

66467-1

NO. 66467-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

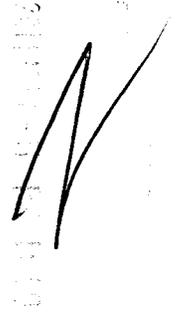
RENEE MALDONADO and ANN LOMBARDO, *Appellants*,

v.

RAYMOND and BEVERLY HOLDREN, a marital community, and KELLY
HOLDREN, *Respondents*.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT



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ORIGINAL

TABLE OF CONTENTS

Table of Contents.....p. i

Table of Authorities.....p. ii

I. Introduction.....p. 1

II. Assignments of Error – No Assignments of Error.....p. 2

III. Statement of the Case.....p. 2

IV. Summary of Argument.....p. 4

V. Argument.....p. 5

A. New Evidence.....p. 5

B. Standard of Review.....p. 7

C. Holdren Did Not Routinely Let Others Drive Her Car Nor is Such Evidence Properly Admissible as Habit Evidence.....p. 8

D. Appellants Have No Evidence Whatsoever Indicating That Kelly Holdren Gave Casey Elmer Permission to Drive.....p. 10

VI. Conclusion.....p. 11

TABLE OF AUTHORITIES

Table of Cases

Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).....p. 7

Balise v. Underwood, 62 Wash. 2d 195, 381 P.2d 966 (1963).....p. 8

Maehren v. Seattle, 92 Wash.2d 480, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).....p. 9

Mansour v. Mansour, 126 Wn. App. 1, 106 P.3d 768 (2004).....p. 6

Norris v. State, 46 Wn. App. 822, 826, 733 P.2d 231 (1987).....p. 9

Parrilla v. King County, 138 Wn. App. 427, 441 157 P.3d 879 (2007).....p. 10

Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002).....p. 7

Smith v. Safeco Ins. Co., 150 Wash. 2d 478, 78 P.3d 1274 (2003)p. 7

Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 206 P.3d 364 review denied 167 Wash.2d 1017, 224 P.3d 773 (2009).....p. 6

State v. Prestegard, 108 Wn. App. 19, 28 P.3d 817 (2001).....p. 8

Torgerson v. State Farm Mut. Auto. Ins. Co., 91 Wn. App. 952, 957 P.2d 1283 (1998).....p. 9

Rules

Additional Evidence on Review, RAP 9.11.....p. 6

Civil Rule 56: Summary Judgment.....p. 7

Evidence Rule 406: Habit; Routine Practice.....p. 9

I. Introduction

The trial court's order granting Respondents Holdren summary judgment and dismissing plaintiffs' case with prejudice, filed on November 12, 2010, should be affirmed. Appellant Renee Maldonado was involved in a motor vehicle accident in the early morning hours of August 19, 2007, after leaving a house party to go on a late night food run. Maldonado was the passenger in a vehicle driven by Casey Elmer. Both had been drinking and inhaling Dust-Off. Maldonado suffered a wrist injury while Casey was killed.

Thereafter, Maldonado fabricated a far-flung story claiming that she was never present at the house party at all, despite numerous eyewitness accounts. Instead, she claimed that Casey Elmer was sent as her chauffer, and that the accident occurred on their way to the party. Meanwhile, Holdren and others at the party told the truth: that Maldonado was partying with them the whole time.

Far from being "unsubstantiated" there is in fact no question that Maldonado was present at the party that night. Appellants' entire argument for imposing liability under the negligent entrustment doctrine is built upon a flimsy series of incorrect inferences. In short, they raised no material issues of fact at the summary judgment hearing. The trial court

properly recognized this and granted respondents summary judgment accordingly.

II. Assignments of Error – No Assignments of Error

There was no error below. The trial court properly granted summary judgment under CR 56 and the order should be affirmed.

III. Statement of the Case

Appellants' Statement of The Case is utterly inadequate and presents an incorrect, skewed version of the facts. Kelly Holdren was prohibited from allowing anyone else to drive her vehicle. CP 12. Her car was provided primarily for transportation from home to school and work. CP 20. Her parents imposed strict repercussions if Kelly violated these restrictions. CP 20. Appellant Maldonado acknowledged the existence of these same limitations in her deposition testimony. CP 12.

On the day in question, Maldonado snuck out of her house sometime between 8 p.m. and 10 p.m to join her group of friends partying. According to Holdren, Maldonado "always" snuck out because her parents did not let her do much. CP 16. After sneaking out of the house, Holdren, Maldonado, and friends Amber Hickerson, Haley Elmer, Casey Elmer, and Toby Schultz all met at an apartment where Maldonado's boyfriend "Cory" lived with his father. CP 17. They arrived sometime around 10:00 p.m. *Id.* Cory's father was not home. *Id.*

At Cory's apartment, the group began drinking vodka and beer. *Id.* Maldonado and both Casey and Haley Elmer were inhaling cans of Dust-Off to get high. *Id.* Thereafter, Cory's dad came home and demanded that everyone leave. *Id.* Cory remained at the apartment, but the rest of the group went to a house in Bonney Lake where "Chris" lived. *Id.*

The group, including Maldonado, arrived at Chris' house at approximately 1 a.m. *Id.* Upon arrival, Holdren locked all of the girls' purses, valuables, and cellular phones inside the trunk of her car so that nobody could leave. CP 18. She then tucked her keys away in her zippered jacket pocket. *Id.*

The group continued drinking at Chris' house. Amber Hickerson was put to bed after drinking too much. CP 17. Casey Elmer continued inhaling cans of Dust-Off. *Id.* At one point, Holdren threw one of the cans out a window to prevent further use. CP 18. A can of Dust-Off was later found in the wrecked car with Maldonado and the deceased, Casey Elmer. *Id.*

At approximately 3 a.m. Casey decided that he was hungry and wanted to go to Jack in the Box for food. CP 19. A minor dispute arose when Holdren refused to let him take her car because he had been drinking. *Id.* Holdren retired to the room in which Hickerson was asleep

with the keys still inside her zippered jacket pocket. *Id.* Holdren removed the jacket, hung it next to the bed, and fell asleep next to Hickerson. *Id.*

Maldonado maintains that she was asleep at home after a night spent babysitting when she was suddenly awoken by a drunken, hysterical phone call from Hickerson around 3 a.m. CP 13. According to Maldonado, Hickerson “needed” her at the party and sent Casey Elmer as her ride. CP 13-14. Under Maldonado’s version of events, she did not even leave her house until approximately 4 a.m. when Casey purportedly arrived. CP 14.

Maldonado claims that when Casey picked her up he was acting normally despite the fact that he had been drinking for hours. CP 14. After they stopped at the Bonney Lake Jack in the Box to order food, Casey told Maldonado about prior near-death experiences, and that “he was not afraid to die.” CP 14-15. Despite being “very uncomfortable” Maldonado made no attempt to exit or assume control of the vehicle. *Id.*

After leaving Jack in the Box, Casey accelerated rapidly down highway 410 west, cresting Eli Hill before losing control of the vehicle, bouncing off the Jersey barrier, and rolling several times down the hillside. CP 15. The crash resulted in injury to Maldonado’s wrist and Casey’s death.

IV. Summary of Argument

It is permissible for a trial court to resolve factual disputes and make credibility determinations in awarding summary judgment if no reasonable person could find otherwise. The present case reflects this rule because whether or not Maldonado's tale is corroborated by her parents, eyewitness testimony refutes it. Furthermore, there is no admissible circumstantial evidence by which a reasonable person could draw the inference that Casey Elmer had permission to operate Holdren's vehicle.

Instead, appellants rely on a series of flimsy inferences such as "Casey Elmer must have had permission to drive because he was an older, more experienced driver, and Amber 'needed' Renee to come to the party." These inferences ignore the uncontroverted testimony of Holdren herself that she explicitly denied Casey permission to drive and went to sleep shortly thereafter with her car keys in her pocket. Without some modicum of evidence permitting the inference that Casey was a permissive user, the trial court's grant of summary judgment to respondents was proper and should be affirmed.

V. Argument

A. New Evidence

Rule 9.11 allows additional evidence upon review under limited circumstances:

The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11 (a)

In addition, The Court of Appeals may waive the requirements of the Rule of Appellate Procedure on criteria for acceptance of new evidence on appeal, if the new evidence would serve the ends of justice. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 206 P.3d 364, review denied 167 Wash.2d 1017, 224 P.3d 773 (2009). Declarations and supporting documents are properly admissible new evidence if relevant to trial court's rulings which are challenged on appeal. *Mansour v. Mansour*, 126 Wn. App. 1, 106 P.3d 768 (2004).

In the present case, respondents have acquired signed declarations from Amber Hickerson and Tobias (Toby) Schultz. These declarations are necessary to fairly resolve the issues on appeal because appellants contend that Holdren's story is "unsubstantiated" and impermissibly base their wild inferences upon this contention. Furthermore, respondents were

unable to contact Toby Schultz to include his declaration before the trial court decided the summary judgment motion. Unquestionably, the consideration of two sworn declarations from eyewitnesses present at the party with Maldonado that refute the story which forms the basis of her appeal would serve the ends of justice. For these reasons, appellants respectfully request this court to consider the declarations of Amber Hickerson and Toby Schultz. These declarations will be furnished immediately upon the court's request.

B. Standard of Review

An order granting summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See *Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002), CR 56(c). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach only one conclusion. *Smith v. Safeco Ins. Co.*, 150 Wash. 2d 478, 78 P.3d 1274 (2003). Credibility issues, in order to preclude summary judgment, must be based on more than argument and inference on collateral matters. *Amend v. Bell*, 89 Wash. 2d 124, 570 P.2d 138 (1977). If the only evidence purportedly establishing a genuine credibility issue is so incredible as to not be believable by reasonable minds, summary

judgment is appropriate. *Balise v. Underwood*, 62 Wash. 2d 195, 381 P.2d 966 (1963).

Because there are no genuine issues of material fact here, and any issues of credibility are too incredible to be believable by reasonable minds, the trial court's order granting summary judgment should be affirmed. Several eyewitnesses, including Amber Hickerson and Toby Schultz, have provided declarations that clearly place Maldonado with the group after she snuck out of her own house around 10 p.m. Furthermore, Hickerson does not recall making the purported drunken, hysterical phone call summoning Maldonado to her aid. Any claim that Maldonado remained at her house until approximately 4 a.m. is false, and no reasonable person could believe it. Therefore, the trial court did not err by granting summary judgment to respondents.

C. **Holdren Did Not Routinely Let Others Drive Her Car Nor is Such Evidence Properly Admissible As Habit Evidence**

ER 406 contains two disjunctive clauses, one permitting habit evidence of a person and the other permitting routine practice of an organization. Accordingly, a party wishing to establish an organization's routine practice need not meet the foundational requirements for establishing habit. *State v. Prestegard*, 108 Wn. App. 19, 28 P.3d 817 (2001). Habitual behavior consists of semi-automatic, almost involuntary

and invariably specific responses to fairly specific stimuli. *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952, 957 P.2d 1283 (1998). The comment to ER 406 states that it is the notion of the invariable regularity that gives habit evidence its probative force. The determination of whether evidence is admissible is within the discretion of the trial court. *Norris v. State*, 46 Wn. App. 822, 826, 733 P.2d 231 (1987) (citing *Maehren v. Seattle*, 92 Wash.2d 480, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981)).

In the present case, plaintiffs' proffered circumstantial evidence that Kelly Holdren "routinely" let others drive her car simply does not rise to the level of invariability required for the admission of habit evidence. It is unclear from appellant's brief what testimony forms the basis for their conclusory assumption that Holdren routinely let others use her car. In fact, Mr. and Mrs. Holdren both testified that Kelly was strictly prohibited from letting others use her car, and that there would be consequences if they discovered she allowed others to drive.

Appellants supporting contentions that Maldonado was "needed" at the party and that Casey Elmer was Holdren's boyfriend are not compelling. By her own declaration, Hickerson's "hysterical" phone call never occurred. There was no immediate need for Maldonado's presence at the party because she was already with the group all night.

Furthermore, Holdren refutes that Casey Elmer was her boyfriend. She would be no more likely to let Casey drive contravening her parents' rules than anyone else.

Even if appellants' incredible facts are accepted as true, the evidence would still not qualify as habit evidence. Habit evidence of a person is distinguishable from evidence of an organization's routine practice and the legal standard is greater for admission. To be admissible, appellants would have to present evidence that Holdren invariably let others drive her vehicle such that whenever she got into the car with someone else she always handed the keys to that person. Appellants are unable to make this showing. Because habit evidence that Holdren routinely let others drive her car is inadmissible even when viewed in a light most favorable to appellants, this court should not now consider it as circumstantial evidence that Casey Elmer had permission to drive.

D. Appellants Have No Evidence whatsoever Indicating That Kelly Holdren Gave Casey Elmer Permission To Drive

Appellants correctly outline the elements of negligent entrustment. However, it is equally true that a crucial element of negligent entrustment is some kind of agreement or consent, either express or implied, to relinquish control of the instrumentality in question (ie. Holdren's vehicle). *Parrilla v. King County*, 138 Wn. App. 427, 441 157 P.3d 879

(2007). The inescapable truth for appellants is this: the only person who offered testimony on whether or not Casey Elmer had permission to operate the vehicle was Kelly Holdren. Holdren's uncontradicted testimony is that she explicitly withheld permission to drive her car from Casey Elmer, and then retired to a bedroom and fell asleep with the keys in her jacket pocket.

Undeterred, appellants' have conjured an elaborate story rife with inference to try to show that Casey Elmer must have had permission to drive. Appellants' brief properly categorizes this argument as a "summary of inferences." However, it is nothing more. Appellants incorrectly and impermissibly infer that because Hickerson "needed" Maldonado at the party, Holdren "came to the aid" of her friend by handing the keys over to Casey Elmer. However, without evidence, they have failed to raise a material issue of fact.

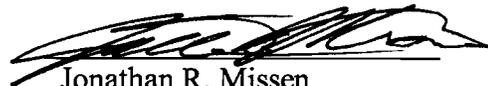
V. Conclusion

The legal standard required for the admissibility of habit evidence requires more than conclusory statements based upon mere inferences. Furthermore, the standard for summary judgment permits factual resolution by the trial court where one version of events is simply too incredible to be believed. Both Schultz and Hickerson were actually present at the party with Maldonado and tell a very different story.

Because there was no genuine credibility issue resolved by the trial court in granting respondents summary judgment, the trial court did not err and the order should be affirmed.

May 4, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan R. Missen", written over a horizontal line.

Jonathan R. Missen
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