STATE OF MICHIGAN

COURT OF APPEALS

BRIDGETTE BRUNELL and DONALD BRUNELL, SR.,

Plaintiffs-Appellants,

v

SNAPPY CAR RENTAL, INC.,

Defendant-Appellee.

UNPUBLISHED
October 19, 1999

No. 207541
Macomb Circuit Court
LC No. 95-003759 NI

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

O'CONNELL, J. (concurring in part and dissenting in part).

I concur in the majority opinion in all but part III B, where the majority concludes that the trial court abused its discretion in denying leave to amend the complaint to add a claim of liability under the owner's liability statute, MCL 257.401; MSA 9.2101. I would affirm the trial court in all respects.

I generally agree with the majority's statement that, "[w]here 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." However, I believe that this rule is inapplicable to the facts of this case.

Here, Snappy Car Rental, Inc. ("Snappy") kept rental vehicles at a collision shop for rental to the shop's customers while their vehicles were being repaired. Snappy only consented to the incidental movement of the rental vehicles on the shop's premises by the shop's employees, and specifically prohibited the employees from operating the rental vehicles for any personal reasons. Michael G. Schwach, the employee that was operating the vehicle at the time of the accident, admitted that he drove the vehicle outside of the shop's premises and without permission. He pleaded guilty to the unlawful use of a motor vehicle.

This is not a case where the owner gave permission to a person to operate the vehicle and that person exceeded the scope of the permission. Instead, this is a case where, although Schwach was

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

allowed to move the vehicle on the shop's premises while at work, he was

specifically not allowed to use the vehicle off the premises or for personal reasons. However, contrary to these instructions, he took the vehicle for personal use off the shop's premises. Schwach was therefore not acting as one of the shop's employees, but as a car thief.

The statute provides that "[t]he owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge." MCL 257.401(1); MSA 9.2101(1). See also *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998) ("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 was being operated with the defendant's knowledge or consent."). Here, the vehicle was not being driven with Snappy's consent or knowledge. Rather, the vehicle was stolen. The following example is illustrative: if a car dealership allows its salespersons to move the vehicles on the dealership's premises while the salespersons are at work, this does not mean that the car dealership has consented to one of the salespersons stealing a vehicle. Here, Schwach stole one of Snappy's rental vehicles. The owner of a vehicle is not liable where the vehicle was stolen, i.e., not being driven with the express or implied consent or knowledge of the owner.

The presumption that the operator was driving with the owner's consent may only be overcome by "positive, unequivocal, strong and credible evidence." *Bieszck v Avis Rent-A-Car System, Inc*, 459 Mich 9, 19; 583 NW2d 691 (1998). In this case, I would hold that the presumption has been overcome. Schwach pleaded guilty to stealing one of Snappy's vehicles. I would therefore conclude that the trial court did not abuse its discretion in denying leave to amend the complaint.

Accordingly, I would affirm.

/s/ Peter D. O'Connell