

63714-2

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Docket No. 63714-2-1

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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DEBORAH KAYE

Plaintiff/Appellant,

v.

LOWE'S HIW, INC., CITY OF SEATTE; JACQUES P.  
COTE; CHRISTOPHER TEMPLETON; AND TEMPLETON  
CONSTRUCTION SERVICES INC.,

Defendants/Respondents,

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BRIEF OF APPELLANT DEBORAH KAYE

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2009 NOV -4 AM 3:39

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## Table of Contents

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	3
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
IV.	STATEMENT OF CASE.....	5
	A. SUBSTANTIVE FACTS .....	5
	1. Description of the Collision and Ms. Kaye's Injuries ..	5
	2. Mr. Cote and Mr. Templeton are Life Long Friends...	6
	3. Mr. Cote Had a History of Reckless Driving Prior to the Collision Which Mr. Templeton Knew About or Cannot Reasonably Deny.....	8
	4. Mr. Templeton Bought a Truck and Loaned it to His Friend and Employee Mr. Cote Who Could Not Obtain a Vehicle on His Own .....	8
	5. Mr. Templeton Obtained a Protection Order Giving Him Possession of the Truck.....	10
	6. Mr. Cote Worked For Mr. Templeton Construction Services on Various Projects.....	11

B.	PROCEDURAL FACTS .....	12
V.	ARGUMENT .....	14
A.	STANDARD OF REVIEW .....	14
B.	THE TRIAL COURT'S FINDINGS AND CONCLUSIONS ARE INCONSISTENT WITH THE ORDER OF DEFAULT .....	17
C.	TEMPLETON AND TCS ARE JOINTLY AND SEVERALLY LIABLE AS A MATTER OF LAW .....	21
1.	Mr. Templeton Provided a Vehicle to Mr. Cote who Could Not Get One on His Own Because of His Nefarious Driving and General Irresponsibility: .....	22
2.	Mr. Cote Was Employed By Or In the Service of Mr. Templeton/TCS .....	26
VI.	CONCLUSION .....	29

## Table of Authorities

### Cases

163 Wn.2d 1045 (2008) .....	17
<i>Aloha Lumber v. Department of Labor &amp; Industries,</i> 77 Wn. 2d 763, 766, 466 P.2d 151 (1970) .....	18
<i>Bernethy v. Walt Failor's Inc.,</i> 97 Wn.2d 929, 933, 653 P2d 280 (1982). .....	14
<i>Breedlove v. Stout,</i> 104 Wn. App. 67, 69, 14 P.3d 897 (2001) .....	17
<i>Cameron v. Downs,</i> 32 Wn. App. 875, 878, 650 P2d 260 (1982) .....	14
<i>Curley v. General Valet Serv., Inc.,</i> 270 Md. 248, 311, A.2d 231, 241 (1973).....	16
<i>Hollingbery v. Dunn,</i> 68 Wn. 2d 75, 411 P.2d 431 (1966) .....	17
<i>Mejia v. Erwin,</i> 45 Wn. App. 700, 704-06, 726 P2d 1032 (1986).....	16
<i>Merriman v. Cokele,</i> 215 P.3d 241, 246 (2009).....	12
<i>O'Brien v. Hafer,</i> 122 Wn. App. 279, 93 P.3d 930 (2004).....	17
<i>Parrilla v. King County,</i> 138 Wn. App. 427, 157 P.2d 879 (2007) .....	13

*v. King County*,  
138 Wn. App. 427, 157 P.3d 879 (2007) ..... 15

*Yong Tao v. Heng Bin Li*,  
140 Wn. App. 825, 166 P.3d 1263 (2007) ..... 17

**Statutes**

Restatement (Second) of Torts Section 290 ..... 15

Restatement (Second) of Torts Section 302 ..... 15

Section 390 of the Restatement (Second) of Torts ..... 14

Restatement Second of Torts, § 302B ..... 14

## I. INTRODUCTION

Plaintiff Deborah Kaye ("Kaye") asks this Court to address whether Defendant Christopher Templeton ("Templeton") should be held jointly and severally liable for the injuries sustained by Ms. Kaye as a result of his negligently providing Defendant Jacques Cote ("Cote") with a vehicle while in the course of his employment with Templeton Construction Services ("TCS"). Here, trial court has acknowledged the great suffering and emotional distress, as well as the loss of quality of life Ms. Kaye has endured as a result of the collision. However trial court failed in assigning liability to the owner of the vehicle, Mr. Templeton. This was an error.

On May 21<sup>st</sup>, 2009 Ms. Kaye filed a Motion for Default against Cote, Templeton, and TCS in anticipation of them not appearing for trial. CP 280-281, 294-326. This Motion was granted on June 1, 2009. CP 364-365. Under CR 55(a)(1) once a default has been entered, the defending party is precluded from filing an answer or **contesting liability, and is limited solely to contesting the amount of damages...** By operation of law, once the order of default was entered Mr. Templeton and TCS admitted liability. The Court disregarded its own order of default by concluding that Templeton and TCS were not liable, this was an

error. If the court wants to consider the merits of the case the following applies.

Mr. Templeton knowingly provided a vehicle to Mr. Cote who could not get one on his own because of his terrible driving record and general irresponsibility. Furthermore Cote was employed by and/or in the service of Mr. Templeton's company TCS at the time of the collision. The findings at trial court do not support the law or the undisputed facts of this case.

As a general rule a vehicle owner is under a duty to refrain from entrusting a motor vehicle to another when the owner knows the individual to be reckless. Here, Templeton and Cote were lifelong friends, and Templeton was well aware of Cote's reckless driving behavior. The trial court erred in failing to hold Templeton jointly and severally liable for negligently providing Cote with a vehicle.

Additionally, under the respondeat superior theory, the general rule is an employer may be held liable for negligence caused by their employee if that employee is acting within the scope of their employment. Here, Cote was driving Templeton's truck and admittedly worked with and for Templeton. The trial court

erred in failing to hold Templeton and TCS liable for the injuries Ms. Kaye sustained under the respondeat theory.

The trial court should be reversed in part and Mr. Templeton should be held both jointly and severally liable for Ms. Kaye's injuries.

## **II. ASSIGNMENTS OF ERROR**

Assignment of Error No. 1. The trial court erred in failing to find Christopher Templeton jointly and severally liable for Ms. Kaye's damages.

Assignment of Error No. 2. The trial court erred in failing to find TCS jointly and severally liable for Ms. Kaye's damages.

Assignment of Error No. 3. The trial court erred in altering the following findings of fact as offered by Plaintiff Kaye: 17, 19, 21, 23, and 34,

Assignment of Error No. 4. The trial court erred in deleting the following findings of fact as offered by Plaintiff Kaye: 23 and 44.

Assignment of Error No. 5. The trial court erred in entering the following findings of fact as numbered by the court: 33 and 43.

Assignment of Error No. 6. The trial court erred in entering the following conclusions of law as numbered by the court: 6.

Assignment of Error No. 7: The trial court erred by deleting the following conclusions of law as offered by Plaintiff Kaye: 6, 7, 8, 9, 10 and 11.

Assignment of Error No. 8: The trial court erred by amending the following conclusions of law as offered by Plaintiff Kaye: 13.

A copy of the Findings of Fact, Conclusions of Law and Judgment with these provisions highlighted is attached hereto as Appendix A.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue No. 1. Whether the trial court could issue findings of fact and conclusions of law finding that Templeton and TCS were not liable for Ms. Kaye's damages when it had entered an order of default against them?

Alternatively,

Issue No. 2. Whether Mr. Templeton should be held jointly and severally liable for damages caused to Ms. Kaye on a theory of negligent entrustment?

Issue No. 3: Whether TCS should be held jointly and severally liable for Ms. Kaye's damages on a theory of respondeat superior?

#### IV. STATEMENT OF THE CASE

##### A. SUBSTANTIVE FACTS

The undisputed facts of this matter are as follows.

##### 1. Description of the Collision and Ms. Kaye's Injuries

On May 5, 2007, around 4:00 p.m., Ms. Kaye, was struck by a 1999 Dodge Ram pickup truck ("Truck") driven by Jacques Cote in the Lowe's parking lot located at 12525 Aurora Avenue North, Seattle Washington 98133. The Truck was owned by Mr. Templeton. Declaration of Catherine C. Clark in Support of Plaintiff Kaye's Response to Chris Templeton's and TCS's Joint Motion for Summary Judgment ("Clark Dec.").<sup>1</sup> Ex. 1.

Ms. Kaye and her partner, Ms. Jan Van Ysslestyne, were going to Lowe's to look at plants and flowers as well as pick up a lamp for Ms. Kaye's office. CP 195-200 (81:3-5).<sup>2</sup> The two parked in the Lowes parking lot and walked toward the building. Clark Dec. Ex. H (42:9-13). When Ms. Kaye reached the Lowe's designated pedestrian crosswalk she stopped and looked both left and right,

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<sup>1</sup> A Supplemental Designation of Clerk's Papers is made with the filing of this brief to include this document from the Trial Court which was inadvertently omitted from the original designation.

<sup>2</sup> For ease, when a reference is made to deposition testimony, the page number is followed by a colon and then the line numbers inserted).

after seeing a break in traffic she began to cross at the crosswalk. Ms. Kaye was approximately two thirds across the crosswalk when Mr. Cote hit her from behind. CP 195-200 (83:8-15, 84:15-16).

Ms. Van Ysslestyne saw that Mr. Cote had driven into the wrong lane in order to avoid various people and flower racks in the Lowe's parking lot. Clark Decl. Ex. H (53:11-20). All witnesses to the accident agree that he was proceeding at an unsafe speed for a parking lot, and was in the wrong lane when he struck and ran over Ms. Kaye. CP 207-213.

Following the collision Ms. Van Ysslestyne observed construction and landscaping tools in the bed of the truck Mr. Cote was driving. Clark Decl. Ex. H, (94:17-20). As referenced and confirmed in trial, Ms. Kaye was seriously injured as a result of the collision. Clark Decl. Ex. H.

At the time of the collision the truck was owned by Mr. Templeton. Clark Decl. Ex. K.

## **2. Mr. Cote and Mr. Templeton are Life Long Friends**

Mr. Cote and Mr. Templeton have been friends most of their lives. They met at Einstein Middle School in 1978 when they were twelve years old. Clark Decl. Ex. G (31:2-11). While there was a brief period where the two were not in close contact, they

reconnected, and have maintained their friendship for over twenty years. *Id.* (36:11-24). Mr. Templeton even allowed Mr. Cote to move into his home with him and his family for over a year. *Id.* (9:4-8). While things went sour between the two in the Summer of 2008, they know each other well and have been a large part of each other's lives living, working and socializing together. *Id.* (9:1-6, 60:14-15, 36:25).

Mr. Templeton has long been aware of Mr. Cote's extensive history of problems with authority, (*i.e.* by Mr. Templeton's own admission, Mr. Cote's has a disregard for the law, the rules of society and others). Clark Decl. Ex. G (52:1-8). According to Mr. Templeton, "throughout [Mr. Cote's] entire life [he] had maintained a position of paranoia [about] anybody of authority". *Id.* (52:1-8). Mr. Templeton was also aware that Mr. Cote operated "off the grid" repeatedly paying people or being paid under the table and having a fear of filing governmental information about himself. *Id.* (65:12-16; 70:18-24). Further, in an effort to obtain a protection order against Mr. Cote from this court, Mr. Templeton characterized Mr. Cote as "a time bomb" and as having a "mental illness". *Id.* (53:11-22). When asked to explain what kind of mental illness Mr. Cote had, Mr. Templeton testified under oath:

besides the paranoia, I don't know. His behaviors were-- unusual. He would talk to you with his eyes closed. Talk to you in the third person. Yell.

*Id.* (53:16-22). Mr. Templeton also admitted to knowing about Mr. Cote's long time drug use. Clark Decl. Ex. B (p.5).

**3. Mr. Cote Had a History of Reckless Driving Prior to the Collision Which Mr. Templeton Knew About or Cannot Reasonably Deny**

Mr. Cote had a history of reckless driving prior to the collision. On December 9, 2006 he pled guilty to criminal trespass in the first degree and reckless driving in Clallam County. Clark Dec. Ex. A. Mr. Templeton knew that Mr. Cote was being prosecuted for a traffic crime shortly before acquiring the Truck (for Mr. Cote) that was involved in the collision with Ms. Kaye. Clark Decl. Ex. G, (80:3-12, 94:6-9). However, even while providing Mr. Cote with a vehicle, Mr. Templeton testified that he did not believe Mr. Cote's driving troubles were of his concern. Mr. Templeton stated "**His driving violations were not really my business**". Clark Decl. Ex. G, (92:24-25).

**4. Mr. Templeton Bought a Truck and Loaned it to His Friend and Employee Mr. Cote Who Could Not Obtain a Vehicle on His Own**

Mr. Templeton bought the Truck on September 6, 2003, two and a half years before the collision. Clark Decl. Ex. G (59:2-10).

Mr. Templeton admittedly bought and loaned the Truck to Mr. Cote because Cote could not obtain a vehicle on his own. Clark Decl. Ex. G (59:10-15). Mr. Templeton testified under oath at his deposition:

I'm not sure what the circumstances [why dealership would not sell car to Cote] were at the time. There was some reason why they wouldn't release it to him at the time.... he may not have had a --current driver's license or something...

*Id.* (59:10-15).

He further testified in response to a question about the truck being insured:

I think that's why they [dealership] wouldn't... I think that's why they wouldn't let him take it [truck] immediately... Because he may not have had the insurance in place at the time...

*Id.* (60:20-25).

On the title to the Truck, Mr. Templeton listed himself as both the registered and legal owner of the Truck and drove it off the lot. Clark Decl. Ex. G (117:1-5). As far as payment for the vehicle was concerned, Mr. Templeton testified that he bought the Truck for Mr. Cote to use, because he believed he would pay him back since he knew him so well. *Id.* (112:16-25). However, no records of any payments were kept. *Id.* (114:4-10). Rather, if any payments were made, they were made in cash. *Id.* (70:18-24). There is no

receipt or any evidence that Mr. Cote paid any monies to Mr. Templeton for the Truck. *Id.* (86:1-9).

From the purchase of the vehicle in September 2003, Mr. Templeton was the registered owner of the Truck. He licensed the Truck in his own name every year and paid all licensing fees. Clark Decl. Ex. G (114:4-10). The only documentation showing the Truck belonged to anyone but Mr. Templeton is an un-notarized, un-witnessed self created document between Mr. Templeton and Mr. Cote which states the sale of the Truck was completed shortly before the collision. Clark Decl. Ex. F. In fact, the title to the Truck was not transferred, until September 2006, five months after the collision. Clark Decl. Ex. F.

#### **5. Mr. Templeton Obtained a Protection Order Giving Him Possession of the Truck**

Mr. Templeton and Mr. Cote had a falling out evidenced by the filing of a petition for a protective order in King County Superior Court by Mr. Templeton against Mr. Cote on July 30, 2008. Clark Decl. Ex. B. In this petition Mr. Templeton revealed Mr. Cote as being mentally unstable and “a time bomb”. Clark Decl. Ex. B. Mr. Templeton also asked this Court to grant him possession of the Truck involved in the collision with Ms. Kaye, which Mr. Templeton

listed, in his own handwriting, as belonging to him. The Protective Order states:

7. Petitioner [Mr. Templeton] is granted use of the following vehicle: Year, Make & Model:

*97 Dodge 1500 Green/Silver License No. A34287W.*

(Italics denote Mr. Templeton's handwriting in the original) Clark Decl. Ex B and Ex. G (102-104:23-25, 13-25). Thus, Mr. Templeton has legal possession of the vehicle that struck Ms. Kaye.

#### **6. Mr. Cote Worked For Mr. Templeton Construction Services on Various Projects**

Mr. Templeton has admitted Mr. Cote worked for TCS on various different projects. Clark Decl. Ex. G (44:3-20). TCS was incorporated in 1996. The company does business in general construction and labor. *Id.* Ex. 5, (15:21-24). Mr. Templeton also does business as Evergreen Landscaping an unincorporated arm of TCS. *Id.* (28:1-4). Mr. Cote is a landscaper who sometimes worked on projects with TCS. *Id.* (37:13-24). In the course of their work, Mr. Cote and TCS have filed a joint lawsuit against a former client. Clark Decl. Ex. I. In that particular project, Mr. Cote and TCS issued joint billings. Clark Decl. Ex. I. Further, Mr. Templeton admitted that Mr. Cote was the "mouthpiece" between himself and the client. Clark Decl. Ex. G (46:19-20).

While Mr. Templeton explained there was nothing outlining the exact position Mr. Cote held with TCS, he has admitted they worked together. Clark Decl. Ex. G (44:3-20). Mr. Templeton testified:

He [Cote] was around all the time, you know. So, I mean, there may have been, [overlap] but it's nothing - nothing was outlined by my company to have him work for me...(when further questioned on the status of Cote working for Mr. Templeton he stated) by virtue of him being there, it's possible.

*Id.*(44: 10-13).

Mr. Templeton testified to Mr. Cote using TCS tools, office equipment, laptops, printers and PC cards to complete work tasks in conjunction with TCS. Clark Decl. Ex. G (57-58:23-4). Mr. Templeton has further admitted Mr. Cote worked on Templeton's own property located in Index, Snohomish County, Washington. Clark Decl. Ex. G (60:12-15).

## **B. PROCEDURAL FACTS**

Ms. Deborah Kaye initiated this action on October 5, 2007 after Mr. Cote negligently struck her with Mr. Templeton's pickup in the Lowe's parking lot crosswalk. CP 1-6.

On August 15, 2008 Lowe's moved for summary judgment of dismissal which this court denied. On January 21, 2009 Mr. Templeton and TCS filed their own motion for summary judgment

of dismissal. CP 14-44. After receiving Ms. Kaye's and Lowe's opposition to the motion, Mr. Templeton and TCS struck their motion. Their attorneys also withdrew from representing them in March 2009. CP189-190.

Ms. Kaye filed a Motion for Partial Summary Judgment of Dismissal of the Affirmative Defense of Comparative Fault on April 16, 2009, which was granted on May 15, 2009. CP 224-239; 276-279.

On May 21, 2009, Ms. Kaye filed a Motion for Default against Cote, Templeton and TCS in anticipation that they would not appear for trial.<sup>3</sup> CP 280-81; 294-326. The documents were timely served by certified mail and first class mail. CP 284-285.

On June 1, 2009, Ms. Kaye and her attorneys appeared for trial. Neither Cote, nor Templeton/ TCS appeared. The trial court granted the Motion for Default and entered an Order of Default against all Cote, Templeton and TCS. CP 364-365. (Appendix B).

On June 3, 2009, the trial court entered a Findings of Fact, Conclusions of Law and Judgment, stating that Plaintiff had not

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<sup>3</sup>Mr. Cote failed to file an appearance or an answer in the matter. Mr. Templeton and TCS did appear and file an answer. (The Clerk's Papers do not contain the Notice of Appearance. A supplemental designation of clerk's papers is filed along with this brief asking the trial court to transmit this document to this court.)

proven respondeat superior or negligent entrustment with regard to Templeton, and did not find him or TCS jointly and severally liable. CP 367-377 (Appendix A). This appeal follows.

## **V. ARGUMENT**

### **A. STANDARD OF REVIEW**

This case presents a unique circumstance. Counsel for Ms. Kaye can find no Washington case which directly addresses the situation here.

Ms. Kaye suggests to this court that the proper standard of review here is a combination of *de novo* review and the abuse of discretion standard as the questions presented to this court involve both a question of law and one of discretion as follows.

First, whether the trial court had the authority to hold that Ms. Kaye had the obligation to prove that Cote, Templeton and TCS were liable when it found that they were in default under CR 55 and entered an order so stating is a question of law subject to *de novo* review as stated below. *Niccum v. Enquist*, \_\_\_ Wn. App. \_\_\_, 215 P.3d 987, ¶8 (Sept. 1, 2009) (review of the application of a court rule is *de novo*).

Second, did the court abuse its discretion in determining the amount of damages recoverable by Ms. Kaye. This point is a matter

of discretion subject to the abuse of discretion standard. Ms. Kaye does not appeal the amount of the damages award here.

In attempting to resolve this conflict, Division Three has stated:

In general, the de novo standard is best applied when the appellate court stands in the same position as the trial court and may make a determination as a matter of law, while the abuse of discretion standard is applied when the trial court is in the best position to make a factual determination.

(Citations omitted.) *State v. Ortega*, 120 Wn.App. 165, 171, 84

P.3d 935 (2004). Recently, the Supreme Court also further

commented on this potential conflict in *Dix v. ICT Group, Inc.* by

stating:

If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion. Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied. If, however, a pure question of law is presented, such as whether public policy precludes giving effect to a forum selection clause in particular circumstances, a de novo standard of review should be applied as to that question.

(Citations omitted.) *Id.* at 1020.

The Supreme Court has also stated:

In *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989), we noted that the appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence. This principle was drawn from the general rule that

where the record both at trial and on appeal consists entirely of written and graphic material-documents, reports, maps, charts, official data and the like-and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.

*Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969) ... Under such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues. *Smith*, 75 Wn.2d at 718-19, 453 P.2d 832.

(Other citations omitted.) *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 252-253, 884 P.2d 592 (1994).

Under the abuse of discretion standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Dix v. ICT Group, Inc.*, \_\_\_ Wn.2d \_\_\_, 161 P.3d 1016, 1020 (2007). Thus, there is an apparent overlap between standards of review in the situation presented by

CR 55: the entry of an order of default (a question of law) and the entry of a default judgment (a matter of discretion).

**B. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS ARE INCONSISTENT WITH THE ORDER OF DEFAULT**

Civil Rule 55(a)(1) addresses the entry of a default and states:

When a party against whom a judgment for affirmative relief is sought has **failed to appear, plead, or otherwise defend as provided by these rules** and that fact is made to appear by motion and affidavit, a motion for default may be made.

(Emphasis added.)

Washington Practice tells us that an “order (or accurately, a finding) of default is the official recognition that a party is in default, and is a prerequisite to the entry of judgment on that default.” 4

WASHINGTON PRACTICE *Rules Practice* CR 55 (5<sup>th</sup> Ed.) The treatise goes on to state:

The defaulting party will be deemed to have **admitted all the allegations of the plaintiff's complaint as to liability**, leaving only the determination of damages and the entry of judgment under CR 55(b).

4 WASHINGTON PRACTICE, *Rules Practice* CR 55 (5<sup>th</sup> Ed.).

Additionally,

Thus, once a default has been entered under CR 55(a), the defending party is precluded from filing an answer or contesting liability, and **is limited solely to**

**contesting the amount of damages** and the type of judgment, unless the entry of default is set aside pursuant to CR 55(c).

4 WASHINGTON PRACTICE, *Rules Practice* CR 55 (5<sup>th</sup> Ed.).

In Washington, an order of default is proper when a party fails to appear at trial, subject to proper notice of the motion. *In re: Marriage of Daley*, 77 Wn. App. 29, 888 P.2d 1194 (1994). In *Daley*, a party to a dissolution failed to appear for trial. The court entered an order of default against him. He moved to vacate the order but the trial court denied the request. This Court held that the order of default should have been vacated as the party had appeared in the matter but had not received the proper notice of the motion. *Id.* at 31.

Here, Cote, Templeton and TCS all received notice of the motion for default. CP 284-285. Thus, the entry of the order of default was proper. Once the order of default was entered, Defendants Templeton admitted liability and thus, the court did not have the authority to determine whether they were liable or not—they had, by operation of law, already admitted liability. By concluding that Templeton and TCS were not liable, the court disregarded its own order on default. This was error.

Once an order of default has been entered, CR 55(b) sets out the procedure for obtaining a default judgment as follows:

Entry of Default Judgment. As limited in rule 54(c), judgment after default may be entered as follows, if proof of service is on file as required by subsection (b)(4):

...

- (2) *When Amount Uncertain.* If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.

Judgments by default are of two general kinds: (1) for want of appearance, and (2) for failure to plead or to otherwise defend as provided by rules, although the party has initially appeared in the action. *Sarlie v. E. L. Bruce Co.*, 265 F. Supp. 371 (S.D.N.Y.1967).<sup>4</sup> On failing to “otherwise defend”, there are two schools of thought but Counsel for Ms. Kaye was unable to find a Washington case on the point. The Third Circuit has stated that a default on liability is

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<sup>4</sup> CR 55 is based on the Federal Rule. Thus, reference to federal cases is appropriate. See *State v. Copeland*, 130 Wn.2d 244, 258, 922 P.2d 1304 (1996).

appropriate irrespective of whether the party has appeared and answered.

The failure to plead is no greater an impediment to the orderly progress of a case than is the failure to appear at trial or meet other required time schedules, and we see no reason why the former would be subject to a sanction not equally applicable to the latter. Indeed, the Supreme Court signified the seriousness with which it viewed counsel's failure to appear at a scheduled pretrial conference, sustaining dismissal on that ground in *Link v. Wabash Railroad*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).

*Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 918 (3d Cir. 1992).

The other approach is offered by the Fifth Circuit in *Bass v. Hoagland*, 172 F.2d 205 (5<sup>th</sup> Cir. 1949) where a plaintiff, who is faced with a defendant who fails to appear for trial, must put on evidence of liability.

CR 55(a) authorizes the clerk to enter a default 'When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules.' This does not require that to escape default the defendant must not only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial. The words 'otherwise defend' refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. When Bass by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him. The burden of proof was put on

the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no default was generated; the case was not confessed. The plaintiff might proceed, but he would have to prove his case.

*Id.* at 210.

Obviously, Ms. Kaye would prefer the approach of the Third Circuit as stated in *Hoxworth* and supported by *Daley* and *Washington Practice*. If the court is inclined to adopt such an approach, then that is the end of the matter and the rest of this brief is not necessary.

If, however, this court is not so inclined and prefers the approach of the Fifth Circuit as stated in *Bass* then the following analysis ends in the same place: Templeton and TCS are jointly and severally liable for Ms. Kaye's damages.

**C. TEMPLETON AND TCS ARE JOINTLY AND SEVERALLY LIABLE AS A MATTER OF LAW**

When reviewing findings of fact, the court reviews the record to determine if substantial evidence supports them or supports those offered by the appealing party. *E.g. Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 210 P.3d 1048 (2009).

We review findings of fact and conclusions of law to determine whether substantial evidence supports the trial court's findings and, if so, whether the findings support the conclusions of law. Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.

(Citations omitted) *Merriman v. Cokeley* 215 P.3d 241, 246 (2009).

The facts in this case are undisputed. None of the facts presented to trial court were contradicted, yet the findings of the court do not support the law or the facts presented in this case. It was an error of the trial court to ignore uncontradicted evidence. Ms. Kaye proved her damages against both Mr. Cote and Mr. Templeton and the judgment should have reflected this.

**1. Mr. Templeton Provided a Vehicle to Mr. Cote who Could Not Get One on His Own Because of His Nefarious Driving and General Irresponsibility:**

A vehicle owner is under a duty to refrain from entrusting the motor vehicle to another where the owner knows, or should have known, in the exercise of ordinary care, that the person to whom their vehicle was entrusted is reckless, heedless or incompetent.

16 WASHINGTON PRACTICE § 1.23, *Duty to Use Reasonable Care—*

*Entrustment of a motor vehicle or dangerous instrumentality citing*

*Parrilla v. King County*, 138 Wn. App. 427, 157 P.2d 879 (2007)

(adopting Restatement Second of Torts, § 302B relating to

intentional or criminal misconduct of a third party and liability for the foreseeable actions of such third party).

Further, a party need not be the registered owner of a vehicle to be liable for negligent entrustment. *Cameron v. Downs*, 32 Wn. App. 875, 878, 650 P2d 260 (1982) *citing* RESTATEMENT

(SECOND) OF TORTS, § 390 (1965) (sister gave brother keys to father's car knowing brother was not to have driven it).

Washington also follows Section 390 of the Restatement (Second) of Torts entitled "Chattel for Use by Person Known to be Incompetent" states:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

*Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 933, 653 P2d 280 (1982).

We consider it not only common sense, but common law and justice, that one cannot let or loan to another, knowing that other to be reckless and incompetent, and in such a condition that he would be reckless and incompetent, an instrumentality which may be a very dangerous one in charge of such a person.

*Bernethy*, 97 Wn.2d at 934 citing *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922).

For purposes of determining someone's knowledge about another's conduct, Restatement (Second) of Torts Section 290, entitled *What Actor is Required to Know*, states in relevant part:

For the purpose of determining whether the actor should recognize that his conduct involves a risk,

he is required to know (a) the qualities and habits of human beings.

Restatement (Second) of Torts Section 302, entitled *Risk of direct or indirect harm*, states in relevant part:

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

See also *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) which adopted Section 302 and in which the court stated:

An actor owes another a duty to guard against the foreseeable criminal conduct of a third party where the actor's affirmative act has exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would have taken into account.

Washington has refined foreseeability test regarding the conduct of another within a negligent entrustment claim as stated in *Mejia v. Erwin*, 45 Wn. App. 700, 704-06, 726 P2d 1032 (1986) as follows:

We agree with the sentiments expressed in *Curley v. General Valet Serv., Inc.*, 270 Md. 248, 311 A.2d 231, 241 (1973), where the court emphasized that the theory of negligent entrustment is based on foreseeability:

We recognize that the entrustor is only responsible for the subsequent negligent acts of the trustee if a reasonable man could

have foreseen the negligent acts; and that when the foreseeability of harm stems from past conduct, it must be conduct so *repetitive* as to make its reoccurrence foreseeable.

The evidence in this case clearly establishes the foreseeability of Jacques Cote's bad acts. Mr. Templeton under his own admission admitted that Mr. Cote had an extensive history of problems with authority, disregard for the law, rules of society and others. Clark Decl. Ex. G (52:1-8). Mr. Templeton labeled Cote as a "time bomb" and as having "a mental illness". *Id.* (53:11-22). Moreover, Mr. Templeton clearly knew Mr. Cote had a long time drug use problem, reporting it to the court in a Petition for Order for Protection. *Id.* Ex. B (pg. 5).

Cote's driving habits and obviously known proclivities were admitted by Mr. Templeton: Templeton knew that Mr. Cote "had issues", described him as having severe mental problems, and knew he had a drug problem. Furthermore, Mr. Templeton knew that Mr. Cote was being prosecuted for a traffic crime, yet still acquired the truck for him. Clark Decl. Ex. G, (80:3-12, 94:6-9). Mr. Templeton stated under oath that "his [Cote's] driving violations were not really my business". Clark Decl. Ex. G, (80:3-12, 94: 6-9).

Despite these undisputed facts, Mr. Templeton attempted to avoid liability for his poor judgment in giving “**the time bomb Mr. Cote**” a vehicle. Mr. Cote would not have had access to this vehicle had Mr. Templeton not provided it to him. The trial courts findings do not support the undisputed facts of this case. Mr. Templeton negligently entrusted Mr. Cote with the vehicle that ultimately harmed Ms. Kaye and should be held liable.

## **2. Mr. Cote Was Employed By Or In the Service of Mr. Templeton/TCS**

Ms. Kaye also filed suit against Mr. Templeton and TCS under a respondeat superior theory. The determination of a master-servant relationship is generally a question of fact for the trier of fact. *Hollingbery v. Dunn*, 68 Wn. 2d 75, 411 P.2d 431 (1966) (trial court properly found that plaintiff, who contracted to work on farm, was independent contractor, and thus settlement entered into by plaintiff did not give rise to liability on the part of property owner); *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 166 P.3d 1263 (2007) *review denied*, 163 Wn.2d 1045 (2008) (trial court erroneously dismissed claim against putative principal, where question of fact was raised regarding the principal's right to control putative agent); *O'Brien v. Hafer*, 122 Wn. App. 279, 93 P.3d 930 (2004).

The general rule is an employer may be held liable for negligence caused by their employee, if that employee is acting within the scope of their employment. *Breedlove v. Stout*, 104 Wn. App. 67, 69, 14 P.3d 897 (2001) states in relevant part,

Under the respondeat superior doctrine an employer may be liable for its employee's negligence in causing injuries to third person if the employee was within the "scope of employment" at the time of the occurrence.

*Id.*, at 69. The test for determining whether an employee is acting within the scope of their employment is explored in *Aloha Lumber v. Department of Labor & Industries*, 77 Wn. 2d 763, 766, 466 P.2d 151 (1970). The court stated:

Acting in the course of employment means the workman is acting at his employer's direction or in the furtherance of his employer's business and it is not necessary that at the time injury is sustained... he be doing the work on which his compensation is based...

*Id.* The court went on to state:

It is the general rule, relied upon.... that a workman is not, under ordinary circumstances, in the course of employment while going to or from his employer's place of business. There is, however, an exception to the general rule. This exception.... is that a workman is in the course of employment while going to or from work in a vehicle furnished by his employer as an incident to his employment pursuant to custom or contractual obligation, either express or implied.

*Id.* at 766.

Here, the undisputed facts demonstrated that Mr. Cote worked for TCS and/or Mr. Templeton from time to time. Mr. Templeton admitted under oath that Mr. Cote worked for TCS on various different projects. Clark Decl. Ex. G (44:3-20). Further, the two even filed a joint lawsuit against a former client of TCS. Clark Decl. Ex. I. Mr. Templeton called Cote the “mouthpiece” between the client and himself. Clark Decl. Ex. G (46:19-20).

While Mr. Templeton admitted there was nothing outlining the exact position Mr. Cote held with TCS, he stated they did work together, allowing Mr. Cote to use TCS tools, office equipment, laptops and PC cards to complete work tasks in conjunction with TCS. Clark Decl. Ex. G (57-58:23-4),(44:3-20).

The facts evidenced this employer/employee relationship in Templeton’s efforts to obtain a protection order from this court, against Mr. Cote, he used the Declaration of Jordan James Anger in support of his petition. Mr. Anger, in a declaration signed under penalty of perjury stated: “When I first met Mr. Cote, he stated that he was currently business partners with a Christopher Templeton...” *Clark Decl.* Ex. 10. Mr. Anger stated he met Mr. Cote in July 2008 (*Id.*), clearly evidencing Mr. Templeton and Mr.

Cote were and are business partners at all relevant times including during the pendency of this suit.

Further, at the time of the collision, Ms. Van Ysslestyne observed tools in the bed of Mr. Cote's Truck. Ms. Van Yesslestyne was under the impression that Mr. Cote was on his way to or from Mr. Templeton's house for work purposes. Clark Decl. Ex. H, (94: 17-20).

The indisputable facts of this case display Mr. Cote and Mr. Templeton did much of their business under the table and they regularly acted together in a joint concern.

It was an error of trial court to not hold Mr. Templeton and/or TCS liable under the respondeat superior theory of law.

## **VI. CONCLUSION**

For the above stated reasons, the trial court should be reversed in part and this matter remanded for further proceedings.

Respectfully submitted this 4th day of November, 2009.

The Law Office of Catherine C. Clark, PLLC

By: MStau

Catherine C. Clark, WSBA 21231

Melody Staubitz, WSBA 40871

Attorneys for Appellant Deborah Kaye

CAMPICHE BLUE, PLLC

By: JM

Jeffery M. Campiche, WSBA 7592

Attorneys for Appellant Deborah Kaye

Certificate of Service

I hereby certify that I served a true and correct copy of the foregoing upon the below named individuals in the identified manner on this 4th day of November, 2009.

Hand Delivery

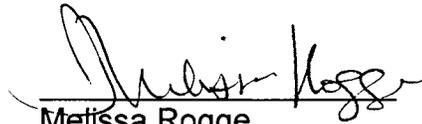
Jeffrey Campiche  
Campiche Blue Trial Attorneys  
701 5<sup>th</sup> Ave suite 4765  
Seattle, WA 98104

Via US Mail

Mr. Christopher Templeton & Templeton Construction  
Services Inc.  
14001 Evanston Ave. N.  
Seattle, WA 98133

Mr. Jacques Cotes  
1012 NE 100<sup>th</sup> Street  
Seattle, WA 98125

Dated this 4th day of November, 2009.

  
Melissa Rogge  
Legal Assistant

# Appendix A



Judge Jim Rogers  
Trial Date: June 1, 2009  
Time: 9:00 A.M.

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

DEBORAH KAYE,

Plaintiffs,

No. 07-2-32473-9 SEA

v.

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT**

LOWE'S HIW, INC., CITY OF SEATTE;  
JACQUES P. COTE; CHRISTOPHER L.  
TEMPLETON; and TEMPLETON  
CONSTRUCTION SERVICES, INC.,

Defendants

**JUDGMENT SUMMARY**

Judgment Creditor:

Deborah Kaye

Judgment Debtor:

Jacques Cote

~~Christopher L. Templeton~~

~~Templeton Construction Services, Inc.~~

~~Jointly & Severally~~

Attorneys for Judgment Creditor:

Jeffery M. Campiche  
Campiche Blue  
701 5<sup>th</sup> Avenue, Suite 4765  
Seattle, WA 98104

**Findings of Fact, Conclusions of Law &  
Judgment - 1**

**COPY**

LAW OFFICE OF  
CATHERINE C. CLARK PLLC  
701 Fifth Avenue, Suite 4785, Seattle, WA 98104  
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Catherine C. Clark  
Melody Staubitz  
Law Offices of Catherine C. Clark PLLC  
701 Fifth Avenue, Suite 4785  
Seattle, WA 98104

1  
2  
3  
4 Principle Judgment Amount:

\$298,035.32 *Ⓟ*

5 Interest Rate on Principle Judgment  
6 Amount:

12% per annum

7 Attorneys Fees:

\$200.00

8 Costs:

*Ⓟ* \$ 3895.20 plus <sup>31</sup>200  
fees

9 Interest Rate on Attorneys Fees &  
10 Costs:

12% per annum

11 THIS MATTER came on regularly for trial before the undersigned judge on Monday,  
12 June 1, 2009;

13 The Court, having jurisdiction over the person of the Defendant Jacques Cote,  
14 Defendant Christopher L. Templeton and Templeton Construction Services, Inc. and the  
15 subject matter of this action, having considered the files and records herein, the evidence  
16 presented at trial and the testimony of witnesses, and being fully advised, has determined that  
17 the relief sought by the Plaintiff Deborah Kaye is proper.

18  
19 NOW, THEREFORE, this Court makes the following:

20 **II. FINDINGS OF FACT**

21 1. On May 5, 2007, at approximately 4:00 p.m., Plaintiff Deborah Kaye, was  
22 struck by a 1999 Dodge Ram pickup truck ("Truck") driven by Jacques Cote in the Lowe's  
23 parking lot located at 12525 Aurora Avenue North, Seattle Washington 98133.  
24

25 **Findings of Fact, Conclusions of Law &  
Judgment - 2**

LAW OFFICE OF  
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701 Fifth Avenue, Suite 4785, Seattle, WA 98104  
Phone: (206) 838-2528 Facsimile: (206) 374-3003

2. The Truck was and is owned by Defendant Christopher L. Templeton.

1 3. Plaintiff Deborah Kaye and her partner, Ms. Jan Van Ysslestyne, were going to  
2 Lowe's to look at plants and flowers as well as pick up a lamp for Plaintiff Deborah Kaye's  
3 office.  
4

5 4. The two parked in the parking lot and walked toward the building and parking  
6 lot flower displays.

7 5. Both noticed a flower display Lowe's placed in a driving lane.

8 6. When Plaintiff Deborah Kaye reached the Lowe's designated pedestrian  
9 crosswalk she stopped and looked left and right, after seeing a break in traffic and no traffic  
10 coming her way she began to cross at the crosswalk.  
11

12 7. Plaintiff Deborah Kaye was approximately two thirds and certainly more than  
13 half way across the crosswalk when Defendant Jacques Cote hit her from behind.

14 8. Ms. Van Ysslestyne saw that a truck had driven into the wrong lane in order to  
15 avoid the people and flower racks.

16 9. Ms. Van Ysselstyne tried to warn Plaintiff Deborah Kaye but it was too late.  
17 Defendant Jacques Cote hit Plaintiff Deborah Kaye with the Truck from behind before she  
18 could respond to Ms. Van Ysslestyne's warnings.  
19

20 10. All witnesses to the accident agree that Defendant Jacques Cote was proceeding  
21 at an unsafe speed for a parking lot, and was in the wrong lane when he struck and ran over  
22 Plaintiff Deborah Kaye. *A Drug Recognition Expert for the Seattle Police  
found no signs of impairment to Mr. Cote.*

23 11. Plaintiff Deborah Kaye was seriously injured as a result of the collision as  
24 follows:  
25

**Findings of Fact, Conclusions of Law &  
Judgment - 3**

LAW OFFICE OF  
CATHERINE C. CLARK PLLC  
701 Fifth Avenue, Suite 4785, Seattle, WA 98104  
Phone: (206) 838-2528 Facsimile: (206) 374-3003

- 1 a. A left clavicle fracture, left thumb fracture, right medical malleolus fracture, left  
2 sided rib fractures, and lacerations/avulsions to her left arm, left ankle and  
3 extensive soft tissue injuries;
- 4 b. left parietal scalp hematoma, left sided rib fractures, a non-displaced fracture of  
5 the right proximal fibula and a fracture of the right medial malleolus;
- 6 c. right ankle fracture;
- 7 d. degloving and avulsion injuries;
- 8 e. excision and grafting to the left forearm and left ankle, debridement and  
9 washout of left arm degloving with skin graft (300 cm<sup>2</sup>); a debridement of left  
10 ankle abrasion with skin graft (100 cm<sup>2</sup>) and a skin graft harvest from the left  
11 thigh (400 cm<sup>2</sup>);
- 12 f. displayed decreased ROM (rotation on movement) in the cervical, thoracic and  
13 lumbar regions of her back;
- 14 g. lymphatic drainage;
- 15 h. medial meniscal tear on her right knee;
- 16 i. emotional trauma;
- 17 j. Achilles tendonitis on the left leg from overcompensation due to her left foot  
18 fracture;
- 19 k. ankle pain, plantar fascia;
- 20 l. decreased mobility in her proximal tibia/fibula, decreased ROM in her  
21 hamstrings, quads and gluts;
- 22 m. tinnitus and suggested possible post traumatic hearing loss;
- 23 n. spastic piriformis and hip pathology;
- 24 o. diminished sensation over the skin graft areas;
- 25 p. low back pain, gluteal pain, spasms and vestibular problems (dizziness);
- q. low tone hearing loss and high frequency hearing loss in the left ear and  
vestibular deficit;

- r. nystagmus on positional testing in the head right position and electrocochleographaphy findings consistent with endolymphatic hydrops;
- s. mild impairment on the CTSIB in most test positions and displayed a significant deficit on foam with distorted visual field, sensory deficits in the lower extremities; and,
- t. chronic neck, shoulder, right knee, left and right foot and ankle pain.

12. <sup>u. Great suffering and emotional distress which was testified to and observed by this Court.</sup>  
 To date, Plaintiff Deborah Kaye has incurred \$98,035.32 in medical expenses and related services as a result of her injuries. <sup>11. v. a loss of quality of life, loss of ability to perform work, hobbies and basic Court.</sup>

13. Ms. Van Ysslestyne observed construction and landscaping tools in the bed of the Truck just after the collision. <sup>excessive.</sup>

14. At the time of the collision and today, the Truck was owned by Defendant Christopher L. Templeton and was titled in his name.

15. Defendant Jacques Cote had a <sup>conviction</sup> history of reckless driving prior to the collision. <sup>in 2006</sup>

16. On December 9, 2006 Defendant Jacques Cote pled guilty to criminal trespass in the first degree and reckless driving in Clallam County in the matter entitled *State v. Cote*, Clallam County Cause No. 04-1-00001-6.

~~17. As a result of his guilty plea, Defendant Jacques Cote's driver's license was suspended.~~

17. ~~18.~~ Defendant Christopher L. Templeton <sup>and Jacques Cote jointly</sup> bought ~~and loaned~~ the Truck to his life long friend Defendant Jacques Cote <sup>because he could not borrow the balance of the funds necessary to complete the purchase</sup> who could not obtain a vehicle on his own.

18. ~~18.~~ Defendant Christopher L. Templeton bought the Truck on September 6, 2003, <sup>was purchased</sup> two and a half years before the collision.

19 ~~20~~. On the title, Defendant Christopher L. Templeton listed himself as both the registered and legal owner of the Truck and drove it off the lot.

20 ~~21~~. Defendant Christopher L. Templeton <sup>loaned money to Cote for</sup> bought the Truck for Defendant Jacques Cote to use, because ~~he~~ <sup>Templeton</sup> believed ~~he~~ <sup>Cote</sup> would pay ~~him~~ <sup>Templeton</sup> back since he knew ~~him~~ <sup>Cote</sup> so well.

21 ~~22~~. No record of any payments by Defendant Jacques Cote to Defendant Christopher L. Templeton for the Truck was kept.

~~23. There is no evidence that Defendant Jacques Cote paid any monies to Defendant Christopher L. Templeton for the Truck.~~

22 ~~24~~. Beginning in September 2003, Defendant Christopher L. Templeton was the registered owner of the Truck.

23 ~~25~~. The Truck was in Defendant Christopher L. Templeton's name each year and paid all licensing fees through September 2006, five months after the collision.

24 ~~26~~. Defendant Jacques Cote and Defendant Christopher L. Templeton are life-long friends.

25 ~~27~~. They met at Einstein Middle School in 1978 when they were twelve years old.

26 ~~28~~. Defendant Christopher L. Templeton allowed Defendant Jacques Cote to move into his home with his family for over a year.

27 ~~29~~. Defendant Christopher L. Templeton has long been aware of Defendant Jacques Cote's extensive history of problems with authority, (i.e. by Defendant Christopher L. Templeton's own admission, Defendant Jacques Cote's has a disregard for the law, the rules of society and for others).

33. There is no evidence that Templeton knew or believed that Cote was an incompetent driver at or around the time of the accident. There is insufficient evidence to establish that Templeton should have been on notice that

28 30. According to Defendant Christopher L. Templeton deposition, "throughout [Defendant Jacques Cote's] entire life [he] had maintained a position of paranoia [about] any body of authority".

Cote was not a competent to drive or was a dangerous driver.

29 31. Defendant Christopher L. Templeton was also aware that Defendant Jacques Cote operates "off the grid" always paying people or being paid under the table as well as his fear of filing governmental information by himself.

30 32. Defendant Christopher L. Templeton knew about Defendant Jacques Cote's long time drug use. used drugs from time to time.

31 33. On July 30, 2008, Defendant Christopher L. Templeton sought an Order of Protection against Defendant Jacques Cote from this Court in the matter entitled *Templeton v. Cote*, King County Cause No. 08-2-24523-3 SEA.

34. In the petition filed in *Templeton v. Cote*, Defendant Christopher L. Templeton stated that Defendant Jacques Cote was mentally unstable and "a time bomb". However, the evidence in the petition relates to a time period after the accident.

32 35. Defendant Christopher L. Templeton also asked this Court to grant him possession of the Truck involved in the collision, which Defendant Christopher L. Templeton listed, in his own handwriting, as belonging to him. The Protective Order entered by the court states:

7. Petitioner [Defendant Christopher L. Templeton] is granted use of the following vehicle: Year, Make & Model 97 Dodge 1500 Green/Silver License No. A34287W.

(Italics denote Defendant Christopher L. Templeton's handwriting in the original)

36. Thus, by virtue of an order of this Court, Defendant Christopher L. Templeton has legal possession of the vehicle that struck Plaintiff Deborah Kaye.

1 ~~34~~ 37. Defendant Jacques Cote worked for Defendant Christopher L. Templeton and  
2 Defendant Templeton Construction Services ("TCS") on various different projects.

3 ~~35~~ 38. TCS does business in general construction and labor.

4 ~~36~~ 39. Defendant Christopher L. Templeton also does business as Evergreen  
5 Landscaping as an unincorporated arm of TCS.

6 ~~37~~ 40. Defendant Jacques Cote is a landscaper who sometimes worked on projects with  
7 TCS and Evergreen Landscaping.

8 ~~38~~ 41. Defendant Jacques Cote and TCS once filed a joint lawsuit against a former  
9 client in this Court entitled *Templeton et al. v. Hikogawa*, King County Superior Court Cause  
10 No.06-2-21812-4 SEA.

11 ~~39~~ 42. In the project which formed the basis for the *Templeton et al. v. Hikogawa* suit,  
12 Defendant Jacques Cote and TCS issued joint billings.

13 ~~40~~ 43. In the project which formed the basis for the *Templeton et al. v. Hikogawa* suit,  
14 Defendant Jacques Cote was the "mouthpiece" <sup>or client representative</sup> for himself and Defendant Christopher L.  
15 Templeton and Defendant Templeton Construction Services.  
16

17 ~~44. Defendant Jacques Cote worked for Defendant TCS and Defendant Christopher~~  
18 ~~L. Templeton.~~

19 ~~41~~ 45. <sup>At times,</sup> Defendant Jacques Cote ~~also~~ used Defendant TCS' tools, office equipment, lap  
20 tops, printers and PC cards to complete work tasks.

21 ~~42~~ 46. Defendant Jacques Cote has worked on Defendant Christopher L. Templeton's  
22 property located in Index, Snohomish County, Washington using Defendant Christopher L.  
23 Templeton's tools to do so.

24 ~~43~~ 47. *There is no direct evidence that Cote worked for*  
25 **Findings of Fact, Conclusions of Law & Judgment - 8**

1 ~~44~~ 47. Ms. Deborah Kaye initiated this action on October 5, 2007.

2 ~~45~~ 48. On August 15, 2008, Defendant Christopher L. Templeton and TCS filed their  
3 own motion for summary judgment of dismissal.

4 ~~46~~ 49. After receiving Plaintiff Deborah Kaye's and Lowe's opposition to the motion,  
5 Defendant Christopher L. Templeton and TCS struck their motion.

6 ~~47~~ 50. Plaintiff Deborah Kaye filed a Motion for Partial Summary Judgment of  
7 Dismissal of the Affirmative Defense of Comparative Fault on April 16, 2009, which was  
8 granted on May 15, 2009.

9 ~~48~~ 51. Prior to the May 15, 2009 summary judgment date, Plaintiff Deborah Kaye  
10 settled with Lowes.

11 ~~49~~ 52. Trial of this matter was set for June 1, 2009 per this Court's Scheduling Order  
12 filed in the above captioned matter.

13 ~~50~~ 53. On June 1, 2009, this court entered an Order of Default declaring Defendant  
14 Jacques Cote to be in default in this matter.

15 ~~51~~ 54. On June 1, 2009, this court entered an Order of Default declaring Defendant  
16 Christopher L. Templeton and Defendant TCS to be in default in this matter.

17 ~~52~~ 55. Ms. Kaye has incurred the following recoverable costs and attorneys fees in the  
18 prosecution of this matter as permitted by RCW 4.84.010 and RCW 4.84.080:  
19

20  
21 Filing Fee: \$200.00  
22 Statutory Attorneys Fees: \$200.00  
23 Costs: \$3,895.20

24 **III. CONCLUSIONS OF LAW**

25 **Findings of Fact, Conclusions of Law &  
Judgment - 9**

1. This Court has jurisdiction over this matter.
2. This Court is the proper venue for this matter.
3. Defendant Jacques Cote negligently struck Plaintiff Deborah Kaye with the Truck.

4. Plaintiff Deborah Kaye was seriously injured as a result of Defendant Jacques Cote's negligence. *She has endured great physical and emotional suffering as well as a loss of quality of life.*

5. Defendant Jacques Cote negligence was a proximate cause of Plaintiff Deborah Kaye's injuries.

*6. Plaintiff has not proven respondeat superior liability against Templeton or that Templeton negligently entrusted his Truck to Cote.*

~~7. Plaintiff is entitled to medical damages of \$98,035.32.~~

~~7. Plaintiff Deborah Kaye was seriously injured as a result of Defendant~~

~~8. Plaintiff is entitled to pain and suffering damages in the amount of \$200,000.~~

~~8. Defendant Christopher L. Templeton's negligence was a proximate cause of~~

~~Plaintiff Deborah Kaye's injuries.~~

~~9. Defendant Jacques Cote was an employee of Defendant Templeton Construction Services, Inc.~~

~~10. At the time of the collision on May 5, 2006, Defendant Jacques Cote was acting in the course of his employment with Defendant Templeton Construction Services, Inc.~~

*11.* The affirmative defense of comparative fault has been previously dismissed by this Court on May 15, 2009.

*12.* Counterclaim filed by Defendant Templeton should be dismissed based on his failure to appear.

**Findings of Fact, Conclusions of Law & Judgment - 10**

LAW OFFICE OF  
CATHERINE C. CLARK PLLC  
701 Fifth Avenue, Suite 4785, Seattle, WA 98104  
Phone: (206) 838-2528 Facsimile: (206) 374-3003

13. Defendants Jacques Cote, Christopher L. Templeton and Templeton Construction Services, Inc. are all jointly and severally liable for Plaintiff Deborah Kaye's injuries.

14. Plaintiff Deborah Kaye is entitled to the entry of judgment.

IV. JUDGMENT

Based on the above, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff Deborah Kaye shall have a judgment against Defendants Jacques Cote, Christopher L. Templeton and Templeton

Construction Services, Inc., jointly and severally, in the amount of \$ 298,035.32, statutory attorneys fees of \$200.00, and costs in the amount of \$ 3,895.20, all together with interest at the rate of 12% per annum.

Dated this 3 day of June, 2009.

The Honorable James Rogers

Presented by:

CAMPICHE BLUE

By: Jeffrey Campiche, WSBA Attorneys for Plaintiff Deborah Kaye

LAW OFFICE OF CATHERINE C. CLARK, PLLC

By: Catherine C. Clark, WSBA #21231 Melody Staubitz, WSBA # 40871 Attorneys for Plaintiff Deborah Kaye

## Appendix B

**FILED**  
KING COUNTY WASHINGTON

JUN - 1 2007

SUPERIOR COURT CLERK  
BY DAVID J. ROBERTS  
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

DEBORAH KAYE,

Plaintiff,

vs.

LOWE'S HIW, INC., CITY OF SEATTLE,  
JACQUES P. COTE; CHRISTOPHER L.  
TEMPLETON; and TEMPLETON  
CONSTRUCTION SERVICES, INC.

Defendants.

No. 07-2-32474-9 SEA

**PROPOSED ORDER GRANTING  
PLAINTIFF KAYE'S MOTION FOR  
DEFAULT**

THIS MATTER, having come on before the Court pursuant to Plaintiff Kaye's Motion for Default and Subjoined Declaration of Catherine C. Clark with attached exhibits, and the court having considered the pleadings and files herein and the following;

1. Plaintiff Deborah Kaye's Motion for Default and Subjoined Declaration of Catherine C. Clark with attached exhibits;

2. \_\_\_\_\_ ;

3. \_\_\_\_\_ ;

4. \_\_\_\_\_ ;

**Order Granting Plaintiff's Motion Default - 1**  
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LAW OFFICE OF  
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Phone: (206) 838-2528 Facsimile: (206) 374-3003

ORIGINAL

CP 364

5. \_\_\_\_\_

1 BASED ON THE FOREGOING, It is hereby:

2 ORDERED that Plaintiff's Motion for Default is GRANTED;

3 AND IT IS FURTHER ORDERED \_\_\_\_\_  
4 \_\_\_\_\_  
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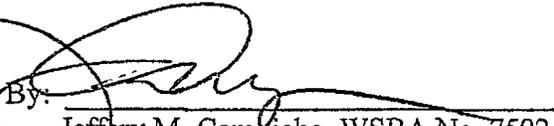
15  
16 Dated: 1 June, 2008

17  
18  
19 The Honorable Jim Rogers  
20  
21  
22  
23  
24  
25

Presented by:

1 CAMPICHE BLUE, PLLC

LAW OFFICE OF CATHERINE C. CLARK PLLC

2  
3  
4 By:   
Jeffery M. Campiche, WSBA No. 7592  
Attorneys for Plaintiff Deborah Kaye

5 By:   
Catherine C. Clark WSBA No. 21231  
Melody Staubitz, WSBA No. 40871  
Attorneys for Plaintiff Deborah Kaye

6  
7  
8 **Copy received; Approved**  
9 **As to Form; Notice of**  
10 **Presentation Waived**

11 FORSBERG & UMLAUF, P.S.

Christopher Templeton, Pro Se

12 By: \_\_\_\_\_  
13 A. Grant Lingg, WSBA No. 24227  
14 Maggie J. Bruya, WSBA 39420  
Attorneys for Defendant Lowes HIW, Inc.

15 By: \_\_\_\_\_  
16 Christopher L. Templeton and  
17 Templeton Construction Services Inc.  
18 Defendant

19 Jacques Cote, Pro Se

20  
21 By: \_\_\_\_\_  
22 Jacques Cote, Defendant

23  
24  
25 **Order Granting Plaintiff's Motion Default - 3**

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