STATE OF MICHIGAN

COURT OF APPEALS

BRENDA GEORGIAN, a/k/a BRENDA BUSKIRK,

Plaintiff-Appellant,

v

JOSEPH LLOYD LEMASTER,

Defendant,

and

ALLEN BROTHERS, INC., ROBERT ALLEN and GARY ALLEN,

Defendants-Appellees.

UNPUBLISHED
November 1, 2005

No. 262722
Oakland Circuit Court
LC No. 03-053693-NI

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants, Allen Brothers, Inc., Robert Allen and Gary Allen ("the Allen defendants"), in this personal injury action for damages arising out of a boating accident. Plaintiff was a passenger in a boat, operated by defendant, Joseph Lloyd LeMaster ("LeMaster"),[1] and owned by the Allen defendants. We affirm.

I. FACTS

This is a personal injury action for damages arising out of a boating accident on July 19, 2003. Plaintiff was a passenger in a boat on Lake Orion in Oakland County, which was being operated by LeMaster and owned by the Allen defendants. LeMaster had been an employee of the Allen defendants for two years before the accident. While on the lake, LeMaster swerved to

[1] The trial court granted plaintiff's motion for order of voluntary dismissal of LeMaster on March 2, 2005.

avoid another oncoming watercraft, lost control of the boat and struck an island, causing plaintiff to be ejected from the boat. Plaintiff, LeMaster and Chris Bartley, another passenger on the boat, were rescued and transported to Pontiac Osteopathic Hospital (POH). Bartley told Officer Larry E. Dugan at the POH that he and LeMaster had been drinking beers that night and that LeMaster was "fucked up," but insisted on driving because "it was his bosses [sic] boat" and "no-one [sic] else could drive it."

On July 20, 2003, plaintiff was hospitalized at the POH, where she received treatment for her injuries, including a femur fracture, respiratory failure, ARDS, and pneumonia. On August 7, 2003, she was transferred to Crittenton Hospital for rehabilitation. After the accident, the police officer interviewed Michael Joseph Starrs, the Allen defendants' employee, Justin Michael Allen, Gary's son, Gary, Robert, LeMaster and plaintiff. Gary told the officer that he had given no one permission to use the boat other than Robert, Justin, Starrs, and his family members. Gary told the officer that the employees at their company must obtain permission before going out on the boat and that no one contacted him on the day of the accident. Robert also told the officer that the boat is not a company boat and no employees, except Tim Gonzales and Starrs, are allowed to take the boat out on their own. Robert said the only time LeMaster was allowed on the boat was when he was with Justin. Robert told the officer that he usually leaves the keys in the glove box inside the boat. Robert wrote in his police statement that his boat was docked on a regular basis at Starrs' house and that LeMaster did not have permission to use the boat. Justin, Gary's son, told the officer that, on the day of the accident, he refused to give LeMaster permission to use the boat, and told LeMaster that he had to ask Gary or Starrs. Starrs told the officer that, on the day of the accident, LeMaster telephoned Starrs and told him that Justin had given him permission to use the boat. Starrs stated that he was not home when LeMaster picked up the boat, but his daughter saw LeMaster at approximately 6:30 p.m. on the day of the accident. Starrs told the officer that the keys were located in the glove box inside the boat. Starrs stated that he met LeMaster at the clubhouse that night and showed him where the light to the boat was. LeMaster told the officer that Justin did not give him permission to use the boat. When LeMaster contacted Starrs, Starrs told him to put gas back in the boat if he took the boat out. LeMaster stated that he was previously permitted to take the boat out five times, and, one time, he was not allowed to use the boat because someone else was using it. Plaintiff told the officer that LeMaster told her that Starrs gave him permission.

LeMaster was charged with operating while under the influence of liquor (OUIL) causing incapacitating injuries, and with unauthorized use or possession of a boat. At a preliminary examination on both charges on October 6, 2003, LeMaster stated that no one gave him permission to use the boat. On December 4, 2003, after being bound over to the Oakland Circuit Court, Judge Steven N. Andrews accepted LeMaster's guilty plea to all of the criminal charges against him, including the unauthorized use or possession of the boat charge. There was no compromise agreement. As part of the factual basis for the plea, LeMaster admitted that he lacked authority or permission to take the boat. On January 6, 2004, LeMaster was sentenced, as a fourth habitual offender, to one to ten years in prison for his OUIL and unauthorized use of the boat convictions. Plaintiff testified at her deposition on September 29, 2004, that she was aware of the criminal charges against LeMaster.

II. MOTION FOR SUMMARY DISPOSITION

On appeal, plaintiff makes two arguments. First, plaintiff contends that the grant of summary disposition in favor of the Allen defendants was improper because a genuine issue of material fact exists regarding whether LeMaster was operating the boat at the time of the accident with the implied consent of the Allen defendants. Further, plaintiff contends that the grant of summary disposition was premature because discovery was not complete. We disagree with plaintiff's arguments.

A. Standard of Review

Although defendants moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact), it is clear that the trial court and parties relied upon materials beyond the pleadings. Thus, our review will be in accordance with the de novo standard of review for a motion under MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited solely to the evidence that was presented to the trial court at the time the motion was decided. *Pena v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

B. Implied Consent

The trial court granted the Allen defendants' motion for summary disposition with regard to plaintiff's claim against them under the watercraft owner's liability statute, MCL 324.80157. MCL 324.80157 provides:

> The owner of a vessel is liable for any injury occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state, or in the failure to observe such ordinary care in the operation as the rules of the common law require. *The owner is not liable unless the vessel is being used with his or her expressed or implied consent.* It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if it is driven at the time of the injury by his or her son, daughter, spouse, father, mother, brother, sister, or other immediate member of the owner's family. [Emphasis added.]

As the trial court found, the implied consent provision in the watercraft owner's liability statute, MCL 324.80157, is similar to the implied consent provision in the automobile owner's liability statute, MCL 257.401. Under the automobile owner's liability statute, the operation of a motor vehicle by a person who is not a member of the owner's family gives rise to a rebuttable common-law presumption of consent. *Bieszck v Avis Rent-A-Car System, Inc*, 459 Mich 9, 18-19; 583 NW2d 691 (1998). Where the events of a case remain in dispute, they are to be resolved

by the finder of fact. However, where the facts have been determined, "the statutory purport of 'consent' in the owners' civil liability act is a matter of law." *Id.* at 19 n 8. In the instant case, upon finding no disputed facts regarding whether LeMaster had the implied consent to use the boat, the trial court ruled, as a matter of law, that the Allen defendants were not liable for plaintiff's injuries under MCL 324.80157. We agree with the trial court's ruling.

Plaintiff, relying on the decisions in *Cowan v Strecker*, 394 Mich 110; 229 NW2d 302 (1975), *Roberts v Posey*, 386 Mich 656; 194 NW2d 310 (1972), and *Landon v Titan Ins Co*, 251 Mich App 633; 651 NW2d 93 (2002), argues that the Allen defendants failed to present "positive, unequivocal, strong and credible evidence" to rebut the presumption of consent. We hold that these cases do not support plaintiff's argument. *Roberts* is the case where the operator was initially given permission by the owner, but was driving outside the scope of the permitted use at the time of the accident. 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 like *Cowan* 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 *Cowan*, *supra* at 115, the 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. [Citation omitted.]

More recently, in *Landon, supra* at 642-643, the collision occurred while the driver was driving the owner's car that had been parked in the driver's yard with the keys in the car. The driver was to give the keys to any potential buyers who wanted to test drive the car. *Id.* This Court found that plaintiff, as a bailee of the vehicle, was in lawful possession of the vehicle on the day of the accident and concluded:

> [P]laintiff has, at the very least, raised a genuine issue of material fact regarding whether she had Roe's implied consent to use the vehicle. Roe's action of leaving the keys in the vehicle, while parked on plaintiff's property, qualifies as giving or entrusting plaintiff with the keys to her vehicle. Roe may only have intended that plaintiff use those keys in order to allow test-drives of the vehicle by potential purchasers. However, the fact that plaintiff exceeded the scope of intended use of the vehicle is irrelevant to the determination whether the driver of the vehicle had the owner's implied consent to use it. [*Id.* at 648-649 (citation omitted).]

We conclude that plaintiff's reliance on *Cowan, supra, Roberts, supra,* and *Landon, supra,* is misplaced. This is not a case where the owner initially gave permission to a person to operate the vehicle or where the owner willingly surrendered control of his vehicle to others. *Cowan, supra* at 115; *Roberts, supra* at 664-665. Also, this is not a case where the operator lawfully possessed the vehicle and did not know that it should not be driven by the operator. *Landon, supra* at 648-649. Here, the boat in question was stolen. Although LeMaster was the Allen defendants' employee, there was no evidence that the Allen defendants gave blanket permission to their employees to use their boat. The undisputed evidence shows that the Allen defendants' employees must obtain permission from the Allen defendants to use the boat and that LeMaster did not get permission from the Allen defendants to use the boat on the day of the accident. LeMaster repeatedly admitted at his deposition and preliminary examination that he took the boat without permission of the Allen defendants, fully knowing that taking the boat without their permission was a crime. According to LeMaster, on the day of the accident, Justin Michael Allen, Gary's son, expressly refused to give LeMaster permission to use the boat and told him to ask Robert or Gary. LeMaster did not call Robert or Gary, but took the boat after lying to Michael Joseph Starrs, LeMaster's coworker, that he got permission from Justin. LeMaster admitted that, after the accident, he initially provided the police officers with false information that he was given permission to use the boat. But before he took the polygraph, LeMaster decided to tell the truth and told the police officers that he absolutely did not have permission to use the boat and that he knew that he should not have used the boat on the day of the accident. Thus, the facts in *Cowan, supra, Roberts, supra,* and *Landon, supra,* are distinguishable from the facts in the instant case, given that the owner did not give permission to others or entrust the vehicle to the operator, and that the boat was stolen.

Moreover, we conclude that any common-law presumption that the operator was driving with the owner's implied consent has been overcome by "positive, unequivocal, strong and credible evidence." *Bieszck, supra* at 19. During the court proceedings, LeMaster admitted that he stole the boat in question and pleaded guilty to the unauthorized use or possession of the boat charge. In *Waknin v Chamberlain,* 467 Mich 329, 332-336; 653 NW2d 176 (2002), our Supreme Court held that criminal conviction after plea or trial constitutes admissible substantive evidence of conduct at issue in a civil case arising out of the same transaction.[2] Accordingly, LeMaster's guilty plea to the unauthorized use or possession of the boat is admissible in the instant case arising out of the same boating incident and it clearly establishes that LeMaster did not drive the boat with the owner's knowledge or consent. As such, we hold that there was no question of fact regarding whether LeMaster had implied consent to hold the Allen defendants liable under MCL 324.80157.

Plaintiff maintains, however, that the affidavit by Chris Bartley, another passenger on the boat, creates a question of fact regarding the issue of consent. In Bartley's affidavit, he stated that LeMaster told him that he had permission to use the boat on the day of the accident, and that

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[2] The *Waknin* Court stated that the fact that the "defendant was found guilty beyond a reasonable doubt - a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case - is highly probative evidence." *Waknin, supra* at 335-336.

when Bartley, LeMaster and plaintiff went to Starrs' house to take the boat on the day of the accident, Starrs was home. Bartley testified that LeMaster could not find the boat's keys and Justin came down to the boat and physically handed the keys to LeMaster. We find this evidence inadmissible because Bartley's affidavit contradicts his earlier statement in the preliminary examination indicating that, when he, LeMaster and plaintiff arrived at Starrs' house, there was no one there and they just took the boat. Bartley did not mention Justin giving the keys to LeMaster. A party or witness may not create a factual dispute by submitting an affidavit that contradicts his own sworn testimony or prior conduct. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997).[3]

Even if Bartley's statement in his affidavit was not considered "contradictory," but merely additional, we do not find that this information created an issue of material fact. It is undisputed that Justin refused to permit LeMaster to use the boat and that LeMaster lied to Starrs that he received permission from Justin to get access to and use of the boat. There is also no evidence that Justin or Starrs had the authority to give permission to use the boat. It is thus immaterial whether Justin gave LeMaster the boat keys or Starrs was home at the time LeMaster took the boat. Moreover, there is no evidence to support Bartley's belief that Justin physically gave LeMaster the keys. All other evidence, including LeMaster's deposition testimony and Starrs' and Robert's police statements, indicates that the keys were left in the boat's ignition or in the glove box inside the boat on the day of the accident. Given the evidence presented, we hold that the trial court did not err in concluding:

> The fact that Justin Allen gave him the keys is insufficient to create an issue as to implied consent since it is undisputed that Justin Allen did not have authority to consent to the use of the boat and LeMaster knew this. It is undisputed that he lied to Starr to get access to and use of the boat. There is no evidence that he did not also lie to Justin Allen.

A de novo review of the record shows that the trial court properly viewed all the evidence, including Bartley's affidavit, in the light most favorable to plaintiff and ruled as a matter of law that no genuine issue of material fact was shown with respect to plaintiff's claim of implied consent to hold the Allen defendants liable under MCL 324.80157. Consequently, we hold that summary disposition was properly granted in favor of the Allen defendants. *Morales*, *supra* at 294.

C. Completion of Discovery

Plaintiff next argues that the trial court should have not granted summary disposition in favor of the Allen defendants because discovery was incomplete. Specifically, plaintiff asserts

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[3] Although Bartley's statement was not a deposition testimony, it was made under oath or as part of legal proceedings. Thus, we find that the general rule against contradicting deposition testimony with an affidavit in the summary disposition context applies to the contradicting sworn testimony.

that the depositions of Robert, Gary, Justin, Tim Gonzales and Starrs would have created "the potential conflict in the testimony" and would have presented evidence of a disputed fact regarding the issue of consent. We disagree.

Generally, a grant of summary disposition under MCR 2.116(C)(10) is premature if discovery concerning a disputed issue is incomplete. *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 714; 686 NW2d 825 (2004). However, "if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 507; 686 NW2d 770 (2004) (internal citation and quotation omitted). Additionally, even if discovery is incomplete, "'summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position.'" *Stringwell, supra* at 714, quoting *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).

Here, plaintiff failed to show a reasonable chance that further discovery would result in factual support for her claim that LeMaster operated the boat with consent or knowledge of the Allen defendants. *Stringwell, supra* at 714. As discussed above, *supra*, it is undisputed that LeMaster pleaded guilty to his unauthorized use of the boat charge and admitted to stealing or taking the boat without the Allen defendants' permission. Moreover, the police statements of Robert, Gary, Justin, LeMaster, Gonzales and Starrs consistently indicate that the employees of the Allen defendants, with possible exception of Gonzales and Starrs, must obtain permission from the Allen defendants before going out on the boat and that LeMaster did not get permission from the Allen defendants to use the boat on the day of the accident. The evidence does not create any question of fact that LeMaster thought he operated the boat on the day of the accident with consent or knowledge of the Allen defendants. Also, plaintiff failed to provide any independent evidence that Robert, Gary, Justin, Gonzales and Starrs would testify contrary to their police statements or contrary to the Allen defendants' discovery responses to plaintiff's various discovery requests. *The Mable Cleary Trust, supra* at 507. Given that plaintiff failed to show that further discovery would uncover factual support for her claim of implied consent, we hold that the trial court timely granted summary disposition in favor of the Allen defendants.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette