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UNPUBLISHED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.

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regularly used the vehicle, without first obtaining specific permission, except when her privileges had been revoked.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 What is relevant is whether she had permission on the day in question or whether the general permission had been revoked.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