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Rebutting the Presumption of Permissive Use

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It is well-known that, with the exception of car leasing or rental companies, which have recently been excluded from the application of Vehicle and Traffic Law §388 (see Subchapter 1 of Chapter 301 of Title 44, United States Code, effective Aug. 10, 2005),[1] that that statute imputes to the owner of a motor vehicle liability for death or injury to persons or property resulting from negligence in the use or operation of the vehicle by any person using the vehicle with the owner's express or implied permission.[2]

Conversely, it has long been recognized that a vehicle owner may not be held liable for damages caused by the operator of his vehicle if the driver takes the vehicle without permission or in defiance of instructions not to do so.[3]

Vehicle and Traffic Law §388 creates a rebuttable presumption of permissive use, which continues until there is "substantial evidence to the contrary," i.e., evidence sufficient to show that the vehicle was not operated with the owner's permission or consent.[4]

Presumption Rebutted

In numerous cases, the courts have expressly recognized the rebuttable nature of the presumption of permissive use and held, based upon uncontroverted evidence to the effect that the driver did not have permission or consent to operate the vehicle—sometimes from both the owner and the driver—that the presumption of permissive use was rebutted as a matter of law.

For example, in *Barrett v. McNulty,* 27 NY2d 928 (1970), the driver had pleaded guilty to theft of the vehicle and there was no competent evidence from which permission or consent could be inferred. Under those circumstances, the Court of Appeals upheld the dismissal of the complaint against the owner at the close of the evidence.

In *Bruno v. Privilegi,* 148 AD2d 652 (2d Dept. 1989), the driver's admission to taking the vehicle without the owner's permission was corroborated by the owner's affidavit and the testimony of the owner's teenage son, who had been a passenger in the vehicle at the time of the accident. On the basis of that evidence, unrefuted by plaintiffs, the court granted the owner's motion for summary judgment dismissing the complaint against him.

Similarly, in *Polsinelli v. Town of Rotterdam,* 167 AD2d 579 (3d Dept. 1990), the owner's brother admitted that he took the keys and drove the vehicle on the date of the accident (and on two other occasions) without the owner's knowledge or permission. That testimony was corroborated by the owner and another brother in whose custody the vehicle had been placed. Indeed, the owner testified that she had not been in contact with the driver for many years prior to the accident and did not even know he was in town, and she had never given him permission to drive her car in the past. Upon that record, the court held that the owner had rebutted the statutory presumption of consent as a matter of law and, thus, had demonstrated her entitlement to summary judgment. See also, *State Farm Mutual Auto. Ins. Co. v. White,* 175 AD2d 122 (2d Dept. 1991) (presumption rebutted as a matter of law by testimony from both the owner of the vehicle and the driver [her nephew], that the driver did not have either express or implied permission to operate the vehicle).

In *Manning v. Brown,* 91 NY2d 116 (1997), the driver and the owners testified in their depositions that the driver neither asked for nor received permission from the owners to drive the car and the driver pleaded guilty to car theft. Under these circumstances, the court ruled that the trial court properly granted summary judgment to the owners, who produced sufficient evidence to rebut the presumption, leaving no triable issue for the court as to the issue of consent.

New York Central Mutual Fire Ins. Co. v. Nationwide Mutual Ins. Co., 307 AD2d 449 (3d Dept. 2003), involved an auto accident that occurred following an underage drinking party at the home of the owner of one of the vehicles, which was driven by an attendee of the party who was not related to the owner. Sworn statements by several individuals, including the driver of the car, indicated that the driver asked the owner's son for the car keys to prevent him from driving under the influence; the keys were put away so the son would not find them; the driver had never been permitted to drive that car before; the vehicle was locked; the son did not then or ever tell or imply that the driver could drive the vehicle; and the next morning, the son was not even aware that the car was gone, did not know who took the car and was upset that it had been taken. Noting that this information was consistent with the son's statements regarding the issue of nonpermissive use, the court held that "This information rebuts the presumption and establishes a lack of permission for [the driver] to operate the ...vehicle."

In *Bost v. Thomas,* 275 AD2d 513 (3d Dept. 2000), the evidence established that three friends of the defendant/vehicle owner went to the owner's house and asked to use her telephone. While in the house, after using the phone, and after the defendant/owner went to sleep, these individuals found the car keys and took the car on a "joy ride." Following the accident, the driver, who confessed to the police that she had taken the car without her permission, was arrested on charges of, inter alia, grand larceny. In support of her motion for summary judgment, the owner submitted her own affidavit detailing the circumstances of how her vehicle had been taken without her knowledge or consent, and the driver's voluntary statement to the police through an affidavit of counsel. Under these facts, the court held that the owner "presented sufficient evidence to rebut [the] presumption" and granted summary judgment dismissing the complaint.

Questions of Fact Raised

On the other hand, in several other cases, even where the owner and the driver both testified that the vehicle was used without permission or consent, such testimony was held to be far less conclusive or convincing.

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In *St. Andrassy v. Mooney,* 262 NY 368 (1933), the vehicle owner, his wife, and their chauffeur testified that the chauffeur had no consent—express or implied—to take the car, and that he took it unlawfully and in defiance of his employer's commands. The court stated that, "If the evidence produced to show that no permission has been given has been contradicted or, because of improbability, interest of the witnesses or other weakness, may reasonably be disregarded by the jury, its weight lies with the jury." Although there were no grounds in that case upon which to discredit the testimony, and, thus, the presumption of permission was held to be overcome, the court made clear that where reasons to discredit or disbelieve such evidence exist, a different result might obtain.

In *Piwowarski v. Altamont Cornwell,* 273 NY 226 (1937), the Court of Appeals held that the testimony by the owner and the borrower of the car at issue to the effect that the car was being used at the time of the accident outside the scope of the permission granted "bore the marks of self-interest testimony" and its credibility should have been submitted to the jury. Thus, the presumption of liability upon the owner was not destroyed as a matter of law.

In *Winnowski v. Polito,* 294 NY 159 (1945), the owner parked his car on a busy thoroughfare, leaving the key in the ignition switch and his 14-year-old son in the car. A police officer ordered the son to move the car, notwithstanding his protest that he had neither the permission nor the competence to drive it. The father confirmed that he expressly forbade his son to drive the car at any time. The Court of Appeals held that the trial court was within its prerogative as the trier of facts in concluding that the son had implied permission, based on the reasonable expectation that an emergency or other necessity might arise, that would require the car to be moved.

Motor Vehicle Accident Indemnification Corp. (MVAIC) v. Cont'l Nat'l American Group Co., 35 NY2d 260 (1974), is another instance in which summary judgment to the owner was held to be unwarranted although the owner had undeniably withheld its express consent to the driver. There, the owner, a rental car company, leased the car to a customer who agreed that he would not let anyone else drive it without the company's permission. In spite of the agreement, the customer allowed a third person to drive the car and an accident ensued. The Court of Appeals held that, despite the restrictions in the rental contract, the rental company gave "constructive consent" to the third person based on the likelihood that customers would allow others to drive rental cars. While *MVAIC* was based on public policy grounds, it is viewed as an illustration that summary judgment for the owner will not necessarily be granted even though both the owner and driver acknowledge that the owner did not give the driver consent to operate the car, or even expressly prohibited such operation.

More recently, in *Correa v. City of New York, et al.,* 18 AD3d 418 (2d Dept. 2005) (a case in which the authors were involved), the defendant owner submitted in support of his motion for summary judgment not only his own (and his wife's) affidavit expressly denying that his estranged son had permission to use his vehicle on the date of the accident(s) and, indeed, stating that the son's use of the vehicle was against his wishes, but also the sworn statement of the son, himself, attesting to the fact that he never had permission to use the car and that he had broken into his parent's home when he knew they were away and took the keys and the car, planning to return them before they returned.

In opposition to this motion, plaintiffs submitted proof, in the form of certified records from the New York State Department of Motor Vehicles, i.e., three traffic tickets that had been issued to the son on three separate occasions within three months prior to the date of the subject accident, while he had been operating his father's vehicle, which, they contended, established that the son, at the very least, had implied permission to use the vehicle on the date of the accident. Notwithstanding the fact that the owner, his wife, and the son, in reply, all attested to the fact that the parents/owners had no knowledge of the son's prior uses of the vehicle either, the court denied defendant's motion and held that the presumption of permissive use was not rebutted as a matter of law.

Court of Appeals Decision

The Court of Appeals has recently weighed in on this topic again, at the express invitation of the U.S. Court of Appeals for the Second Circuit. In *Country Wide Insurance Company v. National Railroad Passenger Corp.,* __NY3d__, __NYS2d__, 2006 WL 346296 (2006), the Second Circuit certified to the Court of Appeals several specific questions pertaining to the circumstances in which, for summary judgment purposes, a driver may be said to have operated a vehicle without the owner's permission. Among these questions was the pertinent question of whether, under New York law, uncontradicted statements of both the owner and driver that the driver was operating the vehicle without the owner's permission are sufficient to warrant a court in awarding summary judgment to the owner?

In answering the questions certified to it by the Second Circuit, the Court of Appeals stated that "uncontradicted statements of both the owner and the driver that the driver was operating the vehicle without the owner's permission will not necessarily warrant a court in awarding summary judgment for the owner. In most circumstances—including the circumstances of this case—they will, but not as an absolute or invariable rule." As the Court further explained, where both the owner and the driver disclaim consent, and the plaintiff can produce no competent evidence from which consent could be inferred, summary judgment may be appropriate: "As a corollary, however, disavowals by both the owner and the driver, without more, should not automatically result in summary judgment for the owner. Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion, or implied permission, the issue of consent should go to a jury.... In short, whether summary judgment is warranted depends on the strength and plausibility of the disavowals and whether they leave room for doubts that are best left for the jury."

1. The effect of this federal provision is to nullify N.Y. Vehicle & Traffic Law §388 as it applies to leasing companies or rental agencies. Specifically, the new law provides that "An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any state or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)."

2. See *Murdza v. Zimmerman,* 99 NY2d 375 (2003); *State Farm Mut. Auto. Ins. Co. v. Fernandez,* 23 AD2d 480 (2d Dept. 2005); *New York Central Mutual Fire Ins. Co. v. Dukes,* 14 AD3d 704 (2d Dept. 2005).

3. See *Huegel v. Courdert,* 244 NY 393 (1927); *Ermann v. Kahn,* 279 App. Div. 693 (1st Dept. 1930).

4. See *Murdza,* supra; *State Farm v. Fernandez,* supra; *New York Central Mutual Fire Ins. Co. v. Dukes,* supra; *Allstate Indemnity Co. v. Nelson,* 285 AD2d 545 (2d Dept. 2001).