STATE OF MICHIGAN

COURT OF APPEALS

TERRY MARSHALL, Personal Representative of the Estate of DARRIN SHAY MARSHALL, Deceased, TEREZ WORD, LINDA TERRELL, as Next Friend of PHYLLIS JONES, a Minor, TERI TAYLOR and DOUGLAS TODD, as Next Friend of ALLEN TODD, a Minor,

Plaintiffs-Appellees/Cross-Appellants,

v

RONTAE O'BRIAN HILL and SEAN STEVE SIMMS,

Defendants/Cross-Defendants,

and

GLENN STARKS and AAA,

Defendants,

and

CHRISTINA PALAZZOLO and DOMINIC PALAZZOLO,

Defendants/Cross-Plaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
September 21, 2006

Nos. 261115; 261952
Wayne Circuit Court
LC Nos. 04-415888-NI;
03-300867-NI

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In docket no. 261115, defendants Christina Palazzolo (Christina) and Dominic Palazzolo (Dominic) ("the Palazzolos") appeal by leave granted from an order denying their motion for summary disposition. In docket no. 261952, the Palazzolos appeal by grant of their delayed

application for leave to appeal from four orders: (1) an order granting partial summary disposition to plaintiffs on the issue of Christina's ownership of the Taurus vehicle involved in the accident giving rise to this case; (2) an order denying the Palazzolos' countermotion for summary disposition vis-à-vis plaintiffs Terry Marshall (Marshall), Personal Representative of the Estate of Darrin Shay Marshall (decedent), and Terez Word (Word); (3) an order denying the Palazzolos' countermotion for summary disposition vis-à-vis plaintiff Linda Terrell (Terrell); and (4) an order denying the Palazzolos' countermotion for summary disposition vis-à-vis plaintiff Teri Taylor (Taylor). In docket nos. 2166615 and 261952, Marshall, Word, Terrell, Taylor and Douglas Todd, as Next Friend of Allen Todd, a Minor, cross-appeal as of right from the following orders: (1) the order granting partial summary disposition to plaintiffs on the issue of Christina's ownership of the Taurus; (2) the order denying Marshall and Word's motion for summary disposition; (3) the order denying Taylor's motion for summary disposition; and (4) the order denying Terrell's motion for summary disposition.

Because the undisputed evidence indicates that Christina did not have exclusive use of the automobile at issue, a Taurus, for a period greater than 30 days, the trial court erred as a matter of law in holding that Christina was an owner of the Taurus. Also, plaintiffs did not provide sufficient evidence to create a genuine issue of material fact regarding whether Hill drove the Taurus with the knowledge or consent of its owner, Dominic. For these reasons, we reverse and remand for entry of an order granting summary disposition in favor of Christina Palazzolo and Dominic Palazzolo.

This action arises out of a motor vehicle accident involving a Taurus titled to Dominic. Dominic gave his daughter Christina permission to drive the Taurus. Christina gave her friend Sean Steve Simms permission to drive it. Simms in turn gave permission to drive the Taurus to Rontae O'Brian Hill in exchange for cocaine. An accident occurred while Hill drove the Taurus resulting in a fatality. Plaintiffs' claims includes a claim that the Palazzolos should be held liable for the death of decedent and other injuries resulting from the accident under the owner liability statute, MCL 257.401(1).

On appeal, the Palazzolos argue that (1) the trial court erred when it denied their motions for summary disposition because consent to operate the Taurus was revoked by reporting the vehicle stolen and having a police report timely filed, and (2) the trial court erred in granting summary disposition to plaintiffs and denying it to the Palazzolos on the ownership issue, because Christina was not an owner of the Taurus because she did not have the exclusive use of it for a period greater than 30 days. On cross-appeal, plaintiffs argue that (1) with the material facts undisputed, determination of the consent issue was a question of law; (2) Christina, Simms and Hill each had express permission to drive the Taurus; and (3) the Palazzolos did not overcome the presumption of consent by revoking consent.

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable

inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

We first address the question of whether Christina is an owner of the Taurus. The Michigan vehicle code provides, in pertinent part:

> "Owner" means any of the following:
>
> (a) Any person . . . renting a motor vehicle *or having the exclusive use thereof*, under a lease or otherwise, *for a period that is greater than 30 days*.
>
> (b) . . . a person who holds the legal title of a vehicle. [MCL 257.37 (emphasis added).]

The definition of owner "must be broadly construed to include persons who . . . have exclusive control over the vehicle for at least [sic] thirty days." *Basgall v Kovach*, 156 Mich App 323, 327; 401 NW2d 638 (1986).

Thus, under the statute, the appropriate inquiry is whether Christina "ha[d] the exclusive use thereof . . . for a period . . . greater than 30 days." MCL 257.37(a). "Exclusive" is not defined in the statute. "[A]ppellate courts give [an undefined term] its plain and ordinary meaning, and consult dictionary definitions." *Pierce v City of Lansing*, 265 Mich App 174, 178; 694 NW2d 65 (2005). *Random House Webster's College Dictionary* (2nd ed, 1997) defines "exclusive" as "single or sole." Similarly, in *Plymouth Canton Crier v Prose*, 242 Mich App 676, 679; 616 NW2d 725 (2000), regarding prescriptive easements, this Court stated: "exclusive use, in the sense of use by only one individual . . . ."

Our review of the record reveals that Christina did not have exclusive, sole, or singular use of the Taurus "for a period . . . greater than 30 days" in order to satisfy the requirements to be an "owner" as a matter of law pursuant to MCL 257.37(a). Christina testified that she primarily drove the Taurus most of the time, that her father, Dominic, permitted her to use the Taurus without asking, and she had her own set of keys. But, Christina also testified:

> *Q. While you were staying at Lansing did anyone else in your family use the Taurus?*
>
> *A. When I was home for weekends or holidays, yes.*
>
> *Q. How often did you come home from school?*
>
> *A. Roughly two to three weekends a month, plus vacation time*.

The facts also show that in July 2002 Christina moved home from college. Christina's mother, sister, and Dominic also used the Taurus between April and October 2002. Her sister "used it often." Other than relying on Christina's and Dominic's deposition testimony, plaintiffs have

provided no other evidence to create a question of fact regarding whether Christina should be classified as an "owner" pursuant to MCL 257.37(a). Because plaintiffs failed to create a genuine issue of material fact based on the record evidence, the trial court should have properly applied MCL 257.37(a) and found as a matter of law that Christina was *not* an owner, and granted partial summary disposition to the Palazzolos on that issue.

Next, we address the issue of whether Hill was driving the motor vehicle with the consent or knowledge of the owner. It is not disputed by the parties that Dominic held the legal title to the Taurus, and since we concluded that Christina was not an owner of the Taurus, we must determine if Hill was driving the motor vehicle with the consent or knowledge of Dominic. The owner liability statute 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 common law. *The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge.* It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family. [MCL 257.401(1) (emphasis added).]

"To subject an owner to liability under the statute, a plaintiff need only show that the defendant was the owner of the vehicle and that it was being driven with the defendant's knowledge or consent." *Travelers Ins v U-Haul*, 235 Mich App 273, 281; 597 NW2d 235 (1999). Accordingly, in order to survive summary disposition, plaintiffs must create a justiciable question of fact regarding whether Simms drove the Taurus with Dominic's knowledge or consent. *Id*.

The parties agree, and the record displays that Dominic had no contact with Simms, and certainly no contact with Hill. But, plaintiffs argue that Hill received the Taurus by operation of several grants of permission without the use of overt force. It is plaintiffs' position that a chain of grants of permission exists because Dominic gave permission to Christina, who gave permission to Simms, who gave permission to Hill. But, Hill never had valid consent from Simms to possess the Taurus. The consent granted to Hill was invalid. It is undisputed that Hill gained permission to use the Taurus by giving cocaine in exchange. A contract, to be valid, must have valid consideration. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Exchanging an illegal narcotic for the use of a vehicle does not constitute valid consideration. Hill never had valid consent from Simms to drive the Taurus.

Our second issue with plaintiffs' "chain of grants" argument is that a presumption that a vehicle was being driven with the owner's express or implied consent may be overcome. *Roberts v Posey*, 386 Mich 656, 663; 194 NW2d 310 (1972). Our Supreme Court has held that consent "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 *time* of the driving." *Roberts, supra* at 661-662. If consent to operate a motor vehicle has been given by its owner, the permissive user cannot invalidate that consent by exceeding the scope of use the owner intended to license, unless that consent is subsequently denied. *Id*. The presumption can 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). The issue of consent may be resolved by the court if it "is satisfied that it is impossible for the claim of consent or knowledge to be supported by the evidence at trial." *Basgall, supra* at 329.

On the date in question, Christina received a cell phone call from an unidentified person who had Simms's cell phone and the Taurus. Although Simms testified that he exchanged both his cell phone and the use of the Taurus for narcotics from Hill, Hill denied talking on Simms's cell phone with Christina. Since the evidence is disputed, we will refer to the person with whom Christina spoke as the unidentified person. The evidence further shows that Christina informed the unidentified person that she needed the car back and wanted Simms to return the car. The unidentified person using Simms's cell phone told Christina that she could come to Keating Street in Detroit and retrieve the car in exchange for a sexual favor. Christina refused, and instead went to the Mt. Clemens police department accompanied by her brother Frank. Christina explained the situation to the Mt. Clemens police who told Christina to wait until Simms brought the car back. Christina and Frank then returned home and told Dominic what had transpired. Dominic immediately called the Almont police department and filed an incident report with Officer Kenneth Kovach.

Dominic provided Officer Kovach with a description of the Taurus, including its vehicle identification number, registration, and proof of insurance. Dominic reported to Officer Kovach that he gave Christina permission to drive the Taurus to school and work, but "by no means, gave permission to anybody else to use the vehicle." Almont police entered the Taurus's information into LEIN (law enforcement information network), so that if police located the vehicle, the vehicle would be classified as "stolen," its operation immediately stopped, and the vehicle held. Police also prepared an incident report for an unlawful driving away of an auto.

These facts are distinct from the facts of *Roberts, supra*, where the defendant granted consent to the driver of the vehicle for a preset period of time and when the driver did not return the vehicle, the defendant simply waited for its return. In that case, the defendant contacted the driver's wife, his place of work, several hospitals in an attempt to get his car back. The defendant also notified the police of the situation and that his car "was missing." However, unlike the facts here, the defendant was content to wait one day to see if the driver returned the vehicle before he made a formal report to the police classifying the vehicle as stolen. Our Supreme Court found that the facts in *Roberts*, indicated that the defendant was attempting "to exercise control over the direction in which the car was being driven" i.e. to have the driver return his car, and never actually revoked his consent for the vehicle to be driven at the time the accident in that case occurred. *Roberts, supra* at 663-664.

Unlike *Roberts, supra*, the record displays that here, Dominic was not content to wait to have the vehicle returned by Simms, Hill, the unidentified person, or anyone else. Dominic reported the matter to the police immediately after learning of the unauthorized use of the Taurus and had the vehicle declared stolen. By formally reporting the vehicle stolen to the police, Dominic wanted the operation of the vehicle immediately stopped, and the vehicle held by the police. The record is unequivocal that Dominic pursued available means to have the authorities cease any and all unauthorized use of the Taurus one day *before* the accident at issue occurred.

The record evidence here reveals that *any* use of the Taurus was strictly prohibited and clearly without consent. Before Dominic's complete revocation of anyone's use, the unidentified

person with Simms's cell phone and Taurus knew that use was prohibited from his discussion with Christina. This evidence, together with Dominic's complete revocation, illustrates that at the time of the accident, Hill was not driving the Taurus with the express or implied consent of Dominic. Dominic's actions constitute "positive, unequivocal, strong and credible evidence" that Hill was no longer driving the Taurus with the consent or knowledge of Dominic. In other words, Dominic subsequently denied consent and any further operation of the vehicle would be without his knowledge. *Travelers, supra.* Under the unique circumstances present, and taking the undisputed evidence in a light most favorable to plaintiffs, no reasonable trier of fact could find that at the time of the accident Hill was driving the Taurus with the consent or knowledge of its owner.

A related issue discussed by the parties is whether MCL 257.401 abrogated the common law presumption, regarding nonfamily members, that a person driving a motor vehicle has the owner's consent. Because we conclude that Hill was not driving the Taurus with the consent or knowledge of Dominic, and that Dominic effectively revoked any alleged consent, it is not necessary for us to decide whether the owner liability act abrogated the common law presumption regarding nonfamily members. *Rose v Stokely*, 258 Mich App 283, 298; 673 NW2d 413 (2003).

Reversed and remanded for entry of an order granting summary disposition to the Palazzolos on the claim under the owner's liability statute. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio