

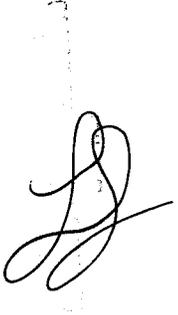
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COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

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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,

Respondents.

RESPONDENT'S BRIEF

Eric S. Newman, WSBA No. 31521
Attorney for Respondent

McDermott Newman, PLLC
1001 Fourth Avenue
Suite 3200
Seattle, WA 98154
(206) 684-9463

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A. ASSIGNMENT OF ERROR

Respondents made no assignments of error before this Court.

B. STATEMENT OF THE CASE

1. The Parties.

The parties are Mark Kelly, Mary Taylor-Kelly, Jessica Kelly, and Brett Kelly (hereinafter “the Kellys”), appellants, and Janice Rickey (hereinafter “Ms. Rickey”), respondent.

2. Background Facts.

This case arises out of a motor vehicle collision that occurred in December 2006, in Snohomish County, Washington. It is undisputed that on the date of the accident, Robert Kaloger, who is not a party to this matter, was driving¹ home from work on SR 96 when he crossed over the center line and struck the Kellys’ vehicle, which was driven by Mark Kelly, head-on. It is also not disputed that, at the time of the accident, Mr. Kaloger was driving a vehicle that was registered to defendant Janice Rickey, who was his roommate. Ms. Rickey was not present at the time of the accident, and, in fact, because she and Mr. Kaloger worked different shifts, she had not seen Mr. Kaloger for at least three days preceding the accident. CP 279.

¹ There is no dispute that Robert Kaloger was licensed to drive on the date of the accident. *See* CP 147.

Ms. Rickey is a nurse. CP 152, 13:5. At the time of the accident, she was working in a rehabilitation center. *Id.* at 13:3. Mr. Kaloger's mother also worked at the facility as a nurse, and she and Ms. Rickey became friends. CP 159, 64:22. For a period of time, Mr. Kaloger was also working in the same facility as a janitor. CP 152, 13:6. Because Ms. Rickey was friends with Mr. Kaloger's mother, she knew Mr. Kaloger as well.

Approximately a year before the accident in question, Mr. Kaloger experienced some financial difficulties and became homeless. *Id.* at 14:9. Ms. Rickey invited him to come live with her because she had an extra bedroom in her house and Mr. Kaloger's mother's house was too small for him to stay there. *Id.* Mr. Kaloger accepted Ms. Rickey's offer and moved into her house in late 2005. CP 150, 7:17.

Mr. Kaloger eventually left his job at the rehabilitation facility. CP 157, 45:13. His next job was at a Wendy's restaurant in Lynwood, which was more than 30 miles from Ms. Rickey's house in Goldbar, Washington. *Id.* at 47:20-48:12. When Mr. Kaloger first took the job at Wendy's, he commuted by bus. *Id.* at 48:15. In order to assist Mr. Kaloger with his commute, in late 2006, Ms. Rickey offered to buy him a car. CP 151, 10:24. She took him to a car dealership and picked out a 15-year-old Honda. CP 151, 11:8. He drove it home, and, though there were two keys

to it, he kept them both. CP 161, 69:11-70:1. The car was registered in Ms. Rickey's name, but she never drove it, and she only rode in it a single time, when she and Mr. Kaloger went to dinner. CP 156, 31:2 & CP 161, 70:2. Mr. Kaloger drove the car on that occasion. CP 156, 31:8. Ms. Rickey owned two other cars for her own use, so she had no need to drive Mr. Kaloger's car. CP 151, 10:12. Ms. Rickey put the Honda on her insurance and on one occasion paid for a repair to it, but only Mr. Kaloger ever drove it, and Mr. Kaloger paid for his own gas. CP 161, 69:5.

3. The Kellys' Allegations

The car that Mr. Kaloger was driving at the time of the accident was the Honda that Ms. Rickey bought for him. Plaintiffs filed suit against Janice Rickey under two theories: (1) negligent entrustment and (2) agency liability. The claim of agency liability was the subject of a motion for partial summary judgment, and the court below dismissed that claim. The dismissal of that claim has not been appealed.

After the agency liability claim was dismissed, Ms. Rickey moved the court below for an order of summary judgment of dismissal of the Kellys' only remaining claim, negligent entrustment.

In their complaint, the Kellys alleged,

[D]efendant Rickey loaned or entrusted defendants' car to Robert C. Kaloger ("Kaloger"). Defendant knew or should have known Kaloger was not competent to properly operate

the Rickey car, and rather was heedless and/or reckless, such that he should not have been given control of Rickey's automobile. The Rickey car became a dangerous instrumentality under Kaloger's control.

CP 320, ¶ 5. The Kellys went on to allege that Mr. Kaloger "was intoxicated on methamphetamines at the time of the crash and, upon information and belief, was smoking a meth pipe at the time of the impact." *Id.* at ¶ 6. Ms. Rickey denied the Kellys' allegations and was questioned about them at her deposition.

At her deposition Ms. Rickey testified at length regarding her lack of knowledge of any drug or driving problems Mr. Kaloger may have had at the time she bought him the car. She testified that she was not aware of Mr. Kaloger's criminal history. CP 152 13:25-14:2. She also was not aware of Mr. Kaloger's driving history. *Id.* at 15:7.

As a nurse, she testified that she was aware of the symptoms of someone who is using methamphetamines. CP 154, 22:20. She said loss of appetite was one of them, but she never noticed Mr. Kaloger showing any loss of appetite. *Id.* at 23:3. She said long periods of time without sleep was one of them, but she never saw him going without sleep. *Id.* at 23:6. Ms. Rickey denied ever seeing Mr. Kaloger smoking marijuana and denied that she ever suspected he was smoking marijuana. *Id.* at 24:3.

She was specifically asked if she was aware of Mr. Kaloger's smoking anything besides cigarettes, and she said "no." *Id.* at 23:20.

She was asked if she had ever seen Mr. Kaloger in possession of drug paraphernalia; she had not. CP 302, 53:8. She denied any knowledge of his drug use on the date of the accident or any other time while she knew him. She was specifically asked, "Did you ever think he was ever intoxicated on any substance at any time?" She replied "No." CP 297, 24:15. In fact, she had never even seen him drink alcohol, even on occasions when she was drinking alcohol. CP 303, 55:9.

4. Ms. Rickey had no prior knowledge of Mr. Kaloger's drug use.

The Kellys start their statement of facts with a misleading account of Ms. Rickey's interaction with Mr. Kaloger's mother. The Kellys allege, "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."² Kellys' Brief, p. 3. None of this is supported by the record.

There is nothing in the record that indicates that Ms. Rickey had a "close relationship" with Mr. Kaloger's mother. What the record actually says is that they were friends and that they would chat occasionally at

² For this assertion, the Kellys cite CP 151-152, 12:18-14-12; CP159-160 62:22-66:1.

work. Ms. Rickey testified, “[Mr. Kaloger’s mother] would be sitting in the lobby, the staff lounge, reading and waiting for a ride. She didn’t drive. She doesn’t drive. And I would come in and chat, you know, for a few minutes before my shift started.” CP 159-160, 64:22-65:1.

There is nothing in the record that indicates that the two women “often discussed Mr. Kaloger,” and there is nothing in the record that indicates that the women discussed Mr. Kaloger’s periods of homelessness or incarceration. Most importantly, there is nothing in the record that Ms. Rickey knew about Mr. Kaloger’s “long history of drug use” prior to the accident that is the subject of this case.³

Though Ms. Rickey did say that she had a conversation with Mr. Kaloger’s mother about Mr. Kaloger’s previous drug use, she could not recall if that conversation happened before or after the accident. She testified:

Q. When is the first time she told you that he had had problems with drugs?

³ With respect to Mr. Kaloger’s drug problem, no admissible evidence was offered to the court below, and there is no evidence in the record to this court demonstrating that Mr. Kaloger actually had a prior drug problem or, if he did have a prior drug problem, when he had the drug problem, what the extent of his drug problem was, what drug he allegedly had a problem with, or when he started his recovery. It is possible, Mr. Kaloger’s drug history, if he had one at all, occurred decades before the accident, when he was a teenager, and that he had not used for 20 years. Certainly plaintiffs are not arguing that a person who was an alcoholic or a drug addict at any time in his life is forever prohibited from borrowing, renting, or being given a car. Plaintiffs had the burden of proving not

A. See, I worked there for six years, 2004 through 2010. The first time that she asked me -- or that she told me?

Q. Yes, ma'am.

A. Somewhere in that time frame. I don't know. I'm not trying to be a smart-aleck or anything, but I couldn't tell you.

CP 159, 64:12-64:20. The accident that is the subject of this case occurred in December 2006, so the conversation could have occurred as many as three years after the accident. Obviously, if it happened after the accident, it would have no bearing on this case.⁴

C. SUMMARY OF ARGUMENT

The court below properly dismissed the Kellys' negligent entrustment claim because there is no evidence whatsoever that Mr. Kaloger was an incompetent driver. The Kellys were unable to produce any evidence that Mr. Kaloger had ever had any accidents, any speeding

only that Mr. Kaloger had a drug history but also that it was extensive enough and close enough in time to be relevant to this accident. Plaintiffs have failed to do so.

⁴ This conversation is the only evidence offered by plaintiff that Mr. Kaloger had a previous drug problem. It is inadmissible evidence and should not be considered by this Court in deciding this matter. If it is being used to prove that Mr. Kaloger had a drug problem, it is hearsay and, therefore, inadmissible. If it is being used to show that Ms. Rickey knew he had a drug problem, it is irrelevant because, as stated above, it does not demonstrate that she knew he had a drug problem at the time of the accident because there is no evidence that the conversation occurred prior to the accident.

tickets, or any charges of driving negligently, recklessly, or under the influence of any substance.

The Kellys try to argue, despite the lack of any previous problems with driving, that because they allege Mr. Kaloger used drugs in the past, he was a reckless person and should never have been given a car. There are three problems with the Kellys' argument.

First, there is no admissible evidence that Mr. Kaloger had a history of problems with drugs. The Kellys argue that Ms. Rickey knew Mr. Kaloger used methamphetamines on a single occasion a month before the accident, but a review of Ms. Rickey's deposition shows that she was confused by the Kellys' counsel's question on this subject and immediately clarified her response.

The Kellys also argue that Mr. Kaloger had drug problems for years, but they offer no admissible evidence of whether he actually had a drug problem. Putting that aside, even if he did have a drug problem, the Kellys have no evidence that Ms. Rickey knew about it before the accident, nor do they have any evidence of when he had the alleged drug problem, what the extent of his alleged drug problem was, what drug he allegedly had a problem with, or when he started his recovery.

Second, the fact that a person has used drugs in the past does not disqualify them from using a car. The Kellys argue that Mr. Kaloger

used drugs a month before the accident. As stated above, Ms. Rickey denies that Mr. Kaloger said this, but even if he did use drugs on that occasion, in order to use prior behavior to show negligent entrustment, that behavior must be repetitive. A single instance is not repetitive, so the one-time use a month before the accident is insufficient to support the Kellys' claims.

Third, and most importantly, in order to prove negligent entrustment, the Kellys had to provide evidence that Ms. Rickey knew or should have known that Mr. Kaloger had a history of being a reckless *driver*. Simply making allegations that Mr. Kaloger was a generally reckless person by using drugs is insufficient. The Kellys had to show that Mr. Kaloger had a history of driving under the influence. Because they offered no evidence of previous driving under the influence or reckless driving of any kind, regardless of Mr. Kaloger's previous drug use, there can be no negligent entrustment.

D. ARGUMENT

1. The Kellys' case was appropriately dismissed on summary judgment.

Courts should grant summary judgment when there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. *Weyerhaeuser Co. v. Aetna Cas. and Sur.*

Co., 123 Wn.2d 891, 874 P.2d 142 (1994). A “material fact” is one upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. CR 56. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 77 P.2d 182 (1989). If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Id.* at 225.

Here, as discussed below, the Kellys failed in their burden of proof, and, therefore, their claims were properly dismissed.

2. There is no evidence of negligent entrustment.

“A person entrusting a vehicle to another may be liable under a theory of negligent entrustment only if that person knew, or should have known in the exercise of ordinary care, that the person to whom the vehicle was entrusted is reckless, heedless, or incompetent.” *Mejia v. Erwin*, 45 Wn. App. 700, 704, 726 P.2d 1032 (1986). More specifically, in order to prove negligent entrustment, there must be evidence that the

person to whom the vehicle was entrusted was “*an incompetent driver.*”

Kaye v. Lowe’s HIW, Inc., 158 Wn. App. 320, 325, 242 P.3d 27 (2010).

“[O]rdinarily the existence of negligence is a jury question. However, if it can be said as a matter of law that reasonable persons could reach but one conclusion, after considering all of the evidence and the reasonable inferences therefrom most favorably to the nonmovant, summary judgment should be granted.” *Mejia v. Erwin*, 45 Wn. App. at 705. The issue of negligent entrustment can be decided as a matter of law and should be decided as a matter of law when, as here, the driver who was allegedly entrusted with the vehicle was licensed to drive at the time of the accident and that person had no history of reckless, heedless, or incompetent driving. *Vikelis v. Jaundalderis*, 55 Wn.2d 565, 570, 348 P.2d 649 (1960); *see also Mejia, supra*.

a. Licensed drivers are presumed competent.

In the negligent entrustment context, if the driver in question “had a valid and subsisting driver’s license, at the time [of the accident], we must presume *as a matter of law*, that he was competent and qualified to operate [the] car.” *Vikelis v. Jaundalderis*, 55 Wn.2d at 570 (emphasis added).

In *Vikelis* a father loaned his car to his minor son who was involved in an accident. In that case, the Washington Supreme Court affirmed a grant of summary judgment on the issue of negligent entrustment despite the father's knowledge of a number of driving infractions by the son in a short period of time prior to the accident and despite the father's admission that, *on the day of the accident*, he was worried that there might be an accident because his son was not a very good driver. The Supreme Court held that these facts were insufficient evidence to overcome the presumption of competence. *Id.*

On the date of the *Vikelis* accident, the father told the son that he did not want him to drive the car, saying, "That is too far and the highways are very crowded and you know that you are a fast and sharp driver, . . . and I am afraid you will wreck the car and something will happen so I don't want you to go." *Id.* at 569 (ellipsis in original). Additionally, the son "had previously received some traffic citations and, on one occasion, his driver's license had been suspended for thirty days, but had been reinstated prior to [the date of the accident]." *Id.* Despite his father's apprehension and the son's previous citations, the son was permitted to take the car, and he got into an accident.

The *Vikelis* court held, "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 that the father's comments regarding his apprehension at loaning the car to his son, even when it was coupled with the son's prior driving infractions, provided "insufficient evidence...to overcome the presumption." *Id.* at 570.

In this case, as in *Vikelis*, the Kellys allege that Mr. Kaloger was "heedless and/or reckless, such that he should not have been given control of Rickey's automobile." Complaint, ¶ 5. There is no dispute that Mr. Kaloger was licensed to drive at the time of the accident, and plaintiffs offer no explanation as to how Mr. Kaloger was "heedless and/or reckless" at the time the car was given to him. They allege that Mr. Kaloger was smoking methamphetamines while driving on the date of the accident and that Ms. Rickey should have foreseen that fact and prevented him from driving the car, but they offer no admissible evidence that Mr. Kaloger had a history of driving under the influence, let alone that Ms. Rickey was aware of any history.

There is no dispute that Ms. Rickey had not seen Mr. Kaloger for at least three days before the accident, and there is certainly no evidence that Mr. Kaloger was impaired at the time Ms. Rickey gave him the car, months earlier. As a result, there can be no argument that Ms. Rickey had

a duty to prevent Mr. Kaloger from driving based on his condition the last time she saw him.

b. Mr. Kaloger's past conduct is insufficient to support a negligent entrustment claim.

There is no dispute that Mr. Kaloger was not intoxicated when he was given the car, and there is no dispute that he was not incompetent to drive at the time he was given the car. However, the Kellys allege that Ms. Rickey should have foreseen that Mr. Kaloger would drive while smoking methamphetamines based on his past conduct.

In the negligent entrustment context, “when the foreseeability of harm stems from past conduct, it must be conduct *so repetitive* as to make its recurrence foreseeable.” *Mejia v. Erwin*, 45 Wn. App. 700, 706, 726 P.2d 1032 (1986) (citation omitted) (emphasis in original). As stated above, during the two years that Ms. Rickey knew Mr. Kaloger, she was not personally aware of any drug use, any drinking, any intoxication, any criminal activity, any driving infractions, or any wrongdoing whatsoever.

It is the plaintiffs' burden to prove not only that Mr. Kaloger was smoking methamphetamines at the time of the accident, but that Ms. Rickey had information that Mr. Kaloger was using drugs so often, so repeatedly that she should have foreseen that Mr. Kaloger would drive under the influence of methamphetamines on the date of the accident.

There is insufficient evidence to support plaintiffs' allegations, and therefore, their claims should be dismissed.

c. There is no evidence that Kaloger used drugs in the months prior to the accident.

The Kellys insist that Ms. Rickey knew Mr. Kaloger had used drugs "within one month of his collision with the Kellys." Kellys' Brief, p. 15. They go on to argue "She admitted this was 'one time' specifically that she was aware Mr. Kaloger ingested methamphetamines." *Id.* This argument is patently misleading. In fact, when quoting Ms. Rickey's deposition on page six of their brief, the Kellys intentionally omitted clarifying testimony in an attempt to mislead this court into taking Ms. Rickey's testimony out of context. A reading of the full line of questioning of Ms. Rickey shows that she was confused about the question quoted by the Kellys, and she immediately clarified that confusion.

The Kellys quoted to this Court Ms. Rickey's testimony:

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, 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.”

Kelly’s Brief, p. 6 (citing CP 152-153, 16:1-16:3, 16:25-17:3. However, the very next question, which was omitted by the Kellys, attempted to clarify her answers, and it became clear that she thought that Mr. Kaloger was talking about alcohol, not methamphetamines, and that she did not even know that for sure.

The following is the remainder of the exchange from Ms. Rickey’s deposition which was omitted by the Kellys and replaced with an ellipsis:

Q. I’m sorry?

A. I fell off the wagon.

Q. What else did you say? I didn’t hear that other part.

A. That’s how he put it. *I thought he was talking about alcohol*, but I never saw him drink anything but soda or water.

Id. (emphasis added).

This was the conversation the Kellys were referring to that occurred approximately a month before the accident. There is no evidence

that Mr. Kaloger ever said he was taking methamphetamines at that time. In fact, there is no evidence in the record before this Court that Mr. Kaloger ever took methamphetamines at any time in his life, prior to the date of the accident, let alone evidence that Ms. Rickey knew about it.

d. Even if Ms. Rickey did know of a single instance of drug use, there would still be insufficient evidence to support a claim of negligent entrustment.

There can be no dispute: Ms. Rickey had no knowledge of Mr. Kaloger's previous use of methamphetamines. She denied any knowledge of his drug use on the date of the accident or any other time while she knew him. She was specifically asked, "Did you ever think he was ever intoxicated on any substance at any time?" She replied "No." CP 297, 24:15.

The Kellys argue that the court below found Ms. Rickey's deposition testimony credible as a matter of law, which they argue was error because there were issues with Ms. Rickey's credibility. *See Kellys' Brief*, p. 20. However, the Kellys fail to cite to anywhere in the record that demonstrates that the court below made any factual determinations as a matter of law. Of course, the court below did no such thing. The Court below found that even if Ms. Rickey did know about drug use on a single

occasion, that would be insufficient to support a negligent entrustment claim.

As stated above, to support a negligent entrustment claim, prior behavior must be “so repetitive as to make its recurrence foreseeable.” *Mejia v. Erwin*, 45 Wn. App. at 706. Here, there was, at best, a single incident. There was no repetition, and therefore, the act was not foreseeable as a matter of law. Just because a person has used drugs on a single occasion, does not make them incompetent to ever drive again.⁵

e. The Kellys have not shown any evidence that Mr. Kaloger was an incompetent driver.

As stated above, even assuming that Mr. Kaloger did use drugs on that single occasion more than a month before the accident, there was no repetition, and therefore, the act was not foreseeable as a matter of law. However, even if there were a pattern of drug use, there is no evidence whatsoever of prior driving under the influence by Mr. Kaloger. Ms. Rickey certainly had no knowledge of any propensity by Mr. Kaloger to

⁵ Though no court has ever supported their argument, the Kellys make an attempt to use RCW 46.61.5055, the DUI statute, to argue that if one uses drugs on a single occasion, they are incompetent to drive for 90 days. Putting aside the fact that they are referring to a sentencing guideline for someone who has been convicted of a crime, the primary problem with the Kellys’ argument is that, RCW 46.61.5055 only applies if a person was *driving* under the influence. Here there is not even an argument that Mr. Kaloger had ever *driven* under the influence. So, the Kellys would have this Court find that if a person drinks any amount of alcohol, regardless of whether they drive under the influence of that alcohol, they are incompetent to drive for 90 days as a matter of law.

drive under the influence of any intoxicant, and it is the risk of *driving* under the influence that must be foreseeable to attach liability.

This Court recently ruled on the issue of negligent entrustment and found that past drug use, even coupled with a known “disregard for the law, the rules of society and for others,” was not enough to support a negligent entrustment claim. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 333; 242 P.3d 27 (2010). The *Kaye* court held that, to prove negligent entrustment, there must be evidence that the person to whom the vehicle was entrusted was “*an incompetent driver.*” *Id.* at 325. In fact, the *Kaye* court affirmed the trial court’s refusal to enter a default judgment against an allegedly negligent entrustor, despite a default order, because there was insufficient evidence of negligent entrustment in that case, as a matter of law. The essence of the *Kaye* opinion is, regardless of other past history or tendencies of the tortfeasor, the plaintiff must prove that the vehicle was entrusted to an incompetent *driver*.

In *Kaye*, a pickup truck driven by defendant Cote struck plaintiff Kaye in a parking lot, resulting in serious injuries to Kaye. *Id.* at 323-324. Seeking to recover for her injuries, Kaye filed suit against Cote, Christopher Templeton, and Templeton Construction Services (“TCS”). *Id.* at 324. Kaye alleged that Templeton and TCS were negligent in entrusting the vehicle to Cote. *Id.* A default order was eventually entered

against Cote, Templeton, and TCS. *Id.* at 324-325. However, when Kaye moved for a default judgment against all three parties, the trial court denied her motion with respect to Templeton and TCS, holding that there was insufficient evidence of negligent entrustment. *Id.* “The trial court found that there was no evidence that Templeton knew or believed that Cote was *an incompetent driver* at the time of the collision. It also found that there was insufficient evidence to establish that Templeton should have been on notice that Cote was *a dangerous driver.*” *Id.* at 325 (emphasis added). Kaye appealed, but this Court affirmed the trial court’s ruling.

In analyzing the negligent entrustment claim in *Kaye*, this Court assumed the facts stated in the complaint were true because they were “deemed admitted by the defendants in default.” *Id.* at 331. As a result, the Court of Appeals presumed the following facts were true:

- (1) Templeton knew about “Cote’s extensive history of problems with authority”;
- (2) Templeton knew about Cote’s “disregard for the law, the rules of society and for others.”
- (3) Templeton believed Cote “maintained a position of paranoia [about] authority”;
- (4) Templeton believed Cote was mentally unstable.

(5) Templeton was aware that Cote “operates ‘off the grid’”;
and

(6) Templeton was aware that Cote “*has used drugs.*”

Id. at 333 (emphasis added). “Despite these findings, the trial court did not err by concluding that there was no evidence that Templeton knew Cote was *an incompetent driver* or should have been on notice that Cote posed a danger.” *Id.* (emphasis added).

The Kellys’ entire negligent entrustment argument is founded on the allegation that Ms. Rickey “should have known” about Mr. Kaloger’s legal troubles from a decade or more before the accident and that she should have taken the car from Mr. Kaloger based on his statement that he “fell off the wagon.” However, the Court of Appeals in *Kaye* held that even when Templeton had *actual knowledge* that Cote had a “disregard for the law, the rules of society and for others,” and even though he had *actual knowledge* of Cote’s drug use, that was insufficient evidence to support a negligent entrustment claim. Those are the only two arguments the Kellys have made in this case: that Kaloger had a disregard for the law and that he used drugs. The *Kaye* court held, as a matter of law, that those two facts are insufficient to support a negligent entrustment claim.

The key to a negligent entrustment claim is that the person is a negligent or reckless *driver*. Repeatedly, the *Kaye* court drew attention to

this point. It held that Kaye had to prove that “Templeton knew or believed that Cote was *an incompetent driver* at the time of the collision.” *Id.* at 325 (emphasis added). It plainly stated, “to establish liability for negligent entrustment, the plaintiff must show that the defendant knew—or, in the exercise of ordinary care, should have known—of the *danger of relinquishing control of the vehicle.*” *Id.* (citing *Parrilla v. King County*, 138 Wn. App. 427, 441, 157 P.3d 879 (2007)) (emphasis added).

Though the Kellys cited the *Kaye* opinion to the court below, they did not cite it in their brief to this court. Instead they cited *Cameron v. Downs*, 32 Wn. App. 875, 650 P.2d 260 (1982). However, the *Cameron* opinion supports this Court’s ruling in *Kaye* and supports the argument of Ms. Rickey in this case.

As stated above, the previous reckless behavior had to have been related to *driving*. The *Cameron* court recognized this by stating that there must be evidence that the alleged entrustor “knew or, in the exercise of ordinary care, should have known that [the driver] was both a *reckless driver and likely to be intoxicated.*” *Id.* at 879. The only reason why the *Cameron* court found a question of fact in that case was because there was evidence that the driver “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.” *Id.* Additionally, the alleged entrustor in *Cameron* was aware of the driver’s intoxication on the night of the accident prior to the accident.

Here there is no evidence that Ms. Rickey knew that Mr. Kaloger was intoxicated on the date of the accident nor is there evidence that Mr. Kaloger had “a reputation for being a reckless, dangerous, and incompetent driver.” In fact, Mr. Kaloger’s driving record does not reveal any accidents, any speeding tickets, or any charges of driving negligently, recklessly, or under the influence of any substance. CP 147. Because there is no evidence of prior *driving* problems, there can be no negligent entrustment.

3. Ms. Rickey had no duty to investigate Mr. Kaloger’s past.

The Kellys argue that “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.” Kellys’ Brief, p. 20. There are two problems with this assertion. First, plaintiffs provide no authority or even argument that Ms. Rickey had a duty to investigate Mr. Kaloger’s background, which, as discussed below, is fatal to their argument. Second, Mr. Kaloger’s background did not include a single citation or charge for a drug crime or

a driving crime, so even if she had investigated, she would have found nothing.

a. Defendant had no duty to investigate Kaloger's background.

The Kellys insist that Ms. Rickey's failure to inquire into Mr. Kaloger's history creates a question of fact as to whether she breached her duty of care, but plaintiffs skip an important step in the negligence analysis.

“In an action for negligence, a plaintiff must prove *the existence of a duty*, breach of that duty, resulting injury, and proximate causation.” *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009) (citing *Curtis v. Lein*, 150 Wn. App. 96, 102-03, 206 P.3d 1264 (2009)) (emphasis added). So, before the Kellys can argue breach, they must first establish duty. “The threshold determination of whether a duty exists is *a question of law*.” *Id.* (emphasis added).

The Kellys provide no argument or authority whatsoever demonstrating that a person has a duty to investigate the background of a potential driver before allowing him access to a car. Because the Kellys failed to show any authority supporting the alleged duty of Ms. Rickey, their argument must fail. However, even if they had attempted to find

supporting authority, they would have found that the law is actually contrary to their position.

As stated above, in *Mejia v. Erwin*, a father was sued for negligently entrusting a car to his adult son. The father was aware of his son's being involved in two accidents and receiving three speeding tickets over a two-year span 11 years before the accident in question, but the court found that 11 years was too remote in time to be relevant. What the father did not know was that during those 11 years, his son got *five* more speeding tickets, a ticket for failing to obey a sign, and was involved in *four* car accidents over the four years preceding the accident in question. *Id.* at 702. The plaintiff in that case argued that the father *should have known* about those citations and accidents, but the Court found that there was no duty to investigate, holding, "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." *Id.* at 704.

The same holds true here. There is no duty for a woman to investigate the background of her 32-year-old roommate before giving him a car. In the *Mejia* case, the parties were much more closely related (father and son), and the facts unknown to the alleged entrustor were far more relevant and far more recent than the facts of this case, and yet the

Court found that there was no duty to investigate the driver's background. The same ruling should be made here.

b. Kaloger had no relevant history.

Even if Ms. Rickey had investigated Mr. Kaloger's background, she would not have found any relevant information. In support of their response to the court below, the Kellys offered Mr. Kaloger's driving record from the Washington Department of Licensing. *See* CP 146-147. That driving record includes a number of violations for driving without insurance or registration and a single citation for failure to stop.

Other than the accident that is the subject of this case, Mr. Kaloger's record does not reveal any accidents, any speeding tickets, or any charges of driving negligently, recklessly, or under the influence. *Id.*

Plaintiffs also offered Mr. Kaloger's criminal record. *See* CP 135-142. A number of points should be made from these records:

First, in the twenty years included in Mr. Kaloger's history, there is not a single drug crime, not a single driving crime, not a single indication, whatsoever, that Mr. Kaloger was prone to using drugs, let alone driving while under the influence of drugs.

So the Kellys argued that Ms. Rickey should have investigated Mr. Kaloger's driving and criminal record, but those records show that *he never had any* "speeding tickets, tickets for negligent/reckless driving, or

driving while intoxicated.” So, even if Ms. Rickey had spoken to him about it, even if she had retrieved his driving records from the Department of Licensing, she would have found that he had never committed any of those infractions, so her failure to ask about them makes no difference to this case at all.

The only thing Mr. Kaloger’s driving record revealed is that he had several offenses for driving without insurance and driving an unregistered vehicle. Putting aside that Ms. Rickey had no knowledge of Mr. Kaloger’s prior driving without insurance or registration, Ms. Rickey remedied both of those problems by insuring and registering the car he was driving. It is ironic that the Kellys now attempt to use those facts against her to attempt to prove that she owned the car.

4. There is no evidence of *previous* recklessness.

The Kellys attempt to address the elements of negligent entrustment, but when they reached the element that the driver be “reckless, heedless, or incompetent,” because they have no evidence of previous reckless, heedless, or incompetent behavior, they simply ignore the requirement that the person exhibit the behavior at the time he is entrusted with the vehicle. Instead they argue that Mr. Kaloger was intoxicated on the date of the accident, and “An intoxicated person is considered reckless.” Kellys’ Brief, p. 13 (citing *Hickley v. Bare*, 135 Wn.

App. 676, 145 P.3d 433 (2006)). There are two problems with this argument.

First, *Hickley v. Bare* is not a negligent entrustment case; it is a case interpreting RCW 5.40.060, which creates a defense based on the intoxication of the plaintiff, so it has nothing to do with the facts of this case. However, more importantly, it does not even mention the proposition the Kellys cited it for (*i.e.* “An intoxicated person is considered reckless.”) It does not analyze the recklessness of an intoxicated person at all. The Kellys do not cite any authority that holds that intoxication is *per se* reckless.

Second, even if intoxication were *per se* reckless, the Kellys have to prove that Ms. Rickey knew or should have known that Mr. Kaloger was reckless at the time she entrusted him with the vehicle. *See Mejia v. Erwin, supra* and *Kaye v. Lowe's HIW, Inc., supra*. As stated above, there is no evidence that Ms. Rickey knew of any propensity toward recklessness by Mr. Kaloger at the time she gave him the car, so the fact that he may have acted recklessly at the time of the accident has no relevance to this Court’s analysis.

5. There is no evidence that Ms. Rickey had the right to control the vehicle in question.

Even if Ms. Rickey knew Mr. Kaloger to be an incompetent driver, she had no authority to take the car from him. The Kellys insist that they have provided sufficient evidence of ownership of the vehicle in question, but the only evidence they have provided to show Ms. Rickey's control over the vehicle is that the car was registered to her. However, "Registration and title certificates are only *prima facie* evidence of ownership, which evidence is rebuttable." *Crawford v. Welch*, 8 Wn. App. 663, 664, 508 P.2d 1039 (1973) (citing *Junkin v. Anderson*, 12 Wn.2d 58, 74-76, 120 P.2d 548, 123 P.2d 759 (1941-42); *Gams v. Oberholtzer*, 50 Wn.2d 174, 310 P.2d 240 (1957)).

In a case where a car was to be taken by creditors, the Supreme Court held,

While it was shown that the title to the car when purchased was taken in the name of the father, that the state license was taken and the car insured in his name, and that he executed a mortgage upon it to procure a part of the purchase price, yet it was shown that these things were done for reasons satisfactory to the father and son, and that as between them the car was the property of the son.

Hartford v. Stout, 102 Wash. 241, 246-247, 172 P. 1168 (1918).

Additionally, in a replevin case where the title was maintained in the name of a purported seller, but possession remained with a purported

buyer, the Washington Supreme Court was able to determine as a matter of law that the buyer had a “right to possession, if not his absolute title, and if he had the right of possession, that alone is sufficient to defeat an action in replevin.” *Kimball v. Donohue*, 124 Wash. 505, 507, 217 P. 37 (1923).

The undisputed evidence shows that the car was a gift to Mr. Kaloger. Ms. Rickey specifically stated that it was a gift. Ms. Rickey also testified to a significant amount of evidence that establishes that she never had control of the car. She testified:

- (1) She gave the car to Mr. Kaloger months before the accident. CP 151, 10:24
- (2) Mr. Kaloger drove it home from the dealership. CP 161, 69:12-70:1
- (3) She never drove the car. *Id.*
- (4) She never had a key to the car. *Id.*
- (5) She only rode in the car once, and Mr. Kaloger drove on that occasion. *Id.*
- (6) She owned two other cars, so she had no need to drive Mr. Kaloger’s car. CP 151, 10:17.

The Kellys offer no evidence to dispute any of this. Plaintiffs simply state that Ms. Rickey should not be believed, and the jury should speculate that

there is some alternate truth, though they offer no evidence, or even speculation of what this alternate truth may be.

As stated above, plaintiffs' only evidence of control of the vehicle is that it was registered to Ms. Rickey and was insured by Ms. Rickey. However, those exact facts existed in *Hartford v. Stout*, and the Supreme Court held that they alone were insufficient to prove ownership when considering additional evidence to the contrary. *See Hartford v. Stout*, 102 Wash. at 246-247.

The *Hartford* case was cited in Ms. Rickey's briefing to the court below, as was *Kimball v. Donohue, infra*. The Kellys did not even mention these cases in their brief, let alone argue that they are not applicable to this case.

Based on this undisputed evidence, Ms. Rickey did not own the vehicle, or at the very least she had no possessory interest in it. Without a possessory interest in it, she had no right to take it away from Mr. Kaloger. At best she could have stopped insuring the vehicle, but as the *Kimball* court held, because Ms. Rickey had no possessory interest in the vehicle, she had no right of replevin and could not take it away. Ms. Rickey cannot be held liable for negligent entrustment of the vehicle to Mr. Kaloger if she "had no legal basis upon which to deny him control." *Hulse v. Driver*, 11 Wn. App. 509, 515, 524 P.2d 255 (1974).

6. Mr. Kaloger's criminal history is not relevant.

Though they do not provide argument regarding these facts, the Kellys discuss in their Statement of the Case Mr. Kaloger's criminal history. *See* Kellys' Brief, p. 6-7. The Kellys argued to the Court below that Mr. Kaloger's criminal history was relevant to the determination of negligent entrustment in this case. Because they provide no argument in their brief to this Court that the criminal history is in any way relevant, they seem to have abandoned this argument. However, because it is discussed at length in their Statement of the Case, it is necessary for Ms. Rickey to address these issues to eliminate any doubt that Mr. Kaloger's criminal history is not relevant to the issues before this court, with the exception of the fact that Mr. Kaloger had no history of drug or alcohol related crimes or infractions. In fact, a review of this history reveals no evidence that he was a poor driver, let alone "reckless, heedless, or incompetent," as is required to support a negligent entrustment claim.

a. A sex crime is irrelevant to Mr. Kaloger's driving ability.

As purported evidence of Mr. Kaloger's allegedly poor driving history, the Kellys inexplicably cited to the Court below a sexual assault conviction from 21 years ago, when Mr. Kaloger was a minor, a subsequent conviction for failing to register as a sex offender from 13

years ago, and a conviction to one count of patronizing a juvenile prostitute from 13 years ago. These sex crimes could not possibly have any relevance to a determination of whether he was a good or bad driver.

b. Mr. Kaloger's sex-crime history was, as a matter of law, too remote in time to be relevant.

Even if a sex crime were relevant to Mr. Kaloger's driving ability, his most recent sex offense was committed in 1997, nearly a decade before the accident. That remoteness in time prohibits its relevance as a matter of law.

In *Mejia v. Erwin*, the father who allegedly negligently entrusted a vehicle to his adult son "was aware of his son's accidents in 1968 and 1969, and of [his son's] three traffic citations in that same year." *Mejia v. Erwin*, 45 Wn. App. 700, 704, 726 P.2d 1032 (1986). The accident that was the subject of that case happened 11 years later, in 1980. *Id.* at 701. The *Mejia* plaintiff argued that the passage of time merely presented a question of fact as to negligence, citing an out-of-state case called *Giers*, but this Court disagreed. It stated, "We note that in *Giers*, the intervening period was a mere 3 years and was not a period in excess of a decade that we have here." *Id.* at 704. In *Mejia*, unlike this case, the previous behavior was directly relevant to the son's driving (*i.e.* three tickets and

two accidents in less than two years), but still this Court said it was too distant in time, as a matter of law.

Here we have the same decade of time that had passed *and* the crime had nothing to do with driving, so there could not possibly be any relevance to this case.

E. CONCLUSION

The Kellys have failed to show a history of recklessness, they have failed to show any previous reckless driving or propensity toward reckless driving, and they have failed to show a pattern of recklessness. As a result, their claims were properly dismissed and this Court should affirm the ruling of the court below.

RESPECTFULLY SUBMITTED this 4th day of April, 2011.

McDermott Newman, PLLC

By: _____

Eric S. Newman, WSBA No. 31521
Of Attorneys for Respondent

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NO. 66431-0-1

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

MARK KELLY, et al,

 Plaintiffs,

vs.

JANICE RICKEY, et al,

 Defendant.

AFFIDAVIT OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date, I caused to be delivered **via Hand Delivery** a copy of Respondent's Brief to:

David L. Tift
Ryan, Swanson & Cleveland
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034

DATED this 4th day of April, 2011, at Seattle, Washington.

By: Blythe Alldredge
Blythe Alldredge