to the statute's purpose, and, more importantly, Budget misses the larger point. Regardless of the statute's purpose, Budget personnel were required to adhere to it. Had Ms. Luzader bothered to check the signatures, she would have noticed the marked discrepancy. At that point, she must either refuse the transaction or, at a minimum, require that Turner resign. For summary judgment purposes, it is a fair inference from the facts that the reason Turner's signature does not match his driver's license (and is a mere scrawl) is because he was impaired and, as such, was not capable of accurately writing his signature. Clearly, it would have been unreasonable for Ms. Luzader to proceed with the transaction if she discovered that Turner was unable to sign his own name.

see that Weber has more than just the Predmore declaration from which a reasonable jury could conclude that Turner should have been identified as incompetent to drive a vehicle.

2. Weber has produced evidence from which a reasonable jury could conclude that Budget should have recognized Turner as someone who was likely to become impaired.

Budget claims it cannot be liable because its staff had no duty to investigate Turner's drug habits and could not have known his drug tendencies just by looking at him. But the issue here is not whether Budget had a duty to ensure that Turner was not a drug user, it is whether, under the facts of this case, a reasonable jury could conclude that Budget should have recognized Turner as someone who was reasonably likely to become impaired in the future.

First, the fact that Turner had visible track marks on his left forearm and that Luzader recalls seeing Turner's forearms is enough to create an issue of fact for the jury as to the reasonableness of Luzader's actions. The evidence is that Turner was wearing a sleeveless shirt [CP 338-339], Luzader saw Turner's arms and recalled his tattoos [CP 122], and that Turner has multiple injection marks on his left forearm [CP 304].⁵ It is a reasonable inference that an individual with multiple needle

⁵ Budget argues that "there is no reasonable inference [from Officer Harris' observations] that the marks were present 24 hours earlier at the time of rental" because the officer

marks in his forearms may be an intravenous drug user.⁶ Luzader need only to have recognized Turner as a *potential* intravenous drug user for there to be an issue of fact as to the reasonableness of her actions.

Budget's attempt to distinguish *Mitchell v. Churches* on its facts is without moment. Weber relies on *Mitchell* for the limited purpose of demonstrating the longstanding rule in Washington that liability for negligent entrustment may attach even where an individual is not impaired at the time of entrustment but is only reasonably likely to become impaired. In *Mitchell*, the Court affirmed the jury's verdict in favor of the plaintiff. Thus, it is not a case that in any way advances Budget's argument that Weber's claim fails as a matter of law.

Second, Turner's tattoos and darkened fingertips are corroborative evidence that Turner is a drug user. They are also relevant to Budget's overall assessment of Turner and whether he was competent to drive.

Budget's argument that Luzader may not have understood the "symbolic meaning" of Turner's tattoos [Brief of Respondent at 26] is

described them as "fresh." Brief of Respondent at 25. But Budget's argument rests on its supposition as to what Officer Harris meant by "fresh." Given that Turner has testified that he did not use methamphetamine between the date of rental (May 20) and the date of the accident (May 21) [CP 183], it is a fair inference from the evidence that the injection marks observed by Officer Harris had to have been present at the time of the rental.

⁶ See, e.g., *Crawford v. U.S.*, 278 A.2d 125, 128 (D.C. 1971) (multiple puncture marks in forearm was an indication that individual was a drug user); *Dabner v. State*, 279 N.E.2d 797, 798 (Ind. 1972) (puncture marks in forearm is evidence of intent to use drug paraphernalia found in defendant's possession); *State v. Guy*, 197 N.W.2d 774, 777 (Wis. 1972) (needle marks in forearms relevant to probable cause determination).

disingenuous because there is nothing “symbolic” about a tattoo with the words “WASTED YOUTH CREW” in large lettering. Luzader may not have known what Turner was referring to in that tattoo, but a reasonable jury may conclude that she should have recognized it as another sign that Turner was a drug user. Likewise, a tattoo of a woman in a gas mask holding a needle with fumes rising around her may very well have meaning to Turner that Luzader does not appreciate. But, again, a jury could view that tattoo (in the context of the other evidence) as one more marker of a possible drug user.

Luzader’s conduct must also be evaluated against the backdrop of Budget’s internal policies. Those policies do not demand absolute certainty when it comes to issues of intoxication and impairment. To the contrary, Budget’s policies require that there be *no evidence* of drug consumption, and they direct an employee to decline a rental if the employee has “any reasonable doubts” as to the renter’s ability to safely operate the vehicle. CP 313. Under the circumstances of this case, a jury could reasonably conclude that Luzader did not exercise ordinary care.

3. Budget’s violation of its policy requiring two forms of identification is evidence of Budget’s negligence.

Budget argues that its failure to get two forms of identification, as its policy requires, is inconsequential because (i) Budget did not breach

any duty owing to Weber, and (ii) Budget's failure was not a "but for" or "legal" cause of Weber's injuries. Brief of Respondent at 30. Once again, Budget conflates *evidence* of negligence with a stand-alone claim of negligence. Weber is not required to show how every piece of relevant evidence could, itself, satisfy the elements of a negligence claim. To the contrary, Weber need only show that Budget's failure to follow its policies is evidence relevant to the jury's assessment of whether Budget acted with ordinary care.

Here, there is no dispute that Budget did not follow its policy requiring a renter to provide two forms of identification.⁷

Budget argues first that it did not owe a duty of care to Weber. This is false. Weber is a foreseeable plaintiff. Under Washington law, when a plaintiff is injured through a person's negligent use of an instrumentality negligently entrusted to that person by another, the injured plaintiff is within the reasonable zone of danger. *See, e.g., Bernethy*, 97 Wn.2d at 933.

Budget next argues that there is no causation between Budget's violation of its policy and Weber's injury. Budget's argument is

⁷ Budget argues that Turner had a second form of identification (a Washington State Identification Card) in his possession, but he was not asked for it. In reality, Turner's testimony is that he does not believe he had his ID card with him on the date of the accident (May 21) and did not know one way or another if it was with him on the date of the rental (May 20). CP 189.

effectively one of relevance. But, Budget has both falsely assumed that Turner had his ID card at the time of rental (which is unclear under the record) and is mistaken that each piece of evidence must independently satisfy the elements of negligence. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Here, the evidence of Budget's violation of its policy is relevant as a part of the total picture.

Much of the jury's determination of liability will rest on its evaluation of Lori Luzader's testimony and credibility. Budget maintains that Luzader was aware of Budget's policies relative to renting to persons who may be impaired. Brief of Respondent at 7. But, Luzader's failure to adhere to Budget's policy requiring two pieces of ID is evidence from which a jury could infer that Luzader lacked training as to Budget's policies, lacked knowledge of Budget's policies, and/or lacked regard for Budget's policies.

Moreover, the existence of the policy is itself an indication that Budget felt two pieces of identification were necessary to protect the company from liability. The jury could infer that one of the reasons for the policy requiring two pieces of ID is to bolster Budget's safety policies, insofar as a renter with two forms of identification may have been

Luzader took all reasonable steps to comply with the policy, but that is an issue for the jury.

Budget also argues that, even if it had checked a database that is used by its “sister” company, Budget Car Rental,⁸ that database would not have shown the status of Turner’s license. Brief of Respondent at 40. But, the evidence Budget relies on (i) comes from two witnesses that were not disclosed to Weber and that she never had the opportunity to depose, and, in any event, (ii) is only relevant to the ultimate weight the jury may give to Budget’s violation of its policy, but does not render the evidence immaterial.

First, Budget relied on two undisclosed witnesses in its motion for reconsideration to the trial court who testified that a search through TML Information Services would not have yielded any results in Turner’s case. Budget argues that it did not know that TML was an issue until the summary judgment hearing itself. Brief of Respondent at 43. But Weber alerted Budget to the issue of accessing a prospective renter’s driving record and criminal record through a subscription or online records service early in the case. In November, 2009, during the deposition of Fred Parker, Weber asked whether Budget had contracts with public records search companies and even specifically asked about TML. CP 100 at

⁸ Budget Truck Rental and Budget Car Rental are both a part of the Avis Budget Group and are commonly owned.

pp. 36-37. Moreover, the issue of confirming license status and driving records was raised in Weber's briefing to the trial court on summary judgment. CP 210; CP 239. Thus, the trial court should not have permitted Budget to rely on the Sellers and Darmody declarations.

Second, even if Budget can demonstrate that it cannot reasonably verify the status of an Oregon driver's license, that does not mean violation of its policy is not part of the total mix that the jury can consider. After all, why does Budget have such a policy if Budget maintains it cannot reasonably comply with it? The bottom line is that Budget did not do what it says it will do in its policy. That is some evidence that, when added to the other evidence, creates an issue of fact as to whether Budget exercised reasonable care.

5. Budget violated Washington law in failing to confirm whether Turner was duly licensed at the time of rental.

Budget asks this Court to hold that a rental car company satisfies RCW 46.20.220, which requires that a renter be "then duly licensed," by merely facially inspecting a driver license. Brief of Appellant at 35. But there is no good reason for this Court to make such a sweeping pronouncement in this case. Violation of a statute is evidence of negligence in Washington, not evidence *per se*. Accordingly, the jury may

give appropriate weight to that evidence depending on the reasonableness of the efforts made by the responsible party to comply with the statute.

Budget argues that RCW 46.20.220 was enacted “when there was no real-time manner to check the validity of a driver’s license.” Brief of Appellant at 35. Budget suggests that the fact that the Legislature has not modified the language of the statute is evidence that the Legislature does not intend to impose any further requirements on rental car companies. But Budget misses the larger point. What is ordinary care depends on the circumstances of the time. And where technology has evolved, a jury’s determination of what is ordinary care may also evolve. What is reasonable is fundamentally a jury question.

In Washington, for example, the status of a driver license can be checked online, with virtually instant results, for free.⁹ It would be extreme to suggest that a jury, in evaluating reasonable care, could not even consider the fact that a rental car company failed to make use of a free, near instantaneous, online system to check the status of a driver license. Thus, this Court should decline Budget’s invitation to make sweeping law that would permit rental car companies to do nothing more than visually inspect a renter’s driver license.

⁹ See <https://fortress.wa.gov/dol/dolprod/dsdDriverStatusDisplay/>

In this case, what is involved in verifying an Oregon driver license status is admittedly more difficult. But, ultimately the difficulty in verifying a license is something that goes to the weight of the evidence of the violation and is, therefore, for the jury. The key distinction between this case and those relied on by Budget is that Washington does not recognize negligence *per se* for the violation of a statute [RCW 5.40.050] and Weber does not assert her claim based solely on the fact that Turner had a suspended license. In *Cousin v. Enterprise Leasing* the claim was for negligence *per se* under Mississippi law. In *Cowan v. Jack, Nunez v. A&M Rentals*, and *Lindstrom v. Hertz*, the **only** evidence offered was that of the license suspension. (*Lindstrom* was slightly different, having to do, instead, with the rental car company's failure to advise a British renter of the "rules of the road" before renting.) So, in effect, all of the cases relied upon by Budget are either negligence *per se* cases or cases that effectively seek a determination of negligence based on nothing more than the suspension. In holding that the mere fact of suspension does not automatically lead to liability, courts are not stating that evidence of suspension is irrelevant to a common law liability analysis.

At bottom, Budget violated Washington law. What weight the jury gives to that violation will depend on whether accessing Oregon driver license records was commercially reasonable in the context of this case.

6. Budget concedes that Turner would not have been permitted to rent a car from Budget's "sister" company.

Budget does not dispute that, for several reasons, Turner would not have been permitted to rent a car from its "sister" company, Budget Rent-A-Car. It is ironic that Turner would have been precluded from renting a car from Budget Rent-A-Car, but could rent a larger, heavier cargo van from Budget Truck Rental. The fact that Turner lacked a credit card is relevant evidence in its own right.¹⁰ And, it is also important evidence about the adequacy of Budget's policies, particularly in light of what is required under the policies of its sister company.

When this evidence is added to the total mix of evidence in this case, the only reasonable conclusion is that the trial court erred in dismissing Weber's claim on summary judgment.

III. CONCLUSION

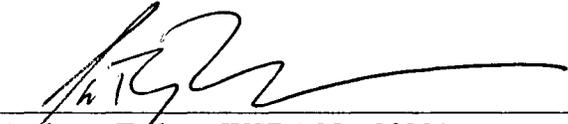
Plaintiff submits that the trial court erred by weighing the evidence rather than asking whether, when taken together, the evidence is sufficient to create a genuine issue of material fact for the jury. Weber asks that the Court reverse the ruling of the trial court on summary judgment and remand this matter for trial.

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¹⁰ See discussion at p. 27 of the Opening Brief of Appellant.

DATED this 16 day of June, 2010.

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CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Seattle, Washington, sent to the attorneys of record for defendant-appellee 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.

6/15/10
Date



Signed