IN THE SUPREME COURT OF THE STATE OF NEVADA

TIEN CHANG, SHIU-CHIN CHEN CHANG, SHU-HUA CHEN, GEN-PING CHANG AND HUI-MING LIU, INDIVIDUALLY; CHI-LUNG CHU ON BEHALF OF HIMSELF INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE AND HEIRS OF WEI-HUNG TAN CHU, DECEASED, AND JUI-HSIUNG CHU, DECEASED; CHEN-CHING CHEN, ON BEHALF OF THE ESTATE AND HEIRS OF MI-DUO CHEN, DECEASED; HWA-HU YAO, ON BEHALF OF THE ESTATE AND HEIRS OF HUA-LI YAO, DECEASED; SHING-TZU CHIU YU ON BEHALF OF THE ESTATE AND HEIRS OF JUNG-LING YU, DECEASED; WEI-LAN TAN, ON BEHALF OF THE ESTATE AND HEIRS OF WEI-CHI TAN, DECEASED,
Appellants/Cross-Respondents,
vs.
ALLSTATE RENT-A-CAR, INC.,
Respondent/Cross-Appellant.

No. 36328

FILED

JUL 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment in favor of Allstate-Rent-A-Car ("Allstate") based upon the conclusion that Allstate did not breach a duty of care to Mr. Chang, his family and co-workers ("Appellants") when it rented a vehicle to Steven Ting without confirming the legitimacy of the business under which Ting allegedly operated.

Appellants argue that this court is to give no weight at all to the trial court's findings and conclusions, since the trial court reached the

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wrong conclusion. Further, Appellants claim that the trial court reached several erroneous findings and conclusions, constituting mixed questions of fact and law. Therefore, Appellants argue that this court should conduct an independent review of this case.

This court will not set aside a district court's factual findings unless they are clearly erroneous and unsupported by substantial evidence.[1] However, in reviewing the trial court's conclusions of law, this court conducts a de novo review.[2]

Here, Appellants argue that this court should adopt the legal principle of "contributory liability" provided in the Restatement (Second) of Torts § 877(c). Further, Appellants argue that the trial court should have applied the theory of negligent entrustment to the facts of this case. Appellants also allege that the trial court erred in concluding that Allstate did not owe a duty of care to Appellants. Resolution of these arguments essentially requires us to determine whether Allstate owed Appellants a duty of care. "Whether a defendant owes a plaintiff a duty of care is a question of law."[3] Therefore, the appropriate standard of review by this court is de novo.

Appellants claim that the trial court erred in refusing to find liability against Allstate on the theory of "contributory liability" under the

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[1]Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294, 948 P.2d 704, 705-06 (1997).

[2]Blaich v. Blaich, 114 Nev. 1446, 1447-48, 971 P.2d 822, 823 (1998).

[3]Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

Restatement (Second) of Torts § 877(c). We conclude that Appellants' argument lacks merit.

> The Restatement (Second) of Torts § 877(c) provides that:
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> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
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> . . .
>
> (c) permits the other to act . . . with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously
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> . . . .

Restatement (Second) of Torts § 877(c) (1979).

Here, Allstate rented a fifteen-passenger van to Ting, who was properly licensed and insured to operate the vehicle for non-business purposes. However, Ting was not licensed to operate a carrier-for-hire business. On several occasions, Ting informed Allstate that he was employed by a tour company, but did not directly disclose that he was renting vehicles to use for touring purposes. Nevertheless, Ting signed a rental agreement which prohibited such use of rental vehicles. Ting paid cash every time he rented a vehicle from Allstate after securing the vehicles with his personal credit card.

In order for Allstate to be subject to liability under the theory of "contributory liability," it had to know or have reason to know that Ting would act tortiously. Appellants argue that imposing liability in this case is consistent with existing Nevada law. In Karadanis v. Newcomb,[4] this court accepted the Restatement (Second) of Torts § 318 (1965), which provides that those who permit a third person to use chattels are subject

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[4]101 Nev. 196, 698 P.2d 872 (1985).

to liability if they know or have reason to know that the third person may use the chattel in such a manner that others may be harmed.[5] Appellants also rely on Zugel v. Miller,[6] which applied a negligent entrustment theory where the respondents permitted their minor son to operate a motorcycle without a driver's license.[7] We conclude that the cases relied upon by Appellants do not dictate that this court adopt the theory of "contributory liability." Further, the theory of "contributory liability" would not apply to the present case even if this court adopted such a theory.

Here, Allstate rented a vehicle to Ting, who provided a valid, unrestricted driver's license and proof of insurance covering such a rental to an individual. Unlike Karadanis, this case did not involve a situation where there was an acknowledged dangerous condition created by the owner due to the removal of a safety measure.[8] Rather, Ting presented every indication that he and his driver were competent to operate a vehicle. Therefore, there was no dangerous condition created by Allstate by renting the vehicle to a licensed driver for personal use. Furthermore, this case is distinguishable from Zugel because, here, Ting was properly licensed to operate the vehicle he rented from Allstate. Appellants have failed to show that Allstate knew or had reason to know that Ting would act tortiously. Appellants have not alleged that Ting presented any reason why Allstate should have known he would act tortiously, such as

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[5]Id. at 200, 698 P.2d at 875.

[6]100 Nev. 525, 688 P.2d 310 (1984).

[7]Id. at 528, 688 P.2d at 313.

[8]See Karadanis, 101 Nev. at 200, 698 P.2d at 874-75.

exhibiting symptoms of intoxication when he rented the vehicle. Nor do Appellants argue that Ting's driver's license was invalid. Ting's lack of a business license to own and operate Mustang Tours does not provide Allstate with any notice that Ting would act tortiously in renting and operating the vehicle. This court has not previously recognized "contributory liability," and the facts of this case do not require that this court consider adopting such a theory at this time. Therefore, we conclude that the district court did not err in refusing to recognize the theory of "contributory liability."

Appellants next contend that the trial court erred in refusing to apply the theory of negligent entrustment to Allstate's conduct. Appellants claim that Allstate had the right to control the vehicle it rented to Ting, and that Allstate knew or should have known that renting a vehicle to Ting may have created an unreasonable risk of harm to others. We disagree.

The theory of negligent entrustment applies "where one who has the right to control the car permits another to use it in circumstances where he knows or should know that such use may create an unreasonable risk of harm to others."[9] Here, Allstate does not argue that it did not have the right to control the vehicle that it rented to Ting. However, no facts in this case demonstrate that Ting or any other driver created an unreasonable risk of harm to others simply because Mustang Tours was not a properly licensed business entity. Allstate never rented a vehicle to

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[9]Mills v. Continential Parking Corp., 86 Nev. 724, 726, 475 P.2d 673, 674 (1970). See also Zugel, 100 Nev. at 525, 688 P.2d at 310 (holding that negligent entrustment occurs when a person knowingly entrusts a vehicle to an incompetent person).

Mustang Tours. Ting and Ho, as individuals, were licensed to drive the vehicle, which is the only use permitted by Allstate under the rental agreement.

The cases relied upon by Appellants do not further their argument.[10] These cases address situations where the tortfeasor was incompetent to drive due to a lack of a driver's license. This court has held that a defendant was not liable even if the defendant had knowledge of alleged driving infractions in the past.[11] Here, Appellants cite no case law which supports the contention that a person without the proper license to operate a business, is incompetent to drive a rental vehicle obtained under his own name and insurance policy. Other courts have held that a rental car agency is not negligent in renting to customers who provide the necessary credentials and show no signs of incompetence to drive.[12] Therefore, since there was no evidence of incompetence to drive by Ting or any other driver on his behalf, we conclude that the district court did not err in holding that the theory of negligent entrustment was not applicable in this case.

Appellants also claim that the trial court erred by not finding Allstate liable under general negligence principles because Allstate's own

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[10]See Mills, 86 Nev. at 724, 475 P.2d at 673; Zugel, 100 Nev. at 525, 688 P.2d at 310; Tellez v. Saban, 933 P.2d 1233 (Ariz. Ct. App. 1996); Owens v. Carmichael's U-Drive Autos, 2 P.2d 580 (Cal. Ct. App. 1931); Roland v. Golden Bay Chevrolet, 207 Cal. Rptr. 413 (Ct. App. 1984) dismissed as moot 704 P.2d 175 (Cal. 1985).

[11]Cooke v. American Sav. & Loan Ass'n, 97 Nev. 294, 296, 630 P.2d 253, 254 (1981).

[12]See Normand v. Hertz, 211 So.2d 382 (La. App. 1968); Bartley v. Budget Rent-a-Car Corp., 919 S.W.2d 747 (Tex. App. 1996).

internal operating policy prohibits renting vehicles to individuals who intend to use the vehicle for commercial purposes. Further, Appellants allege that this internal policy evidences a duty upon Allstate to investigate a potential violator of this policy by inquiring as to the intended use of the vehicle, and contacting the Public Service Commission to inquire regarding Ting's licensure as a passenger carrier. We disagree.

> In a negligence action, the plaintiff has the burden of demonstrating the following: (1) that the defendant had a duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the plaintiff was damaged.[13]

Duty is a summation of the public policy considerations which require that a plaintiff be protected.[14] Furthermore, "foreseeability of harm is a predicate to establishing the element of duty."[15]

Here, Appellants claim that social policy considerations and the foreseeability of harm mandate that Allstate owed a duty to refrain from aiding and abetting an illegal enterprise. However, Appellants ignore the fact that Allstate, consistent with its internal operating policy, required that Ting sign a rental agreement which expressly prohibited the use of rental vehicles for commercial purposes.

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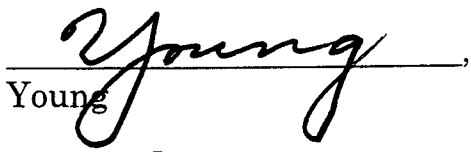
[13]Joynt v. California Hotel & Casino, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992).

[14]Turpel v. Sayles, 101 Nev. 35, 39, 692 P.2d 1290, 1292-93 (1985).

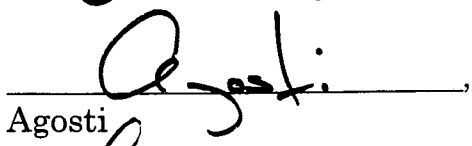
[15]Dakis v. Scheffer, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) (quoting Merluzzi v. Larson, 96 Nev. 409, 414, 610 P.2d 739, 742 (1980)).

Appellants claim that NRS Chapter 706 supports their claim that Allstate should be liable for failing to thoroughly investigate Ting's background before allowing him to rent a vehicle. However, NRS Chapter 706 imposes criminal liability upon those who permit a vehicle to be used in a passenger service without a certificate of public convenience, not civil liability.[16] Since Allstate expressly prohibited the use of its vehicles for commercial purposes, we conclude that Appellants have provided no statutory support for the imposition of civil liability upon Allstate. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Young



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Agosti

_____, J.
Leavitt

cc: Hon. Michael A. Cherry, District Judge
Robertson & Benevento/Las Vegas
Robertson & Benevento/Reno
Sterns & Walker
Bell and Young, Ltd.
Clark County Clerk

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[16]See NRS 706.756(3).