DIVISION ONE
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| RICARDO SIERRA, on behalf of the heirs and the Estate of SILVANO SIERRA (deceased), | 1 CA-CV 08-0739 |
| | DEPARTMENT E |
| Plaintiff/Appellant, | **MEMORANDUM DECISION** |
| v. | (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) |
| STEWARD VENTURES, INC. dba ALAMO RENT-A-CAR, | |
| Defendant/Appellee. | |

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-006009

The Honorable Glenn M. Davis, Judge

**AFFIRMED**

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Lowell A. Jensen PLC — Safford
By Lowell A. Jensen
Attorneys for Plaintiff/Appellant

Thomas, Thomas & Markson PC — Phoenix
By Benjamin C. Thomas
And Michael G. Kelley
Neal B. Thomas
Attorneys for Defendant/Appellee

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**O R O Z C O**, Judge

**¶1** This is a wrongful death case. Ricardo Sierra (Sierra), on behalf of the heirs and estate of Silvano Sierra, appeals from a grant of summary judgment in favor of Steward Ventures, Inc. (Steward), doing business as Alamo-Rent-A-Car (Alamo). Finding no genuine issue of material fact or legal error, we affirm the judgment.

## FACTS AND PROCEDURAL BACKGROUND

**¶2** This case arises out of a fatal head-on crash which occurred on U.S. Highway 70 during the early morning hours of May 23, 2005. The colliding cars were operated by Silvano Sierra, the deceased, and Wendell Kimbell (Kimbell).

**¶3** Kimbell rented his vehicle approximately three hours earlier from Alamo's office at Phoenix's Sky Harbor Airport. Kimbell presented a valid California driver's license and paid with a credit card. David Guzik (Guzik), a Steward rental agent, reviewed the license and compared the signature on it with Kimbell's signature on the rental agreement. Guzik also reviewed the license photo and verified that it was of Kimbell.

**¶4** Guzik stated in an affidavit that he observed no indication that Kimbell was unfit to operate the vehicle at the time of the rental transaction. Specifically, Kimbell: (1) did not have bloodshot or watery eyes; (2) did not smell of alcohol; (3) did not slur his speech; (4) appeared alert, awake, and coherent during the transaction; and (5) walked away from the

rental counter carrying two large pieces of luggage without difficulty. The transaction occurred at approximately 11:40 p.m. Other Steward employees working that evening – including another rental agent, two bus drivers, and a security gate attendant – did not observe any customer who appeared impaired. The accident occurred at approximately 2:47 a.m.

**¶5** On December 28, 2005, Sierra filed a wrongful death action against Steward and Kimbell[1] in Graham County Superior Court. The complaint alleged Steward had negligently entrusted the vehicle to Kimbell and that its "method of operation did not utilize safety measures and/or devices to screen drivers from which it could reasonably be anticipated that dangerous conditions would regularly arise." Steward answered the complaint and succeeded in changing venue to Maricopa County Superior Court. Sierra amended the complaint to name Guzik as a defendant based on negligent entrustment.

**¶6** On May 21, 2007, Steward filed a motion for summary judgment. On August 2, 2007, Guzik joined Steward's motion for summary judgment. The trial court ruled that, as a matter of law, Steward had not negligently entrusted the rental vehicle to Kimbell as there was "no evidence at all submitted upon which a jury could conclude that [Kimbell] more probably than not did in

[1] On November 15, 2006, after settling with Sierra, Kimbell was dismissed from the case with prejudice.

fact appear intoxicated and such conclusion could only be based upon pure speculation." The court granted summary judgment to Guzik on the same basis.

**¶7** The court stated that its ruling was only for a partial summary judgment and declined to rule as to whether Steward was liable as a matter of law regarding the issue of screening. The court found the following screening-related issues were not addressed by Steward's motion for summary judgment: (1) "whether there was a duty to adopt and use screening measures;" (2) "whether such measures were adopted;" and (3) "whether those screening measures could have been effective" to discover Kimbell's intoxication. The court then invited summary judgment briefing on Steward's alleged failure to utilize safety measures and/or devices to screen drivers. After briefing, the court granted summary judgment in favor of Steward on the issue of screening.

**¶8** The trial court entered a signed judgment. Sierra filed a timely notice of appeal and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

**DISCUSSION**

**¶9** Sierra raises two issues on appeal: (1) whether the trial court erred in granting summary judgment in favor of Steward on Sierra's negligence claim for failing to use safety

measures and/or screening devices; and (2) whether the trial court erred in failing to find a duty, negligence and causation in relation to Steward's overall mode-of-operation.[2]

**Summary Judgment**

**¶10** We review a trial court's grant of summary judgment de novo. *State v. Mabery Ranch Co., L.L.C.*, 216 Ariz. 233, 239, ¶ 23, 165 P.3d 211, 217 (App. 2007). Summary judgment is proper if no genuine issue of material fact exists and "the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We may affirm "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required," that no reasonable person could find for its proponent. *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

**Duty**

**¶11** Sierra makes two arguments for why Steward was negligent: (1) Steward was negligent in not using safety measures and/or screening devices to detect impaired customers; and (2) Steward was negligent in its overall mode-of-operation because it failed to adequately equip its employees with

[2] Sierra does not appeal the trial court's grant of summary judgment regarding Sierra's negligent entrustment claim.

training and procedures to detect impaired drivers.[3] Both arguments necessarily depend on whether Steward owed a duty to third parties, such as Sierra, to screen customers for the detection of possible impairment. *See Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007) (stating that to maintain a valid negligence claim, a plaintiff must prove the defendant owed a duty to the plaintiff to conform to a certain standard of care).

**¶12** As the plaintiff, Sierra has the burden of proving the existence of a duty. *Smith v. Johnson*, 183 Ariz. 38, 41, 899 P.2d 199, 202 (App. 1995). Whether a duty exists, however, is decided by the court. *Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n, Inc.*, 177 Ariz. 256, 261, 866 P.2d 1342, 1347 (1994). Accordingly, the existence of a duty is a question of law to be reviewed de novo. *Wertheim v. Pima County*, 211 Ariz. 422, 424, ¶ 10, 122 P.3d 1, 3 (App. 2005).

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[3] Sierra uses "mode-of-operation" to refer to the hiring, supervision, and training of its employees. To the extent Sierra's "mode-of-operation" argument is based on the "mode-of-operation" rule, we reject it. The "mode-of-operation" rule is only applied in premises liability cases. *See Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 139, ¶ 8, 149 P.3d 761, 763 (App. 2006) (applying the mode-of-operation rule in premises liability cases in which a plaintiff may not be able to trace the origins of an accident; thus, courts look to a business's particular mode-of-operation and whether the business could reasonably anticipate the hazardous condition that caused the accident). The injury in this case did not occur on Steward's premises or result from a hazardous condition on Steward's premises. Accordingly, we find the "mode-of-operation" rule does not apply in this case.

**¶13** Sierra cites no legal or factual basis establishing the duty a rental car company owes in Arizona or anywhere else.[4] Nevertheless, Sierra argues that "changing social conditions require recognition of a duty which extends to innocent third parties and which is based on the relation of the [rental vehicle] supplier . . . and his patron." *Ontiveros v. Borak*, 136 Ariz. 500, 508, 667 P.2d 200, 208 (1983). The *Ontiveros* court found an evolution in the case law toward imposing tavern licensee liability. *Id.* Our research yields no such trend concerning the standard of care for rental car companies.

**¶14** In Arizona, rental car companies owe a duty to third parties to conform to two standards of care. First, rental car companies may not entrust a motor vehicle to a person whom they know, or should know, is incapable of driving safely. *Acuna v. Kroack*, 212 Ariz. 104, 110, ¶ 22, 128 P.3d 221, 227 (App. 2006). This standard of care reflects Sierra's original claim of negligent entrustment. A negligent entrustment claim is "predicated on [the owner's] knowledge of [the driver's] driving habits at the time that she gave him permission to drive the

[4] Industry practice or custom may supply some evidence of the appropriate standard. *See Erlich v. First Nat'l Bank of Princeton*, 208 N.J.Super. 264, 505 A.2d 220, 234 (Ct.Law. Div.1984). Sierra supplied no evidence whatsoever from persons employed in the rental car industry about what standard is followed, nor did Sierra provide testimony as to the training and procedures other rental car companies follow. Accordingly, we cannot consider industry practice or custom in making our determination of the standard of care.

car." *Id.* at 113, ¶ 33, 128 P.3d at 230, *quoting Picard v. Thomas*, 60 Mass.App.Ct. 362, 802 N.E.2d 581, 587 (2003). However, this standard of care does not require rental car companies to screen customers for detection of possible impairment.

**¶15** Second, Arizona courts have adopted A.R.S. § 28-3472 (2004) to require rental car companies to verify a potential renter's driver's license.[5] *Christy v. Baker*, 7 Ariz.App. 354, 355-56, 439 P.2d 517, 518-19 (1968) (finding a violation of the precursor statute to § 28-3472 established negligence *per se*; however, also finding no liability based on a lack of proximate causation); *but cf. Tellez v. Saban*, 188 Ariz. 165, 172-73, 933 P.2d 1233, 1240-41 (App. 1996) (finding a violation of the precursor to § 28-3472 was not negligence *per se*, but created a duty for rental car companies to inquire further when a renter fails to produce a driver's license). Like the standard of care reflected in a negligent entrustment claim, this standard of

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[5] According to A.R.S. § 28-3472.B:

> A person shall not rent or lease a motor vehicle to another person until the person inspects the driver license of the other person and compares and verifies the signature on the license with the signature of the other person that is written in the person's presence.

care does not require rental car companies to screen customers for detection of possible impairment.

**¶16** Furthermore, we decline to expand a defendant's duty in the absence of some legislative authority. *Henning v. Montecini Hospitality, Inc.,* 217 Ariz. 242, 246, ¶ 13, 172 P.3d 430, 434 (App. 2007) ("We would exceed our authority were we to substitute our own public-policy determinations for those of the legislature.").

**¶17** We hold Steward owed no duty to screen customers for detection of possible impairment. Accordingly, Steward was not required to implement safety measures and/or screening devices to detect impairment. By extension, Steward was under no obligation to hire, supervise, or train its employees to detect impairment. In making this determination, we note that Steward still owed a duty to conform to the standard of care reflected by a negligent entrustment claim. This decision simply rejects Sierra's proposed expansion of the duty a rental car company owes to third persons.[6]

[6] Because we hold Steward owed no duty to Sierra to screen for impairment, we decline to address Sierra's arguments regarding foreseeability, proximate cause, and the existence of a superseding intervening cause.

## CONCLUSION

**¶18** For the reasons stated above, we affirm the trial court's grant of summary judgment in favor of Steward.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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PHILIP HALL, Presiding Judge

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DONN KESSLER, Judge