

65021-1

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NO. 65021-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GRETCHEN WEBER,

Plaintiff -Appellant,

v.

BUDGET TRUCK RENTAL, LLC, a Delaware Corporation

Defendant-Respondent

BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION.

The central issue on appeal is whether the trial court properly granted Defendant-Respondent Budget Truck Rental's ("BTR") motion for summary judgment, dismissing Plaintiff Gretchen Weber's ("Weber") negligent entrustment claim. Weber's summary judgment opposition failed to establish that BTR knew, or should have known, that the renter to whom it entrusted one of its rental vans—Defendant Timothy Turner ("Turner")—was reckless, heedless or incompetent. Because Weber flatly failed to establish the existence or causative breach of any duty owed to her, BTR maintains summary judgment was properly granted and should be upheld. BTR respectfully requests that the Court of Appeals affirm the decision of the trial court.

B. COUNTER-ASSIGNMENTS OF ERROR.

Weber's assignments of error unnecessarily complicate the issues on appeal. Although Weber posits four error assignments, the first three address a single issue—whether the trial court properly concluded Weber could not, as a matter of law, establish the elements of negligent entrustment. Weber's

final error assignment avers that the trial court improperly considered certain declaration evidence in dismissing her claims. To facilitate review, BTR suggests the following counter-statement of Weber's assignments of error:

a. Whether the trial court erred in concluding Weber did not establish the existence or causative breach of any duty owed to her when it dismissed her negligent entrustment claim against BTR; and

b. Whether the trial court erred by considering factual statements from previously undisclosed witnesses in deciding BTR's motions for reconsideration and summary judgment.

Issues Pertaining to Assignments of Errors

RAP 10.3(4) requires that Appellant's brief contain: "A separate concise statement of each error a party contends was made by the trial court, *together with the issues pertaining to the assignments of error*" (emphasis added). Weber's brief fails to comport with this rule, both in form and substance, as it wholly omits any identification or discussion of the legal issues Weber is

asking the court to decide. BTR offers the following Statement of Issues Pertaining to its Counter-Statement of the Assignments

Assignment of Error 1:

Did Weber establish BTR agency personnel ignored evidence Turner was apparently intoxicated by methamphetamine, or likely to become intoxicated, at the time of the van rental, thereby breaching its duty of care to Ms. Weber?

Did Weber establish that requiring presentation of two forms of identification would have put BTR on notice of Turner's dangerous propensities behind the wheel?

Assuming, *arguendo*, that either state law or BTR's internal policies created a duty for BTR to confirm the "actual" validity of Turner's Oregon driver's license, could BTR have learned that Turner's Oregon's drivers license had been suspended through verification services available to BTR's sister company, Budget Car Rental?

Assignment of Error 2:

Does the trial court have discretion under KCLR 26(b)(4), or any other basis, to consider declaration testimony of previously undisclosed witnesses in deciding a dispositive motion?

C. COUNTER-STATEMENT OF THE CASE.

1. BTR Background Facts.

Budget Truck Rental, LLC ("BTR") is a Delaware corporation. CP 5, ¶ 1.3; CP 9, ¶ 1.3. BTR is a subsidiary of Avis Budget Car Rental, LLC, but is a stand-alone corporation,

distinct from Budget Car Rental. CP 95, p. 12, l. 18 – p. 13, l. 7.

BTR rents trucks to the public through its approximately 2,800 locations nationwide. CP 96, p. 14, ll. 5-7. Duane and Brenda Guiranovitch are the BTR “agency operators” who, through an agreement with BTR, operate BTR’s “Seattle Agency.” CP 475, ¶ 2. At the time of the subject incident in May 2008, Lori Luzader was the general manager of the Seattle Agency. CP 119, p. 23, ll. 20-25.

2. The Van Rental.

Shortly after 2:00 p.m. on May 20, 2008, Turner rented a 12’ cargo van at the BTR Seattle Agency. CP 476, ¶ 3; CP 484. Turner presented an Oregon driver’s license to Ms. Luzader that appeared valid on its face. CP 120, p. 29, ll. 9-25; CP 122, p. 35, ll. 15-20; CP 123, p. 40, l. 14 – CP 124, p. 45, l. 10. Visual examination of Turner’s Oregon driver’s license did not show it to be in any way invalid or suspended. CP 128, p. 25, l. 3 – CP 129, p. 27, l. 14; CP 132. Ms. Luzader manually entered Turner’s driver’s license and address information into BTR’s computer system. CP 123, p. 40, l. 16 – CP 124, p. 45, l. 10. It was Ms. Luzader’s general practice to compare the

signature on a renter's driver's license with his or her signature on the rental agreement. CP 124, p. 45, ll. 11-21.

Turner did not have a credit card and paid a \$150.00 cash deposit for the van rental. CP 122, p. 35, l. 24; CP 123, p. 39, ll. 15-17; CP 476, ¶ 3. At the time of the van rental, Turner also was in possession of a Washington State ID card. CP 189, p. 6, l. 1 – p. 9, l. 20. The Washington State ID card was unexpired and otherwise valid. CP 128, p. 25, l. 3 – CP 129, p. 27, l. 14; CP 131.

The three BTR Seattle Agency personnel who interacted with Turner at the time of the rental were Brenda Guiranovitch, Lori Luzader and Duane Guiranovitch. CP 113, p. 14, ll. 2-12; CP 338, l. 3 – CP 339, l. 7; CP 122, p. 34, l. 6 – CP 123, p. 38, l. 10; CP 172, p. 17, l. 5 – CP 173, p. 19, l. 7. These three Seattle Agency personnel are the only individuals who observed Mr. Turner's appearance and condition at or near the time of the rental on May 20, 2009. Notably, as set forth below, none of the three observed anything unusual or out of the ordinary about Turner's behavior or appearance at the time. More specifically,

none of them observed any unusual behavior or signs of apparent intoxication.

Brenda Guiranovitch observed Turner and overhead parts of Turner's conversations with Lori Luzader about the rental. CP 113, p. 14, ll. 4 – 10; CP 338, ll. 3 – 25. His appearance was distinctive only because of his extensive forearm tattoos. CP 338, l. 18 – CP 339, l. 24. Turner did not exhibit any signs of obvious intoxication when Brenda Guiranovitch observed him during the course of the rental transaction. CP 115, p. 48, ll. 19-22. Similarly, Duane Guiranovitch does not recall “anything distinctive” about Mr. Turner during their interaction at the time of the rental. CP 173, p. 18, l. 13 – p. 19, l. 7.

Lori Luzader, who had the most contact with Mr. Turner during the rental transaction, testified that there was nothing about Mr. Turner's appearance that caused her “any concern” and that he “seemed just like a normal person who needed to rent a truck.” CP 122, p. 35, ll. 11-14. Turner appeared “calm” throughout the rental transaction process. CP 123, p. 39, ll. 22-24.

Ms. Luzader's practice was to closely observe rental customers "from the time they come in the door" to observe "their demeanor, how they are handling things," and "if they're walking straight, if they're slurring at all, if their eyes appear glassy." CP 121, p. 32, ll. 2-11. Ms. Luzader was well-aware that it was against BTR policy to rent a vehicle to an individual who appeared "intoxicated at all, under any kind of influence, just acting out of the ordinary like they might be under some kind of influence of something." CP 120, p. 26, l. 21 – p. 27, l. 2.

3. The Accident.

This lawsuit arises from a motor vehicle-pedestrian accident. At approximately 12:41 p.m. on May 21, 2008, Turner—driving the van he had rented from BTR the day before—struck Weber as she was crossing Jackson Street and 5th Avenue in downtown Seattle. CP 130. Turner was making a left turn from southbound Fifth Avenue South onto eastbound South Jackson Street when he struck Weber, knocked her to the ground, and dragged her some distance. *Id.* Based on field observations of Turner by Seattle Police Department officers and detectives at the scene of the accident, Turner was suspected of

driving while under the influence of alcohol or drugs. CP 130-31.

Turner was taken to Harborview Medical Center where his blood was drawn. CP 131. Preliminary tests were positive for amphetamine in Turner's blood. *Id.* Turner was arrested and taken to the King County Jail. *Id.* At the time of the collision, Turner possessed a suspended Oregon driver's license and a valid Washington State ID card. *Id.* The final results of the toxicology tests showed that Turner had both methamphetamine and amphetamine in his blood. CP 136.

Turner was charged with a number of offenses and subsequently pled guilty to vehicular assault and driving under the influence. CP 144-53. Turner has admitted liability in this case. CP 160.

4. BTR Policies and Procedures for a Cash Rental.

BTR training materials, policies and procedures in place at the time Turner rented the van in May 2008 specify that a BTR rental customer paying with cash must present both a valid driver's license and an additional form of identification; forms of identification acceptable to BTR include a photo identification card from a renter's place of business, passport, credit card,

social security card, state/country issued identification card, military ID, phone bill with address, paycheck, and/or pay stub. CP 98, p. 26, l. 24 – p. 27, l. 19, CP 103-04. The purpose for requiring two forms of ID is to establish that the renter is who they say they are, and to provide additional information to assist BTR in locating the renter should he or she not return the rented vehicle. CP 98, p. 28, l. 6 – p. 29, l. 14.

During their depositions, Seattle Agency personnel Duane Guiranovitch, Brenda Guiranovitch, and Lori Luzader each testified that BTR policies and procedures permitted a cash-paying customer to rent a vehicle upon presentation of a driver's license accompanied by sufficient funds to deposit for the rental, in this case, \$150 for a single day van rental. CP 114, p. 33, ll. 10-17; CP 121, p. 30, l. 22 – p. 31, l. 3; CP 171, p. 11, l. 20 – p. 12, l. 7.

At the time of rental, Turner possessed two acceptable forms of ID, his Oregon driver's license and a valid Washington State photo ID card. CP 188, p. 5, l. 7 – CP 189, p. 9, l. 20; CP 192-93. Turner presented only his Oregon driver's license to Lori Luzader at the time of the van rental, however. CP 122, p.

34, l. 6 - CP 124, p. 45, l. 10. The Seattle Agency, like all other BTR agencies, did not have access to any computerized or online databases at the time of rental to determine the status of Mr. Turner's Oregon driver's license. CP 172, p. 14, ll. 2 -15, CP 100, p. 36, ll. 3 17, CP 123, p. 38, ll. 13 - 23. In requiring Turner to present only his driver's license and a sufficient cash deposit, the Seattle Agency personnel did not technically comply with BTR's two-forms of ID requirement. CP 108, p. 29, ll. 2 - 15.

5. The Validity of Turner's Oregon Driver's License.

The Oregon driver's license Turner presented to BTR employees appeared valid on its face. CP 120, p.29, ll. 9-25; CP 122, p. 35, ll. 15-20, CP 123, p. 38, ll. 5-10; CP 128, p. 25, l. 22 - p. 26 l. 24; CP 144-53. As part of his agreement to BTR's rental terms, Turner affirmatively represented that he had obtained the rental without providing "false or misleading" information. CP 489. Following the accident, however, it was learned that Turner's license had been suspended for failure to pay a traffic ticket. CP 179, p. 35, ll. 7-17. Turner was unaware of his suspended license status until after his arrest. *Id.*

BTR has never used a computerized or online status verification database to determine whether a potential renter has a valid driver's license. CP 100, p. 36, l. 3 - p. 37, l. 17. Similarly, none of BTR's major truck rental competitors (*i.e.*, U-Haul, Penske, and Ryder Commercial) utilize computerized or online databases to check driving records for rental customers. *Id.*

6. Facts Regarding Turner's Use of Methamphetamine.

Turner is a methamphetamine addict; in May of 2008, he was using methamphetamine on a near-daily basis. CP 177, p. 23, l. 12 - CP 178, p. 26, l. 21. Turner had spent the early morning of May 20, 2008 (the day of the rental) with "unsavory people" and had smoked methamphetamine. CP 180, p. 54, l. 14 - CP 182, p. 62, l. 10. His consumption of methamphetamine that day occurred at approximately 5:00 a.m. CP 181, p. 60, ll. 19-23. Turner smoked methamphetamine during the evening of May 20th (after he had rented the van) in order to get high. CP 191, p. 25, ll. 1-16. Turner also likely consumed methamphetamine on May 21st (the day of the accident) before the accident occurred. CP 190, p. 21, ll. 1-12:

CP 183, p. 108, ll. 2 – 8, and amended answer on correction sheet at CP 185.

7. Procedural History.

BTR moved for summary judgment, maintaining Weber could not establish the existence or breach of any duty BTR owed to her. CP 27. BTR further argued Weber could not show that any act or omission of BTR was a proximate cause of the accident. *Id.*

Weber opposed BTR's motion, arguing, among other things: (1) Turner was obviously intoxicated at the time of the rental; (2) even if Turner was not obviously intoxicated at the time, BTR staff could have determined that he would eventually become intoxicated; (3) BTR's failure to review two forms of ID constituted a breach of a duty to Weber; and (4) BTR's failure to determine the "actual" validity of Turner's license was further evidence of negligence. CP 194-216. Turner's summary judgment opposition was bolstered by the declarations of private investigator Daniel Peyovich (CP 238-49) and forensic toxicologist David Predmore (CP 250-90).

Weber's opposition to BTR's summary judgment motion unequivocally states as a "fact" that "had Budget Truck checked

Mr. Turner's driving history, as Budget Car would have, it would have discovered that Mr. Turner's license was suspended and that Mr. Turner had multiple convictions for crimes involving use of a vehicle." CP 214. Peyovich's declaration infers that had BTR conducted driving history inquiry through TML Information Services, such would have shown the suspended status of Turner's license. CP 239, ¶ 3. Mr. Peyovich's assertions were unsupported by any admissible evidence procured from TML Information Services.

Predmore's declaration conjures, based on "retrograde analysis" of Turner's blood test results, that Turner would more likely than not have displayed "characteristic effects of methamphetamine including: restlessness, agitation, nervousness, licking of lips, rapid speech and dilated pupils."¹ CP 253, ¶¶ 7-8. Predmore's source for the effects of characteristic methamphetamine affects is an untitled internet source, which does not bear the author's name, that Predmore found using a Google search. CP 254; 286-90.

¹ Curiously, Predmore's declaration does not even mention whether or not he has personally observed any individual displaying the effects of methamphetamine intoxication.

BTR timely moved to strike inadmissible portions of the Peyovich and Predmore declarations. CP 393; 400-402; 411-12. BTR objected to Peyovich's declaration testimony regarding a TML Information Services driver's license status check on the basis that there was no foundation as to what TML searches would reveal regarding Oregon driver's records. CP 401. BTR moved to strike Predmore's opinions about "characteristic effects of methamphetamine intoxication" on the basis of speculation and lack of contemporaneous observational evidence, as required by *Faust v. Albertson*, 167 Wn.2d 531, 538-541, 658-64, 222 P.3d 1208 (2009). CP 411.²

Though apparently disposed during oral argument to grant BTR's summary judgment motion on the duty and proximate cause theories on which BTR's motion was based, the court initially denied BTR's motion (CP 425-26) on the basis of a duty issue raised by the court *sua sponte* and not briefed or argued by the parties' in their motion papers. CP 429-30. The duty issue on which the trial court initially denied summary judgment was

² The trial did not make any specific rulings on BTR's motions to strike. Inasmuch as the Court of Appeals reviews the granting of summary judgment *de novo*, the inadmissible testimony in the Peyovich and Predmore declarations should either be struck or not considered on appeal.

whether BTR's sister company's (Budget Car Rental) website representation regarding checking the validity of renter's driver's licenses created a duty incumbent upon BTR to similarly check Turner's driver's license status using the subscription service ("TML Information Services") utilized by Budget Car Rental.

Id.

Following oral argument and entry of the order denying BTR's summary judgment motion, BTR's counsel contacted the Founder and President of TML Information Services, Inc. ("TML"), Edward Darmody. *See* CP 438-439. Mr. Darmody executed a declaration, stating: "Oregon drivers license records and Oregon license status information are not now and were not in 2008 available through the TML Driver Check System." CP 438.

BTR's counsel also submitted the declaration of the fleet manager for Oregon's Budget Car Rental's operation, Charles Sellers, who stated: "From my experience in the auto rental industry in Oregon and my experience with OCTRLA [Oregon Car and Truck Rental Leasing Association] Oregon driver's license records and driver's license status information are simply

not available from any commercial computerized driving record service or database such as TML.” CP 441. Mr. Sellers also personally conducted a TML Information Services inquiry for Turner. It came back showing “no issue or problem” regarding Turner’s driver’s license status and no criminal convictions or criminal history. CP 442.

BTR moved for reconsideration of the trial court’s denial of summary judgment, proving through Darmody and Sellers’ declarations that even if a TML driver’s license status search had been done at the time of the Turner rental, it would not have shown the suspended status of Turner’s driver’s license. CP 429-33.

The trial court granted BTR’s motion for reconsideration and directed Weber to respond to the facts set forth in Darmody and Sellers’ declarations as to proximate cause (CP 445-447). Weber opposed BTR’s motion for reconsideration, not by responding to the proximate cause issue as the court requested, but on the grounds the court improperly considered the above-referenced declarations as the witnesses were not previously disclosed under KCLR 26(b)(4). CP 448-450. The court

considered Turner's opposition pleadings, then granted BTR's summary judgment motion and dismissed Weber's negligent entrustment claim. CP 457-59. The court simultaneously entered CR 54(b) findings. CP 462-69.

D. ARGUMENT.

1. The trial court properly concluded Weber could not establish the existence or material breach of any duty owed to her by BTR when it dismissed Weber's negligent entrustment claim.

"A person entrusting a vehicle to another may be liable under a theory of negligent entrustment only if that person knew, or should have known in the exercise of ordinary care, that the person to whom the vehicle was entrusted is reckless, heedless, or incompetent." *Mejia v. Erwin*, 45 Wn. App 700, 704, 726 P.2d 1032 (1986) (citing *Cameron v. Downs*, 32 Wn. App 875, 879, 650 P.2d 260 (1982)). The *Mejia* court further explained 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 recurrence foreseeable.

Mejia, 45 Wn. App at 705 (quoting *Curley v. General Valet Serv., Inc.*, 270 Md. 248, 311 A.2d 231, 241 (Md. 1973)).

Foreseeability is normally an issue for the trier of fact, but will be decided as a matter of law where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). The evidence before the trial court presented no genuine issue of material fact regarding BTR's alleged negligent entrustment. Summary judgment was proper.

- a. There is no contemporaneous observational evidence that Turner was apparently intoxicated at the time of the rental.

The linchpin of BTR's summary judgment motion was the lack of any contemporaneous observational evidence of Turner's alleged apparent intoxication, an essential element of Weber's negligent entrustment case on which Weber would have the burden of proof at trial. To have survived summary judgment, or to prevail on appeal, Weber must produce admissible evidence that Turner's intoxication was so apparent that BTR knew, or should have known, that Turner was a danger to society behind the wheel of the rental van. *Mejia*, 45 Wn. App at 704. Weber did not make such a showing below, and cannot make such a showing here.

First, Weber asserts Turner was high on methamphetamine and showing obvious signs of impairment at

the time of the rental. App. Br. 16. In fact, the record reveals that though Turner had smoked methamphetamine (quantity unknown) approximately nine hours before the rental, he was not acting abnormally and displayed no signs of apparent intoxication or aberrant behavior during the transaction at the BTR office. This is supported by the declarations of the three BTR personnel who interacted with Mr. Turner and observed his appearance and conduct at the time the van was rented.

Weber maintains these declarations are self-serving, potentially untruthful and should be considered in light of the fact that BTR employees have a financial interest in turning a blind-eye to public safety. App Br. at 14. Weber further argues that this testimony “should not be permitted to prevail over independent evidence of impairment. . . .” App Br. at 15. However, Weber failed to come forward with any contemporaneous observational evidence of Turner’s alleged apparent intoxication.

Instead, Weber offered the declaration testimony of David Predmore, a forensic toxicologist from the Washington State Toxicology lab. Predmore executed a declaration in opposition

to BTR's Motion for Summary Judgment, stating that, more probably than not, Tuner would have displayed subtle outward signs of impairment at the time of the rental. CP 253. Predmore's based his conclusion on Turner's deposition testimony and his review of a number of reports generated after the subject accident, including Turner's hospital records, the Washington State Toxicology Laboratory report showing the results from Turner's blood draw, the arresting officer's observations and a police video taken of Turner at the time of his arrest. CP 253. From these materials, Predmore ran a "retrograde analysis" using the half-life of methamphetamine to determine Turner's probable methamphetamine levels and draw conclusions regarding his "probable" appearance at the time of the rental. CP 253-54.

In *Faust*, the Washington Supreme Court addressed the question of what type of evidence a plaintiff in an alcohol over-service case must produce to demonstrate that the tortfeasor was "apparently under the influence" in order to survive summary judgment. The court ultimately held that such evidence must be direct, observational evidence at the time of the alleged over-

service or by reasonable inference deduced from observation shortly thereafter. *Faust*, 167 Wn.2d at 538-41. The court also affirmed prior case law that held that a combination of post-accident observational evidence, expert testimony and BAC test results were *insufficient* to defeat a summary judgment motion. *Id.*, citing *Purchase v. Meyer*, 108 Wn. 2d 220, 223, 737 P.2d 661 (1987) (emphasis added). The court expressly noted that “because the standard of liability [for over-service] revolves around appearance, any direct or circumstantial evidence must address *actual* rather than assumed appearance (emphasis added).” *Id.* at 541.

Here, the testimony of all three BTR agency personnel who came in contact with Turner at the time of the rental was that Turner did not appear to be acting out of the ordinary and that he did not appear to be obviously intoxicated. On the contrary, Turner appeared to be “calm” during the entire transaction. CP 123, p. 39, ll. 22-24. Weber did not present any contrary contemporaneous observational evidence that Turner appeared intoxicated or otherwise affected at or about the

time of the rental. There were factual disputes regarding Turner's appearance or behavior at the time he rented the van.

Moreover, the accident happened approximately 23 hours after the rental. CP 130-31. During the time between the rental and the accident, Turner admittedly consumed additional methamphetamine. CP 190, p. 21, ll. 1-12; CP 183, p. 108, ll. 2 - 8, and amended answer on correction sheet at CP 185. Given the significant time delay and Turner's additional consumption of methamphetamine, Weber cannot utilize distant post-accident observation evidence of Turner's appearance, conduct or the blood test results as proof of his apparent intoxication at the time of the rental. To this same point, Weber cannot rely on expert testimony to create a question of fact as to how Turner would have theoretically appeared to BTR rental employees a full day prior to the accident to create a question of fact.

Similarly, Weber cannot point to the alleged discrepancies between Turner's signature on his driver's license and his signature on the rental agreement to conclude that any reasonable person would have identified Turner as impaired. App. Br. 18.

Again, applying the rationale explicated in *Faust*, the unchallenged testimony of the three BTR agency personnel is the only evidence of Turner's appearance or behavior that may be considered. Moreover, the plain language of the statute cited by Weber regarding the requirement that vehicle rental employees compare the signature on the renter's drivers license to one written in his or her presence indicates that the purpose of the statute is to confirm the renter's identity, not the renter's sobriety. RCW 46.20.220(2).³ Identity of the driver of the van that struck and injured Weber is undisputed and is not at issue in this case. Turner was the person driving the van that struck Weber.

Finally, Weber attempts to concoct a question of fact by claiming that had the BTR agency personnel been properly trained, they would have had reasonable doubts or suspicions about Turner's fitness to drive a cargo van. App. Br. 19. However, there is simply no contemporaneous observational evidence in the record that Turner was acting out of the ordinary

³ RCW 46.20.220(2) reads: It shall be unlawful for any person to rent a motor vehicle to another person until he has inspected the vehicle driver's license of such other person and compared and verified the signature thereon with the signature of such other person written in his presence;

or otherwise apparently impaired, or that the BTR agency staff overlooked any apparent signs of drug intoxication while Turner was at the BTR Seattle Agency. The only “evidence” of visible signs of apparent intoxication submitted by Weber is the speculation in Predmore’s declaration, which, for the reasons set forth above is inadmissible and therefore insufficient to defeat a summary judgment motion in light of direct, observational testimony. *See Faust*, 167 Wn.2d at 639.

Weber’s opposition to BTR’s summary judgment motion cavalierly dismissed and disregarded *Faust* and claimed that BTR was improperly applying the “apparent intoxication” standard from liquor over-service cases in a negligent entrustment case. Whereas here, liability turns on apparent intoxication, the standard for admissibility of evidence of apparent intoxication in liquor over-service cases is directly applicable and on point. The trial court apparently agreed. BTR respectfully requests this court apply *Faust* and uphold the trial court’s decision on these same grounds.

- b. There is no evidence BTR knew, or should have known, that Turner was a drug user and therefore likely to become a danger behind the wheel.

Weber claims BTR should have known Turner was a drug user and therefore it was reasonably likely he would drive the vehicle in an impaired state. App. Br. 20. In support of this theory, Weber points to (1) copious tattoos on Turner's arms, some of which depict drug use; (2) darkened fingertips on his left hand; and (3) "track marks"⁴ observed on Turner's left arm by a police officer a day after the rental. *Id.* All of this purported evidence is irrelevant and inadmissible.

BTR staff should not be expected to conduct a close visual evaluation and content analysis of a potential renter's body art,

⁴ Weber's Brief makes numerous references to Turner's alleged "track marks." Use of such term is hyperbole and not supported by the physical description in the record. Track marks result from scarring following "repeated injections into subcutaneous veins. Track marks are a linear area of tiny, dark punctuate lesions (needle punctures) surrounded by an area of darkened or discolored skin due to chronic inflammation." Patrick G. O'Connor, MD, MPH, *Drug Use and Dependence: Injection Drug Use*, MERCK MANUALS ONLINE MEDICAL LIBRARY (Whitehouse, N.Y., Merck & Co., Inc., July 2008 revision, accessed May 13, 2010) <<http://www.merck.com/mmpe/sec15/ch198/ch198c.html>. The officer who inspected Turner shortly after arrest did not note any scarring from chronic inflammation or darkened discolored skin on Turner's arm, his report described "TWO FRESH, RED INJECTION MARKS (emphasis added)." CP 304. Given that the officer specifically described the injection marks as being "fresh," there is no reasonable inference that the marks were present 24 hours earlier at the time of rental.

engage in a discussion regarding the symbolic significance of various tattoos, and then make a judgment about the potential renter's fitness to drive a van. Furthermore, there is no duty that BTR staff review a patron's skin for any potential blemishes, puncture marks, burns or irregularities and try to determine whether they are related to drug use. Notably, Weber's own understanding of the symbolic meaning of Turner's tattoos comes about through Turner's sworn deposition testimony, after counsel had ample time to scrupulously study photos of his body art. This is quite a different context than the situation under which BTR agency personnel interacted with Turner.

Similarly, there is absolutely no evidence that the alleged "track marks" on Turner's left arm were visible to BTR agency staff at the time of rental simply because they were noted as being "fresh" a day later by the police officer who was specifically tasked with gathering evidence of vehicular assault against Mr. Turner after the accident.

Weber cites *Mitchell v. Churches*, 119 Wash. 547, 206 Pac. 6 (1922), for the proposition that negligent entrustment can be found even where the trustee is not incompetent at the time

of entrustment, but is only likely to become so. Notably, Weber identifies only this one case, decided nearly a century ago, for this proposition. Regardless, the facts in *Mitchell* are easily and fundamentally distinguishable.

In *Mitchell*, the trustee and the car owner had a long-standing personal relationship. 119 Wash at 548. The trustee expressly advised the owner on the day he borrowed the car that he was traveling to a “drinking party.” *Id.* at 549. The owner knew the trustee had a quart of whisky with him when he left with the vehicle and that it was his intent to go on a “spree,” driving while under the influence. *Id.*

In the present case, there is no pre-existing relationship between the parties that might have altered BTR to Turner’s propensities or intentions. Similarly, Turner did not set his meth pipe on the BTR agency countertop or advise the agency personnel of his intent to get high and drive the vehicle. Instead, Weber argues that BTR employees should have known, just by looking at Turner, that he was a drug user and therefore likely to become intoxicated. The court’s holding in *Mitchell* does not, however,

place such extraordinary and unreasonable expectations on BTR staff.

- c. BTR's alleged failures to follow internal policy did not breach any purported duty to Weber.

Weber maintains BTR violated its own policies by: (1) failing to obtain proper identification from Turner; and (2) failing to confirm whether Turner's license was "actually" valid, as opposed to facially valid. App. Br. 22. As a result, Weber claims BTR breached a duty to her.

- (1) BTR's failure to request a second form of identification from Turner did not breach any duty owing to Weber, nor was it the proximate cause of the van/pedestrian accident.

As argued to the trial court, Weber's claim regarding BTR's failure to request two forms of identification constitutes a general negligence claim. CP 030. That is unless Weber is alleging that BTR would have been alerted to Turner's propensity as a reckless, heedless, or incompetent individual had it asked for a second form of ID. Although likely unnecessary, BTR addresses the latter argument briefly herein.

The mere occurrence of an accident and injury does not inherently lead to an inference of negligence. *Marshall v. Bally's*

Pacwest, Inc. 94. Wn. App 372, 377, 972 P.2d 475 (1999). To establish a prima facie claim for negligence, the plaintiff must prove four elements: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered legally compensable damages. *Id.* at 378. Whether or not the duty element exists in the negligence context is a question of law. *Hertzog v. Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1991). Similarly, proximate cause consists of "cause-in-fact" and "legal causation." *Id.* at 282. Although generally a question for the fact finder, the existence of proximate cause may be determined as a matter of law if reasonable minds could not differ. *Id.* at 275.

Cause in fact concerns the "but for" consequences of an act: those events the act produce in a direct, unbroken sequence, and which would not have resulted had the act not occurred. *Taggart v. State*, 118 Wn. 2d 195, 226, 822 P.2d 243 (1992). Legal cause "rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend." *Id.*

In order to prevail on a general negligence claim, Weber must show that: (1) BTR's failure to request two forms of ID from Turner constitutes breach of a duty of conduct owing to her; and (2) that BTR's failure was the "but for" and "legal" cause of the injuries she suffered. Weber can do neither.

It is true that BTR's corporate policy at the time of the accident required a cash-paying customer to present two forms of identification at the time of the rental. It is also true that the local BTR agency that rented Turner a vehicle only asked for one form of ID. However, this failure does not constitute breach of any duty owed by BTR to Weber, nor did it proximately cause the subject accident.

Examination of a second form of ID would not have changed anything in this case whatsoever. Turner was who he said he was. Turner was not using a fake Oregon driver's license. There is no dispute that the man who rented the van was, in fact, Timothy C. Turner. Hence, Weber cannot establish that BTR's failure to follow their internal policy of asking for an additional form of ID to confirm Turner's identity constitutes a breach of any duty owing to her or the general public.

Even if Weber could demonstrate breach, she cannot demonstrate that BTR's failure to ask Turner to present a second ID was a proximate cause of the accident. This is because Turner had an additional form of identification, a valid Washington ID card, in his possession at the time of the rental. Accordingly, BTR would not have had any reason to deny Turner the opportunity to rent the van. In other words, Weber cannot show that "but for" BTR's failure to ask for a second form of ID, the accident would not have occurred. On these facts, it would fly in the face of both public policy and common sense to hold BTR liable for the injuries Turner inflicted on Weber. Reasonable minds cannot differ on the question of causation. Accordingly, the trial court properly dismissed Weber's claim that BTR's failure to ask for two forms of identification was evidence of negligence.

To the extent Weber is arguing that BTR's failure to ask for two forms of ID is evidence of negligent entrustment, Weber's claim also fails. As set forth in the preceding section, a person can only be liable under a theory of negligent entrustment if that person knew, or should have known in the exercise of

ordinary care “that the person to whom the vehicle was entrusted is reckless, heedless, or incompetent.” *Mejia*, 45 Wn. App. at 704 (citing *Cameron v. Downs*, 32 Wn. App 875, 879, 650 P.2d 260 (1982)). Weber must therefore show that had BTR asked Turner to show the second form of identification, BTR would have been alerted to the fact that Turner was potentially dangerous, making it foreseeable the he would injure someone like Weber. There is nothing on the face of Turner’s Washington ID card that would have provided local BTR agency staff with such information. Again, summary judgment in favor of BTR was proper.

- (2) BTR did not have a duty to determine the “actual” validity of Turner’s Oregon driver’s license, and even if it did, Weber cannot establish that BTR’s failure to confirm Turner’s license status was a breach of the duty, or the cause of the accident.

Weber argues BTR’s failure to identify Turner’s Oregon driver’s license as suspended is evidence of negligent entrustment. Weber’s argument fails as a matter of law.

RCW 46.20.220 governs vehicle rental records. The statute states:

(1) It shall be unlawful for any person to rent a motor vehicle of any kind, including a motorcycle to any person unless the latter person is then duly licensed as a vehicle driver for the kind of motor vehicle being rented in this state, or in case of nonresident, then that he is duly licensed as a driver under the laws of the state or country of his residence except a nonresident whose home state or country does not require that a motor vehicle driver be licensed;

(2) It shall be unlawful for any person to rent a motor vehicle to another person until he has inspected the vehicle driver's license of such other person and compared and verified the signature thereon with the signature of such other person written in his presence;

(3) Every person renting a motor vehicle to another person shall keep a record of the vehicle license number of the motor vehicle so rented, the name and address of the person to whom the motor vehicle is rented, the number of the vehicle driver's license of the person renting the vehicle and the date and place when and where such vehicle driver's license was issued. Such record shall be open to inspection by any police officer or anyone acting for the director.

The requirements of RCW 46.20.220 are similar to BTR's internal policies and procedures. BTR rental customers must present a "valid driver's license." CP 163-67; CP 98, p. p. 26, l. 15 – p. 27, l. 19; CP 103-104. To confirm this, BTR agency personnel ask customers to present their license for inspection and determine whether the license is facially valid.

CP 120, p. 29, ll. 9 – 25. BTR agency personnel are trained to look for expired licenses, licenses with any marks or notations indicating the license has been suspended (for example a hole-punch), and licenses missing the state hologram (where applicable). Id. In these respects, Seattle Agency general manager Lori Luzader, complied with both RCW 46.20.220 and BTR internal protocol. Luzader asked Turner for his driver's license and he presented an unexpired, Oregon license that appeared valid on its face.

BTR did not have any information regarding Turner's past driving history or access to any information regarding his license status. Moreover, there were no circumstances shown that reflected any inability on his part to operate the van upon his arrival. BTR had no actual or constructive knowledge that Turner was even potentially reckless, heedless, or incompetent. BTR, therefore, satisfied its duty of ordinary care to Ms. Weber.

In opposition to BTR's motion for summary judgment, and again on appeal, Weber maintains that the "duly licensed" language in RCW 46.20.220 required BTR to determine Turner's actual licensing status. App Br. 24. To accomplish this, Weber

maintains BTR should have reviewed any number of on-line databases to obtain this information. Again, Weber's arguments fail.

With respect to RCW 46.20.220, any requirement for BTR to determine actual validity, rather than facial validity, goes beyond the clear intent of the statute. The statute was originally passed when there was no real-time manner to check the validity of a driver's license (i.e. there was no internet, searchable databases, etc.). S.B. 147, 25th Reg. Sess. (Wa. 1937). While this statute has been modified several times since 1937, the changes have not been relevant to the issue of whether real-time verification was contemplated by the legislature. *See e.g.*, Substitute S.B. 15, 40th Reg. Sess. (Wa. 1967) (adding motorcycles to the kinds of motor vehicles governed by the statute).

Notably, other states confronted with the question of whether a car rental agency has a duty to query a state agency about the status of a prospective renter's license or driving record have uniformly held that there is no such duty, or that it is the function of the legislature, not the courts to impose such a duty.

In *Cousin v. Enterprise Leasing, Co*, 948 So.2d 1287, 2007 Miss. LEXIS 39 (Miss. 2007) (CP 44-49)⁵, the Supreme Court of Mississippi was asked to determine whether the “then duly licensed” language in Miss. Code Ann. §63-1-67⁶ (which is virtually identical to RCW 46.20.220) required rental car companies to contact the local licensing agency to determine actual status. The Court found that the statute only placed a burden on rental companies to “accept facially valid, unexpired driver’s licenses” and that rental car companies could comply

⁵ All foreign case law cited herein is contained in the Clerk’s Papers, and cited immediately following the date of decision.

- ⁶
- (1) No person shall rent a motor vehicle to any other person unless the latter person is then duly licensed under the provisions of this article, or in the case of a nonresident, then duly licensed under the law of the state or country of his residence except a nonresident whose home state or country does not required that an operator be licensed.
 - (2) No person shall rent a motor vehicle to another until he has inspected the license of the person to whom the vehicle is to be rented and compared and verified the signature thereon with the signature of such other person written in his presence;
 - (3) Every person renting a motor vehicle to another person shall keep a record of the vehicle license number of the motor vehicle so rented, the name and address of the person to whom the motor vehicle is rented, the number of the vehicle driver’s license of the person renting the vehicle and the date and place when and where such vehicle driver’s license was issued. Such record shall be open to inspection by any police officer or employee of the commissioner.

with Section 63-1-67(1) by fulfilling the responsibilities mandated by Subsection (2), which requires inspection of license and signature, and Subsection (3), which requires the name and address of the renter. *Id.* at 1291.

In reaching its conclusion, the Court in *Cousin* referred to *Cowan v. Jack*, 922 So.2d 559, 2005 La. App. LEXIS 2885 (La. Ct. App. 4 Cir. 2005) (CP 50-59) and *Dortch v. Jack*, 2005 U.S. Dist. LEXIS 41115, 2005 WL 1279025 (SD Miss.) (CP 60-64). In those cases, the Court of Appeals of Louisiana and the United States District Court for the Southern District of Mississippi were both interpreting North Carolina Gen. Stat. §20-34. The statute prohibited a person from authorizing or knowingly permitting a motor vehicle “owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this Article.” The Courts found that, “if a customer presents a valid driver’s license, the rental company is under no duty to inquire further.” *Id.* at 11.

Similarly, in *Nunez v. A & M Rentals, Inc.*, 63 Mass App. Ct 20, 822, N.E.2d 743 (2005) (CP 65-67), the plaintiff brought a claim of negligent entrustment against the defendant

rental company (A & M) on the ground that it rented a car to a driver with a suspended license, who subsequently killed her son while driving the vehicle. *Id.* at 21. Plaintiff's claim was based on Mass. Gen. Laws ch. 90, § 32C, which states "No lessor shall lease any motor vehicle until the lessee shows that he or his authorized operator is the holder of a duly issued license to operate the type of motor vehicle or trailer which is being leased." The Appeals Court of Massachusetts held that A & M had no duty to verify the status of the license with commercially available technology because the legislature was silent on the issue, and the court would not impose a further duty on the rental company.

Consistent with the aforementioned decisions refusing to impose a duty on rental agencies to determine actual validity of a license, other courts have similarly held that expanding the scope of a rental company's duty of ordinary care is the responsibility of the legislature. For example, California rental agencies are required by state statute to inspect driver's licenses to determine facial validity and evaluate signatures. California Vehicle Code §14608. However, California courts have refused to extend the

duty to require car rental agencies to determine whether customers are familiar with the rules of the road, noting it is for the legislature, not the court, to determine whether tort liability should be based on an individual's membership in a class. *Lindstrom v. Hertz Corp*, 81 Cal App 4th 644, 649-651, 96 Cal Rptr. 2d 874 (2000) (CP 69-73).

Likewise, the First Circuit Court of Appeal in Louisiana has held that "presentation of valid license satisfies the lessor's duty of ordinary care in inquiring as to the individual's ability to operate a motor vehicle." *McCarroll v. U-Haul*, 526 So.2d 484, 489, 1998 La. App. LEXIS 1176 (1988) (CP 74-78). Accordingly, when presented with the question of whether to impose a duty on a rental agency to require testing of a prospective vehicle lessee, the court stated that it was "within the province of the legislature to so decree and set the appropriate standards." *Id.*

BTR asks this court to apply the reasoning consistently set forth in the aforementioned cases, and reject Weber's contention that RCW 46.20.220 imposed a requirement on BTR to determine Turner's "actual" driver's license status.

At oral argument on BTR's motion for summary judgment, the trial court *sua sponte* raised the issue of whether BTR's policies and training materials requiring a "valid license" and BTR's sister company's (Budget Car Rental) website representation regarding checking driver's license records of potential renters created a duty incumbent upon BTR to check Turner's driver license status using an on-line service, even though BTR did not have the ability to do so. CP 429-430. This "creation of a duty" issue was not raised by Weber in opposition to BTR's summary judgment motion.

Following the summary judgment hearing, BTR contacted Charles L. Sellers, an employee of BTR's sister company, and Edward Darmody, the founder and president of TML Information Services, Inc. ("TML") to determine what information would have been available through a search of TML. Both Sellers and Darmody confirmed that a search would not have shown that Turner's license was suspended, nor would such a search have revealed Turner's criminal record. CP 438; CP 440-43. Hence, even if BTR's sister company's policies and had created a duty, as theorized by the Court, a TML search for

Turner's driver's Oregon license status would not have produced any information showing that Turner's Oregon license was suspended. Accordingly, the failure to perform a TML search could not be a proximate cause of the accident. The trial court agreed and granted BTR's motion. BTR respectfully requests that this court uphold the summary judgment order on these same grounds.

Notably, although it is true that Turner's license was suspended at the time of the accident, the suspension was based solely upon an unpaid traffic ticket, and not because of any incompetent, reckless, negligent, or heedless act on Turner's part. As there is no indication the proximate cause of the accident was related to Turner's license being suspended, Weber cannot demonstrate BTR was the actual or legal cause of the injuries she suffered. This analysis is unchanged by Weber's reference to a legislative finding that suspended drivers are more likely to cause accidents. *See* RCW 46.55.105 (regarding impounding vehicles). This is particularly true, whereas here, Weber offers no explanation for why such a legislative finding precludes summary judgment.

2. The trial court properly considered the declarations of Charles Sellers and Edward Darmody in deciding BTR's motion for reconsideration and granting summary judgment.

Weber maintains the trial court improperly considered the declarations of Charles Sellers and Edward Darmody submitted with BTR's motion for reconsideration. App. Br. 28. Specifically, Weber contends that the testimony is inadmissible under KCLR 26(b)(6) on the grounds that Sellers and Darmody were not disclosed consistent with the case scheduling order. *Id.* Although Weber acknowledges that KCLR 26(b)(6) gives the trial court discretion to admit such testimony, Weber claims it was done without good cause shown as required by the rule.

Weber's suggestion that BTR cannot establish good cause is based on her contention that BTR had been on notice that Weber's claim of negligence was founded, in part, on BTR's failure to confirm whether Turner had a valid drivers license. App. Br. 28. As an initial matter, BTR has consistently argued that it has no duty, under state law or its internal policies, to confirm "actual" license status at the time of rental. Moreover, until the Peyovich declaration submitted with her opposition to summary judgment, Weber had never identified a particular

database or other source which she believed BTR should have utilized to ascertain the “actual” validity of Turner’s Oregon driver’s license.

In fact, it was not until the trial court posed the question of whether or not BTR’s internal policy of requiring a renter provide a “valid license,” coupled with BTR’s sister company’s representation regarding a policy of checking validity of license records (through TML), created a duty on BTR to check Turner’s driver license status, that the need to contact someone with TML or Budget’s sister company arose. BTR obtained the requested information and submitted the subject declarations in direct response to the duty issue raised *sua sponte* by the trial court at the summary judgment hearing. There is no better example of “good cause.”

Weber’s claim that she should have been entitled to depose Sellers and Darmody is equally hollow. Had Weber developed the theory of “creation of a duty” on her own, there might have been a reason to disclose these individuals prior to discovery cut off. Given the claims asserted by Weber, however, there was no such reason. In any event, had Weber been

afforded the opportunity to depose Sellers and Darmody, she could not have elicited any information to contradict the fact that Budget's sister company did not have access to any Oregon driver or criminal records through TML. CP 438, CP 441.

E. CONCLUSION.

Weber asks this court to reverse and remand on the grounds that when all the facts are viewed together "as part of a constellation of facts and circumstances," a reasonable jury might conclude that had BTR exercised ordinary care, it should have discovered that Turner was reckless, heedless or incompetent. App. Br. 30. Weber ignores, however, that she failed to establish the existence of a legally cognizable duty, prove its breach, or show proximate causation with respect to her allegation that BTR negligently entrusted a rental van to Turner. The order granting summary judgment was proper in all respects. BTR respectfully requests that this court affirm the trial court's order granting BTR's motion for summary judgment.

SUBMITTED this 17th day of May, 2010.

KARR TUTTLE CAMPBELL

By 
Steven D. Robinson, WSBA #12999


Celeste Mountain Monroe, WSBA #35843

APPENDIX

(1) It shall be unlawful for any person to rent a motor vehicle of any kind including a motorcycle to any other person unless the latter person is then duly licensed as a vehicle driver for the kind of motor vehicle being rented in this state or, in case of a nonresident, then that he is duly licensed as a driver under the laws of the state or country of his residence except a nonresident whose home state or country does not require that a motor vehicle driver be licensed;

(2) It shall be unlawful for any person to rent a motor vehicle to another person until he has inspected the vehicle driver's license of such other person and compared and verified the signature thereon with the signature of such other person written in his presence;

(3) Every person renting a motor vehicle to another person shall keep a record of the vehicle license number of the motor vehicle so rented, the name and address of the person to whom the motor vehicle is rented, the number of the vehicle driver's license of the person renting the vehicle and the date and place when and where such vehicle driver's license was issued. Such record shall be open to inspection by any police officer or anyone acting for the director.

[1969 c 27 § 1. Prior: 1967 c 232 § 9; 1967 c 32 § 28; 1961 c 12 § 46.20.220; prior: 1937 c 188 § 63; RRS § 6312-63.]

Notes:

Allowing unauthorized person to drive: RCW 46.16.011, 46.20.024.

Helmet requirements: RCW 46.37.535.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 17 day of May, 2010, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered by messenger to the following counsel of record:

Anthony A. Todaro
Peterson Young Putra
1501 Fourth Avenue, Suite 2800
Seattle, WA 98101

Counsel for Plaintiff-Appellant Gretchen Weber

I further certify that on the 17th day of May, 2010, I caused a true and correct copy of the foregoing document, "Brief of Appellant," to be served upon K.C. Webster, counsel for Defendant Timothy Turner, via e-mail, as previously agreed, transmitted to the following e-mail address:

kc@phillipswebster.com

DATED this 17th day of May, 2010, at Seattle, Washington.



Steven D. Robinson

2010 MAY 17 PM 5:55
PHILLIPS WEBSTER