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No. 66467-1

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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RENEE MALDONADO AND ANN LOMBARDO

Appellant,

v.

RAYMOND AND BEVERLY HOLDREN AND KELLY HOLDREN

Respondent.

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***APPELLANT BRIEF***

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KING COUNTY SUPERIOR COURT  
CAUSE NO. 09-2-18027-0 SEA  
HONORABLE JUDGE CATHERINE SHAFFER

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## INTRODUCTION

Teen-aged Respondent Kelly Holdren (“Holdren”) was at a drinking party with some friends. She loaned her boyfriend Casey Elmer (“Elmer”) her parents’ car, sending him across town to pick up Appellant Renee Maldonado (“Maldonado”), and bring her to the party. Elmer did pick up Maldonado, but on the way back to the party, Elmer lost control of the vehicle and it went off the road. Elmer was killed; Maldonado was severely injured.

Maldonado sued Holdren and her parents for her injuries, under the “family car doctrine”<sup>1</sup> and the doctrine of “negligent entrustment”.

Holdren spun an entirely different, irreconcilable, and completely unsubstantiated version of events. According to her, Maldonado was already at the party, and had been with Holdren’s group all night. Holdren’s version was that Maldonado and Elmer in effect “stole” Holdren’s car by removing the car keys from her jacket pocket as she lay “sleeping” at the end of the evening, because they wanted to go out for food.

Thus, as Elmer turned the key on the car’s ignition that night, Maldonado was either (1) at home, miles across town, waiting for Elmer

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<sup>1</sup> Maldonado does not appeal the dismissal of the “family car” doctrine claim.

to come pick her up (Maldonado's version); or (2) sitting in the passenger seat next to him (Holdren's version). It seems difficult to escape the conclusion that one or the other is lying.

The trial court overlooked this fundamental credibility issue and granted summary judgment to Holdren, based upon her "undisputed" testimony that she had not given Elmer permission to drive the car that night, and this despite abundant circumstantial evidence to the contrary.

The judgment should be reversed and the critical fact question decided by a jury.

#### ASSIGNMENT OF ERROR

The court erred in dismissing Maldonado's claims on summary judgment in the face of abundant and substantially undisputed evidence from which a reasonable jury could determine that Holdren had negligently allowed Elmer to use the car, resulting in his death and Maldonado's injuries.

#### STATEMENT OF THE CASE

Maldonado spends the day with Holdren, without drinking.

Late Saturday morning, August 18<sup>th</sup>, 2007, Maldonado, Holdren and three other friends, including "Amber", left Enumclaw in Holdren's car, headed for the South hill Mall in Puyallup; they were "sidetracked" by

a road-side show in Bonney Lake and stayed there for a few hours. CP 69-70. After that they ended up “driving around a bit”, then went to Amber’s house for lunch. CP 71. There was no drinking through this time of the day. CP 72.

Maldonado parts company with the group

After lunching at Amber’s house, the group spent the rest of the afternoon together. Holdren took Maldonado home about 6:00 to 7:00 that evening. CP 91.

Maldonado babysits her siblings as Holdren and the group begin to “party”

Maldonado’s mother and stepfather went to the movies Saturday night, while Maldonado babysat her two young siblings. CP 72. Maldonado’s mother Ann Lombardo corroborated this. CP 136.

Meanwhile, as Holdren herself described it, her group “partied”, including Casey Elmer. CP 17.

Maldonado’s mother and stepfather arrive home and see her in bed, as Holdren and the others continue to party

Lombardo and her husband got home from the movie about 10:30 to 11:00. CP 136, 137. Around midnight, Lombardo discovered that Maldonado was still up and having trouble sleeping. CP 136, 137.

Maldonado was to start a new job at Safeway the next morning CP 79. Lombardo gave Maldonado a sleeping pill and insisted that she go to bed. CP 137.

Meanwhile, as described in Holdren's own testimony, her group continued to "party". Casey Elmer consumed alcohol and "dust offs", in Holdren's presence. CP 17,18.

Maldonado gets a phone call from the party; Amber "needs her" and will "send a ride" to pick her up and bring her to the party

Around 2:30 or 3:00 a.m., Maldonado woke up to her cell phone ringing. It was Amber, calling from a friend's cell phone. CP 77. Amber was overwrought:

".... After I got her to calm down, she just said that she need my help, and she was scared. She wanted me to be—or, to help her get to bed or something. I---she was kind of hysterical.

Q. So she said she needed your help to get to bed?

A. She wasn't making any sense, which is why I had several phone calls from them, because I was half-asleep when I was talking to her.

Q. Okay.

A. So. I heard—she was just kind of sobbing, and she just needed my help. And I got her to calm down, and she said that she was going to send a ride for me, because it was way too early in the morning for me to be driving because I still had an intermediate driver's license."

CP 77-78. (emphasis added)

Casey Elmer arrives at Maldonado's home shortly after Amber said she was going to 'send a ride' for Maldonado.

About 45 minutes after the conversation with Amber, Casey Elmer arrived at Maldonado's home. CP 17.

Holdren routinely allowed others to drive her car

Casey Elmer wasn't the only person Holdren let use her car. Indeed, less than 24 hours before the accident, Maldonado herself had driven it (CP 103) Further:

Q. Okay. Do you—had you ever seen anybody else driving Kelly's car before?

A. A lot of the friends used to take turns. Everyone was just getting their licenses, so it was kind of exciting.

Q. Who else had you seen driver Kelly's car?

A. Couple of her friends. Amber.

Q. Anyone else besides Amber?

A. Just Kelly's friends in general. It was like a general group of people we used to hang out with.

Q. Okay. And how far would they get to drive the car?

A. I don't know.

Q. I mean, like a block or what?

A. I don't know.

Q. I mean, do you remember any specific—

A. If we're going---

Q. ---occasions?

A. If we were, like, going on a trip to the mall, whoever was a better highway driver would drive because we were all real new still.

CP 73-74.

Casey Elmer was Holdren's boyfriend and a more 'experienced' driver than Holdren's friends.

He was 19 years old. CP 100. He and Holdren were dating. CP 76.

Though initially appearing to be sober and in control of himself, Elmer drives the car off the road

When Elmer first arrived, Maldonado smelled no alcohol on him. CP 85.

However, after the two had stopped at Jack in the Box to get a large order of food for the parties, Elmer began to speed, CP 90. He lost control of the car and it crashed. CP 90, 91.

#### SUMMARY OF ARGUMENT

This being an appeal from a summary judgment of dismissal, the court reviews the evidence de novo, construing the evidence in the light most favorable to the Appellant, who was the non-moving party.

The parties agree that the "negligent entrustment" doctrine will impose liability where one in control of an automobile allows an intoxicated person to drive it. Hulse v. Driver, 11 Wn. App. 509, 524 P. 2d 255 (1971). Kellie Holdren was in control of her parent's car with their

permission, and admits that she knew Elmer had been drinking/doing drugs that night; In fact she claims that is exactly why she “refused consent”.

The outcome-determinative issue of this appeal, then, is whether there is sufficient evidence to allow a reasonable jury to find that Casey Elmer had Kelly Holdren’s permission to use the Holdren car that night.

The sum of the circumstantial evidence supports the finding that Casey Elmer did have permission to use the car. Moreover, Holdren’s credibility is completely impeached by Maldonado’s version of events, which is corroborated by Maldonado’s mother.

#### ARGUMENT

1. Fundamental rules of summary judgment

It is beyond axiomatic that in ruling upon a Motion for Summary Judgment, the Court must take the evidence in the light most favorable to the non-moving party. Jones v. Allstate, 146 Wn. 2d 291, 45 P. 3d 1068 (2002).

Circumstantial evidence may be used to defeat summary judgment, if the sum of the inferences raises fact issues. Herron v. King Broadcasting, 109 Wn. 2d 514, 746 P. 2d 295 (1987); Waite v. Whatcom

County, 54 Wn. App. 682, 775 P. 2d 967 (1989); Riehlus vs. Foodmaker, Inc., 152 Wn. 2d 138, 94 P. 3<sup>rd</sup> 930 (2004).

Summary judgment is inappropriate if reasonable minds could reach different conclusions from undisputed facts. Gray v. Pierce County Housing Authority, 123 Wn. App. 744, 97 P. 3d 26 (2004).

Importantly to this case, genuine credibility issues render summary judgment inappropriate. Balise v. Underwood, 71 Wn. 2d 195, 200, 381 P. 2d 996 (1963).

## 2. The Doctrine of “Negligent Entrustment”

“It is the general rule that an owner or other person in control of a vehicle and responsible for its use, who entrusts the vehicle to another, may be held liable for damages resulting from the use of the vehicle, under the theory of negligent entrustment, where he knew, or should have known in the exercise of ordinary care, that the person to whom the vehicle was entrusted was intoxicated at the time of the entrustment. Mitchell v. Churches, 119 Wash. 547, 206 P. 6 (1922) (an owner allegedly lent an automobile to one with knowledge that he might become intoxicated); Atkins v. Churchill, 30 Wash.2d 859, 194 P.2d 364 (1948) (entrusting an automobile to an unlicensed minor); General Valet Service, Inc. v. Curley, 16 Md.App. 453, 298 A.2d 190 (1973), rev'd based upon sufficiency of the evidence, Curley v. General Valet Service, Inc., 270 Md. 248, 311 A.2d 231 (1973); Stafford v. Far-Go Van Lines, Inc., 485 S.W.2d 481 (Mo.Ct.App. 1972); Annot. 19 A.L.R.3d 1175--1182, 1192 (1968); 60A C.J.S. Motor Vehicles § 431(1), (2) (1969); Restatement (Second) of Torts § 390 (1965).”

Hulse v Driver, 11 Wn. App. 509, 514, 524 P. 2d 255 (1971).

The Holdrens moved for summary judgment of dismissal on the “negligent entrustment” claim based solely on Kellie Holdren’s claim that she had withheld permission to drive the car that night, because “We [were] all under the influence and intoxicated.” CP 19. In other words, the Holdren’s openly acknowledge that it would have been negligent to let Elmer driver the car that night.

This makes the sole issue of this appeal: Whether the evidence supports the inference that Holdren did let Elmer driver that night.

3. Circumstantial evidence allows the inference that Elmer had Holdren’s permission to drive the car

*Holdren routinely allowed others to drive her car.*

Evidence of a person’s “habit and routine practice” is admissible to show than on a particular occasion he/she acted in conformity with the habit. ER 406. Importantly, the rule applies “whether corroborated or not and regardless of the presence of eyewitnesses”.

“Habit/routine practice” evidence has been approved in the following situations:

To show that a Sheriff’s office “routinely” lost documents that were filed through its main window (State v. Prestegard 108 Wn. App. 14,

28 P. 3d 817 (2001) (evidence should have been admitted in prosecution for failure to register as sex offender) v.;

To show that an insurance company “routinely” presented a UIM “rejection form” to customers who asked for UIM coverage with less than the liability limits (Torgerson v. State Farm Mut. Auto Ins. Co., 91 Wn. App. 952, 957 P. 2d 1283 (1998) (agent could testify to such a practice);

To show the personal habits of the victim in a homicide prosecution, where the body had not been discovered, to prove that she had not “simply disappeared” (State v. Thompson, 73 Wn. App. 654, 870 P. 2d 1022 (1994);

To show that a liability insurance adjustor dealing with an unrepresented injured person insured with the same company “always” advised that she was representing only the at-fault party (Heigis v. Cepeda, 71 Wn. App. 626, 862 P. 2d 129 (1993);

To show that the defendant “usually” carried a knife (State v. Platz, 33 Wn. App. 345, 655 P. 2d 710 (1982) (murder prosecution in which victim was stabbed to death).

The fact that Holdren routinely let her friends----who were “just getting” their licenses---drive her car allows the inference that she would have let Elmer use it that night.

*Elmer was her boyfriend and a more “experienced” driver*

That Elmer was Holdren’s boyfriend, and three years older only increases the likelihood that she would have let him use the car that night.

*Amber “NEEDED” Maldonado at the party and told Maldonado she was going to “send a ride”*

Consider the scene: Holdren, Amber and their small group had been “partying” together. Suddenly Amber suffers some sort of teen angst. She desperately calls her friend Renee Maldonado----on Hailey’s cell phone. Amber is “hysterical”. She “[isn’t] making sense”. She’s “sobbing”. She’s “scared”. She “needs [Renee’s][ help.” It takes “several” phone calls to “calm her down”.

Finally, after those several phone calls, finally calm, Amber tells Maldonado that she is going to “send a ride” for Maldonado. (ER 803 (a)(3) specifically makes statements of “intent” an exemption to the hearsay rule, regardless of the declarant’s “availability.”)

Forty-five minutes later, Casey Elmer arrives in Holdren’s car.

The summary of these inferences is:

Amber wanted Maldonado at the party;

Holdren “came to the aid” of her friend Amber; by

Sending her boyfriend Casey Elmer out in Holdren’s car to pick her up.

4. Holdren's version of events is so fundamentally irreconcilable with Madonado's as to create a credibility issue demanding trial

Recall that Holdren claimed that Maldonado was with the "partiers" the entire night, and that the accident happened when she left with Elmer to buy food. Simply put: If Maldonado's version of events is accepted as true, as it must be for purposes of Summary Judgment, Holdren's version is fundamentally false.

"When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. 6 Moore's Fed.Prac. (2d ed) p 56.15(4), pp. 2139, 2141; 3 Barron & Holtzoff, fed. Prac. and Proc., § 1234, p. 134."

Balise v. Underwood, 62 Wn. 2d 195, 200, 381 P. 2d 966 (1963).

Although it shouldn't matter for purposes of summary judgment, it is also true that Maldonado's version of events is corroborated by her mother Ann Lombardo's Declaration, while Holdren's is totally uncorroborated.

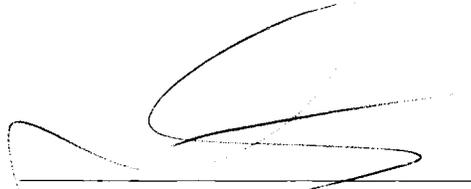
Thus, not only is there abundant circumstantial evidence that Holdren gave permission to use the car; Holdren's testimony to the contrary is impeached.

CONCLUSION

The judgment should be reversed.

DATED this 23 day of March, 2011.

By:



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