STATE OF MICHIGAN

COURT OF APPEALS

VICTOR A. PENNELL and RACHEL L. PENNELL,

Plaintiffs-Appellees,

v

HTA COMPANIES, INC,

Defendant-Appellant,

and

ORION JAMES CONLEY,

Defendant.

UNPUBLISHED
August 13, 2020

No. 350296
Ingham Circuit Court
LC No. 18-000233-NI

Before: MURRAY, C.J., and CAVANAGH and SWARTZLE, JJ.

PER CURIAM.

Defendant HTA Companies, Inc (HTA), appeals by leave granted[1] the trial court order denying its motion for summary disposition in this dispute regarding liability for a motor vehicle accident. HTA argues that it is entitled to summary disposition where plaintiffs, Victor A. Pennell (Victor) and Rachel L. Pennell (Rachel), did not contest summary disposition of their vicarious liability claim, and HTA was not liable under the owner liability statute, MCL 257.401. We reverse the trial court order in part, affirm in part, and remand this matter for entry of an order consistent with this opinion. This appeal is being decided without oral argument under MCR 7.214(E)(1).

[1] *Pennell v HTA Co, Inc*, unpublished order of the Court of Appeals, entered October 16, 2019 (Docket No. 350296).

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises from a motor vehicle accident involving Victor and defendant Orion James Conley[2] on December 27, 2016. At that time, Conley was an employee of HTA. HTA is a landscape construction company that provides snow plowing as a service. Conley was driving a 2011 Chevrolet Silverado owned by HTA with a snow plow on the front.

Ted Harkins, president and owner of HTA, testified that the night before the accident, Conley went to the large wooded area on HTA's property in Conley's own pickup truck to go "mudding" or "four-wheeling." Conley got his own truck stuck, so he took HTA's Silverado. Conley, however, has no recollection of the 12 hours preceding the accident. The gate to HTA's property has a lock and is typically locked, but Harkins did not know specifically whether it was locked that night. Although Conley had a key to the building, he did not have permission to be on the property after hours.

Around 6:33 a.m. on December 27, 2016, Victor was stopped at a red light at an intersection in Lansing. As Conley approached the same red light behind Victor, Conley failed to slow down and stop, and rear-ended Victor's vehicle. Victor rear-ended the vehicle in front of him before striking a guidewire and coming to a stop on the side of the road. Conley fled the scene, but a witness followed him, and Conley was later apprehended by police. Conley told the police that he had been drinking and had taken the prescription drug Xanax, and he was arrested for operating under the influence with a blood alcohol level of 0.17. He was incarcerated for three months. Conley was terminated from his employment with HTA after the accident.

Plaintiffs filed a complaint against HTA and Conley, alleging negligence, gross negligence, owner liability, and vicarious liability in Count I, and negligent hiring, training, supervision, and entrustment in Count II. Rachel's claims were derivative of Victor's. HTA filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it was entitled to summary disposition of Count I of plaintiffs' complaint regarding vicarious liability and statutory owner liability.[3] The court held a hearing on the motion, and although plaintiffs conceded that HTA was entitled to summary disposition of their vicarious liability claim, the court only addressed the statutory owner liability claim. The court determined that HTA was not entitled to summary disposition of plaintiffs' statutory owner liability claim because genuine issues of material fact existed regarding whether Conley had express or implied consent to use the Silverado at the time of the accident. The court entered an order denying HTA's motion for summary disposition in full, without addressing the vicarious liability claim.

II. VICARIOUS LIABILITY

[2] The trial court entered a stipulated order of partial dismissal, dismissing Conley as a party to the case with prejudice. He is not subject to this appeal.

[3] HTA's motion for summary disposition did not address Count II, negligent hiring, training, supervision, and entrustment. As such, it is not at issue on appeal.

The trial court erred when it denied HTA summary disposition of plaintiffs' vicarious liability claim.

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). HTA asserted in its motion for summary disposition that it was entitled to summary disposition of plaintiffs' claim of vicarious liability because the evidence was clear that Conley was not acting within the scope and course of his employment when the collision occurred. Plaintiffs conceded in their response to the motion that summary disposition of their vicarious liability claim was appropriate. Despite this, the trial court did not address plaintiffs' vicarious liability claim, but rather, solely provided its reasoning why it denied HTA summary disposition regarding the owner liability claim. The order entered by the court merely provides that HTA's motion for summary disposition was denied. However, an issue raised in the trial court and pursued on appeal is preserved even when the trial court fails to address or decide an issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Therefore, this issue is reviewed under the standard of review for a motion for summary disposition filed under MCR 2.116(C)(10).

An appellate court reviews a trial court's decision on a motion for summary disposition de novo. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. In reviewing such a motion, the trial court considers affidavits, pleadings, depositions, admissions, and other documentary evidence filed or submitted by the parties in the light most favorable to the nonmoving party. *Id*. at 211-212, citing MCR 2.116(G)(5). "If, [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, . . . the moving party is entitled to judgment or partial judgment as a matter of law, and the trial court must grant the motion without delay." *Id*. at 212 (quotation marks and citation omitted). "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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When making this determination, the trial court may not assess credibility, weigh the evidence, or resolve factual disputes. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

Under Michigan law, a defendant is not vicariously liable for the tortious conduct of a third party unless the third party is an employee or agent of the defendant. *Laster v Henry Ford Health Sys*, 316 Mich App 726, 728; 892 NW2d 442 (2016). "Vicarious liability is indirect responsibility imposed by operation of law." *Id*. at 735 (quotation marks and citation omitted). Under the theory of respondeat superior, "an employer may be liable for the negligent acts of its employee if the employee was acting within the scope of his employment." *Id*. at 734. "An employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control." *Rogers v JB Hunt Transp, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002). "[I]t is well established that an employee's negligence committed while on a frolic or detour, or after hours, is not imputed to the employer." *Id*. (citations omitted).

Harkins testified that Conley was not in the course of his employment at the time of the accident. Conley was shown his time cards during his deposition, and he had worked the day

before the accident, but did not punch in on the day of the accident. There was no evidence that Conley was acting within the scope and course of his employment at the time of the accident. Moreover, plaintiffs conceded that Conley was not in the scope or course of his employment at the time of the accident, and agreed that summary disposition of their vicarious liability claim was proper. Therefore, there is no genuine issue of material fact that Conley was not acting within the scope or course of his employment at the time of the collision, and HTA is entitled to summary disposition of plaintiffs' vicarious liability claim under MCR 2.116(C)(10).

III. STATUTORY OWNER LIABILITY

The trial court properly denied HTA summary disposition of plaintiffs' statutory owner liability claim.

Because summary disposition of plaintiffs' claim of statutory owner liability was raised before, addressed by, and decided by the lower court, this issue is preserved for appeal. *Gen Motors Corp*, 290 Mich App at 386. The same standard of review for a motion for summary disposition filed under MCR 2.116(C)(10) discussed above applies.

The owner liability statute, MCL 257.401(1), provides:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. 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.

"The purpose of the statute is to place the risk of damage or injury on the owner, the person who has ultimate control, as well as on the person who is in immediate control." *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 185; 607 NW2d 417 (1999).

Both Conley and Harkins testified that Conley did not have permission to take the Silverado on the date of the accident. Conley testified as follows:

> *Q.* Fair enough. Do you admit that you didn't have permission from the company to drive the vehicle?
>
> *A.* Yeah. I didn't have permission at that time, yeah.
>
> * * *
>
> *Q.* Do you remember telling Mr. Harkins that you knew you didn't have permission to take the vehicle, and that you shouldn't have done it?

A. Yeah, at that time I didn't have permission.

* * *

Q. Okay. And whatever might have happened on different occasions, I think you already admitted to me that you know you didn't have permission to take that truck on that day?

A. Yeah, I admitted that. Yep.

Harkins also testified that Conley did not have permission to take the vehicle:

Q. If [Conley] had been on your property, and his vehicle was stuck, would you have given him permission to use the pickup truck?

A. Absolutely not.

Harkins did not know that Conley was driving the Silverado at the time, and was only made aware after the accident when he was contacted by the police.

Thus, Conley did not have express permission to take the Silverado, nor did HTA know that Conley was using the vehicle, and the issue boils down to whether Conley had implied consent. MCL 257.401(1). Circumstantial evidence can be examined and considered in determining consent. See *Weisswasser v Chernick*, 399 Mich 653, 655; 252 NW2d 766 (1977).[4] "Implied consent . . . may be gathered from a consideration of all the facts and circumstances, and is usually a question for the jury[.]" *Wingett v Moore*, 308 Mich 158, 161; 13 NW2d 244 (1944) (examining whether the driver of a vehicle involved in an accident had implied consent from its owner to operate the vehicle).

"An employee is presumed to be driving with the implied consent of his employer in the absence of testimony to the contrary." *Cowles v Erb-Restrick Lumber Co*, 21 Mich App 642, 651; 176 NW2d 412 (1970). Plaintiffs' burden of establishing HTA's implied consent is governed by the operation of a rebuttable common law presumption that applies to nonfamily members of the owner "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 owner of the vehicle must produce "positive, unequivocal, strong and credible evidence" negating implied consent. *Mich Mut Liability Co v Staal Buick, Inc*, 41 Mich App 625, 626; 200 NW2d 726 (1972). In *Krisher v Duff*, 331 Mich 699, 710; 50 NW2d 332 (1951) (citations omitted), the Michigan Supreme Court explained what evidence may rebut the presumption:

[4] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority[.]" *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

> 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. The result must necessarily vary as to the circumstances of each case.

In *Roberts v Posey*, 386 Mich 656, 661-662; 194 NW2d 310 (1972), the Supreme Court stated that the consent or knowledge requirement in the owner liability statute "refers to the Fact of Driving. It does not refer to the Purpose of the driving, the Place of the driving, or to the Time of the driving." The *Roberts* Court held:

> 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.]

In *Cowan v Strecker*, 394 Mich 110, 112; 229 NW2d 302 (1975), the owner consented to operation of his car with certain limitations, and the driver violated the terms of consent by giving a third party permission to operate the vehicle. The *Cowan* Court concluded:

> 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 admonitions which would purport to delimit his consent. It must be so, or the statutory purpose would be frustrated. [*Id*. at 115 (citation omitted).]

Similarly, in *Reitenga v Kalamazoo Creamery Co*, 288 Mich 161, 162; 284 NW 683 (1939), the driver was an employee of the defendant creamery, and used a company vehicle for deliveries. The defendant had a fleet of 28 trucks, the keys of which were kept in the vehicles, parked in a lot near the creamery. *Id*. The day before the accident, the driver clocked out at 1:30 p.m. *Id*. The plant superintendent gave the driver permission to borrow a truck the day before the accident to help his mother move, and the driver returned the truck on Sunday evening. *Id*. Then the driver visited several taverns with friends, consumed alcohol, returned to the creamery parking lot, took a vehicle to drive home, and was in an accident with the plaintiff. *Id*. at 162-163. The driver testified that the defendant's sales manager said that he could use a company truck to get to work because of a lack of bus service, and he did so three to five times each week. *Id*. at 163. Although this was contradicted by testimony of other company employees, the Supreme Court determined that there was "evidence of loose control over the use of trucks that stood in the parking lot as well as permissive use by [the driver] and others on certain occasions." *Id*. The Supreme Court held, "An examination of the testimony presented requires the conclusion that the question of express or implied consent was one of fact and that the court was not in error in declining to direct a verdict for defendant." *Id*. at 165.

However, in *Kalinowski v Odlewany*, 289 Mich 684, 687; 287 NW 344 (1939) (citation omitted), overruled on other grounds by *Moore v Palmer*, 350 Mich 363, 394; 86 NW2d 585 (1957) (overruled to the extent that it provided that the statutory test of scope of knowledge or consent, express or implied, may not be used in cases under the owner liability statute where the owner is also the employer of the driver), the Supreme Court determined that the use of a truck by the plaintiff, who had occasionally been employed by the truck owner, solely for the purpose of visiting a friend, was beyond the " 'express or implied consent or knowledge' " of the owner required under a previous version of the owner liability statute[5] to render the owner liable for injuries resulting from the driver's negligence.

Similarly, in *Christiansen v Hilber*, 282 Mich 403, 404-405; 276 NW 495 (1937), the plaintiff was injured when struck by a logging truck owned by the defendant, driven by the defendant's son. The presumption of consent was overcome by testimony, and the Supreme Court concluded that the trial court erred in not directing testimony in favor of the defendant under a previous version of the owner liability statute:

> Defendant testified his son Eugene drove the truck when there was hauling to be done, when it was necessary, when there was something to do; that the truck was bought for business purposes and he never permitted any one to use it for pleasure purposes, and gave no one permission to use it on the occasion in question. Eugene Hilber, the son, testified the truck was used at the camp for hauling supplies and he used it on the occasion in question, without permission, for pleasure purposes. While he was never instructed not to use it, he was told only to take it when 'we needed it.' There was no other testimony bearing upon [the defendant's] consent. Fairly considered, this testimony shows the truck in question was bought, kept, and used for business purposes, and [the defendant] never gave any one permission to use it for pleasure purposes, and that its use on the occasion in question was without [the defendant's] consent or permission. [*Id*. at 408.]

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[5] The previous version of the owner liability statute in effect at the time that *Kalinowski* was decided was very similar in language to the current version:

> 'Nothing herein contained shall be construed to abridge the right of any person to prosecute a civil action for damages for injuries to either person or property resulting from a violation of any of the provisions of this act by the owner or operator of a motor vehicle, his agent or servant. The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle whether such negligence consists of a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in such operation as the rules of the common law require. *The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge.*' [*Miller v Bd of Rd Comm'rs of Manistee Co*, 297 Mich 487, 488-489; 298 NW 105 (1941), quoting Section 4648, 1 Comp Laws 1929 (Stat Ann § 9.1446), overruled in part by *Mead v State*, 303 Mich 168; 5 NW2d 740 (1942) (emphasis added).]

In this matter, the trial court determined that there existed a question of fact regarding whether Conley had express or implied consent to operate HTA's vehicle during off-duty hours. This conclusion was reached based on Conley's testimony.

Conley testified that he would plow snow for HTA using a company vehicle. Before starting a plowing shift, he did *not* have to ask to use a specific vehicle because everyone was assigned a vehicle in the fall. Conley said that he was assigned the Silverado for snow plowing. When it was time to plow, he went to work, got in the vehicle, and went to the job site. The keys to HTA vehicles were kept inside an HTA building. Conley would retrieve the keys himself. Conley said that as a mechanic for HTA, there were times when he needed to use a company vehicle to go get a part, and he did not have to report to anyone before taking the vehicle. He would simply take the keys, and use the vehicle. No one ever discussed with him that there were rules against doing so. When asked whether other HTA employees used vehicles without asking permission first, Conley said, "I don't think anyone there had to ask if they got issued one." It was "common practice" for employees to do so. Conley also said that it was not uncommon for him to be on HTA property after hours. Conley said that he had used the Silverado outside normal business hours "for plowing and other stuff." He had also taken the vehicle home to get a few hours rest before plowing snow.

Harkins testified, however, that Conley was "not necessarily" assigned a particular truck for snow plowing, but rather, would be told what vehicle to take. Harkins admitted that there was nothing about the use of vehicles in the HTA policy manual, and nothing "that authorizes people to use vehicles for personal use[.]" Rather, Harkins testified that only HTA salespeople were permitted to take company vehicles home at night because it was written into their employment contracts. Employees who plowed snow were not allowed to take vehicles home, and if they did, it was without consent. If Conley was in an emergency situation with a disabled vehicle and had to get somewhere while on HTA property, Conley would not have Harkins's permission to take a vehicle. If an employee wanted to take a vehicle, they had to ask permission from Harkins or his brother, the superintendent of the company. Harkins said that there were times when Conley needed to go get a part, and he would typically check in and say what he was doing. Harkins could not say that there were not times when Conley or other employees simply took a car to do so, and if Harkins was unavailable to check in with, the employee could take the vehicle "[i]f they were punched in on the clock under normal business hours." Similarly, when asked if he had ever taken a company vehicle off hours without permission, Conley responded, "Not without permission," because he knew it was company policy to get express permission.

The trial court did not err in determining that questions of fact existed regarding consent for Conley to take the vehicle at the time that he did. The test for consent under the owner liability statute "refers to the Fact of Driving," *Roberts*, 386 Mich at 661-662, and consent cannot be "overcome by evidence that the driver has violated the terms of the original permission," *id*. at 665. "The essential consent is consent to the Driving of the vehicle by others." *Cowan*, 394 Mich at 115. Conley admitted that he did not have permission to use the HTA Silverado at the time of the accident. However, he freely had access to the keys to the vehicle, and did not have to ask permission before using it. Conley also testified that he had taken a company vehicle home before to get rest in between shifts blowing snow. Similar to the facts of *Reitenga*, it appears that there was "loose control" over the use of HTA's vehicles, and "permissive use by [the driver] and others on certain occasions." *Reitenga*, 288 Mich at 163. Therefore, there are genuine issues of material

fact regarding whether Conley had implied consent to take the Silverado, MCR 2.116(C)(10), and the trial court properly denied HTA summary disposition of plaintiffs' statutory owner liability claim.

IV. CONCLUSION

The trial court order denying HTA summary disposition is reversed in part to the extent that it denies HTA summary disposition of plaintiffs' vicarious liability claim, and affirmed in part to the extent that it denies HTA summary disposition of plaintiffs' statutory owner liability claim, and the matter is remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Brock A. Swartzle