IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RENEE MALDONADO and ANN LOMBARDO, Appellants, v. RAYMOND and BEVERLY HOLDREN, and KELLY HOLDREN, Respondents.	)	NO. 66467-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2012

Lau, J. — The trial court granted summary judgment dismissing the lawsuit filed by Renee Maldonado and her mother Ann Lombardo for injuries Maldonado sustained as the passenger in a car accident. Our de novo review of the record reveals that Maldonado failed to carry her burden to produce evidence demonstrating a genuine issue of material fact for trial. Accordingly, we affirm.

FACTS

We construe the facts and inferences in the light most favorable to Maldonado.[1]

[1] Holdren has moved to supplement the record on appeal with additional declarations that were not presented to the trial court. Because the standards for

At about 3 a.m. on August 19, 2007, 16-year-old Maldonado was awakened by her cell phone ringing. The call was from her friend, Amber Hickerson, who was "hysterical" and "sobbing." Hickerson told Maldonado she needed her help, but she could not coherently explain what was wrong. Maldonado had a car, but did not want to drive herself because she had an intermediate license that allowed her to drive only during daytime hours. Hickerson told Maldonado she would "send a ride" for her. Maldonado said the she did not know for certain whether Hickerson and the group of teenagers she was with had been drinking, but it occurred to her that might be the case.

About 45 minutes later, Casey Elmer arrived at Maldonado's house. Elmer was the older brother of one of Maldonado's friends, and Maldonado had met Elmer a few times. He was driving a car that belonged to another friend, Kelly Holdren, whom he was dating at the time. The car was registered to Holdren's mother but used primarily by Holdren. Maldonado snuck out of her house and got into the car with Elmer. Elmer's manner was friendly, and she did not notice any impairment. Maldonado assumed Elmer was taking her to Hickerson's house.

On the way, Elmer stopped at a drive-through window of a Jack-in-the-Box. While waiting for their order, Elmer made some comments about being unafraid to die that made Maldonado feel "uncomfortable." Shortly after Elmer began driving again, he

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supplementing the appellate record under RAP 9.11 have not been met, we deny the motion. We grant Maldonado's motion to strike references in the respondents' brief to the proposed evidence that was not before the trial court.

began to speed, lost control of the car, hit a barrier, and flipped the car. Elmer was ejected from the car and died. Maldonado sustained a wrist injury.

Maldonado sued Kelly Holdren and her parents, Beverly and Raymond Holdren. She claimed that the accident was caused by Elmer's negligence and that Holdren was liable under the theory of negligent entrustment for allowing Elmer to drive her car. Maldonado asserted that Holdren's parents were vicariously liable under the "family car doctrine."

Holdren moved for summary judgment, contending that she did not consent to Elmer's use of her car on the night in question and that the car was not being operated for a family purpose at the time of the accident. The trial court granted the motion and dismissed. Maldonado appeals.

STANDARD OF REVIEW

We review summary judgment orders de novo. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). Summary judgment is subject to a burden-shifting scheme. A defendant may move for summary judgment on the ground that the plaintiff lacks competent evidence to support his or her claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party meets the burden to

show there is no genuine issue of material fact, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). When considering a summary judgment motion, the court must construe all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Fed. Way Sch. Dist. No. 210 v. State, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

ANALYSIS

Proof that Holden consented to Elmer's use of her car is essential to Maldonado's theory of negligent entrustment. See Parrilla v. King County, 138 Wn. App. 427, 441, 157 P.3d 879 (2007) (consent to relinquish control of the instrumentality is a necessary element of a negligent entrustment claim).[2] Maldonado contends that the trial court erred in granting summary judgment because there was "abundant and substantially undisputed evidence" of consent to establish her negligent entrustment

[2] Maldonado makes no argument on appeal with respect to her claim under the family car doctrine. Thus, it appears that she has abandoned any contention that the trial court improperly dismissed this claim. See Dickson v. U.S. Fid. & Guar. Co., 77 Wn.2d 785, 787, 466 P.2d 515 (1970) (failure to argue or discuss an assignment of error in an opening brief results in an abandonment of the issue). In any event, assuming the doctrine may extend to circumstances where the car is driven by someone other than a family member for whom the car is maintained when the family member is not in the car, proof of consent would also be essential under this theory. See Holthe v. Iskowitz, 31 Wn.2d 533, 548, 197 P.2d 999 (1948); Phillips v. Dixon, 236 Ga. 271, 223 S.E.2d 678 (1976).

claim. Appellant's Br. at 2. Maldonado claims that a jury could infer that Holdren consented to Elmer's use of her car based on the following facts she testified to: (1) Elmer showed up at her house driving the car, (2) Holdren was dating Elmer at the time, and (3) Holdren had let friends drive her car on prior occasions, even though her parents did not allow it.[3]

But in support of her motion for summary judgment, Holdren produced evidence that she expressly denied permission for Elmer to use her car. According to Holdren's version of events, Maldonado snuck out of her parents' house at around 10 p.m. and was hanging out and drinking with the group all night. Holdren said at some point after 1 a.m., Elmer wanted to use her car to go out and buy food, but she refused because Elmer had been drinking and inhaling a household product, "Dust Off," during the course of the evening. Holdren said she and Elmer argued back and forth about it. Someone suggested that Maldonado could drive, but Holdren still refused because she did not believe Maldonado was fit to drive. Holdren said she left the others at that point because they were getting mad at her for refusing to let anyone drive the car. She went into a room where Hickerson was already asleep and went to bed. Her keys were in her jacket pocket. She took off the jacket and placed it beside her before going to sleep.

[3] Although Maldonado claims the evidence of Holdren's past behavior is admissible habit evidence under ER 406, she does not establish the regularity of this conduct. Nor does Maldonado allege that Holdren previously allowed intoxicated friends to drive her car.

According to Maldonado, she was not at the house when Elmer left in Holdren's car. Therefore, she did not, and could not, offer any evidence about whether Holdren gave Elmer permission to drive her car. Holdren's testimony is the only evidence in the record on the issue of consent. The inferences that Maldonado relies upon to support her claim of consent would be relevant in the absence of any evidence on the issue. But in the face of evidence establishing the lack of consent, she may not rely on speculation, conjecture, or mere possibility to raise issues of material fact precluding summary judgment. Chamberlain v. Dep't of Transp., 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995); Greenhalgh v. Dep't of Corr., 160 Wn. App. 706, 714, 248 P.3d 150 (2011).

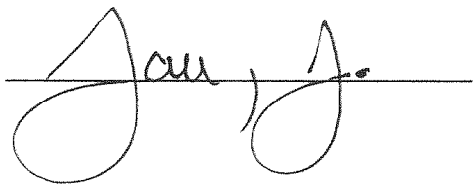
Nothing in the record contradicts Holdren's claim that she expressly denied consent. Maldonado claims that a jury could determine that Holdren's testimony is not credible and reject it. A party opposing summary judgment may not, however, "'merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.'" Laguna v. State Dep't of Transp., 146 Wn. App. 260, 266-67, 192 P.3d 374 (2008) (internal quotation marks omitted) (quoting Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 627, 818 P.2d 1056 (1991)). As we held in that case:

> Since a defendant without the burden of proof may move for summary judgment based on nothing more than the absence of evidence to support the plaintiff's case, the nonmoving party should not be able to escape summary judgment simply by impeaching the defendant's witness without providing proof sufficient to prove the plaintiff's case.

Laguna, 146 Wn. App. at 266 n.12. Holdren's testimony that she explicitly refused to allow Elmer to drive her car on the night in question is uncontroverted. Maldonado's assertions that Holdren's testimony is not credible or is subject to impeachment are insufficient to defeat summary judgment.

Maldonado also claims that irreconcilable discrepancies between her version and Holdren's version of the night of the car accident raise material issues of fact that must be resolved by a jury. According to Maldonado, her claim hinges on the critical fact of whether she was with Elmer when he left the party to buy food or whether she was waiting at her house for someone to pick her up. But the standard of review on summary judgment requires that we accept as true the facts as presented by Maldonado. Accordingly, we assume that Maldonado was at home until Elmer picked her up at around 4 a.m. But even assuming this, Maldonado failed to carry her burden to produce evidence demonstrating a genuine issue of fact as to whether Holdren consented to the use of her car. The defendants presented evidence that Holdren explicitly told Elmer he did not have permission to use her car. Nothing that Maldonado testified to contradicts this fact.

In sum, the evidence before the court on summary judgment construed in the light most favorable to Maldonado fails to establish that Holdren relinquished control of her car to Elmer on the night of the accident that resulted in Maldonado's injury. Summary judgment was proper.



Affirmed.

WE CONCUR:

Leach, C.J.

Schindler, J.