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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.

**REPLY BRIEF OF APPELLANTS**

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. SUMMARY OF KEY FACTS.....	2
III. ARGUMENT .....	5
A. Ms. Rickey owned her car and entrusted it to Mr. Kaloger. ....	7
B. Ms. Rickey knew or should have known of Mr. Kaloger’s propensity to become a reckless, heedless, or otherwise incompetent driver. ....	9
IV. CONCLUSION .....	14

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Cameron v. Downs</i> , 32 Wn. App. 875, 650 P.2d 260 (1982).....	5
<i>City of Seattle v. Harclaon</i> , 56 Wn.2d 596, 354 P.2d 928 (1960) .....	6
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006) .....	8
<i>Crawford v. Welch</i> , 8 Wn. App. 663, 508 P.2d 1039 (1973).....	7
<i>Forsberg v. Tevis</i> , 191 Wn. App. 355, 71 P.2d 358 (1937).....	7
<i>Gams v. Oberholtzer</i> , 50 Wn.2d 174, 310 P.2d 240 (1957) .....	7
<i>Kaye v. Lowe’s HIW, Inc.</i> , 158 Wn. App. 320, 242 P.3d 27 (2010).....	12, 13
<i>Mejia v. Erwin</i> , 45 Wn. App. 700, 726 P.2d 1032 (1986).....	10
<i>Parilla v. King County</i> , 138 Wn. App. 427, 157 P.3d 879 (2007).....	6, 7, 10
<b>Rules</b>	
CR 65(c), .....	6

## I. INTRODUCTION

Janice Rickey had first-hand knowledge of Robert Kaloger's drug use yet asked no questions before handing him the keys to her car. Ms. Rickey knew Mr. Kaloger struggled with a history of drug abuse and she testified to at least one instance only one month before the collision with the Kelly family that Mr. Kaloger admitted to using methamphetamines again. It is undisputed that Mr. Kaloger was under the influence of methamphetamines again on the night he drove home from a friend's house, crossed over the center line, and struck the Kellys' family van head-on.

In granting summary dismissal of the Kellys' claim against Ms. Rickey for negligent entrustment, the trial court erroneously resolved genuine issues of material fact. Despite inconsistencies, the trial court concluded Ms. Rickey's self-serving deposition testimony was reliable. The trial court further determined that it was reasonable for Ms. Rickey to entrust her car to Mr. Kaloger and that doing so did not violate her duty to exercise ordinary care. These conclusions are wrong and involve genuine issues of material fact which are for the jury alone

to decide. This Court should reverse the trial court's order on summary judgment and remand this case for trial.

## II. SUMMARY OF KEY FACTS<sup>1</sup>

The relevant facts are stated in the Kellys' Opening Brief. The Kellys reiterate the following facts to clarify and refute Ms. Rickey's version of the facts.

Ms. Rickey initially learned of Mr. Kaloger's drug problems through conversations with Mr. Kaloger's mother. CP 160, 179. Ms. Rickey testified she had "multiple conversations" with Mr. Kaloger's mother, which included conversations about Mr. Kaloger and the drug problems he had "for years." CP 159 at 63:10-64:4. These discussions took place before Mr. Kaloger came to live with Ms. Rickey. CP 160 at 65:2-65:6.

When Mr. Kaloger became homeless, Ms. Rickey invited him to live in the spare bedroom of her house. CP 152 at 14:7-14:10. Ms. Rickey purchased a 1991 Honda in October 2006, which is only two

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<sup>1</sup> Ms. Rickey's response claims the Kellys relied upon inadmissible evidence, but nothing in the record suggests the Kellys' evidence is inadmissible. In fact, Ms. Rickey noted a motion to strike before the trial court but upon the court granting the Kellys' CR 56(f) continuance, the trial court cautioned Ms. Rickey that her motion was inappropriate and a waste of judicial resources. Ms. Rickey did not re-note her motion and the trial court never entered any order striking the Kellys' evidence.

months prior to Mr. Kaloger's collision with the Kellys. CP 7:24-11:11; 89-90; 150-51. Ms. Rickey titled her car in her name, registered her car, insured it, and paid for all its maintenance. CP 150-151 at 8:9-8:11, 8:22-9:18; CP 151 at 11:1-11:3; CP 160 at 68:3-68:7; 243. Ms. Rickey allowed Mr. Kaloger to drive her car immediately after she purchased it. CP 161 at 69:12-69:13. Ms. Rickey handed Mr. Kaloger the keys without asking any questions regarding his driving record, criminal record, arrest record, status as a sex offender, release requirements, state mandated drug or alcohol tests, or any history of driving under the influence. CP 152 at 13:9-14:2, 14:24-16:6; CP 155 at 27:14-28:22; CP 161 at 69:20-70:21.

Only one month after Ms. Rickey purchased her car and allowed Mr. Kaloger to drive it, Mr. Kaloger admitted to Ms. Rickey that he had ingested methamphetamines:

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

A. Yes.

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

A. Yes.

Q. How is it 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.

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.

CP 152-153 at 16:1-16:20. Ms. Rickey admitted twice that she knew Mr. Kaloger used methamphetamines. *Id.* Her subsequent attempts to downplay these two admissions only highlight her lack of credibility. CP 153-154 at 19:10-21:5.

One month after admitting to Ms. Rickey that he used drugs, Mr. Kaloger ingested methamphetamines again and while under the influence of those methamphetamines, swerved Ms. Rickey's vehicle into the oncoming lane of traffic colliding with the Kellys' family van. CP 322-336. The Kellys sustained life-altering injuries, both mental and physical. CP 170 at 25:19-26:6; CP 175 at 45:7-49:1; CP 178 at 60:4-60:14; CP 180-181 at 66:17-69:4; CP 183-184 at, 80:23-82:21; CP 188 at

97:23-99:4; CP 212 at 17:2-17:5; CP 219 at 45:14-45:21; CP 222-223 at 58:10-61:3.

### III. ARGUMENT

Pursuant to CR 56(c), a summary judgment dismissal may be granted only if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Cameron v. Downs*, 32 Wn. App. 875, 878, 650 P.2d 260 (1982). The trial court's function is to determine if genuine issues of material fact exist; it is not to resolve an existing factual issue. *Id.* at 877.

An owner or other person in control of a vehicle who entrusts that vehicle to another may be held liable for damages resulting from the use of the vehicle where she knew or should have known in the exercise of ordinary care that the person to whom the vehicle was entrusted was or had the propensity to become reckless, heedless, or otherwise incompetent. *Cameron*, 32 Wn. App. at 877. The elements of negligent entrustment are: (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. *Parilla v. King County*, 138 Wn. App. 427, 435-36, 157 P.3d 879 (2007).

After the Kellys presented evidence to the trial court of Mr. Kaloger's intoxication at the time of the collision, Ms. Rickey did not contest the element of whether Mr. Kaloger was reckless, heedless, or incompetent. CP 30 at 2:1-5 (withdrawing her argument regarding the lack of evidence of Mr. Kaloger's impairment for the purposes of her motion for summary judgment). Despite Ms. Rickey's efforts now to raise the issue she withdrew on appeal and her attempt to persuade this Court that a licensed driver can never be "reckless, heedless, or incompetent," this Court should consider this element met because of the undisputed evidence that Mr. Kaloger was under the influence of methamphetamines when he drove Ms. Rickey's car into the Kellys' van.

Ms. Rickey has not disputed the element of the existence of the Kellys' damages. Ms. Rickey has waived her right to object on these grounds on appeal. *City of Seattle v. Harclon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960) ("Counsel cannot, in the trial of a case, remain silent as to claimed errors and later, if the verdict is adverse, urge his trial

objections for the first time on appeal.”) Therefore, the element of damages is met.

Consequently, the only two elements of negligent entrustment in dispute are: ownership of the vehicle; and whether Ms. Rickey knew or should have known Mr. Kaloger was or was likely to become reckless, heedless, or incompetent through the exercise of ordinary care. Ms. Rickey’s arguments on these elements are without merit.

**A. Ms. Rickey owned her car and entrusted it to Mr. Kaloger.**

In the context of a claim for negligent entrustment, “entrustment” requires consent, either express or implied, to relinquish control of the instrumentality in question. *Parilla*, 138 Wn. App. at 441. Registration and title certificates are prima facie evidence of ownership which must be rebutted by conclusive evidence that ownership has been transferred. *Crawford v. Welch*, 8 Wn. App. 663, 664, 508 P.2d 1039 (1973); *Forsberg v. Tevis*, 191 Wn. App. 355, 357, 71 P.2d 358 (1937); *Gams v. Oberholtzer*, 50 Wn.2d 174, 177, 310 P.2d 240 (1957).

Ms. Rickey purchased her car in October 2006 and the collision occurred in December 2006. CP 80-90, 151 at 9:13-10:4. Mr. Kaloger drove Ms. Rickey’s car for only two months. *Id.* No evidence exists that

Ms. Rickey failed to maintain ownership of her car in the two months from the date she purchased it until the December 24, 2006 collision.

Ms. Rickey states she permitted Mr. Kaloger to drive her car home from the dealership and keep the keys. Respondent Brief at 30. Ms. Rickey claims she owned two other cars and “had no need to drive Mr. Kaloger’s car.” *Id.* Even if, Ms. Rickey’s position is credible, these facts fall short of intent to relinquish permanent ownership of her car. Her legal title, monetary interest, and equitable right to possession and control of her car conclusively establish this element is met. CP 150-151 at 8:9-8:11, 8:22-9:18; CP 151 at 11:1-11:3; CP 160 at 68:3-68:7; CP 243.

At a minimum, resolution of these factual issues is inappropriate on summary judgment. Resolution of these factual issues in Ms. Rickey’s favor is even further contrary to Washington’s requirement that facts and inferences therefrom be construed in a light most favorable to the nonmoving party to summary judgment. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006). Therefore, summary judgment dismissal on the element of ownership and entrustment is improper.

**B. Ms. Rickey knew or should have known of Mr. Kaloger's propensity to become a reckless, heedless, or otherwise incompetent driver.**

Ms. Rickey fails to provide sufficient evidence that she neither knew nor should have known of Mr. Kaloger's propensity to become a reckless, heedless, or otherwise incompetent driver such that summary dismissal of the Kellys' claim for negligent entrustment was appropriate. To the contrary, the Kellys provide sufficient evidence that Ms. Rickey actually knew and therefore should have known Mr. Kaloger had the propensity to use methamphetamines, be reckless, heedless, and/or otherwise incompetent while driving her car. While the facts of this case do not fit the run-of-the-mill negligent entrustment fact pattern, that does not negate the legal merit of the Kellys' claim.

Ms. Rickey claims she did not see Mr. Kaloger immediately before the collision, thus she had no duty to stop him from driving her car that day. Respondent's Brief at 13-14. The lack of face-to-face interaction between Ms. Rickey and Mr. Kaloger on the date of the collision in no way vitiates the validity of the Kellys' claim for negligent entrustment. There is no legal authority in Washington which requires a negligent entrustment claimant to prove only actual knowledge of

intoxication, evidence of a ceremonial handing over of keys, or that the entrustor is familiar with any certain number of the driver's "dangerous propensities." Washington law requires a plaintiff to prove the entrustor either knew or should have known through the exercise of ordinary care that the person to whom the vehicle is entrusted has the propensity to become reckless, heedless, or otherwise incompetent. *Parilla v. King County*, 138 Wn. App. at 435-36. The Kellys have provided evidence that Ms. Rickey's actual knowledge of Mr. Kaloger's history of drug use and actual knowledge of his recent relapse just one month before his collision with the Kellys should have put Ms. Rickey on notice of Mr. Kaloger's propensity to become reckless and heedless while driving. CP 26-27. Ms. Rickey had the opportunity to take her car keys away from Mr. Kaloger, yet she did not do it.

Ms. Rickey cites *Mejia v. Erwin*, 45 Wn. App. 700, 726 P.2d 1032 (1986) in another attempt to escape liability. She cites *Mejia* for the proposition that when foreseeability of harm stems from past conduct, conduct must be repetitive as to make the reoccurrence foreseeable. Respondent's Brief at 14. In support, Ms. Rickey states, "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.” *Id.* She makes no citation to the record for this premise.

In fact,

- Ms. Rickey testified she knew Mr. Kaloger had drug problems “for years” through her “multiple conversations” with Mr. Kaloger’s mother. CP 159 at 63:10-64:4.
- Ms. Rickey testified she knew Mr. Kaloger had become intoxicated on methamphetamines when he stated to her that he “fell off the wagon” just one month prior to the collision. CP 152-153 at 16:1-16:20.
- Ms. Rickey knew Mr. Kaloger had to register as a sex offender, having been convicted of either “rape of a minor” or “statutory rape.” CP 161 at 71:8-72:11.

Ms. Rickey’s statement that she is unfamiliar with “any wrongdoing whatsoever” in spite of her admitted knowledge of Mr. Kaloger’s wrongdoings is illustrative of Ms. Rickey’s head-in-the-sand defense. Ms. Rickey cannot escape liability by pleading ignorance if that ignorance violates her duty to exercise ordinary care. At the very least, these issues create genuine issues of material fact as to what Ms. Rickey knew, what Ms. Rickey should have known, and whether such knowledge or purported knowledge violated her duty of ordinary care.

Ms. Rickey's also cites to *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 333, 242 P.3d 27 (2010) to try to avoid liability for her actions, but *Kaye* does not disprove the Kellys' claim. Unlike this case, *Kaye* was decided in the context of a default judgment. The court stated it would not enter default judgment against the defendant where Ms. Kaye failed to plead defendant had any knowledge of the driver's incompetence or "likelihood to be dangerous." *Kaye*, 158 Wn. App. at 325. The court stated Ms. Kaye's cursory allegations as to the driver's "problems with authority," "paranoia," and general use of drugs was insufficient to support her claim on default. *Id.* at 333. This is not the standard on summary judgment and is not the factual record before this Court. There are genuine issues of material fact regarding Ms. Rickey's entrusting her car to Mr. Kaloger despite her knowledge of his recent drug use and significant disregard for the law and the welfare of others. Simply put, *Kaye* is factually and procedurally distinguishable from the case at hand and is not authority for summary judgment dismissal of the Kellys' claim for negligent entrustment.

Ms. Rickey also claims there must be a "duty" and that she owes no legal duty to the Kellys as a matter of law. Respondent's Brief at 24.

But in negligent entrustment cases, the entrustor owes a duty of ordinary care to ensure the trustee of a vehicle is not and is not likely to become reckless, heedless, or incompetent. *Kaye*, 158 Wn. App. at 332. The Kellys present significant evidence that Ms. Rickey had a duty to exercise ordinary care in the entrustment of her vehicle, and she violated that duty of care when she failed to inquire as to any of Mr. Kaloger's criminal history, traffic history, drug history, or propensity to be reckless. At the very least, the issues of whether Ms. Rickey's failure to further inquire or otherwise investigate Mr. Kaloger's ability to responsibly operate the vehicle are issues of fact which are inappropriate for summary resolution.

The Kellys have presented sufficient evidence to prove Ms. Rickey knew or should have known of Mr. Kaloger's propensity to be a reckless, heedless, or otherwise incompetent driver. Mr. Kaloger was reckless, heedless, and incompetent when he drove under the influence of methamphetamines and crashed into the Kellys a mere month after he admitted to Ms. Rickey that he "fell off the wagon."

#### IV. CONCLUSION

The issues on appeal concern who is credible, what is reasonable, and whether evidence was interpreted correctly. Despite her attempt to twist the evidence before this Court, Ms. Rickey cannot escape the fact that she invited a registered sex offender with a history of drug abuse into her home and handed him a dangerous weapon. While this case may not fit into the typical negligent entrustment case, the Kellys nonetheless have proven the elements of negligent entrustment and Ms. Rickey should be held liable for her wrongs. This Court should reverse the trial court's dismissal of the Kellys' case and remand this case for trial.

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**DECLARATION OF SERVICE**

I declare that on the 4<sup>th</sup> day of May, 2011, I caused to be served the foregoing document on counsel for Appellees, as noted, at the following address:

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Dated: 5/4, 2011

Place: Seattle, WA