

## Summary Judgment – Negligent Entrustment

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Transportation Law

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August 24, 2018

New Hampshire Supreme court upholds summary judgment in favor of tow truck company for wrongful death, amputation and head injury claims.

Mike Johnson and Quinn E. Kelley of Boyle | Shaughnessy Law recently obtained a New Hampshire Supreme Court order upholding the Superior Court's order granting motion for summary judgment in favor of its towing company client, involving claims of negligence and negligent entrustment.

This matter arose from an accident involving an impaired driver who collided with a group of motorcyclists resulting in significant injuries and a fatality. The driver failed a field sobriety test administered at the accident scene, and blood samples drawn contained a high combination of drugs, including Xanax.

The driver had been arrested for driving under the influence about 12 hours before the accident by a town police officer. The police officer called the towing company to tow the driver's vehicle from the road where the stop occurred. After the arrest and booking, the police officer transported the impaired driver home at 1:30 a.m. With a temporary license in hand, the owner of the vehicle arrived at the defendant's tow yard later that morning to pay his towing and storage charges and to pick up his vehicle. The exact time the vehicle was picked was in dispute; however credible showed that it was likely between 8:30 and 10:00 a.m. The plaintiffs alleged that the vehicle was picked up approximately one half hour before the accident. The owner of the towing company testified that he did not have a clear memory of the interaction with the vehicle owner, but that he did not seem impaired. The driver testified that he had no memory of events from the time of his arrest the evening before through the time of his accident with the plaintiffs. A few minutes before the accident, the driver called the police department and left a long and incoherent voicemail for the arresting officer.

The plaintiffs brought suit against the town, its police department and the towing company. In regard to the suit against the towing company, the plaintiffs asserted a claim for negligent entrustment, and that the towing company violated RSA 262:40 which provides when vehicles are impounded or believed to be involved in a crime, the tow company cannot release the vehicle without court order or authorization from the police department that ordered the tow. The towing company moved for summary judgment arguing that:

1. Because the driver's vehicle was towed rather than impounded under RSA 262:40, the towing company was not required to obtain authorization from the police or a court prior to releasing the

vehicle;

2. Given the undisputed material facts, the towing company cannot be found liable under the theory of negligent entrustment as its right to possession was through a bailment and the owner was entitled to the return of the vehicle; and
3. The towing company owed no duty of care to the plaintiffs that would support a theory of negligence as there was no evidence that the owner of the vehicle exhibited signs of impairment at the time he picked up the vehicle.

Attorneys Johnson and Kelley successfully argued that the evidence and testimony in the case supported the finding that the towing company did not violate RSA 262:40; that it was undisputed that the vehicle was towed pursuant to a separate statute, RSA 262:32, rather than impounded pursuant to RSA 262:40. The latter statute would have required the towing company to obtain authorization from the police or a court order before releasing the vehicle back to the driver on the morning of the accident, whereas the RSA 262:33 & 33 compelled the return of the vehicle.

In addition, Attorneys Johnson and Kelley successfully argued that the towing company was not liable for negligent entrustment because the tow company could not, by law, entrust anything to the rightful owner. Further, counsel was able to convince the court that “no reasonable jury could conclude” that the towing company had reason to believe that the driver was impaired when he picked up his vehicle and that even assuming that the towing company owed the plaintiffs a duty, there was insufficient evidence establishing that the duty was breached because there was no evidence that the tow company owner knew or should have known that the driver was impaired. It was important to note that after the accident, the police utilized the expertise of a Drug Recognition Expert (a specially trained police officer) to establish impairment.

After full briefing and oral argument, the New Hampshire Supreme upheld the trial courts ruling.

It is believed that the three plaintiffs were seeking in excess of several millions had the case been brought in front of a jury.

This finding is applicable to other automobile bailees such as valets and auto repair shops when dealing with potentially intoxicated owners of vehicles.