

66431-0

66431-0

No. 66431-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK KELLY; MARY TAYLOR-KELLY, individually and as the
Guardians for the minor children JESSICA KELLY and BRETT KELLY,

Appellants,

v.

JANICE L. RICKEY and JOHN DOE RICKEY, husband and wife, and
the marital community composed thereof,

Appellees.

OPENING BRIEF OF APPELLANTS

RYAN, SWANSON & CLEVELAND, PLLC
David L. Tift, WSBA #13213
Britenae Pierce, WSBA #34032
Amanda C. Bley, WSBA #42450
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
(206) 464-4224

Attorneys for Appellants

2011 MAR 14 10:44:02
COURT OF APPEALS
DIVISION I
CLERK

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	1
III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	2
IV. STATEMENT OF THE CASE.....	3
V. ARGUMENT	9
A. The standard of review for a summary judgment motion is <i>de novo</i>	9
B. Genuine issues of material fact exist, preventing summary judgment dismissal of the Kellys' claim for negligent entrustment.	10
1. The Kellys sufficiently established Ms. Rickey is the owner of the 1991 Honda and did not gift it to Mr. Kaloger.....	12
2. The Kellys sufficiently established Mr. Kaloger was intoxicated on methamphetamines at the time of the collision and such intoxication caused the injuries sustained by the Kellys.	13
3. Ms. Rickey violated a duty of care to the Kellys when she knew Mr. Kaloger was likely to become intoxicated and continued to entrust him with the use of her Honda.	14
4. At the very least, the Kellys sufficiently established Ms. Rickey violated a duty of care to the Kellys when she should have known Mr. Kaloger was likely to become intoxicated and continued to entrust him	

	with the use of her Honda.	19
a.	The trial court erred when it found Ms. Rickey's deposition testimony credible as a matter of law.	20
b.	Foreseeability of Mr. Kaloger's negligent conduct is a genuine issue of material fact.	23
c.	Ms. Rickey's failure to exercise ordinary care is a genuine issue of material fact.	23
VI.	CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Brouillet v. Cowles Publ'g Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990).....	9
<i>Cameron v. Downs</i> , 32 Wn. App. 875, 650 P.2d 260 (1982).....	9, 14, 16, 21
<i>Carey v. Reeve</i> , 56 Wn. App. 18, 781 P.2d 904.....	14
<i>Chelan County Deputy Sheriffs' Ass'n v. Chelan County</i> , 109 Wn.2d 282, 745 P.2d 1 (1987).....	10
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	10
<i>Denaxas v. Sandstone Court of Bellevue</i> , 148 Wn.2d 654, 63 P.3d 125 (2003).....	10
<i>Forsberg v. Tevis</i> , 191 Wash. 355, 71 P.2d 358 (1937).....	12
<i>Gams v. Oberholtzer</i> , 50 Wn.2d 174, 310 P.2d 240 (1957).....	12
<i>Hamilton v. Huggins</i> , 70 Wn. App. 842, 855 P.2d 1216 (1993).....	9
<i>Hickly v. Bare</i> , 135 Wn. App. 676, 145 P.3d 433 (2006).....	13
<i>Hulse v. Driver</i> , 11 Wn. App. 509, 524 P.2d 255 (1974).....	14

<i>LaLone v. Smith</i> , 39 Wn.2d 167, 234 P.2d 893 (1951).....	14
<i>Mathis v. Ammons</i> , 84 Wn. App. 411, 928 P.2d 431 (1997).....	23
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967).....	20
<i>Mejia v. Erwin</i> , 45 Wn. App. 700, 726 P.2d 1032 (1986).....	19
<i>Parilla v. King County</i> , 138 Wn. App. 427, 157 P.3d 879 (2007).....	10, 12, 19
<i>Riley v. Andres</i> , 107 Wn. App. 391, 27 P.3d 618 (2001).....	20
<i>Roger Crane & Associates v. Felice</i> , 74 Wn. App. 769, 875 P.2d 705 (1994).....	9
<i>Seeberger v. Burlington N.R.R. Co.</i> , 138 Wn.2d 815, 823, 982 P.2d 1149 (1999).....	23
<i>Vikelis v. Jaundalderis</i> , 55 Wn.2d 565, 348 P.2d 649 (1960).....	17, 18

STATUTES

RCW 46.61.5055	24
RCW 68.50.105	8

RULES

CR 56(c).....	9, 20
RAP 9.12.....	9

I. INTRODUCTION

Respondent Janice Rickey entrusted her vehicle to Robert Kaloger. Ms. Rickey did so with full knowledge of Mr. Kaloger's history of drug abuse and after Mr. Kaloger told her he "fell off the wagon." Less than one month after "falling off the wagon," Mr. Kaloger used Ms. Rickey's vehicle, crashing it into appellants on Christmas Eve.

Appellants Mark Kelly and Mary Taylor-Kelly, individually and on behalf of their minor children, Jessica and Brett Kelly (collectively, the "Kellys"), filed suit against Ms. Rickey for her negligent entrustment. Notwithstanding the many genuine issues of material fact in this case and issues regarding Ms. Rickey's credibility, the trial court dismissed the Kellys' claim for negligent entrustment as a matter of law.

This dismissal is in error because Washington law does not allow dismissal as a matter of law when genuine issues of material fact exist, as they do here. By this appeal, the Kellys seek reversal of the trial court's order and remand for trial.

II. ASSIGNMENT OF ERROR

The trial court erred in granting Defendant's Motion for Summary Judgment dismissing the Kellys' claim for negligent entrustment as a matter of law.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether genuine issues of material fact exist precluding entry of summary judgment?

2. Whether Ms. Rickey's inconsistent testimony on the material issue of her exercise of ordinary care precluded the trial court's entry of summary judgment in Ms. Rickey's favor?

3. Whether the genuine issue of material fact regarding Ms. Rickey's ownership of the Honda precluded the trial court's entry of summary judgment in Ms. Rickey's favor?

4. Whether a genuine issue of material fact regarding Ms. Rickey's actual knowledge of Mr. Kaloger's reckless behavior precluded the trial court's entry of summary judgment in Ms. Rickey's favor?

5. Whether a genuine issue of material fact regarding whether Ms. Rickey exercised ordinary care in entrusting the Honda to Mr. Kaloger precluded the trial court's entry of summary judgment in Ms. Rickey's favor?

6. Whether a genuine issue of material fact regarding whether Mr. Kaloger's intoxication injured the Kellys precluded the trial court's entry of summary judgment in Ms. Rickey's favor?

IV. STATEMENT OF THE CASE

Janice Rickey and Robert Kaloger first met when both were working at Delta Rehabilitation Center in Snohomish County. CP 151, 12:22-12:23. Ms. Rickey developed a close relationship with Mr. Kaloger's mother and the two women often discussed Mr. Kaloger, his long history of drug use, and his periods of homelessness and incarceration. CP 151-152, 12:18-14:12; CP 159, 16, 62:22-66:1.

In 2005, upon learning Mr. Kaloger had again become homeless, Ms. Rickey permitted Mr. Kaloger to live in her spare bedroom. CP 152, 14:7-14:10. In October 2006, Ms. Rickey purchased a 1991 Honda Prelude (the "Honda") so Mr. Kaloger could commute to his job. CP 150-151, 8:17-11:7. Ms. Rickey titled the Honda in her name, registered the Honda, insured it, and paid for all its maintenance. CP 150-151, 8:9-8:11, 8:22-9:18; 151, 11:1-11:3; 160, 68:3-68:7; 243.

On December 24, 2006, only two months after purchasing the Honda, Mr. Kaloger left Lynnwood to drive to Ms. Rickey's home in Goldbar, Washington. CP 175-176, 45:7-49:1. During the trip, he drove the Honda across the center line and collided head on with the Kellys' Toyota Sienna van on their way home from a Christmas Eve church service. CP 175-176, 45:7-49:1. The collision caused significant front-end damage to the van and caused physical and mental injuries to the

Kellys. CP 92-95, 60:4-60:14; 180-181, 66:17-69:4; 183-184; 188, 97:23-99:4; 212, 17:2-17:5; 214, 25:19-26:6; 219, 45:4-45:21; 222-223, 58:10-61:3.

The Washington State Patrol (“WSP”) went to the scene and fully investigated the incident. CP 88-142. The WSP investigation report includes photographs showing that the Honda traveled almost entirely into the westbound lane of State Route 96 before striking the Kellys. CP 92-95. The photographs also show a lack of tire marks leading up to the collision, indicating Mr. Kaloger made no corrective effort to either avoid an obstacle in his eastbound lane or otherwise correct his entry into the westbound lane. CP 92-95; 98-103.

The WSP investigation report includes the reports of at least six responding officers who witnessed illegal drug paraphernalia next to Mr. Kaloger’s driver’s seat. CP 105-119. The WSP report also includes photographs of a glass pipe commonly used to smoke methamphetamines, which was found at the scene. CP 128-129.

Prior to the collision, a number of witnesses reported seeing Mr. Kaloger swerving “all over the road” and “crossing the line.” CP 124, 126. Those same witnesses reported seeing a bag of what appeared to be illegal drugs in Mr. Kaloger’s hand after the collision with the Kellys. CP 121-126.

Mr. Kaloger died on the way to the hospital. CP 150, 7:10-7:12.

Mr. Kaloger's subsequent autopsy report, including a toxicology report, indicates Mr. Kaloger had .09 mg/L of methamphetamines in his body at the time of his death. CP 333. The Kellys' methamphetamines expert, Dr. Jennifer Souders, stated:

It is my expert medical opinion that Robert Kaloger was impaired or otherwise significantly affected by methamphetamines at the time that the car he was driving struck the car in which the Kelly family was riding on December 24, 2006. I base this conclusion on the several eye witness accounts in the record as to Mr. Kaloger's driving behavior of swerving in and out of his lane. Such behavior is consistent with someone affected by methamphetamines. Mr. Kaloger's toxicology report, indicating a .09 mg/L level of methamphetamines on December 24, 2006, is also consistent with Mr. Kaloger being under the influence of methamphetamines.

CP 2:3-2:11; 34-37.

The Kellys filed this action on October 15, 2009, alleging claims for negligent entrustment and respondeat superior against Ms. Rickey.¹ CP 319-321. As part of discovery, the Kellys deposed Ms. Rickey. Ms. Rickey testified to at least two instances in which she had actual knowledge of Mr. Kaloger's drug abuse. First, Ms. Rickey had an in-depth, factual understanding of Mr. Kaloger's history of drug abuse from her discussions with Mr. Kaloger's mother. CP 151-152, 12:18-14:12;

¹ The Kellys' claim for respondeat superior was dismissed prior to hearing on Ms. Rickey's Motion for Summary Judgment to dismiss the Kellys' claim for negligent entrustment and is not the subject of this appeal.

159, 62:22-66:1. Ms. Rickey testified she was aware Mr. Kaloger had drug abuse problems “for years” and that his battle was continuing. CP 159, 64:4.

Second, Ms. Rickey testified that less than one month prior to the collision, she came home to find Mr. Kaloger sitting on his bed with a shaved head. She testifies:

Q. Were you aware that Mr. Kaloger ingested methamphetamines prior to December 24, 2006?

A. One time.

Q. So you knew prior to December 24, 2006 that Mr. Kaloger had what, smoked meth?

A. I came home from work and his head was shaved, and I said What happened? And he said – it’s all hearsay, but anyway, he said, I messed up. So I shaved my head. And I said, What do you mean, you messed up? And he said, Well, I fell off the wagon.

...

Q. Okay. When did you have this conversation with Mr. Kaloger, where he had shaved his head?

A. It was around Thanksgiving time, approximately one month before the accident.

CP 152-153, 16:1-16:3, 16:25-17:3. Ms. Rickey continued to allow Mr. Kaloger to use her Honda.

Despite her familiarity with Mr. Kaloger’s previous drug activity, Ms. Rickey did not even inquire as to Mr. Kaloger’s previous driving record, criminal record, or arrest record. She knew through her

conversations with Mr. Kaloger's mother that Mr. Kaloger was required by the State of Washington to be registered as a sex offender, but she never asked what crime Mr. Kaloger committed. CP 152, 13:12-13:15. In fact, Ms. Rickey failed to ask about Mr. Kaloger's criminal history in general.² CP 152, 13:25-14:2, 14:24-15:2. Ms. Rickey never asked if Mr. Kaloger was under additional state supervision or was regularly tested for drug and alcohol use. CP 155, 27:10-27:13; 28:6-28:18. Ms. Rickey never talked to Mr. Kaloger about his driving record or asked him whether he had any speeding tickets, accidents, or trouble with drinking and driving. CP 161, 70:11-70:21.

Mr. Kaloger, in fact, had eleven criminal traffic and non-traffic citations. CP 147. While the details of these citations remain archived, the traffic court notations indicate the existence of these eleven infractions in late 2005 and early 2006. CP 147.

On October 1, 2010, Ms. Rickey filed her Motion to Exclude and for Summary Judgment seeking to dismiss the Kellys' cause of action for negligent entrustment. CP 263-312. The Kellys filed their opposition on

² If she had, she would have known of Mr. Kaloger's criminal history. In 1989, Mr. Kaloger was convicted of child rape the first degree, which required him to register as a sex offender. CP 152, 13:9-13:11. Mr. Kaloger then pled guilty to failing to register as a sex offender and patronizing a juvenile prostitute. CP 140-142.

October 18, 2010, and simultaneously sought a continuance to obtain expert testimony regarding Mr. Kaloger's intoxication. CP 82-262.

At the initial hearing, the trial court granted the Kellys' request for a continuance and ordered production of Mr. Kaloger's medical records from the King County Medical Examiner's Office. CP 59-60. The Kellys obtained Mr. Kaloger's medical records and subsequently filed a supplemental response attaching Mr. Kaloger's medical records under seal and the supporting declaration of medical expert Dr. Jennifer Souders.³ CP 10-25, 34-62, 322-336. Ms. Rickey filed a supplemental response on December 2, 2010, withdrawing her argument that Mr. Kaloger was not impaired at the time of the collision. CP 29-33.

At the summary judgment hearing, the trial court dismissed the Kellys' claim for negligent entrustment despite the fact that virtually all of the factual evidence was disputed between the parties. CP 26-27. The Kellys timely filed their notice of appeal to this Court and now seek review of the trial court's summary judgment order. CP 1-6.

³ Mr. Kaloger's medical records are filed under seal pursuant to RCW 68.50.105 and the order of the trial court. CP 8-9.

V. ARGUMENT

A. **The standard of review for a summary judgment motion is *de novo*.**

Summary judgments are reviewed *de novo*; the appellate court engages in the same analysis as the trial court. *See e.g., Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). A trial court's factual findings on summary judgment are superfluous and entitled to no weight, and both the law and the facts will be reconsidered by the appellate court. *Hamilton v. Huggins*, 70 Wn. App. 842, 848-49, 855 P.2d 1216 (1993); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 526 (1990). Decisions must be based only on evidence presented in the summary judgment motion. RAP 9.12.

Pursuant to CR 56(c), summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

In ruling on the motion, the trial court's role is to determine if a genuine issue of material fact exists; it is not to resolve an existing factual issue. *Cameron v. Downs*, 32 Wn. App. 875, 877, 650 P.2d 260 (1982). The motion should be granted only if, from all the evidence, reasonable minds could reach but one conclusion. *Id.* (citing *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980)).

In reviewing a summary judgment order, the appellate court considers all facts and reasonable inferences in a light most favorable to the nonmoving party. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006). If reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987). "The court should grant the motion *only if*, from all the evidence, reasonable persons could reach but one conclusion." *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003) (citations omitted, emphasis added).

B. Genuine issues of material fact exist, preventing summary judgment dismissal of the Kellys' claim for negligent entrustment.

It is the general rule in Washington that an owner of a vehicle is under a duty to refrain from entrusting the vehicle to another where the owner knows, or should know in the exercise of ordinary care, that the person to whom the vehicle was entrusted is reckless, heedless, or incompetent. *Parilla v. King County*, 138 Wn. App. 427, 435-36, 157 P.3d 879 (2007). Accordingly, to prevail on a claim for negligent entrustment, a plaintiff must prove (i) the owner entrusted the vehicle to the driver; (ii) the driver was reckless, heedless, or incompetent; (iii) the owner knew, or should have known through the exercise of ordinary care,

that the driver was or was likely to become reckless, heedless, or incompetent; and (iv) the driver's negligence resulted in damages.⁴ *Id.*

On summary judgment, Ms. Rickey vaguely alleged the Kellys' negligent entrustment claim was insufficient as a matter of law because (i) the Kellys could not present sufficient evidence of entrustment because the car was a "gift" to Mr. Kaloger and (ii) Ms. Rickey had no knowledge that Mr. Kaloger was likely to become intoxicated when she entrusted him with her car. CP 263-312. She also claimed Mr. Kaloger was not intoxicated at the time of the collision, but withdrew that argument in her supplemental reply. CP 29-30. In opposition to Ms. Rickey's motion, the Kellys presented ample evidence to establish each and every element of negligent entrustment and to rebut Ms. Rickey's claims. At the very least, the Kellys raised a number of issues of material fact regarding each element, any one of which merits denial of Ms. Rickey's motion for summary judgment. When these disputes are construed in the light most favorable to the Kellys as the nonmoving party, it is evident that the Kellys' case should not be dismissed.

⁴ Damages are not in dispute, thus will not be addressed in this appeal.

1. The Kellys sufficiently established Ms. Rickey is the owner of the 1991 Honda and did not gift it to Mr. Kaloger.

In the context of a claim for negligent entrustment, “‘entrustment’ requires some kind of agreement or consent, either express or implied, to relinquish control of the instrumentality in question.” *Parilla*, 138 Wn. App. at 441 (citing *Black’s Law Dictionary* 574 (8th ed. 2004)) (“Entrust” defined as: “To give (a person) the responsibility for something, usu. after establishing a confidential relationship.”) Where there is some issue as to ownership, or more specifically where there is an issue as to whether ownership of the vehicle has been transferred, “the law presumes that ownership remains unchanged, in the absence of proof to the contrary.” *Forsberg v. Tevis*, 191 Wash. 355, 357, 71 P.2d 358 (1937). Similarly, “[i]t is well established that a showing that a party is the registered owner of a motor vehicle raises a rebuttable presumption that he is the actual owner for purposes of vicarious liability.” *Gams v. Oberholtzer*, 50 Wn.2d 174, 177, 310 P.2d 240 (1957).

Ms. Rickey maintained ownership of the Honda from the time she purchased it until the December 24, 2006 collision. Ms. Rickey purchased the Honda, continued to register the Honda in her own name, continued to insure the Honda, and continued to pay for all repairs. CP 150-151, 8:9-8:11, 8:17-11:7, 8:22-9:18; 151, 11:1-11:3; 160, 68:3-68:7; 243. At

summary judgment, Ms. Rickey presented only her own testimonial evidence that the Honda was purchased as a gift to Mr. Kaloger. CP 151, 10:25; 152, 15:13; 154, 21:14; 155, 26:23. This testimony belies the documented facts. Ms. Rickey presented no documentary or corroborating evidence to overcome the presumption that the owner of the Honda is anyone but herself. Therefore the Kellys proved this element of negligent entrustment and Ms. Rickey's arguments to the contrary are without merit.

2. The Kellys sufficiently established Mr. Kaloger was intoxicated on methamphetamines at the time of the collision and such intoxication caused the injuries sustained by the Kellys.

The second element of negligent entrustment is that the trustee is reckless, heedless, or incompetent. An intoxicated person is considered reckless. *Hickly v. Bare*, 135 Wn. App. 676, 145 P.3d 433 (2006).

Ms. Rickey originally disputed whether Mr. Kaloger was intoxicated at the time he crashed into the Kellys. CP 268, 272-275. The Kellys, however, submitted Mr. Kaloger's autopsy report as evidence that Mr. Kaloger was intoxicated by methamphetamines at the time of his death immediately after the collision, and the opinion of the Kellys' methamphetamines expert stating "Mr. Kaloger was detrimentally affected by his use of illegal methamphetamines before his car crashed into the car in which the Kelly family was riding." CP 36; 322-366. In her

supplemental response, Ms. Rickey withdrew her opposition to the fact of Mr. Kaloger's impairment. CP 29-30. Therefore, this element is satisfied.

3. Ms. Rickey violated a duty of care to the Kellys when she knew Mr. Kaloger was likely to become intoxicated and continued to entrust him with the use of her Honda.

The linchpin of a cause of action for negligent entrustment is whether the defendant knew or should have known of the driver's propensity to become reckless, heedless or otherwise incompetent. *Cameron v. Downs*, 32 Wn. App. at 878. Washington courts have recognized that a party may be "reckless" for the purposes of a cause of action for negligent entrustment where the person entrusted with the vehicle is intoxicated, incapacitated, or prone to negligent behavior. *See Hickly*, 135 Wn. App. At 676 (recognizing intoxication); *Hulse v. Driver*, 11 Wn. App. 509, 524 P.2d 255 (1974) (recognizing per se negligent entrustment in the context of a vehicle entrusted to an unlicensed driver); *Carey v. Reeve*, 56 Wn. App. 18, 781 P.2d 904 (recognizing the theory of negligent entrustment based on a party's propensity for acting recklessly). Stated most succinctly by the Washington Supreme Court in *LaLone v. Smith*, 39 Wn.2d 167, 172, 234 P.2d 893 (1951):

The negligence may be in entrusting an agent with instrumentalities which, in connection with his known propensities and the qualities of the instrumentalities, constitute an undue risk to third persons. These propensities may be either viciousness, thoughtlessness or playfulness.

Ms. Rickey admits to at least two examples where she actually knew of Mr. Kaloger's propensity to become intoxicated or otherwise engage in reckless behavior. First, Ms. Rickey was intimately familiar with Mr. Kaloger's history of drug abuse through her conversations with Mr. Kaloger's mother. CP 151-152, 12:18-14:12; 159, 62:22-66:1. Ms. Rickey stated she was aware that Mr. Kaloger had drug abuse problems "for years." CP 159, 64:4. Ms. Rickey also testifies to Mr. Kaloger's struggle with drug abuse within one month of his collision with the Kellys. CP 152-153, 16:1-16:3, 16:25-17:3. Ms. Rickey testified that on or about Thanksgiving of 2009, she came home from work to find Mr. Kaloger sitting on the edge of his bed with a shaved head. CP 152-153, 16:1-16:3, 16:25-17:3. He said to her that he had "fallen off the wagon" and "messed up." CP 152-153, 16:1-16:3, 16:25-17:3. She admitted this was "one time" specifically that she was aware Mr. Kaloger ingested methamphetamines. CP 152, 16:1-16:3. The fact that Mr. Kaloger lived with Ms. Rickey makes it even more likely that she would have knowledge of his drug use. In sum, less than one month before the collision, Ms. Rickey knew she was entrusting her vehicle to a person with a history of drug abuse and a recent relapse. Ultimately, this Court should find that Ms. Rickey violated her duty of ordinary care when she knew

Mr. Kaloger had the propensity to become intoxicated and continued to entrust him with her Honda.

This Court's opinion in *Cameron v. Downs*, 32 Wn. App. 875, 650 P.2d 260 (1982) is particularly instructive to this case. *Cameron* concerned a wrongful death action brought by the father of a deceased van passenger against the driver of the van, and the driver's sister and father. *Cameron*, 32 Wn. App. at 876-77. Plaintiff alleged the driver's sister, Brenda Downs, was liable under a theory of negligent entrustment where she knew or should have known her brother was likely to become intoxicated, reckless, heedless, or incompetent when she entrusted him with keys to the family van. *Id.* at 877. The trial court entered an order of summary judgment dismissing the father and sister as defendants. *Id.* Plaintiff appealed to this Court. *Id.*

On appeal, this Court first considered the dismissal of the negligent entrustment claim against Brenda Downs. *Cameron*, 32 Wn. App. at 877-878. The Court stated there was a preliminary factual dispute as to how the driver obtained the keys from Brenda, to which the Court ultimately resolved in favor of the plaintiff, noting: "Brenda did nothing to prevent her brother from driving the van..." *Id.* at 879. Turning next to Brenda's knowledge, the Court stated:

There is also evidence in the record that Brenda knew, or in the exercise of ordinary care, should have known that

her brother was both a reckless driver and likely to be intoxicated. [A trial witness] stated that Steven Downs had a reputation in the community as a reckless, dangerous, and incompetent driver; that those tendencies increased when he drank; and that he was drinking whiskey at the party before the accident.

...

We conclude that the trial court improperly dismissed Brenda Downs on the motion for summary judgment. The evidence summarized above, considered in the light most favorable to Cameron, demonstrates that a genuine issue of material fact exists as to Brenda Downs' liability under the theory of negligent entrustment.

Id.

Like Ms. Downs, Ms. Rickey knew or should have known that Mr. Kaloger was a reckless driver and likely to be under the influence of drugs when she entrusted him with her Honda. Just as in the *Cameron* case, this Court should conclude the trial court improperly dismissed the Kellys' negligent entrustment claim against Ms. Rickey.

Ms. Rickey argues for dismissal of the negligent entrustment claim based on *Vikelis v. Jaundalderis*, 55 Wn.2d 565, 348 P.2d 649 (1960). Ms. Rickey's reliance on *Vikelis* is misplaced. *Vikelis* involved a father who entrusted his minor son with the use of the family car. *Id.* at 570. The father was apprehensive about permitting his son to drive the car because of the son's previous traffic citations and, on one occasion, suspension of his driver's license. *Id.* at 569. Despite the father's apprehension, he allowed his son to take the car and the son got into an

accident which injured the plaintiff. *Id.* On appeal, the *Vikelis* court stated, “in view of the fact that [the son] 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.” *Id.* (emphasis added). The Court found the father’s comments regarding his apprehension at loaning the car to his son coupled with the son’s prior driving infractions provided “insufficient evidence... to overcome the presumption.” *Id.* at 570.

Ignoring the fact that this passage establishes a “presumption” and not a “conclusion,” Ms. Rickey cites *Vikelis* for the proposition that this Court should find as a matter of law that it was reasonable for Ms. Rickey to entrust Mr. Kaloger with the use of her Honda based solely on the fact that Mr. Kaloger had a valid Washington State driver’s license. CP 269-270. This reasoning leads to the result that despite conclusive evidence that a driver has a history of intoxication and was intoxicated at the time of the accident, any negligent entrustment case must fail where the driver of the car is a licensed driver. The law does not support this conclusion. *Vikelis* only supports a presumption in favor of licensed drivers, nothing more. Its holding is not applicable to this case where Ms. Rickey knew of Mr. Kaloger’s history of drug abuse and drug use shortly before the collision. Accordingly, this Court should afford Ms. Rickey no

presumption in favor of dismissal and, in fact, resolve any inconsistencies in favor of the Kellys as the non-moving parties to summary judgment.

4. At the very least, the Kellys sufficiently established Ms. Rickey violated a duty of care to the Kellys when she should have known Mr. Kaloger was likely to become intoxicated and continued to entrust him with the use of her Honda.

A plaintiff alleging negligent entrustment may also prevail where the defendant *should have known through the exercise of ordinary care* that the driver was likely to become reckless, heedless, incompetent, or intoxicated. *Parilla*, 138 Wn. App. at 435-36; *Mejia v. Erwin*, 45 Wn. App. 700, 704, 726 P.2d 1032 (1986). Under this prong, a plaintiff must show the defendant had a duty to conform to a particular standard of conduct and defendant breached that duty by failing to exercise ordinary care. *Parilla*, 138 Wn. App. at 432. This theory is based on foreseeability: the entrustor of a vehicle is liable if a reasonable person could have foreseen the negligent acts of the trustee. *Id.* at 433-34.

In dismissing the Kellys' claim for negligent entrustment, the trial court erred when it resolved a number of genuine issues of material fact related to this element of negligent entrustment. These material issues include: (a) the credibility of Ms. Rickey's testimony as to her familiarity with Mr. Kaloger's past drug use, criminal activity, and general reckless disregard for the law; (b) whether Ms. Rickey's knowledge of

Mr. Kaloger's past conduct made it foreseeable that Mr. Kaloger would act recklessly when using the Honda; and (c) whether Ms. Rickey's failure to further inquire as to Mr. Kaloger's fitness to operate the Honda was a violation of her duty of ordinary care. These genuine issues of material fact cannot be decided on summary judgment. CR 56(c).

- a. The trial court erred when it found Ms. Rickey's deposition testimony credible as a matter of law.

Where the facts presented by the parties require the court to weigh credibility of a witness on any material issue, the issue *must* be resolved in favor of the nonmoving party, and the court should find there is a genuine issue of material fact warranting denial of summary judgment. *See e.g., Riley v. Andres*, 107 Wn. App. 391, 398-99, 27 P.3d 618 (2001). As the Washington State Supreme Court held in *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881-82, 431 P.2d 216 (1967) reflects,

The opposing affidavits are therefore contradictory and raise credibility questions revolving around a material and decisive issue in the case. However complex and intricate plaintiff's problem of proof at the time of trial may be, plaintiff at [the summary judgment] stage of the proceeding is entitled to all favorable inferences that may be deduced from the varying affidavits. So viewing the affidavits, we are satisfied respondents have not met their burden of demonstrating the absence of a genuine issue of material fact. Mere surmise that plaintiff may not prevail at trial is not a sufficient basis to refuse her her [sic] day in court.

A material element of negligent entrustment is whether the entrustor knew or could have known upon exercising ordinary care, of the trustee's propensity for recklessness. *Cameron*, 32 Wn. App. at 878. In support of her motion for summary judgment, Ms. Rickey offered only her own deposition testimony to refute the Kellys' allegation that she knew or should have known that Mr. Kaloger had the propensity to be both reckless and intoxicated. But Ms. Rickey's credibility is at issue on this material fact, as evidenced by her inconsistent deposition testimony. For example, although she admits to purchasing the Honda, insuring the Honda, and updating title to the Honda in her own name *two days* before the collision, Ms. Rickey testifies that the Honda was a gift to Mr. Kaloger. CP 151, 10:25; 152, 15:13; 154, 21:14; 155, 26:23.

Another example is Ms. Rickey's inconsistent recollection of Mr. Kaloger's drug use. Ms. Rickey begins her testimony by stating she was aware Mr. Kaloger had a history of drug abuse. CP 151-152, 12:18-14:12; 159, 62:22-66:1. She also testifies that she was aware Mr. Kaloger ingested methamphetamines shortly before the collision:

Q. So you knew prior to December 24, 2006 that Mr. Kaloger had what, smoked meth?

A. Yes.

Q. How is it that you came to know that?

A. I came home from work and his head was shaved, and I said What happened? And he said – it’s all hearsay, but anyway, he said, I messed up. So I shaved my head. And I said, What do you mean, you messed up? And he said, Well, I fell off the wagon.

CP 152, 16:4-16:13. Ms. Rickey later attempts to recant this statement, testifying instead that she believed Mr. Kaloger’s “falling off the wagon” referred to alcohol. CP 152, 16:16-16:20. However, Ms. Rickey then states:

Q. But it’s your understanding, as a nurse, as a person who has lived on this planet for several decades, that when he said he had fallen off the wagon that he had gone back to something that he was trying to quit?

A. Yes.

Q. And you thought it was alcohol?

A. No. I never saw him drink anything alcoholic.

CP 153, 20:1-20:11.

Ms. Rickey next changes her testimony yet again when she testifies that she never believed Mr. Kaloger was intoxicated on any substance at any time. CP 154, 24:15-24:17.

Ms. Rickey’s inconsistent testimony on material issues calls into question her credibility. Her credibility cannot be determined as a matter of law on summary judgment and cannot sustain dismissal of the Kellys’ claims. Instead, the material issues of Ms. Rickey’s knowledge of

Mr. Kaloger's propensity for recklessness and his drug use must be resolved in the Kellys' favor. Therefore, dismissal of the Kellys' negligent entrustment claim on summary judgment is improper.

- b. Foreseeability of Mr. Kaloger's negligent conduct is a genuine issue of material fact.

"Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury 'are so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *Seeberger v. Burlington N.R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)). Mr. Kaloger's use of methamphetamines one month after his relapse was not "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Seeberger*, 138 Wn.2d at 823. This issue is one for the jury.

- c. Ms. Rickey's failure to exercise ordinary care is a genuine issue of material fact.

It is universally accepted under Washington law that where there are issues surrounding a defendant's failure to exercise ordinary care, summary judgment is improper. *See e.g., Mathis v. Ammons*, 84 Wn. App. 411, 418-19, 928 P.2d 431 (1997).

The Kellys allege Ms. Rickey failed to exercise ordinary care when she entrusted the use of her Honda to Mr. Kaloger with the knowledge that

Mr. Kaloger had a history of drug use and had relapsed while having use of the vehicle, and failed to inquire as to Mr. Kaloger's fitness to operate a vehicle prior to entrusting him with the use of the Honda. By dismissing the Kellys' case, the trial court essentially found as a matter of law that all reasonable minds would conclude that Ms. Rickey exercised reasonable and ordinary care when she permitted a man who she knew had a history of drug use and a relapse while having use of the Honda to continue to use her Honda without additional question or qualification. CP 26-27.

Even the Washington State Driving Under the Influence guidelines discredit such conclusion. RCW 46.61.5055 states that a driver cited for driving under the influence with no prior offenses is subject to a 90-day driver's license suspension. Assuming, in the light most favorable to the Kellys, that Ms. Rickey had actual knowledge of Mr. Kaloger's drug use when he admitted to falling off the wagon in Thanksgiving 2006, Washington State's own sentencing guidelines find a 90-day suspension of a driver's license constitutes an exercise of ordinary care. CP 152-153, 16:1-16:3, 16:25-17:3.

Ms. Rickey's knowledge of Mr. Kaloger's current drug use and knowledge that Mr. Kaloger was continuing to use the Honda was constructive knowledge that Mr. Kaloger either was or had the high likelihood of driving while intoxicated on methamphetamines as of

Thanksgiving 2006. If Ms. Rickey had acted reasonably, or at least in accordance with Washington's suggested guidelines, she would have restricted Mr. Kaloger's use of the Honda and the collision with the Kellys in December 2006 never would have occurred.

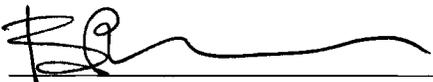
In sum, the trial court's summary dismissal of the Kellys' claim ignores the evidence presented at summary judgment and Washington law mandating issues of material fact to be decided by a jury.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the Order Granting Defendant Rickey's motion for Summary Judgment and remand the case for trial.

DATED this 4th day of March, 2011.

RYAN, SWANSON & CLEVELAND, PLLC

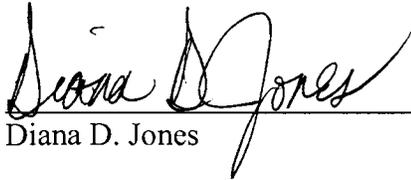
By 
David L. Tift, WSBA #13213
Brittenae Pierce, WSBA #34032
Amanda C. Bley, WSBA #42450
Attorneys for Appellants

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
tift@ryanlaw.com
pierce@ryanlaw.com
bley@ryanlaw.com

DECLARATION OF SERVICE

I declare that on the 4th day of March, 2011, I caused to be served the foregoing document on counsel for Appellants, as noted, at the following address:

Eric S. Newman, Esq.
McDermott Newman, PLLC
1001 4th Ave., Suite 3200
Seattle, WA 98154-1003



Diana D. Jones

Dated: March 4, 2011

Place: Seattle, WA

FILED
COURT OF APPEALS, 3RD DISTRICT
STATE OF WASHINGTON
2011 MAR -4 PM 4:02