STATE OF MICHIGAN

COURT OF APPEALS

JOAN ROSALES PALACIO,

Plaintiff-Appellant,

v

JEAN L. AIKENS,

Defendant-Appellee,

and

MONIQUE ANGELISE AIKENS,

Defendant.

UNPUBLISHED
May 7, 2002

No. 228165
Ingham Circuit Court
LC No. 98-088503-NI

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's March 17, 2000, order granting defendant-mother Jean L. Aikens' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff was involved in an automobile accident with defendant-daughter Monique Angelise Aikens and was awarded a default judgment against her.[1] Plaintiff then filed a first amended complaint adding defendant-mother as a defendant and alleging liability under the owner's liability statute, MCL 257.401, because defendant-mother held title to the vehicle defendant-daughter was driving when the accident occurred. The owner's liability statute provides in pertinent part:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being

[1] The trial court entered the default judgment against defendant-daughter on October 14, 1998.

> driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family. [MCL 257.401(1).]

Defendant-mother moved for summary disposition under MCR 2.116(C)(10) on October 4, 1999, and supported her motion with deposition testimony by defendant-daughter and herself indicating that defendant-daughter did not have permission to drive the vehicle on the day of the accident. According to the record, defendant-mother had taken away defendant-daughter's keys and had left the vehicle sitting in the parking lot at defendant-daughter's apartment only because it would not start. Unbeknownst to defendant-mother, defendant-daughter had an extra set of keys made, and had enlisted the aid of a neighbor to start the vehicle on the day of the accident.

Plaintiff opposed this motion by emphasizing the inconsistencies in defendant-daughter's and defendant-mother's deposition testimony regarding the exact time defendant-mother took away defendant-daughter's keys and by arguing that defendant-mother and defendant-daughter's testimony was self-serving and should be disbelieved. She also argued that lack of permission was an affirmative defense that defendant-mother waived by failing to plead it in her first responsive pleading. MCR 2.111(F)(3). The trial court rejected plaintiff's arguments and granted defendant-mother's motion for summary disposition, finding "clear, unequivocal testimony, which was unrebutted, that [defendant-daughter] did not have permission to use" defendant-mother's vehicle on January 14, 1997.

In reviewing a grant of summary disposition, we examine the record de novo to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence, viewed in the light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Belvidere Twp v Heinze*, 241 Mich App 324, 327-328; 615 NW2d 250 (2000). To defeat a summary disposition motion, the nonmovant must present documentary evidence establishing the existence of a material dispute of fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court may not make findings of fact or weigh credibility at the summary disposition stage. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

"To subject an owner to liability under the [owner's liability] statute, an injured person need only prove that the defendant is the owner of the vehicle and that it was being operated with the defendant's knowledge and consent." *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). The presumption of consent that arises when the driver is one of the owner's family members is rebuttable, and may disappear on a showing of clear, positive and uncontradicted evidence that the owner did not consent. *Krisher v Duff*, 331 Mich 699, 708; 50 NW2d 332 (1951).[2]

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[2] Our learned dissenting colleague asserts that we have not correctly interpreted our Supreme Court's decision in *Krisher, supra*, contending that the statutory rebuttable presumption may (continued…)

In our opinion, summary disposition was inappropriate in this case because plaintiff presented evidence establishing the existence of a material factual dispute regarding whether defendant-daughter had permission to drive defendant-mother's vehicle. During their deposition testimony, defendant-mother and defendant-daughter testified that defendant-daughter did not have permission to drive the vehicle on the date of the accident, January 14, 1997, because defendant-mother had taken away her keys to the vehicle. Specifically, defendant-mother testified that she had taken away defendant-daughter's vehicle privileges about two to three weeks before the accident because of a dispute over the individual defendant-daughter was dating. Although defendant-daughter was unclear with regard to exact dates during her deposition testimony, she also indicated that shortly after Christmas 1996 her vehicle privileges were taken away for between two to three weeks.

However, in response to defendant-mother's motion for summary disposition, plaintiff presented defendant-mother's answers to plaintiff's second interrogatories. In her answers to the interrogatories, defendant-mother conceded that she loaned the vehicle in question to defendant-daughter a few months before the accident in January 1997, and that she was aware that it was "[u]sed regularly [by defendant-daughter] except when taken away." It is undisputed that at the time of the accident, the vehicle was parked at defendant-daughter's residence. Further, defendant-mother admitted in her interrogatories that defendant-daughter was accustomed to using the vehicle without first obtaining defendant-mother's specific approval or permission. Likewise, defendant-daughter's deposition testimony regarding the exact date her mother allegedly revoked her permission to use the vehicle is equivocal at best. Similarly, at oral argument the panel was advised that defendant-daughter's father, Andrew Aikens, visited his insurance agent on the day of the accident to purchase insurance for the vehicle and named defendant-daughter as the primary driver.[3]

Further, plaintiff made out a prima facie case under the owner's liability statute by proving that defendant-mother owned the vehicle and that the vehicle was being driven by defendant-daughter at the time of the accident. In other words, the statutory presumption of consent arose requiring that the issue of consent be submitted to the jury to determine whether defendant-mother can rebut it with clear, positive and uncontradicted evidence. In our view, defendant-mother's general denial of consent is not "clear, positive and uncontradicted evidence" sufficient to overcome the strong presumption of consent the owner's liability statute mandates.

(…continued)

only be overcome by "positive, unequivocal, strong and credible" evidence. In contrast, we have cited the standard as requiring clear, positive and uncontradicted evidence. In our view, this comparison presents nothing more than a subtle distinction without a difference. In a case such as this, where the credibility of defendant-mother and defendant-daughter is seriously in dispute, the case should be presented to the jury. See *Krisher*, *supra* at 713.

[3] The trial court was similarly apprised of this fact during the March 1, 2000, hearing on defendant-mother's motion for summary disposition. In his deposition, Andrew Aikens confirmed that he visited his insurance agent at approximately 3:00 p.m. on January 14, 1997, and procured insurance for the vehicle defendant-daughter was driving when she was involved in the accident earlier that day. Andrew Aikens denied being aware of defendant-daughter's accident when he purchased the insurance. Andrew Aikens' deposition testimony was taken on May 22, 2000, after the trial court entered its judgment in this case.

Under the circumstances, we believe the trial court erred in dismissing the case. Instead, the question whether defendant-daughter had defendant-mother's permission to drive the vehicle should be submitted to the jury. Accordingly, the trial court's order granting defendant-mother's motion for summary disposition is reversed.

Given our disposition of this issue, we need not consider plaintiff's other issues raised on appeal. Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

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SAWYER, J. (*dissenting*).

I respectfully dissent.

In my opinion, summary disposition was appropriate in this case because plaintiff did not present any evidence establishing the existence of a material factual dispute regarding whether the daughter had permission to drive the mother's vehicle. During their deposition testimony, mother and daughter both testified that the daughter did not have permission to drive the vehicle on the date of the accident because the mother had taken away the daughter's keys to the vehicle. Specifically, the mother testified that she had taken away the daughter's vehicle privileges about two to three weeks before the accident because of a dispute over the individual she was dating. The majority, on the other hand, points to nothing of consequence to contradict this evidence.

First, the majority suggests that a genuine issue of material fact exists because the deposition testimony of the mother and the daughter do not clearly establish when the daughter's driving privileges were revoked. However, I fail to see the relevance in whether either or both of them clearly remember the exact date that the mother revoked the daughter's privileges to her car. Rather, what is relevant is that they both recall that the revocation of the privileges occurred before the accident and continued until after the accident.

The majority also places a great deal of emphasis on the fact that the mother had loaned the daughter the vehicle a few months before the accident and was aware that the daughter

regularly used the vehicle, without first obtaining specific permission, except when her privileges had been revoked. Again, I fail to see the relevance of this fact. It is not relevant whether the daughter ever had permission to use the car, or even whether she had to ask permission each time she used it. What is relevant is whether she had permission on the day in question or whether the general permission had been revoked. Both mother and daughter are clear that the daughter lacked permission to use the vehicle on the day of the accident.

Similarly, the majority looks to the fact that the mother left the vehicle parked at the daughter's residence when permission was revoked. I am unaware of any duty that an owner has to physically move the vehicle as part of the process of revoking permission to use it. That the mother left the vehicle at the daughter's residence is particularly understandable in light of the fact that it would not start on the day she revoked permission. Furthermore, the mother took the daughter's keys from her, emphasizing that the daughter was not to use the vehicle.[1]

The majority also looks to the father's actions of attempting to procure insurance on the vehicle on the day of the accident (after the accident occurred) and named his daughter as the primary driver of the vehicle. First, this fact is not properly before this Court inasmuch as it was established in a deposition taken after the trial court's ruling on the motion for summary disposition. MCR 7.210(A)(1). In any event, while the timing of the purchase is certainly suspect, it does nothing to resolve this case. Again, the fact that the daughter was the primary driver of the vehicle and generally had permission to use it is not in dispute and is not an issue in this case. What is an issue is whether that general permission had been revoked as of the day in question.

The majority refers to the mother as making a "general denial of consent." *Ante, slip op* at 3. However, the mother does not make a general denial of consent. Rather, she makes a very specific denial: that the daughter's general grant of consent was specifically denied for a specific reason involving issues with her boyfriend and that the denial of permission continued through the time of the accident. It is the majority that is engaging in generalities by attempting to equate the daughter's general permission to use the vehicle with there being permission on the day in question even in the absence of any evidence to contradict defendants' statements that permission had previously been revoked.

The majority argues that the presumption in favor of finding consent where a family member is involved can be overcome only by clear, positive and uncontradicted evidence, relying on *Krisher v Duff*, 331 Mich 699, 708; 50 NW2d 332 (1951). That is not a correct interpretation of *Krisher*. Rather, *Krisher* states that standard is "positive, unequivocal, strong and credible." *Id.* at 706. The requirement of clear, positive and uncontradicted evidence is the standard by which to remove the issue of consent from the consideration of the jury. Further, *Krisher*, *supra* at 708-710, holds that the defendant's testimony alone can be sufficient to overcome the presumption and remove the issue from the jury:

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[1] The daughter was able to use the vehicle only because she had a spare set of keys that her mother did not know about.

In the cases which have come before this Court in the interpretation of the statutory provision in question, we have dealt with the problem of how much rebutting evidence was needed to justify the court in taking the case away from the jury and directing a verdict in favor of the defendant. Such rebuttal may be accomplished on the testimony of the defendants alone, if such testimony is clear, positive and contradicted. *Christiansen v Hilber*, 282 Mich 403; *Brkal v Pletcher*, 311 Mich 258. These cases did not pass on the matter of instruction at all, as the holding was that the evidence warranted a directed verdict. In the *Christiansen Case*, the Court said at page 410:

"If the testimony opposed to the presumption is clear, positive and uncontradicted, it becomes the duty of the trial judge to direct a verdict if the issue is a controlling one in the case."

On the other hand, if some doubt has been cast on the credibility of the defendants or their witnesses, so that their evidence is not clear, credible and convincing, it is proper to submit the issue of consent to the jury. In *Transcontinental Insurance Co v Berens*, 254 Mich 613, at 617, the Court said:

"In order to overcome the statutory presumption, the evidence must be of a direct, positive, and credible character. * * *

"A review of the quoted testimony shows that it is not clear, positive, and uncontradicted, so as to overcome the presumption, and it became the duty of the trial judge to submit the question to the jury."

* * *

What constitutes clear, positive and credible evidence? It has been held that uncontradicted evidence given by defendants alone is sufficiently clear, positive and credible to rebut the presumption and justify a directed verdict for the defendant. *Christiansen v Hilber, supra; Brkal v Pletcher, supra.* On the other hand, if any doubt has been cast on the testimony of the defendants or their witnesses, either by evidence in rebuttal or by question as to the witnesses' credibility, the evidence is not clear, positive and credible, and the issue of whether or not the presumption of consent has been overcome should be submitted to the jury. *Transcontinental Insurance Co v Berens, supra; Karl v Gary, supra; Cebulak v Lewis, supra.* The result must necessarily vary as to the circumstances of each case.

In the case at bar, both mother and daughter are clear and positive that, from before the time of the accident and continuing until after the accident, the mother had explicitly revoked her daughter's permission to use her vehicle. Furthermore, defendants' evidence of the revocation of the consent is uncontradicted. The majority points to no evidence which contradicts their testimony. The majority presents a convincing argument on an issue not in dispute and not relevant to the disposition of this case: that the daughter generally had permission to use the car. The majority, however, fails to address the issue that must be resolved in the case: whether there

is a genuine dispute over whether permission had been revoked before the accident. On this point, there simply is no contradictory evidence.

For these reasons, I conclude that the trial court properly concluded that there was no disputed issue to submit to the jury. I would affirm.

/s/ David H. Sawyer