STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL FLOWERS,

Plaintiff-Appellant,

v

CHARLES THOMPSON and RENEE WILLIAMS,

Defendants,

and

SANDRA WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
January 17, 2012

No. 301175
Oakland Circuit Court
LC No. 2008-092054-NI

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Renee Williams threw a birthday party for her boyfriend, Jason Armstrong, at a lake-front home owned by defendant Sandra Williams, Renee's mother. The party guests enjoyed a catered meal, a ride in Sandra's pontoon boat, and an evening bonfire. But the good times abruptly ended when an all-terrain vehicle driven by Charles Thompson, one of the party guests, rolled on top of plaintiff Michael Flowers, another party-goer. Flowers' injuries eventually resulted in a partial leg amputation.

Flowers sued Renee and Sandra under the owner's liability statute, MCL 257.401, and also asserted a negligent entrustment claim. In granting summary disposition in favor of defendants, the circuit court found that Sandra had not given Thompson express or implied permission to use her ATV, and lacked any knowledge that the vehicle would be used unsafely. We reverse as to the owner's liability claim and affirm the negligent entrustment ruling.

I. FACTS AND PROCEEDINGS

At the end of the summer of 2006, Sandra Williams purchased a lakefront home in Pinckney. By June 2007, she had equipped the property with two jet skis, a pontoon boat, two small "four-wheelers," and a Yamaha Rhino ATV. Jeffrey Williams, Sandra's son, kept his boat there, and Sandra described that Jeffrey "had free rein of all the equipment and toys that were up at the lake house." Sandra acknowledged that when she permitted Renee to host the

party at the lake house, she understood that the party guests would use "the boats." Sandra further conceded that she and Renee never discussed the party-goers' use of the ATVs, but that she had never forbidden Renee from using them.

Renee testified that Jeffrey and Armstrong, her boyfriend, used the Rhino to transport gasoline from the garage to the pontoon boat and the jet skis. Renee recalled that the Rhino and its ignition key remained at the lakeshore even after the boat and the skis had been filled with gas. According to Renee, no one else at the party asked to use the ATVs, and she would have denied permission to anyone who did.

Despite Renee's resolve to prohibit general use of the ATVs, record evidence supported that Jeffrey, who also attended the party, freely consented to their use. Thompson claimed that Jeffrey pointed to the Rhino and the jet skis and declared, "the keys are in them." When Thompson decided to go for a spin in the Rhino, he found the vehicle parked approximately 30 feet from the waterfront, and the "[k]eys were in it. Keys were in it the whole day." Jeffrey recounted that Armstrong and two other party guests had used the Rhino to ferry gas to the waterfront, but denied having generally permitted the party-goers to use the motorized equipment.

Renee and Sandra sought summary disposition under MCR 2.116(C)(10), contending that neither had expressly or impliedly allowed Thompson to use the Rhino, nor ever entrusted him with the vehicle. Renee additionally asserted that because Sandra owned the ATV, Renee bore no ownership liability. The circuit court entered an opinion and order granting defendants' motions, reasoning as follows:

> The Court finds that summary disposition is appropriate as to these defendants. Sandra Williams is not liable under the Owners Liability Statute because Plaintiff has failed to show that she gave either express or implied consent for Defendant Thompson to drive the vehicle. In addition, Plaintiff has failed to show that Sandra Williams knew anything about Defendant Thompson or that her daughter or any other party guests were likely to use the vehicle in an unsafe manner. Because Renee Williams was not the owner of the vehicle as defined in the statute, she cannot be held liable under the Owners Liability Statute. There is no proof that Renee Williams gave permission for Defendant Thompson to drive the vehicle, therefore she cannot be held liable for negligent entrustment.

II. ANALYSIS

Flowers challenges the circuit court's summary disposition ruling as to Sandra only. Our review of this ruling is de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Because defendants prevailed on summary disposition, we evaluate the relevant documentary evidence in the light most favorable to Flowers. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable

doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

The owner's liability statute imposes on a vehicle owner the legal responsibility for negligent vehicle operation when "the motor vehicle is being driven with his or her express or implied consent or knowledge." MCL 257.401(1). Because Sandra did not expressly consent to Thompson's use of the Rhino, the issue boils down to whether she impliedly permitted him to drive it.[1] Flowers' burden of establishing Sandra's implied consent is lightened by the operation of a rebuttable common law presumption "that the operator was driving the vehicle 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 Sys, Inc*, 459 Mich 9, 19; 583 NW2d 691 (1998). To overcome this presumption, the vehicle owner must produce "positive, unequivocal, strong and credible evidence" negating implied consent. *Michigan Mut Liability Co v Staal Buick*, 41 Mich App 625, 626; 200 NW2d 726 (1972), quoted in *Biesczk*, 459 Mich at 19. What constitutes evidence of this powerful character? In *Krisher v Duff,* 331 Mich 699, 710; 50 NW2d 332 (1951), our Supreme Court answered that question as follows:

> 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. . . . 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. [Internal citations omitted].

Flowers presented evidence that Jeffrey explicitly invited the party guests to ride the Rhino, and effectuated his offer by allowing the vehicle to remain in the midst of the party's waterfront action with its keys at the ready. In response, Sandra relied on Jeffrey's denial that he allowed Thompson to use the Rhino, and contends in this Court that Thompson "unlawfully took this vehicle and drove [it] without permission from anyone including Jeffrey Williams[.]"[2] We

---

[1] An off-the-road vehicle such as an ATV qualifies as a motor vehicle for purposes of the owner's liability statute. *Van Guilder v Collier*, 248 Mich App 633, 637-639; 650 NW2d 340 (2001).

[2] Sandra claims that Thompson merely had an "impression" that he could use the motorized equipment, based solely on a "circular wave" of Jeffrey's hand. We do not read Thompson's testimony quite so narrowly:

> Q. After you got back to the residence, what did you do next?
>
> A. Well, Jeff knew that I had lost all my fishing gear, and there was a jet ski there, and I said can I ride the jet ski. *He goes you can ride anything you want, besides the boat.* He said, the keys are in it. And I asked him, because I had never seen these before at their property, and I said where did you get this stuff. And he was like, I just walked into the marina – and, like I said, he likes to

do not judge the veracity of these differing accounts, but scrutinize them to determine whether a genuine issue exists for a factfinder's resolution. Based on Thompson's testimony, a trier of fact could readily conclude that Jeffrey made the Rhino available to Thompson, and acquiesced in its use. Because the testimony placed in serious dispute the facts surrounding Thompson's use of the Rhino, the circuit court erred by granting Sandra's motion for summary disposition under the owner's liability statute.

Moreover, the case law supports that Jeffrey's mere denial that he consented to Thompson's use of the Rhino does not suffice to eliminate Sandra's ownership liability. In *Baumgartner v Ham,* 374 Mich 169, 174; 132 NW2d 159 (1965), our Supreme Court dispensed with an "unlawful taking" argument akin to Sandra's by declaring that the owner's "failure to complain and prosecute" the claimed theft "tended to support rather than overcome" the presumption of implied consent. Even more directly on point is the Supreme Court's decision in *Cowan v Strecker*, 394 Mich 110; 229 NW2d 302 (1975). In *Cowan*, the vehicle owner allowed an acquaintance to use her vehicle "with specific instructions that [the acquaintance] not let anybody else drive her car." *Id.* at 112. The acquaintance "proceeded to disobey the admonition and permitted her son William to operate the vehicle without [the owner's] knowledge." *Id.* The Supreme Court held that the owner could not escape liability merely by placing verbal restrictions on the vehicle's use:

> be a showoff – and he just pointed at the boat, pointed at the jet ski, pointed at the Rhino, and said I just walked in and said I want that, that, that, that, and that.
>
> Q. What was your understanding of – *he said you could ride anything you want?*
>
> A. *Yeah*.
>
> Q. What was your understanding of what it was you could ride?
>
> A. Well, he said the keys are in it, if you want to ride them, ride them. So I proceeded to put on a life vest and jumped on the jet ski and rode the jet ski for about 45 minutes.
>
> * * *
>
> Q. Okay. And what was your understanding of what he was giving you permission to ride?
>
> A. There was no understanding, he pointed at everything.
>
> Q. Did he point at the jet ski?
>
> A. He pointed at the jet ski, he pointed at the Rhino, he said the keys are in them. It was just like a nonchalant wave, the keys are in them. Like pretty much free for all wave. [Emphasis added].

> 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 admonitions which would purport to delimit his consent. It must be so, or the statutory purpose would be frustrated. As the Court of Appeals . . . so well stated in resolving this case:
>
> "The specifics of any limitations imposed by the owner are irrelevant to the statute's effectuation of its purpose. Whatever the limitations, once the owner has turned his keys over to another, he is powerless to enforce those limitations. Several thousand pounds of steel are being moved upon the public highway because the owner consented thereto. Even if the individual who borrowed the car has deviated from his instructions, the car is being operated on the highway because the owner consented thereto . . . ." [*Id.* at 115, quoting *Cowan v Strecker*, 52 Mich App 638, 641-642; 218 NW2d 50 (1974)].

Sandra willingly allowed Jeffrey and Renee to use the Rhino, and consigned the key to their care. In contrast with the owner in *Cowan*¸ Sandra placed no restrictions on the vehicle's use, and never instructed her children to prevent the party-goers from using it. Jeffrey's denial that he allowed Thompson to ride the Rhino tends to rebut the presumption that Thompson took the vehicle with the owner's consent. But viewed in the light most favorable to Flowers, a reasonable trier of fact could find that Sandra surrendered control of the Rhino to Jeffrey, and that Jeffrey allowed Thompson to ride it. Accordingly, we reverse the circuit court's summary disposition ruling concerning this claim.

Flowers next contends that because record evidence established a prima facie negligent entrustment claim against Sandra, the circuit court erred by summarily dismissing it. "The tort of negligent entrustment is comprised of two basic elements. . . . First, the entrustor is negligent in entrusting the instrumentality to the entrustee. Second, the entrustee must negligently or recklessly misuse the instrumentality." *Allstate Ins Co v Freeman,* 160 Mich App 349, 357; 408 NW2d 153 (1987) (internal citation omitted). An entrustor negligently entrusts an instrumentality to the entrustee if the entrustor

> knew or should have known of the unreasonable risk propensities of the entrustee. . . . To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated. [*Fredericks v General Motors Corp,* 411 Mich 712, 719; 311 NW2d 725 (1981).]

Sandra entrusted the Rhino to Jeffrey and Renee. Flowers presented no evidence that Sandra knew or should have known that Jeffrey, Renee, or anyone else would use the vehicle unsafely. Sandra's knowledge that the Rhino would potentially be available during Renee's planned party, and that party guests likely would imbibe alcoholic beverages, does not constitute notice that the vehicle would be driven unsafely. The circuit court correctly granted summary disposition of this claim.

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

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell