STATE OF MICHIGAN

COURT OF APPEALS

DENISE A. BUDY and KEITH A. BUDY,

Plaintiffs-Appellants

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as Subrogee of DENISE A. BUDY,

Plaintiff,

v

AVIS RENT A CAR SYSTEM, INC.,

Defendant.

UNPUBLISHED
December 22, 1998

No. 204610
Monroe Circuit Court
LC No. 93-001445 NI
LC No. 94-002558

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant. We affirm.

Plaintiffs allege that they were injured as a result of a collision between their automobile and an automobile being driven in a negligent manner by Somboon Thirasisombat. At the time of the collision, the other automobile was owned by defendant, a car-rental company, and leased to Sakesuk Kasemsuwan. Plaintiffs sued defendant on a theory that, as owner of the automobile, it was liable for Thirasisombat's negligence under the owner liability statute, MCL 257.401; MSA 9.2101.[1] Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it could not be held liable for the collision, because there was no genuine issue of material fact regarding its lack of consent to Thirasisombat's use of the automobile. See former MCL 257.401(1); MSA 9.2101(1). The trial court granted defendant's motion and plaintiffs appealed.

On appeal, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition. We disagree. This Court reviews de novo a trial court's decision to grant a

motion for summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual basis underlying a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider pleadings, affidavits, admissions, depositions, and any other documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In the trial court, the party moving for summary disposition pursuant to MCR 2.116(C)(10) bears the initial burden of supporting its position with documentary evidence. See *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996). Once the moving party properly supports its motion, the opposing party then bears the burden of showing that a dispute exists regarding a genuine issue of material fact. *Id*. In so doing, the opposing party may not rest upon mere allegations or denials in the pleadings, but must respond with documentary evidence setting forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Richardson v Michigan Humane Society*, 221 Mich App 526, 527; 561 NW2d 873 (1997). Here, plaintiffs submitted no documentary evidence in response to defendant's motion for summary disposition, but rather advanced a general attack on the adequacy of defendant's evidence. Therefore, the pertinent question on appeal is whether defendant sustained its initial burden of supporting its position with documentary evidence.

The operation of an automobile by one who is not a member of the family of the owner of the automobile gives rise to a rebuttable common-law presumption that the operator was driving the automobile with the express or implied consent of the owner. *Fout v Dietz*, 401 Mich 403, 405; 258 NW2d 53 (1977); see also *Bieszck v Avis Rent-A-Car*, 459 Mich 9, 17-18; 583 NW2d 691 (1998). In Michigan, the sole function of a civil presumption is to place the burden of producing evidence on the opposing party. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985); see also *Bieszck*, *supra* at 19, n 9, quoting MRE 301. A presumption dissipates when the burden of production is met. See *Isabella Co Dep't of Social Services v Thompson*, 210 Mich App 612, 615; 534 NW2d 132 (1995). The "presumption of consent" applicable in this case may be overcome by the production of "positive, unequivocal, strong and credible" evidence of a lack of consent. See *Bieszck*, *supra* at 19, quoting *Ensign v Crater*, 41 Mich App 477, 481-483; 200 NW2d 341 (1972). Consistent with Michigan's treatment of presumptions, a defendant's "'uncontradicted'" evidence of a lack of consent is considered "'sufficiently clear, positive, and credible'" to rebut the presumption of consent and "'justify a directed verdict for the defendant.'" See *Ensign*, *supra* at 482, quoting *Krisher v Duff*, 331 Mich 699, 710; 50 NW2d 332 (1950). Accordingly, summary disposition is appropriate despite the common-law presumption where a defendant's evidence of a lack of consent is uncontradicted.

In this case, as evidence of its lack of consent to Thirasisombat's use of the automobile, defendant submitted (1) a copy of its rental contract with Kasemsuwan, pursuant to which Kasemsuwan agreed that nobody would drive defendant's automobile without his "prior permission," and (2)

Kasemsuwan's sworn affidavit that he never gave Thirasisombat permission to use the automobile. Accepting the language of the rental contract as a "clear and unequivocal" statement of the relationship between defendant and Kasemsuwan with respect to the automobile in question, see *Bieszck*, *supra* at 19-20, we conclude that if Kasemsuwan did not give Thirasisombat permission to use the automobile, defendant could not be said to have "consented" to Thirasisombat's use of the automobile. Cf. *id.*; *Caradonna v Arpino*, 177 Mich App 486, 490-491; 442 NW2d 702 (1989). Thus, by submitting a copy of the rental contract and Kasemsuwan's affidavit, defendant satisfied its initial burden of providing documentary evidence in support of its position that there was no genuine issue of material fact regarding the lack of consent.

Plaintiffs argue that Kasemsuwan's failure to report the unauthorized use of his rented automobile to police until one month after the accident constituted circumstantial evidence contradictory to his sworn statement that he did not give Thirasisombat permission to use the automobile. We disagree. If anything, the fact that Kasemsuwan – who was not the owner of the automobile – eventually did report the incident to the police was consistent with his statement. Cf. *Baumgartner v Ham*, 374 Mich 169, 174-175; 132 NW2d 159 (1965). Plaintiffs also suggest that Kasemsuwan's statement that he forgot to take the automobile keys from Thirasisombat's room (where he was visiting Thirasisombat's roommate) to his own room in the same building, constituted circumstantial evidence that he gave Thirasisombat permission to use the automobile. Again, we disagree. Where Kasemsuwan *forgot* his keys is simply not probative of the issue whether he gave Thirasisombat permission to use the automobile. Finally, we conclude that there was nothing "inherently improbable" about Kasemsuwan's sworn statement, as plaintiffs urge in their reply brief on appeal.

For these reasons, we hold that plaintiffs are not entitled to relief.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] The collision occurred on July 17, 1991. The owner liability statute in effect at that time, and applicable in this case, was subsequently amended by 1995 PA 98. Accordingly, plaintiffs' suit was based on defendant's liability under the former statute.