STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	IN THE COURT OF COMMON PLEAS C.A. No. 2006-CP-40-03605R
Robin R. Jones, by and through her Guardian *ad Litem*, Douglas Raymond Jones, Plaintiff v. Enterprise Leasing Company – Southeast, LLC *formerly* Enterprise Leasing Company – Southeast, Defendant.	)	**ORDER** **DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Before the Court is Enterprise Leasing Company - Southeast, LLC's[1] (Enterprise) motion for summary judgment filed April 23, 2012. The Court listened to arguments made July 13, 2012, has carefully reviewed briefs and other materials submitted and denies the motion.

1.1 Background.

Robin Jones, by and through her guardian *ad litem*, Douglas Jones (Mr. Jones), brings this case against Enterprise who owned the car Mr. Jeffrey Demary (Enterprise Driver or Driver) was operating when it crashed into the rear of Ms. Jones' car. Mr. Jones claims Enterprise was reckless, negligent and negligently entrusted a dangerous instrumentality - a car - to Driver, when it knew or should have known he was incompetent, unfit, inexperienced or reckless. It is alleged Ms. Jones has incurred in excess of $1,000,000.00 in medical expenses to date and suffered severe brain damage as a result of the conduct of Enterprise.

Enterprise argues: 1. "there is no duty in South Carolina which requires a car rental company to perform background checks on its renters' driving histories"; 2. "Plaintiff cannot

[1] Enterprise Leasing Co. – Southeast merged into Enterprise Leasing Co. – Southeast, LLC.

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prove the elements necessary for a negligent entrustment claim in South Carolina"; and 3. "there is no evidence that Enterprise knew or should have known that [Enterprise Driver] Demary was likely to use the car in an otherwise unsafe manner."[2]

2 SUMMARY JUDGMENT STANDARD - MERE SCINTILLA

"'When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.' In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Turner v. Milliman*, 392 S. C. 116, 122, 708 S. E. 2d 766, 769 (2011). Plaintiff provides more than a mere scintilla of evidence to support causes of action for negligence, negligent entrustment and issues of Enterprise's recklessness for purposes of a jury considering these issues.

3 FACTS

For purposes of this motion, the following facts, in the light most favorable to Ms. Jones, are gleaned from Gary Kolodziej, Enterprise's 30(b)(6) corporate designee and other witnesses:

3.1 March 1, 2003 Crash.

On March 1, 2003, Driver was permissively using Enterprise's car at a high rate of speed on I-26 in Richland County. Ms. Jacqueline Hall saw Driver speeding before crashing into the back of Ms. Jones' car, causing it to roll several times. (Hall Dep. pp. 9-11).

3.2 Driver's Driving Record of Speeding Convictions.

When Enterprise supplied a car to Driver on January 29, 2003, he had 13 convictions for speeding, three of which were while operating an Enterprise car. Driver had six moving violation

[2] Enterprise Motion for Summary Judgment, April 19, 2012, pp. 1-2.

convictions for speeding within three years of the crash into Ms. Jones and four were within two years before the crash, including one while driving an Enterprise car.[3]

3.3 Prior Rentals With Enterprise Before the Crash with Ms. Jones.

Driver had rented cars from Enterprise, including in July of 1995. On January 14, 2002, Enterprise rented a car to Driver. On the rental agreement, there is a "Claim Information" section. It notes "Loss Date 1/14/02" and "Accident." The "Repair Shop" for Driver's car is listed. Driver had a rental car for "46" days. On January 29, 2003, Enterprise rented to Driver. It required Driver sign a rental agreement and credit check form to authorize verification of credit and personal information.[4] The rental agreement shows "Claim Information", "Loss Date 1/23/03", "Accident" and identifies the repair shop where Driver's car was being repaired.

At the time, Enterprise had actual knowledge that Driver had been in two collisions within the preceding year, one of which was days earlier. Enterprise's "callback detail" documents activity during a rental. It shows calls to Driver and the repair shop about the status of repairs. The January 29, 2003 rental was terminated on February 27, 2003 at 1:17 p.m. At 5:47 p.m., Driver paid Enterprise $117.00 to get a car through March 1, 2003. There is no evidence Driver signed an agreement, that Enterprise verified his license, or that he presented a license that day.

3.4 Mere Possession of a Driver's License Is Not Evidence of Competence.

Enterprise believed it is prudent to make sure a car is not provided to one who is not qualified.[5] "There are many factors in addition to merely the possession of a valid driver's license

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[3] Dep. Kolodziej, Tickets Ex. 21; SC Driving Record Ex. 22; Richland County list of convictions.
[4] Dep. Robson, pp. 241-242, Rental Agreement Ex. 64 "Renter authorizes owner to verify through credit and other sources personal and credit information provided by Renter."
[5] Dep. Kolodziej, p. 41.

to consider before" renting a car.[6] If Enterprise has reason to believe or ought to believe a person can't operate a car safely, it has a responsibility not to rent a car, even if the person is licensed.[7]

3.5 Factors for Denying a Renter a Car Exist.

There are several factors Enterprise believes should be considered before supplying a car to a potential renter including: present fitness to drive,[8] driver behavior[9] and driver history.[10] Enterprise had driving history criteria in place to deny one a car as it recognizes that a person who has a certain driving history poses a threat to the public in operating one of its cars.[11] It recognizes that a person's driving habits and record can deteriorate over time.[12]

3.5.1 System in Place To Get Driving Record.

Enterprise routinely checked the credit history, employment history, address, and insurance coverage of potential customers as part of its rental process.[13] Enterprise had "in place a service it routinely uses to obtain a person's driving history"[14] and "if Enterprise wanted to, it could have obtained Mr. Demary's [Driver's] driving record information."[15]

3.5.2 Foreseeable Driver Record Gets Worse.

Enterprise knows it is foreseeable that a person's driving record can become worse and that affects the public[16] because cars can cause a lot of damage to people.[17] Enterprise wants to know if

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[6] Dep. Kolodziej, p. 41.
[7] Dep. Kolodziej, p. 108, 1-14.
[8] *Id.*, p. 30:3-7; Dep. Robson, p. 152:14-17; Dep. Keefer, p. 134:10-15.
[9] Dep. Kolodziej, p. 46, lines 10-16.
[10] *Id.*, p. 136, 6-16
[11] *Id*, p. 63: 22-25, p. 64: 1-2.
[12] Dep. Lamarche, pp. 69-70.
[13] Enterprise obtains authorization to run a credit check on customers, including the driver in this matter. Kolodziej, Dep. p. 172, Ex. 25.
[14] *Id.*, p. 61, lines 7-10.
[15] *Id.*, p. 163.
[16] Dep. Robson pp. 62-63.
[17] Dep. Kolodziej, p. 41

somebody poses a threat to the public in operating its cars.[18] Enterprise knows it is not prudent to supply a car to somebody who is not qualified[19] and faces liability when it gives a car to one that is incompetent, unfit, inexperienced or reckless.[20] Enterprise has criteria in place to deny one a car because it knows those who drive with a bad driving history pose a threat to the public.[21]

3.6 Driver's History Disqualified Him From Rental and Enterprise Would Terminate The Rental Had It Learned of His Record While He Had the Car.

Enterprise agrees Driver presented an adverse risk to Enterprise or the public.[22] Enterprise agrees Driver was unfit, incompetent and/or reckless in operating a car because had Driver's driving record come to its attention, it would not have rented him a car.[23] If Enterprise knew Driver's record or even saw his speeding tickets, it would have placed him on the "do not rent" list.[24] Like other car rental companies, Enterprise has a "do not rent" list of drivers who are to be denied a rental.[25] The list is a method for preventing a potential renter, even those who are licensed, from renting a car if they have exhibited that they are an adverse driving risk.[26] Once on the list, a driver's status does not change unless one proves there is not something that impairs one from operating a car safely.[27] After supplying Driver with a car, had Enterprise learned "in some form" of his record it would have terminated the rental and retrieved the car.[28]

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[18] *Id.*, p. 107: 1-4.
[19] *Id.*, p. 41.
[20] Dep. Kolodziej, p. 56.
[21] *Id.*, p. 63: 22-25, p. 64: 1-2.
[22] *Id.*, p. 134, 10-15
[23] *Id.*, p. 129, lines 16-17, pp. 132-136, pp. 167-169; pp. 111: 20-25 - p. 112, line 1.
[24] *Id.*, p. 136, 6-16; p. 118.
[25] *Id.*, p. 117.
[26] *Id.*, pp. 117-118.
[27] *Id.*, pp. 118-119. The witness never saw one come off the list once placed on it. *Id.*
[28] *Id.*, pp. 165-167.

3.7 Car Rental Industry Checks Driving History and Established Criteria in Place.

Since at least 1993, newspapers, government publications, rental company web sites and rental forms show car rental companies were rejecting customers with poor driving records in a matter of seconds.[29] A Federal Trade Commission publication, states:

> Many companies now check driving records when customers arrive at the counter. Some reject customers whose driving records don't meet company standards. Even if you have a confirmed reservation, you may be disqualified from renting a car for moving violations within the last few years; ... accidents, regardless of fault....[30]

At the time, TML was a company that provided driving record check services for rental car companies including: Alamo, Avis, Budget, Dollar, Enterprise, Hertz, National, and Thrifty.[31] Car rental companies supplied TML with disqualifying criteria such as—two accidents regardless of fault or three moving violations within the last two years. *See* "Rental Rule Grid"[32] Prior to rental, a rental agent would enter a driver's license number into a computer system. Then, TML electronically accessed the driving record and compared it to the rental car company rejection criteria.[33] Within about five seconds, the rental agent would receive a "rent or do not rent" message on the screen.[34] TML's charge for this service was less than a dollar.[35]

TML could electronically access driving records from about 40 states, including South Carolina.[36] Printed information explaining the process was provided to those who were interested

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[29] Dep. Regan pp. 49-52, Brochure; Robson Dep. Exs. 27-41; Kolodziej Dep. Exs. 6, 8, 10-19.
[30] Robson Ex. 30; Dedman Dep. FTC Facts For Consumers. Ex. 5.
[31] Regan Dep. pp. 19-24.
[32] *Id.* p. 17-18 and Ex. 3 Rental Rule Grid.
[33] *Id.* pp. 17-18 and Ex. 3 Rental Rule Grid.
[34] *Id.* p. 15-16.
[35] *Id.*, p. 28, lines 9-12, p. 16, lines 4-7.
[36] *Id.* p. 45.

in or used the services.[37] As part of the service, TML would notify the companies how often there were denials for record keeping and statistical purposes.[38] Using the process, all car rental companies would have denied a car to Driver based upon the criteria set forth in the Rental Rule Grid and forms used by the companies that set forth the rejecting criteria.

3.8 Enterprise Knew Others Were Checking and Has No Opinion as to Feasibility.

Since at least 1999, Enterprise was aware that driving records were being checked.[39] Enterprise has "no opinion" as to whether it would be workable or feasible to decline renters using the methods others were using.[40] Enterprise had a service in place that it routinely used for checking a person's driving history that it did not use for renters.[41] Based on the criteria set forth on the Rental Rule Grid, no other car rental company would have rented Driver a car.

3.9 Enterprise Regularly Files Negligent Entrustment Lawsuits and Teaches About It.

For years Enterprise has filed lawsuits and obtained judgments in South Carolina against those it claims negligently damaged its cars. Among other things, the lawsuits state the supplier of a car has several duties, including: ascertaining whether a driver of a car is safe and/or qualified before supplying the driver and preventing a car from being used by an unsafe driver. None of the approximately 55 Enterprise cases presented to the Court alleged alcohol or claimed the entrustee was unlicensed. Enterprise teaches its employees that negligent entrustment means

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[37] Regan Dep. Ex. 2.
[38] Regan Dep. p. 29.
[39] Robson Dep. p. 73, lines 12-16. Regan Dep. pp. 43 - 54, Exs. 3 (Rule Grid), 4 (Agreement with Enterprise), 5 (Emails) and 6 (states where electronic driving checks were available, including South Carolina).
[40] Dep. Kolodziej, pp. 77, 82 (Hertz); p. 80 (Alamo); p. 85-86 (Other Enterprise Group); (Budget) (p. 87-88); Avis (52).
[41] Dep. Kolodziej, p. 61: 7-10.

renting to an individual who poses a threat to the public or himself[42] and to recognize behavior of potential renters so it will not rent to that kind of person.[43]

4 DISCUSSION

4.1 Negligence - Duty To Exercise Reasonable Care And Inquiry Notice.

"A cause of action for negligence arises from the concurrence of three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty by a negligent act or omission, *i.e.*, failure to exercise the care of a reasonable man in the circumstances; and (3) damage proximately resulting from the breach of duty. The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care." *Snow v. City of Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991) (internal citations omitted) Bell, J. "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done *under the circumstances of the situation*, or doing what such a person *under the existing circumstances* would not have done. The essence of the fault may lie in omission or commission." *Renneker v. S.C. Railway Co.*, 20 S.C. 219, 222 (1883). (emphasis added). Thus, negligence is a relative term.

Defendant cites many unpublished cases in other jurisdictions for the proposition that a rental car has no duty to investigate or inquire as to a prospective renter's driving record. Enterprise argues this Court would be unilaterally imposing such a duty on the Defendant and

[42] Dep. Kolodjiez p. 48.
[43] Dep. Kolodjiez, p. 107: 12-24.

the rental car industry as a whole by denying its motion for summary judgment. However, the Plaintiff propounds no such general duty.

Here, issues turn on methods reasonably available to determine driver competency, whether Enterprise's knowledge about Driver, however little, was sufficient to put it on inquiry notice about his driving record and whether Enterprise acted reasonably under the circumstances.

4.2 Duty to Determine Renter's Present Competence Conceded By Enterprise - Driving History is But One *Method* of Determining Competence.

Enterprise claims there is no duty to check a renter's driving history and it is entitled to summary judgment because if there was no duty, there can be no negligence. Enterprise seeks to have this Court determine that *a method* of determining driver competence (checking driver history) is really a duty that is not recognized by the law and never required. This is not correct.

As part of prior 12(b)(6) motions to dismiss, Enterprise argued there was no duty to investigate a driver's record. Judge Breeden and Judge Norton rejected this exact argument.

Enterprise admits it had a duty to evaluate a driver's present fitness to operate one of its cars.[44] Enterprise admits merely possessing a valid license is not enough to qualify a renter if Enterprise had reason to believe or ought to believe a person can't operate a car safely. (Dep. Kolodziej, p. 108, 1-14). Enterprise knows driver behavior (Dep. Kolodziej, p. 46:10-16), a person's present fitness to drive (*Id.*, p. 30:3-7; Dep. Robson, p. 152:14-17; Dep. Keefer, p. 134:10-15) and other factors should be considered before renting a car (Dep. Kolodziej, p. 41). Enterprise recognizes the existence of the duty to ascertain (make sure of) ones competency to operate a car before supplying a car.[45] Thus, Enterprise does not dispute there is a duty to use

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[44] Kolodziej Dep. p. 58, lines 6-11.

[45] *See e.g. Enterprise Leasing Co., Southeast v. Taylor*, 97-CP-40-4501 Complaint, ¶ 5b) (duty to ascertain whether driver was safe and/or qualified and otherwise fit to operate a motor vehicle.)

due care in supplying a car or determining the suitability of the driver. Rather, Enterprise argues it satisfies the duty merely by verifying one has a valid driver's license.

Enterprise relies upon *Palacios v. Aris, Inc.* 2010 WL 933754 (E.D. N.Y.). In that case, the court held summary judgment was *not* proper for defendant because plaintiff produced sufficient evidence to create a genuine issue of material fact as to whether Aris was negligent in failing to exercise reasonable care when it provided a car to a driver based on a purported license presented at the time of rental. As it was not clear what the basis was for Aris determining whether the driver had a valid license, the court was unable to conclude as a matter of law that Aris was not negligent. There were disputed factual issues relating to the claim that a jury was to resolve.

Here, there is no evidence that on February 27, 2003, Driver presented to or Enterprise verified Driver's license. As in Aris, whether Enterprise exercised reasonable care in determining the competence of the driver by verifying his license is a question of fact for the jury.

Further, admissions made by Enterprise, duties it asserted in lawsuits it filed and the evidence before this Court make clear that there are several methods by which one may determine the qualifications of a renter to operate a car, including inquiry as to driving history. It is for a jury to determine whether the method Enterprise chose, verifying a license, satisfies the duty of due care under the circumstances when it has actual knowledge of two prior collisions and does not make further inquiry using available means and methods as discussed herein.

4.3 Plaintiff Argues Enterprise Had Actual Knowledge of Driver's Two Prior Collisions Sufficient to Create Inquiry and a Duty to Investigate.

It is well established in South Carolina that whether party had notice is a question of fact for the jury. *See, e.g., Ford v. S.C. Dept. of Transp.*, 328 S.C. 481, 488-489, 492 S.E.2d 811, 815 (Ct. App. 1997). Plaintiff distinguishes this case from those cited by Enterprise by pointing out that

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Enterprise had actual knowledge that Driver had been involved in two collisions that were serious enough to cause his car to be in a body shop for about 70 days. Cases cited by Enterprise fault Plaintiffs for failing to demonstrate any knowledge by the rental car company, whether actual or implied, of a potential problem with the driver. There were no material questions of fact in the cases, as plaintiffs did not show the rental company knew or should have known of a problem with the driver. Here, knowledge of prior collisions distinguishes this matter.

4.4 Evidence that Performing a Driving Record Check is Reasonable Care Known to Enterprise, Feasible and the Industry At the Time Was Performing Such Checks.

Enterprise argues "[i]mposing a novel duty upon Enterprise to investigate the driving history of its renters and make judgments about which drivers are competent to drive would create an unworkable standard." Def. Motion for Summary Judgment, pp. 6-7. The claim is unsupported by Enterprise testimony.[46] Further, a contract with an Enterprise affiliate[47] as well as Enterprise employee testimony[48] corroborates at least one Enterprise affiliate and other rental car companies could perform electronic driver record checks in about 40 states, including South Carolina.[49] At least one Enterprise affiliate did "use TML's services to screen driving [and] potential renters prior to the rental of the vehicle."[50] In five seconds, TML would send a "rent or do not rent message to Enterprise based on the customer's driving history."[51] It was known by Enterprise in South Carolina that car rental companies, including Enterprise in New York, were

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[46] When asked about their competitors' rental standards involving disqualifying drivers based on driving history, Enterprise never suggested such a policy would be "unworkable" or overly costly. Rather, it refused to express an opinion, good or bad. *See* Robson Dep. pp. 176-77, 180-81.
[47] Regan Dep. pp. 34- 36, 40-41; Ex. 4 TML Agreement with ELRAC, Inc.
[48] Regan Dep. pp. 34-36, 41.
[49] Robson Dep. pp. 162-163 (knowledge Enterprise branch was using service).
[50] Regan Dep. p. 35.
[51] Regan Dep. pp. 34-35.

performing driver record checks before 2003.[52] With this knowledge, Enterprise chose not to do a record check on potential renters.[53] A jury may consider such facts in determining whether Enterprise was negligent or demonstrated reckless indifference.

It is well recognized that "[e]vidence of industry standards, customs, and practices is 'often highly probative when defining a standard of care.' (quoting 57A AM.JUR.2d *Negligence* § 185 (1999)." *Elledge v. Richland/ Lexington School Dist. Five*, 352 S.C. 179, 188, 573 S.E.2d 789, 794 (2002). "The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006). "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Id.* (citing *Peterson v. Natl. R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005).

Here, a jury may consider industry practices, TML's services and defendant's policies of getting a driving history to weed out unsuitable drivers to determine if Enterprise exercised due care when it supplied Driver with a car and did not obtain or inquire about his driving history.

4.5 Enterprise Argues that Because DMV supplied Driver with A License That Acts As Conclusive Proof of A Person's Fitness to Operate a Car.

Enterprise argues the Department of Motor Vehicles determines whether one is competent to drive a car and possession of a license is presumptive fitness to operate a car. However, Enterprise testimony contradicts that contention. "Enterprise does not agree that the mere

[52] Robson Dep. pp. 162-163, 170-173.
[53] Robson Dep. p. 176.

possession of a valid driver's license in and of itself is sufficient to allow somebody to operate or qualify somebody to operate one of their vehicles."[54]

It is well recognized that one's driving habits could change after a license was issued or last renewed. The driving habits of an individual will come to the attention of state licensing officials only if one is charged or convicted of an offense. As every driver knows, people are not convicted of moving violations every time they commit one. So, in the extreme case, it is possible to be habitually reckless without being convicted of a single moving violation.

Simply because the DMV issued a license to one who took a written exam and performed a limited road test does not preclude the possibility that a license holder will later develop dangerous tendencies, habits or propensities when operating a car. Indeed, it would not be until *after* one receives a license that one could develop the dangerous propensities to operate a car.

In any case, a jury may be satisfied that Enterprise exercised due care if it verified the operator possessed a valid license in the presence of other facts that could alert a reasonable person to a problem with the driver's past conduct in operating a car. With actual knowledge of two prior collisions within a year, a jury may conclude Enterprise had facts sufficient to alert it or excite inquiry. It is a question for the jury to determine whether Enterprise acted reasonably in light of the facts and circumstances then existing and known to it.

4.6 Citation to Out of State Authority Irrelevant.

The out of state cases cited by Enterprise for the proposition that there is no duty to investigate are inapplicable or irrelevant for several reasons. First, the cases generally are from states that do not recognize a car as a dangerous instrumentality or require *actual* notice of a potential problem with a renter. Second, in those cases, the car rental companies did not agree

[54] Dep. Kolodjiez, p. 46.

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there was a duty to evaluate the present fitness of a driver and do more than verify a license. Third, there was no evidence the car rental company had actual knowledge or been placed on notice of a potential problem with a driver, *i.e.* two collisions within about 1 year. Fourth, the defendants did not concede driver was incompetent based on his record. Last, unlike here, there was no evidence car rental companies had established criteria to deny renters based on driving history or that companies like TML were used to evaluate a renter in a matter of seconds.

4.7 Driving Record Check's Available Method For Determining Competency.

Enterprise knows *foreseeability of harm to third parties* can be based on supplying a car to a driver with a history of moving violations. The facts show an inquiry or investigation of a driver's record is neither "novel" nor "unworkable." Enterprise chose not to investigate beyond merely looking at a license even with knowledge of the driver having two prior collisions. Enterprise obtained the right to get the driver information and chose not to exercise that right. A jury may conclude the knowledge or information in the records it could have obtained was imputed to Enterprise. With the evidence here, a jury could conclude, that using reasonable care or the methods described herein, Enterprise could have acted reasonably by declining to rent Driver a car. Further, a jury may conclude its conscious failure to use methods known to it was reckless.

South Carolina courts have never held a rental car company that has actual knowledge of prior collisions owes no duty to inquire or investigate the driver. The evidence is such that it was foreseeable that the failure to exercise due care and verify or investigate Driver's history could result in harm to people such as Ms. Jones. With Enterprise admitting a duty to determine the suitability of a driver, the negligence, if any of Enterprise is a jury issue here.

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4.8 Evidence From Which A Jury May Conclude Recklessness or Reckless Indifference.

A car is a dangerous instrumentality in South Carolina.[55] "[A] person of ordinary intelligence and prudence is expected to use greater caution in dealing with very dangerous instrumentalities than in those cases where there is less danger."[56] The duty to exercise great care applies to those who furnish a dangerous instrumentality to someone. *Howell v. Hairston,* 261 S.C. 292, 301, 199 S.E.2d 766, 770 (1973). 'The common law requires a higher degree of care and vigilance in dealing with a dangerous agency than in required in the ordinary affairs of life and business which involve small risk of injury.' *Spruill v. Boyle-Midway, Inc.* 308 F.2d 79, 83 (4th Cir. 1962). A failure to exercise due care in the handling of a dangerous instrumentality may be a "graver breach of duty" than if the instrumentality were not inherently dangerous. *Eaddy v. Greensboro-Fayetteville Bus Lines*, 191 S.C. 538, 5 S.E.2d 281 (1939).[57] Enterprise agrees and it is the case that one has a duty to determine that the person to be supplied with the dangerous instrumentality possesses the qualities necessary for its safe use. *See e.g.* Restatement (Second) of Torts § 391. One in the business of temporarily supplying cars to others for profit must exercise due care, which in the context of dangerous instrumentalities, may require great care.

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[55] *Yaun v. Baldridge*, 243 S.C. 414, 134 S.E.2d 248, 251 (1964).

[56] *Lundy v. Southern Bell Tel. & Tel. Co.*, 90 S.C. 25, 72 S.E. 558, 564 (1911); *Butler v. Temples*, 227 S.C. 496, 590, 88 S.E.2d 586, 590 (1955) (When one has knowledge that a car can cause great harm one has a "duty to use vigilance and care before setting in motion a dangerous instrumentality."); *State v. Barnett*, 218 S.C. 415, 427, 63 S.E.2d 57, 61 (1951) ("[W]ant of ordinary care in the handling of a dangerous instrumentality is the equivalent of culpable or gross negligence."); *Eagle v. Sumter Lighting Co.*, 110 S.C. 567, 96 S.E. 715, 716-17 (1901) ("a very high degree of danger calls for a very high degree of care").

[57] *See e.g.*, "[W]ant of ordinary care in the handling of a dangerous instrumentality is the equivalent of culpable or gross negligence." *State v. Barnett*, 218 S.C. 415, 427, 63 S.E.2d 57, 61 (1951); *Eagle v. Sumter Lighting Co.*, 110 S.C. 567, 96 S.E. 715, 716-17 (1901) (holding that "a very high degree of danger calls for a very high degree of care").

Based on the above, Enterprise is not entitled to summary judgment on the issue of whether there is or is not a duty to perform a driving history check. It is for a jury to determine whether, under the circumstances, Enterprise exercised reasonable care in meeting its duty to evaluate the present fitness of one to operate a car.

4.9 In South Carolina, Negligent Entrustment Does Not Require Alcohol or Intoxication.

Enterprise argues all causes of action for negligent entrustment require the entrustor knew or should have known the entrustee was likely to use alcohol. Defendant's *Memorandum in Support of Motion for Summary Judgment*, p. 4. However, "South Carolina has consistently applied a negligent entrustment standard analogous to *Restatement* sections 308 and 390, even in cases other than those involving automobiles and intoxicated drivers."[58]

4.9.1 Negligent Entrustment: No Alcohol versus Alcohol Cases.

There are negligent entrustment cases in South Carolina that mention alcohol or intoxication of the driver as a factual issue. There are also cases of negligent entrustment without mention of alcohol. In surveying the law while considering an appeal of a different issue in this very case, the Court of Appeals distinguished between cases involving alleged alcohol use, and those —like the present case — that do not involve alcohol use. *Jones ex rel. Jones v. Enterprise Leasing Co.—Southeast*, 383 S.C. 259, 266, 678 S.E.2d 819, 823 (Ct. App. 2009). The Court noted "the elements needed to prove the [negligent entrustment] claim have varied" depending on the facts. *Id. Am. Mut. Fire Ins. Co. v. Passmore,* 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981) ("the owner or one in control of the vehicle and responsible for its use who is negligent in

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[58] *Negligent Entrustment In South Carolina: An Analysis Of South Carolina's Consistent Application And Inconsistent Statements Of The Standard After Gadson v. ECO Services Of South Carolina, Inc.* 59 SOUTH CAROLINA LAW REVIEW 633, 654 (2008). Plaintiff seeks to have this Court adopt the Restatement sections. That issue is for an appellate court, not this trial court.

entrusting it to another can be held liable for such negligent entrustment," with no mention of alcohol) and *McAllister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986) (inserting an element of knowledge of alcohol consumption into the test for negligent entrustment, in a case where alcohol was involved) were mentioned.

As the Court in *Jones* suggests, the Supreme Court required claimants in *McAllister* and its progeny in the alcohol issue line of negligent entrustment cases, including *Gadson v. ECO Servs. of S.C. Inc.*, 374 S.C. 171, 648 S.E.2d 585 (2007) and *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), to show the entrustor knew or should have known the entrustee was likely to drive drunk precisely because the entrustee's alleged alcohol use was the basis for the claim.

Where alcohol is not involved, South Carolina courts have not required a plaintiff prove the defendant knew or should have known the entrustee was likely to drink. *E.g.*, *Passmore*, 275 S.C. at 621, 274 S.E.2d at 418; *Howell v. Hairston*, 261 S.C. 292, 298, 199 S.E.2d 766, 768 (1973) (parents of a boy who shot another with an air rifle they gave him may be liable for negligent entrustment, because they knew or should have known his reputation for maliciousness); *Howle v. McDaniel*, 101 S.E.2d 255, 258-59 (1957) ("a bailor may be liable to a third person so injured where he has entrusted...an automobile to one whom he knows to be so reckless or incompetent that danger to third persons would be a reasonably probable consequence of his operation of it").

Further, courts in this case rejected Enterprise's earlier attempts to dismiss Ms. Jones' claim for failing to meet the elements articulated in the alcohol line of negligent entrustment cases. *See Jones v. Enterprise Rent-A-Car*, Civil Action No. 2:04-1718-18, *Order Denying Motion to Dismiss*, p. 3 (D. S.C. Jan. 25, 2005) (Norton, J.) (the "scope of negligent entrustment is not so limited. The Supreme Court of South Carolina has allowed negligent entrustment claims on facts

not involving intoxication."); *Jones v. Enterprise Rent-A-Car, Order denying Defendants' Motion to Dismiss*, p. 3 (Richland County Court of Common Pleas, Oct. 31, 2005), *citing Passmore,* 275 S.C. at 621, 274 S.E.2d at 418 ("the owner or one in control of vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for negligent entrustment").

Based on the arguments made to those courts and rulings, it could be said that the issue has been decided. Whether or not the issue has been decided, the Court agrees that alcohol is not a necessary element of a negligent entrustment case.

More recently, in a similar negligent entrustment claim, a District Court rejected a defendant's motion for summary judgment based largely on the distinctions between the alcohol line of negligent entrustment cases and the non-alcohol line of negligent entrustment. *Speer v. Ardovini, Avis Budget Group Car Rental, LLC, et al, Order Denying Defendants' Motion for Summary Judgment*, pp. 4-10 (D. S.C. Aug. 8, 2010).

Like Enterprise, defendant there argued that to be liable for negligent entrustment, an entrustor must know or should know an entrustee was likely to drive drunk. After an extensive discussion of the alcohol and non-alcohol lines of cases, the court agreed with plaintiff that *Gadson* does not accurately state the test for negligent entrustment where alcohol is not involved. *Id.* at 8. "This Court's decision is...a determination that the relevant case law from the South Carolina Supreme Court does not restrict negligent entrustment claims solely to situations where there is the presence of alcohol or some other inebriant." *Id.*

In *Becker v. Estes Express Lines*, 2008 WL 701388 (D. S.C. 2008) Herlong, J., the defendant moved for summary judgment claiming South Carolina courts limit the common law negligent entrustment claims to those situations involving alcohol.

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> the court agrees with the Plaintiff, that the South Carolina Supreme Court did not overrule the definition of negligent entrustment found in *Passmore* in its entirety.
>
> Significantly, the negligent entrustment claim in *Gadson* was based on allegations that the driver of the vehicle was intoxicated when the accident occurred. Therefore, the South Carolina Supreme Court has never determined whether the negligent entrustment factors set forth in *Gadson* limit the claim in South Carolina to situations only involving an intoxicated driver. Further, there is no evidence in *Gadson* that the court intended to create such a limitation. In fact, the court explicitly stated in the opinion that it declined to adopt the broader definition of negligent entrustment set forth in the Restatement "based on this set of facts." *Gadson*, 648 S. E. 2d at 588. As stated above, the facts the South Carolina Supreme Court refers to in *Gadson* involved allegations of entrustment to an intoxicated driver. *Id.* at 587. Therefore, the court concludes that the South Carolina Supreme Court appears to limit its holding to the set of facts involved in the *Gadson* case, namely those involving allegations of an intoxicated driver.
>
> In addition, the South Carolina Supreme Court has never explicitly held that the *Gadson* elements must apply in every negligent entrustment case, effectively limiting the claim to situations involving allegations of an intoxicated driver.

Id. at page 3.

Therefore, the question to be litigated is simply whether Plaintiff can prove the elements of negligent entrustment as traditionally applied: That the Defendant entrusted a car to someone it knew or should have known was likely to operate it in an unsafe or incompetent manner. *American Mutual Fire Ins. Co. v. Passmore*, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981) ("the owner or one in control of a vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for negligent entrustment."). *See also Jones v. Enterprise Leasing Services Southeast*, C.A. No. 2:04-1718-18, p. 4-5 (D. S.C. Jan. 25, 2005) (Norton, J.) (denying Enterprise's Motion to Dismiss). *See also* Ralph King Anderson, Jr., *South Carolina Requests to*

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Charge—Civil, 2002, §28-10.[59] Thus, use of alcohol or intoxication is not a required element of negligent entrustment in South Carolina.

4.10 Notice is Question of Fact For A Jury In This Case

Enterprise argues "there is no evidence that Enterprise knew or should have known that Driver was likely to use the car in an otherwise unsafe manner." Motion for SJ, p. 2, Memo in Support for SJ, p. 3. If there is a factual dispute as to the "knew or should have known" element of Driver's unsafe, unfit and/or recklessness, summary judgment should be denied. It appears the incompetence element is satisfied as Enterprise admits Driver's record made him incompetent and unfit to drive one of its cars.[60]

Enterprise admits sufficient notice establishes a duty. Def. Memo. in Support of Mot. for S.J. p. 4. ("[U]nder South Carolina law, the question is what the entrustor knew or should have known at the time he or she entrusted the vehicle to the driver.") Notice "is always largely a question of fact, dependent upon all the circumstances..." *Wheeler v. Corley*, 106 S.C. 319, 91 S.E. 307, 308 (1917).[61] *See, McGee v. French*, 49 S.C. 454, 27 S.E. 487, 489 (1897) (Trial judge correctly "submitted to the jury the question of fact whether there were such facts and

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[59] Elements needed to prove negligent entrustment: (1) The entrustee was incompetent, unfit, inexperienced, or reckless; (2) the entrustor knew or had reason to know of the entrustee's condition or proclivities; (3) there was an entrustment of a dangerous instrumentality; (4) the entrustment created an appreciable risk of harm to others, including the victim, and relational duty on the part of the entrustor; and (5) the harm to the injury victim was proximately caused by the negligence of the entrustor and the entrustee.

[60] Kolodziej Dep., pp. 111:20-25 - 112:1. Enterprise admits that if it learned about his driving record at any time during the two-month-long rental preceding the collision with Ms. Jones, it would have "terminated" the rental. Kolodziej Dep., pp. 164:22—165:8. That is because his driving record "would potentially indicate and we would knowingly at that point have somebody driving our car that shouldn't be." *Id.* at 166:1-4.

[61] Of course, while a statute may impute notice as a matter of law, it is not required; whether a party has inquiry, constructive or actual notice is generally determined by weighing the evidence. *Anderson v. Buonforte*, 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005) (evidence supported finding home owners did not have actual notice of certain neighborhood covenants).

circumstances as were sufficient to have put a reasonably prudent man on inquiry.") Notice may be proved by direct evidence or inferred from the facts. *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998). As the Supreme Court stated:

> "Notice" is generally a subtle thing, evidenced as often by what was not done as what was done. It sometimes crops out in testimony given to prove it did not exist. It is elusive, and rests in silence as well as in speech. Like a thief in the night, it sometimes goes equipped with weapons of offense, and when detected uses those weapons in alleged self-defense. *Wheeler*, 106 S.C. 319, 91 S.E. at 308.

It is well-settled law in South Carolina that one who chooses not to look when he has reason to look will be held to have seen what he would have seen. Here, Jones withstands summary judgment because there are sufficient facts in the record to excite inquiry and create notice for a jury to consider. Such notice is called inquiry notice. *City of Greenville v. Washington Am. League Baseball Club*, 205 S.C. 495, 32 S.E.2d 777, 782 (1945); *Black v. Childs*, 14 S.C. 312, 321-322 (1880). Notice sufficient to put a person on inquiry need not be complete, but "[w]hatever is notice enough to excite attention and put the party on guard and call for inquiry is notice of everything to which such inquiry might have led." 58 AM. JUR. 2d *Notice* § 15. Knowledge is imputed to one whose knowledge of facts is sufficient to put him *on inquiry* and, had the facts been pursued with "due diligence," they would have led to undisclosed facts. *O'Leary-Payne v. R.R. Hilton Head II, Inc.*, 371 S.C. 340, 350, 638 S.E.2d 96, 101 (Ct. App. 2006); *Nettles v. Childs*, 100 F.2d 952, 957 (4th Cir. 1939). *See S.C. Requests to Charge—Civil*, 2002, §§ 31-23 — 31-24 (constructive notice in the context of premises liability); *see also* 66 C.J.S. *Notice* § 10. Constructive or inquiry notice is the legal equivalent of actual notice. *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998).

"Actual notice is comprised of two classes, express, which includes all knowledge or information coming to the party to be charged, of a degree above that which depends upon collateral inference, or which imposes upon him the further duty of inquiry."[62] Inquiry notice exists when there is "a connection between the facts disclosed and the further facts to be discovered, [so] that the former could justly be viewed as furnishing a clue to the latter." *Black*, 14 S.C. at 321-22. The Supreme Court has repeatedly determined that "[w]hen a person has notice of such facts as are sufficient to put him upon inquiry, which, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts." *Norris v. Greenville, S. & A. Ry. Co.*, 111 S.C. 322, 97 S.E. 848, 850 (1919). *See also Washington Am. League Baseball Club,* 205 S.C. 495, 32 S.E.2d, 777, 782 ("[I]f there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything ... that inquiry...would certainly disclose"). *See also* Restatement (Second) of Torts § 12 ("Should know...denote[s] the fact that a person of reasonable prudence and intelligence...would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.")

As the aphorism teaches, where there is smoke there is fire. And smoke - or something tantamount to smoke - puts a person on inquiry notice that a fire has started. *Warren Freedenfeld Associates, Inc. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008). Whether the available facts constitute inquiry or constructive notice is a question of fact. *Wheeler v. Corley*, 106 S.C. 319, 91 S.E. 307, 308 (1917); *McGee v. French*, 49 S.C. 454, 27 S.E. 487, 489 (1897); *Ford v. S.C. Dept. of Transp.,*

[62] Wade, William, A TREATISE ON THE LAW OF NOTICE, 2d Ed. (1886) pp. 4-5.

328 S.C. 481, 488-489, 492 S.E.2d 811, 815 (Ct. App. 1997) (whether defendant had notice of falling trees was a question of fact).

Enterprise had a relationship with Driver back to at least 1995. With actual knowledge of two prior collisions within about one year, Enterprise was on at least inquiry notice sufficient to create a jury issue as to "knew or should have known." *Dinkins v. Booe*, 252 N.C. 731, 114 S.E.2d 672 (1960) (knowledge of prior collisions sufficient to create question of fact for jury).

5 CONCLUSION

For the foregoing reasons, summary judgment is denied. Plaintiff provided sufficient facts to create jury issues concerning whether Enterprise was negligent, negligently entrusted a car and whether there was sufficient notice to create a duty to inquire. It is for a jury to determine if Enterprise's conduct, under the circumstances, was negligent, negligent entrustment, reckless, *etc.* Ample evidence exists to meet the mere scintilla threshold to avoid summary judgment.

IT IS SO ORDERED!

L. Casey Manning
Presiding Judge, 5th Judicial Circuit

Columbia, South Carolina
July 31, 2012

Aug 1, 2012

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2006CP4003605R

Robin R Jones	**Enterprise Leasing Company**
Douglas Raymond Jones	**Enterprise Leasing Company Southeast**
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

RICHLAND COUNTY FILED
2012 AUG -6 AM 11:09
JEANETTE W. McBRIDE C.C.P. & G.S.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 August 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Justin S. Kahn Mark Lee Simpson Sarah Day Hurley Samuel W. Outten

ATTORNEY(S) FOR THE PLAINTIFF(S) **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W. McBride