STATE OF MICHIGAN

COURT OF APPEALS

BRIDGETTE BRUNELL and DONALD BRUNELL, SR.,	UNPUBLISHED October 19, 1999
Plaintiffs-Appellants,	
v	No. 207541 Macomb Circuit Court
SNAPPY CAR RENTAL, INC.,	LC No. 95-003759 NI
Defendant-Appellee.	

Before: Hoekstra, P.J., and O'Connell and R.J. Danhof,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Snappy Car Rental, Inc., on plaintiffs' claims of negligent entrustment and joint venture, and denying plaintiffs' motions for reconsideration and for leave to amend their complaint to add claims of ordinary negligence and liability under the motor vehicle owner's liability statute, MCL 257.401; MSA 9.2101.[1] We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Proceedings Below

Plaintiffs' complaint alleged that plaintiff Bridgette Brunell was seriously injured when Michael G. Schwach ran a red light and struck her vehicle. At the time of the accident, Schwach was employed by the Collision Shop, Inc., as the manager of one of its Troy locations. Schwach, who did not have a drivers license, had been driving a vehicle owned by Snappy. Snappy had an informal agreement with the Collision Shop, whereby Snappy rented its vehicles to Collision Shop customers while their vehicles were being repaired. It was not uncommon for the Snappy vehicles to remain on the Collision Shop premises until they were picked up or re-rented by Snappy representatives.

In support of its motion for summary disposition concerning plaintiffs' negligent entrustment claim, Snappy submitted the affidavit of Michael Malone, the general manager of Snappy's Troy facility.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Malone averred that Collision Shop employees, including Schwach, were

only permitted to move the rental vehicles on the shop's premises, and that Schwach was specifically informed by Snappy management that he was prohibited from driving any Snappy vehicle for personal reasons. Malone further averred that Snappy never provided vehicles for personal use by any Collision Shop employees or anyone who had not entered into a valid rental agreement with Snappy. Snappy also submitted evidence that, when Schwach pleaded guilty to a criminal charge of unlawful use of a motor vehicle stemming from his use of the Snappy vehicle, he admitted under oath that he had used the Snappy vehicle on the day in question without permission.

II. Negligent Entrustment

Plaintiffs argue that the trial court erred in granting Snappy's motion for summary disposition of plaintiffs' negligent entrustment claim. Plaintiffs contend that it was undisputed that Snappy consented to the use of its vehicles by Collision Shop employees, including Schwach, when it entrusted the keys to them and permitted them to operate the Snappy vehicles on the shop premises. We disagree.

A motion for summary disposition under MCR 2.116(C)(10), which tests a claim's factual support, is subject to review de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

To establish a claim of negligent entrustment involving a motor vehicle, the burden is on the plaintiff to prove that (1) the motor vehicle was driven with the permission and authority of the owner, (2) the entrustee was in fact an incompetent driver, (3) the owner knew at the time of the entrustment that the entrustee was incompetent or unqualified to operate the vehicle, or had knowledge of such facts and circumstances as would imply knowledge on the part of the owner of such incompetency, and (4) the entrustment was causally connected to the injury for which the plaintiff complains. *Perin v Peuler (On Rehearing)*, 373 Mich 531, 538-539; 130 NW2d 4 (1964); *Hendershott v Rhein*, 61 Mich App 83, 89; 232 NW2d 312 (1975).

Here, as the trial court noted, the undisputed evidence demonstrates that, at the time Schwach collided with plaintiff's vehicle, he was driving the vehicle without the permission or authority of its owner. Because plaintiffs have failed to establish a requisite element of the negligent entrustment cause of action, their claim fails as a matter of law. *Perin, supra* at 538.

In so holding, we specifically reject plaintiffs' claim that the issue whether Schwach was outside the scope of the permitted use is irrelevant. The authority plaintiffs cite in support of their claim, *CNA Ins Co v Cooley*, 164 Mich App 1; 416 NW2d 355 (1987), is inapposite. *Cooley* does not address the issue of liability where the operator exceeds the scope of his permitted use. Rather, the case focused on whether the owner "knew or should have known" that the operator was intoxicated, that he lacked the capacity to drive, and his intended use of the vehicle. In addition, unlike the present case, the owner in *Cooley* loaned the vehicle to the defendant and, therefore, there was no question that the owner entrusted the vehicle to the defendant and that the defendant drove the vehicle with the owner's permission.[2]

Accordingly, we hold that summary disposition of plaintiffs' negligent entrustment claim was properly granted in favor of Snappy.

III. Leave to File an Amended Complaint

Plaintiffs argue that the trial court abused its discretion in denying plaintiffs' motion for leave to file an amended complaint specifically alleging claims of ordinary negligence and liability under the owner's liability statute, MCL 257.401; MSA 9.2101. The trial court denied leave, finding that the proposed amendments would be futile.

When a court grants summary disposition pursuant to MCR 2.116(C)(10), as occurred here, the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). An amendment is futile when, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

A. Ordinary Negligence

Plaintiffs' proposed amendment to add a claim of ordinary negligence alleged that (1) Snappy owed them a duty to exercise reasonable care in storing the Snappy vehicles and the keys to those vehicles on the premises of the Collision Shop to prevent persons, such as Schwach, from having access to the vehicles, (2) Snappy breached its duty by allowing Schwach, whom Snappy knew to be an unfit, incompetent, and unlicensed driver, to have access to the vehicles, and (3) the breach was the direct and proximate cause of plaintiffs' injuries. The trial court did not abuse its discretion in denying the amendment on the basis of futility.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Swan v Wedgewood Christian and Youth Family Services, Inc*, 230 Mich App 190, 195; 583 NW2d 719 (1998). The issue of duty, which is a question of law for the court to decide, encompasses whether the defendant owes the plaintiff any obligation to avoid negligent conduct. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). In determining whether a legal duty exists, courts look to different variables, including foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm and the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992); *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997).

As a general rule, an individual has no duty to protect another who is endangered by a third person's conduct. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). Here, no special relationship existed between either Snappy and plaintiffs or Snappy and Schwach such that Snappy was under an obligation to protect remote and unknown third persons from Schwach's criminal act of taking one of Snappy's vehicles without permission and driving it in a reckless manner. Such conduct on the

part of Schwach was neither preventable nor foreseeable by Snappy. *Id.*; *Terry*, *supra*. Accordingly, because Snappy was under no legal duty to protect plaintiffs, they have not alleged a prima facie case of negligence and their proposed amendment was properly denied as futile.

B. Owner's Liability Statute

The motor vehicle owner's liability statute, MCL 257.401(1); MSA 9.2101(1), 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 the common law. *The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge*. [Emphasis added.]

Thus, to subject an owner to liability under the statute, an injured person need only prove that the defendant is the owner of the vehicle and that it is being operated with the defendant's knowledge or consent. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

Here, it is undisputed that Snappy was the owner of the vehicle involved in the accident. Thus, the issue on appeal is whether the car was being operated at the time of the accident with Snappy's express or implied consent. The operation of a motor vehicle by one who is not a member of the owner's family gives rise to a rebuttable common law presumption that the operator was driving with the vehicle owner's express or implied consent. *Bieszck v Avis Rent-A-Car*, 459 Mich 9, 18; 583 NW2d 691 (1998); *Fout v Dietz*, 401 Mich 403, 405; 258 NW2d 53 (1977). The vehicle owner thus bears the burden to defeat the presumption of consent with "positive, unequivocal, strong, and credible evidence. . . ." *Bieszck*, *supra* at 19.

In denying plaintiffs' proposed amendment to allege liability under the statute on the basis of futility, the trial court relied, in part, on *Caradonna v Arpino*, 177 Mich App 486; 422 NW2d 702 (1990). In *Caradonna*, the defendant kept his car at his girlfriend's condominium complex and gave her the keys to the vehicle, which she kept on a hook in the kitchen. When the girlfriend's son, Kenneth, came to visit, she expressly told him that he was not to drive the defendant's car. Nevertheless, Kenneth took the keys to the defendant's car without his mother's or the defendant's permission and struck the plaintiff's vehicle. Neither the defendant nor his girlfriend knew that Kenneth was driving the car until after the accident. The plaintiff brought an action against the defendant under the owner's liability statute. This Court, relying on *Fout*, *supra*,[3] held that the presumption of consent was defeated by evidence showing that the defendant-owner had expressly forbidden the driver from driving the vehicle *at all*.

Caradonna and *Fout* are inapposite to the present case, given that Schwach had permission to drive the vehicle in question on the Collision Shop premises. The issue, therefore, is whether the owner is liable under the owner's liability statute even where, as here, the operator was driving outside the scope of the permitted use at the time of the accident. In *Roberts v Posey*, 386 Mich 656; 194 NW2d

310 (1972), the defendant loaned a third party his vehicle for a short time and for a specific purpose. When the third party did not return within the stated time, the defendant extensively searched for the third party and eventually called the police to report his vehicle as missing. It was later revealed that the third party had an accident with the vehicle while on an independent joyride the next day. The injured motorist sued the owner of the vehicle, but the circuit court and this Court denied relief on the ground that the third party had driven well beyond the scope of permitted use. *Roberts*, *supra* at 658-659.

In a unanimous decision, the Michigan Supreme Court reversed and held that the owner had consented to the use of the vehicle under the statute. In so holding, the *Roberts* Court focused on the distinction between the common-law doctrine of respondeat superior and the statutory owner's liability, noting that the latter is based upon a broader standard than scope of employment and emphasized that the question under the owner's liability statute was whether the owner had given permission for the car to be driven:

> The statute absolves the owner from liability only when the vehicle is driven without his express or implied consent or knowledge. The consent or knowledge, therefore, refers to the *fact* of the *driving*. It does not refer to the *purpose* of the driving, the *place* of the driving, or to the t*ime* of the driving.
>
> The purpose of the statute is to place the risk of damage or injury upon the person who has ultimate control of the vehicle.
>
> The owner who gives his keys to another, and permits that person to move several pounds of steel upon a public highway, has begun the chain of events which leads to damage or injury.
>
> The statute makes the owner liable, not because he caused the injury, but because he permitted the driver to be in a position to cause the injury. [*Id*. at 661-662 (emphasis in original).]

The *Roberts* Court concluded:

> The presumption that a motor vehicle taken with the permission of its owner, is thereafter being driven with his express or implied consent or knowledge is not overcome by evidence that the driver has violated the terms of the original permission, nor is it overcome by evidence of good faith efforts by the owner to get the vehicle returned voluntarily by the driver. [*Id*. at 664-665.]

The holding in *Roberts* was subsequently extended to cases involving an owner who consents to operation of his car with certain limitations, and the permittee violates the terms of consent by giving a third party permission to operate the vehicle. In one such case, *Cowan v Strecker*, 394 Mich 110; 229 NW2d 302 (1975), our Supreme Court noted:

> *Roberts* indicates unequivocally that "consent," as the term is used in the owners' civil liability act, must be construed to effectuate the policy of that 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 vehicles by others. 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 the admonitions which would purport to delimit his consent. It must do so, or the statutory purpose would be frustrated. [*Id.* at 115. Citation omitted.]

We find that *Roberts* and its progeny control our disposition of this matter. In their proposed amended complaint, plaintiffs alleged that Snappy owned the vehicle and that Snappy gave the Collision Shop employees, including Schwach, limited permission to move the vehicles on shop premises.[4] Where an owner consents to the use of his vehicle by another for a limited purpose or with other restrictions, the owner is liable even if the operator exceeds the scope of the permitted use. *Roberts*, *supra*. Accordingly, plaintiffs' proposed amendment to allege a claim under the owner's liability statute was not futile, and the trial court abused its discretion in denying leave to amend.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Robert J. Danhof

[1] A default judgment was entered against defendant Schwach, and defendant Collision Shop, Inc., was dismissed from the suit. These defendants are not parties to this appeal.

[2] In their appeal brief, plaintiffs also appear to rely on several cases relating to liability under the owner's liability statute, MCL 257.401; MSA 9.2101, in support of the position that, for purposes of consent, it is irrelevant whether Schwach exceeded the scope of consent by driving the vehicle off the premises. However, the cited cases address the issue of consent as it applies within the confines of the owner's liability statute, MCL 257.401; MSA 9.2101. It is well settled that the common-law doctrine of negligent entrustment and the statutory claim of owner's liability are separate and distinct theories of liability. Thus, while plaintiffs' reliance on these cases may have validity in the context of the owner's liability statute, plaintiffs have failed to cite authority or engage in analysis demonstrating that the same principles apply in the context of claims relating to negligent entrustment.

[3] In *Fout*, the defendant owner expressly forbade his friend from driving his car. The friend nevertheless took the keys from the defendant's bedroom while he slept and subsequently had an accident with the defendant's car. The Michigan Supreme Court affirmed the *Fout* Court's conclusion that the defendant could not be held liable under the owner's liability statute and held that the common-law presumption of consent of the owner to driving the vehicle at the time of the accident was clearly rebutted. *Fout*, *supra* at 406-407.

[4] Plaintiffs also argue that Snappy violated MCL 257.904; MSA 9.2604(1), when it allowed Schwach, whom Snappy knew was unlicensed, to drive its vehicles in the Collision Shop parking lot. A thorough

review of the lower court documents indicates that plaintiffs never raised this issue before the trial court, and consequently, the trial court never addressed it when ruling on Snappy's motions for summary disposition or plaintiffs' motions for reconsideration and to amend the complaint. Accordingly, this issue is unpreserved and will not be addressed by this Court. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 295; 475 NW2d 366 (1991).