IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK KELLY; MARY TAYLOR-KELLY, individually and as the guardians for the minor children JESSICA KELLY and BRETT KELLY, Appellants, v. JANICE L. RICKEY and JOHN DOE RICKEY, husband and wife, and the marital community composed thereof, <u>Respondents.</u>	)	NO. 66431-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 30, 2012

Lau, J. — Mark Kelly and Mary Taylor-Kelly appeal the trial court's summary judgment order dismissing their negligent entrustment personal injury lawsuit. The case stems from a car accident in which Robert Kaloger—driving a car registered to his roommate, Janice Rickey—crossed the center line of SR 96 and hit the Kellys' van head on, killing Kaloger and injuring the Kellys. Because the Kellys present no material fact issues regarding whether Rickey knew or reasonably should have known that Kaloger was a reckless, heedless, or incompetent driver, we affirm the summary

judgment dismissal order.

FACTS

We construe the facts and reasonable inferences most favorably to the Kellys. On December 24, 2006, Robert Kaloger was driving eastbound on SR 96 when he crossed over the center line and struck a Toyota Sienna van head-on. In the van were Mark Kelly (the driver), his wife Mary Taylor-Kelly, and their two children (collectively "the Kellys"). The Kellys suffered physical and emotional injuries, and their van was damaged. Kaloger later died of his injuries at Harborview Medical Center. Witnesses reported seeing Kaloger "cross[ing] the center line at least 6 times" and swerving "all over the road" prior to the accident. Those same witnesses also reported seeing what appeared to be illegal drug paraphernalia in Kaloger's hand after the accident. Responding police officers found illegal drug paraphernalia next to Kaloger's driver's seat and a pipe commonly used to smoke controlled substances. Kaloger's autopsy and toxicology report indicated .09 mg/L of methamphetamines in his body at the time he died. The Kellys' expert witness, Dr. Jennifer Souders, testified:

> 3. It is my expert medical opinion that Robert Kaloger was impaired or otherwise significantly affected by methamphetamines at the time that the car he was driving struck the car in which the Kelly family was riding on December 24, 2006. I base this conclusion on the several eye witnesses accounts in the record as to Mr. Kaloger's driving behavior of swerving in and out of his lane. Such behavior is consistent with someone affected by methamphetamines.
>
> 4. Mr. Kaloger's toxicology report, indicating a .09 mg/L level of methamphetamines on December 24, 2006, is also consistent with Mr. Kaloger being under the influence of methamphetamines. . . .

Kaloger drove a 1991 Honda Prelude registered to his roommate, Janice Rickey, when the accident occurred. Rickey, a registered nurse, met Kaloger at Delta

Rehabilitation Center in Snohomish County where they both worked. Kaloger's adoptive mother, Kathy Wilson, also worked at Delta. In 2005, Wilson told Rickey that Kaloger was homeless. Rickey invited Kaloger to live with her. About two months before the accident, Rickey purchased and registered the Honda Prelude in her name. She testified in her deposition that she bought the car as a gift for Kaloger. Rickey acknowledged legal ownership of the car, paying the insurance premiums and a car repair bill; Kaloger paid for the gas. Rickey testified that she never drove the car, did not keep a key to it, and only rode in it once. Rickey described Kaloger's driving ability on that occasion as "excellent."

As to her knowledge about Kaloger's drug use, Rickey spoke multiple times to Wilson about Kaloger's prior drug use before he moved in. Rickey said that Wilson told her Kaloger "had [drug] problems for years" but gave no specifics. Rickey explained that by December 24, 2006, she knew Kaloger had at least one criminal conviction and a sex offender registration requirement. She knew nothing more about Kaloger's criminal history or driving record. Rickey never asked Kaloger about his criminal or driving records.

Rickey said she had not seen Kaloger for at least three days before the accident because they worked different hours. Rickey described the last time she saw Kaloger alive, "he seemed completely sober and normal" and noted no signs of intoxication or being under the influence of any substance. She also testified to her familiarity with the symptoms of methamphetamine use, including appetite loss and long periods without sleep. She never observed Kaloger exhibit any of these symptoms, appear intoxicated,

or possess drug paraphernalia. Rickey testified that Kaloger admitted to "falling off the wagon:"

> Q. Were you aware that Mr. Kaloger ingested methamphetamines prior to December 24, 2006?
> A. One time.
> Q. So you knew prior to December 24, 2006 that Mr. Kaloger had what, smoked meth?
> A. Yes.
> Q. How is it that you came to know that?
> A. I came home from work and his head was shaved, and I said, What happened?
> And he said – it's all hearsay, but, anyway, he said, I messed up. So I shaved my head.
> And I said, what do you mean, you messed up?
> And he said, Well, I fell off the wagon.
> Q. I'm sorry?
> A. I fell off the wagon.
> Q. What else did you say? I didn't hear that other part.
> A. That's how he put it. I thought he was talking about alcohol, but I never saw him drink anything but soda or water.[1]

The Kellys sued Rickey in October 2009, alleging negligent entrustment and respondeat superior.[2] The Kellys alleged that Rickey knew or should have known that Kaloger was not competent to properly operate the car. Rickey successfully moved to dismiss this claim on summary judgment. The Kellys appeal.

STANDARD OF REVIEW

We review a summary judgment order de novo, performing the same inquiry as the trial court and considering facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45

[1] The parties dispute whether Rickey meant methamphetamines or alcohol.

[2] The respondeat superior claim was dismissed and is not the subject of this appeal. See Appellant's Br. at 5 n.1.

P.3d 1068 (2002). The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements but must set forth specific admissible facts indicating a genuine issue for trial. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004); CR 56(e). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones, 146 Wn.2d at 300–01. "We do not weigh the evidence or determine the truth of the matter; the only question is whether there is a genuine issue for trial." Arreygue v. Lutz, 116 Wn. App. 938, 940-41, 69 P.3d 881 (2003). Summary judgment will be granted only if "reasonable persons could reach but one conclusion" from all the evidence. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

ANALYSIS

The Kellys contend the trial court erred by granting summary judgment because they raised material fact issues regarding (1) Rickey's ownership of the Honda Prelude, (2) Rickey's actual knowledge of Kaloger's "reckless behavior," (3) whether Rickey exercised ordinary care in entrusting the Honda to Kaloger, and (4) Kaloger's intoxication. They also claim these material issues of fact remain justifying a trial: (1) Rickey's purchase and registration of the Honda in her own name and payment of insurance premiums and repairs to the Honda, (2) Kaloger's intoxication on methamphetamines at the time of the crash, (3) Rickey's familiarity with Kaloger's drug abuse history based on conversations with Kaloger's mother, (4) Rickey's knowledge of Kaloger's current drug use, and (5) Rickey's failure to inquire about Kaloger's criminal

or driving records. Rickey responds the Kellys presented no evidence that he knew or reasonably should have known that Kaloger was a reckless, heedless, or incompetent driver.

"Negligent entrustment is a 'well-established' common law doctrine." House v. Estate of McCamey, 162 Wn. App. 483, 264 P.3d 253, 256 (2011) (quoting Christen v. Lee, 113 Wn.2d 479, 499, 780 P.2d 1307 (1989)). The party claiming negligent entrustment "must establish that the person entrusting the vehicle 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.'" House, 264 P.3d at 256 (quoting Mejia v. Erwin, 45 Wn. App. 700, 704, 726 P.2d 1032 (1986)). Negligent entrustment claims are "premised on foreseeability—the entrustor of a vehicle is liable only if a reasonable person could have foreseen the negligent acts of the entrustee." House, 264 P.3d at 256. When past actions or conduct form the basis for foreseeability of some harm, the conduct must be "'so repetitive as to make its recurrence foreseeable.'" Mejia, 45 Wn. App. at 706 (emphasis omitted) (quoting Curley v. Gen. Valet Serv., Inc., 270 Md. 248, 267, 311 A.2d 231 (1973)). To establish liability for negligent entrustment, the Kellys must show that Rickey knew—or in the exercise of ordinary care should have known—about the danger of relinquishing control of the Honda to Kaloger.

The Kellys maintain that a material issue of fact exists regarding whether Rickey knew or should have known that Kaloger was a reckless, heedless, or incompetent driver. Rickey responds that the negligent entrustment issue can be decided as a

matter of law because Kaloger was properly licensed to drive at the time of the accident and had no history of reckless, heedless, or incompetent driving.

Division Two of this court addressed negligent entrustment of a car in Mejia and emphasized that the proper inquiry is the entrustor's perception of the entrustee's competence to drive at the time of entrustment. In Mejia, Felix Erwin rented a car in his own name in 1980 with the understanding that his son, Phillip Erwin, would be driving it. Mejia, 45 Wn. App. at 701. While driving the rented car, Phillip was involved in an accident that injured his passenger, Mejia. Mejia, 45 Wn. App. at 701. Mejia brought a negligent entrustment claim against Felix and his wife. Mejia, 45 Wn. App. at 701. Phillip had been in several accidents and received several traffic citations between 1968 and 1980. Mejia, 45 Wn. App. at 702. There was no evidence that Felix knew about any of Phillip's infractions or accidents after 1969. Mejia, 45 Wn. App. at 702. The court held, "As a matter of law, Phillip's citations and accident 11 years before the date of the alleged entrustment were too remote in time to permit the question of Felix's alleged negligence to go to the jury." Mejia, 45 Wn. App. at 706. While acknowledging the general principle that negligence is generally a jury question, the court reasoned, "After some period of time, knowledge of an entrustee's previous reckless acts should have little bearing on the entrustor's present perception of the entrustee's competence to drive at the time of the entrustment." Mejia, 45 Wn. App. at 705.

Our Supreme Court has explained the importance of proving recklessness, heedlessness, or incompetence with respect to driving in negligent entrustment cases:

> While an automobile is not regarded in law as an inherently dangerous instrumentality, and the owner thereof is not generally liable for its negligent use

> by another, to whom he loans or intrusts it for that other's purposes, yet there is an exception to the rule. If the owner loans or intrusts his automobile to another person, even for that person's purposes, who is so reckless, heedless, or incompetent in his operation of automobiles as to render the machine while in his hands a dangerous instrumentality, he is liable if he knows, at the time he so intrusts it, of the person's character or habits in that regard.

Jones v. Harris, 122 Wn. 69, 74, 210 Pac. 22 (1922) (emphasis added). Appellate courts have consistently required negligent entrustment plaintiffs to show that the entrustor knew or should have known that the entrustee was a reckless, heedless, or incompetent driver. See Weber v. Budget Truck Rental, LLC, 162 Wn. App. 5, 13-14, 254 P.3d 196, review denied sub nom., Weber v. Turner, 172 Wn.2d 1015 (2011) (holding that even if an entrustee's physical features suggested past drug use, they did not show that the entrustee was likely to use illegal drugs while driving a rented van); House, 162 Wn. App. at 258 (concluding that the plaintiff/appellant "failed to present sufficient evidence from which a fact finder could reasonably conclude that [the entrustee] was an incompetent, reckless driver when [the entrustor] entrusted him with the pickup."); Kaye v. Lowe's HIW, Inc., 158 Wn. App. 320, 333, 242 P.3d 27 (2010) ("the trial court did not err by concluding that there was no evidence that [the entrustor] knew [the entrustee] was an incompetent driver or should have been on notice that [the entrustee] posed a danger."); Mejia, 45 Wn. App. at 704 ("there is no evidence from which one could conclude that [the entrustor] had personal knowledge that between 1969 and 1980 [the entrustee's] driving was not satisfactory, much less 'reckless, heedless, or incompetent.'"); Cameron v. Downs, 32 Wn. App. 875, 879, 650 P.2d 260 (1982) ("There is also evidence in the record that [the entrustor] knew, or in the

exercise of ordinary care, should have known that [the entrustee] was both a reckless driver and likely to be intoxicated.").

There is no dispute that Kaloger was properly licensed to drive at the time of the accident, so we presume he was a competent and qualified driver. See Vikelis v. Jaundalderis, 55 Wn.2d 565, 570, 348 P.2d 649 (1960) (noting in negligent entrustment case that "in view of the fact that Talis had a valid and subsisting driver's license, at the time, we must presume as a matter of law; that he was competent and qualified to operate his parents' car").

The Kellys contend, however, that Kaloger's criminal and driving records and drug use history establish a jury question on whether Rickey knew or should have known that Kaloger was a reckless, heedless, or incompetent driver when she entrusted the Honda to him. This argument fails for several reasons.

First, Kaloger's criminal convictions included first degree rape of a child, failure to register as a sex offender, and patronizing a juvenile prostitute. His criminal history shows no drug related criminal convictions. The Kellys fail to demonstrate how these offenses relate to Kaloger's driving and cite no authority that the types of crimes Kaloger committed reasonably establish that he is a reckless, incompetent driver under a negligent entrustment claim. In House, we noted that the plaintiff cited no authority that the types of crimes the entrustee committed (crimes against persons and property, nonmoving traffic violations, and marijuana possession offenses) reasonably established that the entrustee was a reckless or incompetent driver. House, 264 P.3d at 257.[3] "'Where no authorities are cited in support of a proposition, [we are] not

required to search out authorities, but may assume that counsel, after diligent search, has found none.'" McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 883, 167 P.3d 610 (2007) (quoting State v. Logan, 102 Wn. App. 907, 911, 10 P.3d 504 (2000)). Thus, even if Rickey knew about one or more of these convictions, the Kellys fail to show how they are relevant in proving negligent entrustment.

Next, Kaloger's driving record shows several nonmoving traffic violations in 2005 and 2006, including multiple driving without liability insurance infractions, driving while license suspended, registration violations (no tabs), unpaid parking tickets, and one moving violation for failure to stop. The record reveals no traffic accidents other than the December 24, 2006 accident involving the Kellys. Rickey testified that she knew nothing about Kaloger's driving history, and the Kellys present no evidence to the contrary.[4] The record shows no evidence that Rickey ever observed Kaloger drive recklessly or negligently—Rickey described Kaloger as an excellent driver on the one occasion she rode with him. Even if Rickey knew about these traffic violations, the Kellys fail to show that she knew or should have known Kaloger was a reckless, heedless, or incompetent driver. Nothing in Kaloger's driving record suggests any dangerous conduct was "'so repetitive as to make its recurrence foreseeable.'" Mejia,

---

[3] Our Supreme Court recently denied review in House v. Estate of McCamey, 173 Wn.2d 1005 (2011).

[4] House involved a father who entrusted a vehicle to his adult son, who then ran a stop sign and collided with the plaintiff's van. House, 264 P.3d at 255. The son was 49 years old and last lived with his father 31 years before the accident. House, 264 P.3d at 257-58. We concluded no evidence indicated the father knew or should have known about his son's criminal or driving records. House, 264 P.3d at 257-58.

45 Wn. App. at 706 (emphasis omitted) (quoting Curley, 270 Md. at 267).

Turning next to Kaloger's history of drug use, the Kellys fail to show that Rickey knew or reasonably should have known that Kaloger was a reckless or incompetent driver based on his drug use history. As discussed above, a negligent entrustment plaintiff must show that the entrustor knew or should have known the entrustee was a reckless or incompetent driver. Even assuming Rickey knew about Kaloger's past drug use and also knew he had previously "fallen off the wagon," we conclude this knowledge, as a matter of law, is insufficient to establish that Kaloger was likely to use illegal drugs while in possession of the Honda Prelude. We recently addressed a similar issue in Weber. In that case, Timothy Turner rented a moving van from Budget Truck Rental. Weber, 162 Wn. App. at 7. Turner had smoked methamphetamine several hours prior to renting the van, but none of the Budget agents noticed any sign of intoxication. Weber, 162 Wn. App. at 7-8. The following day, while driving the van, Turner ran over Gretchen Weber in a crosswalk. Weber, 162 Wn. App. at 8. An officer responding to the scene "observed Turner exhibiting symptoms of methamphetamine use: fast heart rate, bloodshot eyes, droopy eyelids, little to no pupil reaction to light, and 'two fresh, red injection marks' on his left arm." Weber, 162 Wn. App. at 8 (quoting Clerk's Papers at 264). A blood test performed after the accident showed methamphetamine and amphetamine in Turner's system. Weber, 162 Wn. App. at 8. Weber sued Budget under a negligent entrustment theory, alleging, inter alia, that even if Turner displayed no sign of intoxication at the time he rented the van, Budget agents should have recognized him as an addict who was likely to drive while intoxicated.

Weber, 162 Wn. App. at 9. Weber relied on "Turner's many tattoos, two of which may suggest a reference to drug use; his darkened fingertips, which Weber contended is 'a hallmark characteristic' of drug users who employ a glass pipe; and two injection marks, which [the responding officer] described as 'fresh' at the time of Turner's arrest the following day." Weber, 162 Wn. App. at 13. We held, "Even if these features suggest past drug use, and even if [the Budget agent who handled the rental] noticed them, they do not show Turner was likely to use illegal drugs while in possession of the rental van."

Weber, 162 Wn. App. at 13-14. Our holding in Weber controls here.[5] Even if Rickey knew about Kaloger's prior drug use, no evidence suggests that she knew or should have known at the time she entrusted Kaloger with the car that he would drive while under the influence of drugs.

Although the Kellys argue that Rickey "had a duty to exercise ordinary care in the entrustment of her vehicle, and she violated her duty of care when she failed to inquire as to any of Mr. Kaloger's criminal history, traffic history, drug history, or propensity to be reckless," they cite no authority establishing such a duty to inquire. Appellant's Reply Br. at 13. As discussed above, we are not required to search out authorities in support of a proposition where the parties cite none. McCormick, 140 Wn. App. at 883 (quoting Logan, 102 Wn. App. at 911).

[5] Our Supreme Court recently denied review in Weber. See Weber, 172 Wn.2d 1015 (2011).

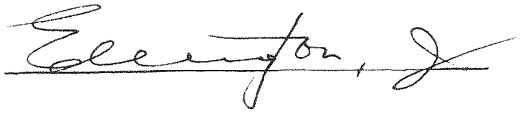
Nevertheless, no case law imposes a duty to investigate the background of a potential driver in a negligent entrustment claim. In Mejia, the court reasoned, "It is not reasonable to expect a parent of an emancipated child to be intimately acquainted with all aspects of his grown child's personal life." Mejia, 45 Wn. App. at 704. Accordingly, it could not be said that Felix (entrustor and father of the entrustee, Phillip) should have known of Phillip's traffic citations and accidents that occurred when Phillip was emancipated and not living in his parents' home. Mejia, 45 Wn. App. at 704. Nothing in Mejia suggests that Felix had a duty to ask Phillip about his driving history. And in House, the plaintiff argued that the entrustor "'had an obligation to read [Department of Corrections] files'" to learn about the entrustee's criminal behavior. House, 264 P.3d at 258 (quoting Appellant's Br. at 20). We noted the plaintiff cited no authority to establish such an obligation. House, 264 P.3d at 258. As in House, the Kellys cite to no authority establishing a duty to inquire.

CONCLUSION

For the reasons discussed above, we conclude that the trial court properly granted Rickey's summary judgment motion. The Kellys failed to present sufficient evidence from which a fact finder could reasonably conclude that Kaloger was an incompetent, reckless driver when Rickey entrusted him with the Honda. We affirm the order dismissing the Kellys' negligent entrustment claim.[6]

[6] The parties also dispute ownership of the Honda Prelude. The Kellys argue that they sufficiently established Rickey owned the vehicle, had control over it, and relinquished control to Kaloger. Rickey responds that she gave the vehicle to Kaloger and the Kellys presented no evidence showing she had the right to control it. We need not address this issue because even viewing the facts in the light most favorable to the

WE CONCUR:



Kellys (and thus assuming without deciding that Rickey owned the vehicle), we conclude that no negligent entrustment occurred.