STATE OF MICHIGAN

COURT OF APPEALS

BUNDY CORPORATION, Plaintiff-Appellee, v GORDON ALLAN WENZEL, Defendant-Appellant, and MICHELLE MACPHERSON, Intervening Defendant-Appellee.	UNPUBLISHED March 26, 2002 No. 223922 Macomb Circuit Court LC No. 96-008161-CZ
BUNDY CORPORATION, Plaintiff-Appellee, v GORDON ALLAN WENZEL, Defendant-Appellee, and MICHELLE MACPHERSON, Intervening Defendant-Appellant.	No. 223924 Macomb Circuit Court LC No. 96-008161-CZ

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

These consolidated appeals are before this Court pursuant to an order of our Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted.[1] We reverse and remand.

[1] *Bundy Corp v Wenzel*, 461 Mich 928; 605 NW2d 319 (1999).

I

Defendant Wenzel, plaintiff's employee, used a company minivan in the course of his employment on Friday, January 26, 1996. He returned to his place of employment in the van and drove it home when he left work for the weekend. That night, Wenzel went out with intervening defendant MacPherson; Wenzel was driving plaintiff's van. Wenzel got drunk and was involved in an accident in which MacPherson was injured and in which the van incurred $10,000 in damages. MacPherson indicated an intent to hold plaintiff liable for her injuries under the owner liability statute, MCL 257.401(1).

Plaintiff filed this declaratory judgment action alleging no liability to MacPherson because Wenzel was driving the van without consent and seeking reimbursement from Wenzel for the damage to the van. The trial court granted plaintiff's requests for relief. In Docket No. 223922, Wenzel appeals the trial court's judgment awarding plaintiff (hereafter "plaintiff"), $10,000 for property damage to plaintiff's van. In Docket No. 223924, intervening defendant, MacPherson appeals the trial court's opinion and order determining that plaintiff was not liable under the owner's liability statute, MCL 257.401, for any injuries sustained by MacPherson, because plaintiff did not consent or know that defendant was using the van at the time of the accident.

II

We review de novo questions of law in declaratory judgment actions. *Herold Co, Inc v Ann Arbor Public Schs*, 224 Mich App 266, 271; 568 NW2d 411 (1997). The trial court's findings of fact will not be reversed unless clearly erroneous. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). Upon review of the record, we conclude that the trial court committed an error of law in its application of the owner's liability statute, MCL 257.401(1), to the ascertained facts.

Under MCL 257.401(1), the "owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge." Consent or knowledge for purposes of the statute refers to the fact of driving, not the purpose, place, or time of driving. *Roberts v Posey*, 386 Mich 656, 661-662; 194 NW2d 310 (1972).

The statutory meaning of consent presents a question of law. *Cowan v Strecker*, 394 Mich 110, 116; 229 NW2d 302 (1975). When a motor vehicle is operated by a person who is not a family member of the owner, a rebuttable presumption arises that the person was driving with the owner's express or implied consent. *Fout v Dietz*, 401 Mich 403, 405; 258 NW2d 53 (1977). "The presumption exists because of the common difficulty in determining the issue of consent." *Bieszck v Avis Rent-A-Car System, Inc*, 459 Mich 9, 20 n 12; 583 NW2d 691 (1998). The presumption may be overcome by positive, unequivocal, strong and credible evidence that the owner did not consent to the person driving the motor vehicle. *Id.* at 19.

III

In this case there is no question that Wenzel had permission to use the van while in the course of business on the day of the accident. The trial court found that when defendant completed his business errand and returned to plaintiff's business premises the previously

granted consent ended. We disagree and find that the facts as determined by the trial court are insufficient to rebut the presumption of consent.

The trial court cited plaintiff's "Human Relations [sic] Procedure" as evidence that it was plaintiff's company policy that company vehicles were to be used strictly for company business. However, there is no evidence in the record that Wenzel ever saw this document or was even aware of its existence. Wenzel testified that no one ever told him he could not use the van for personal purposes and that he had done so in the past. In addition, the employee who was in charge of the use of the van testified that when she took on that responsibility there wasn't "an actual written policy" and that she never told Wenzel that he could not take the van home. On the facts of this case, the presumption of consent is not overcome by positive, unequivocal strong and credible evidence.

Wenzel's conduct of maintaining possession of the van and its key after returning to the business premises is analogous to the circumstances in *Roberts, supra,* where the driver failed to return a vehicle to the owner within the anticipated time. While Wenzel might have violated the terms of the original consent to drive the van, this is not sufficient to overcome the presumption that a motor vehicle, taken with permission of the owner is thereafter being driven with the owner's express or implied consent or knowledge. *Roberts, supra,* at 664. As noted in *Cowen, supra* at 115:

> *Roberts* indicates unequivocally that "consent", as that term is used in the owners' civil liability act, must be construed to effectuate the policy of the act—that is, "to place the risk of damage or injury upon the person who has the ultimate control of the vehicle". The essential consent is consent to the *driving* of the vehicle by others. *Cf. Kerns v Lewis,* 246 Mich 423; 224 NW 647 (1929). Thus, when an owner willingly surrenders control of his vehicle to others he "consents" to assumption of the risks attendant upon his surrender of control regardless of admonitions which would purport to delimit his consent. It must be so, or the statutory purpose would be frustrated.

This case does not involve circumstances of a thief or borrower, who never had consent to drive the vehicle in the first instance. *Cf. Thomas v Eppinga,* 179 Mich App 366, 376; 445 NW2d 234 (1989), and *Caradonna v Arpino,* 177 Mich App 486; 442 NW2d 702 (1989). See also *Fout, supra*.

We therefore conclude that the trial court erred as a matter of law when it concluded that plaintiff's consent to defendant driving the van had ended. Further, it was error to conclude that plaintiff could not be liable under the owner's liability statute, MCL 257.401(1), for injuries sustained by MacPherson during the accident. Because the issue of consent is dispositive, we do not address the question of knowledge as an alternative basis for liability under the statute.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot