STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MICHAEL WOLF, as Personal Representative of
the ESTATE OF SANDRA MARIE RAYMOND,

Plaintiff,

v

File No. 09-27085-NI
HON. PHILIP E. RODGERS, JR.

BAY AUTOMOTIVE, INC., a Michigan
corporation and JILLIAN LAURA KERBY,

Defendants.

_______________________________________/

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DECISION AND ORDER REGARDING DEFENDANT
BAY AUTOMOTIVE INC.'S MOTION FOR SUMMARY DISPOSITION

This is a wrongful death third-party automobile no-fault action. The Plaintiff's Decedent, Sandra Marie Raymond, died as a result of injuries she sustained in an automobile accident that occurred on August 17, 2008. On that date, Defendant Jillian Laura Kerby ("Kerby") was driving at a high rate of speed on County Road 633 when she crossed the center line and collided head on with an automobile being driven by the Decedent. Kerby admitted she was intoxicated. On April 27, 2009, she pled guilty to Attempted Operating While Impaired Causing Death and as a Habitual Offender - third offense and, on May 29, 2009, she was sentenced to 48- to 120-months in prison.

The vehicle Kerby was driving at the time of the accident was a 2007 Chevrolet Malibu with dealer plates that was owned by and registered to Defendant Bay Automotive, Inc. ("Bay

The vehicle Kerby was driving at the time of the accident was a 2007 Chevrolet Malibu with dealer plates that was owned by and registered to Defendant Bay Automotive, Inc. ("Bay Automotive"). Defendant Bay Automotive filed a motion for summary disposition pursuant to MCR 2.116(C)(10) claiming that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. More specifically, Bay Automotive claims that it is not vicariously liable for Kerby's negligence by virtue of the Graves Amendment, 49 USC 30106(a), or its liability is limited under the Michigan Motor Vehicle Code, being MCL § 257.244.

Bay Automotive filed a brief in support of its motion and the Plaintiff filed a response brief. Bay Automotive filed a reply brief. The Court heard the oral arguments of counsel on September 8, 2009 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendant's motion and grants summary disposition to the Plaintiff on his claim under MCL 257.401(1).

Standard of Review

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

A motion filed 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 rely on 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, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits,

The Graves Amendment

The Graves Amendment, 49 USC 30106(a), was enacted in 2005 as a part of a federal highway spending bill. It provides as follows:

> Sec. 30106. Rented or leased motor vehicle safety and responsibility (a) In General - 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).

This legislation eliminates vicarious liability of vehicle owners for accidents of those who rent or lease vehicles from them so long as those owners are "engaged in the trade or business of renting or leasing vehicles." State laws which would recognize vicarious liability in such situations are pre-empted by this federal legislation, but continue to provide for recovery in other situations. An owner who is negligent in its decision to rent or lease a vehicle remains liable for the negligent operation of that vehicle under subparagraph (a)(2) of the federal law, as well as, under MCL §257.401(1).

Under the Graves Amendment, Bay Automotive has to be both (1) in the trade or business of renting or leasing vehicles and (2) not negligent in renting or leasing the vehicle to Kerby in order to be free of liability for Kerby's negligent operation of the vehicle. Therefore, the first issue presented here is whether Bay Automotive is "engaged in the trade or business of renting or leasing vehicles."

Bay Automotive contends that it is in the business of renting vehicles to its customers when those customers take their own vehicles in for service and pay for the service. The Plaintiff counters that this arrangement is nothing more than an accommodation and does not constitute being "in the trade or business of renting or leasing vehicles." The Court agrees with the Plaintiff.

The undisputed facts are the following: Bay Automotive is an automobile dealership and a vehicle repair facility. Bay Automotive commonly provides vehicles for its customers to

drive while their cars are being serviced or repaired. Kerby took her vehicle in to Bay Automotive for service and entered into a Temporary Substitute Vehicle Agreement, whereby she was given a Chevrolet Malibu to drive while her car was being repaired. There was no charge for the use of the Malibu, but Kerby was expected to pay for the repairs.

The Malibu was registered to Bay Automotive and had dealership plates on it. On a Friday, after the repairs on Kerby's car were completed, she was notified that her car was ready to be picked up. Kerby requested that she be allowed to keep the Malibu until Monday. Bay Automotive allowed her to keep the Malibu over the weekend. That weekend she was involved in the subject accident.

Bay Automotive contends that the Graves Amendment applies because (1) it is engaged in the trade or business of renting or leasing motor vehicles and (2) there was no negligence or criminal wrongdoing on its part. Since key terms such as "loan," "lend," "borrow," "rent" and "lease" are not defined in the Amendment, Bay Automotive relies upon dictionary definitions and common and approved usage of those terms and concludes that it is engaged in the trade or business of renting or leasing vehicles and it is immune from liability under the Graves Amendment. The Court agrees with Bay Automotives analysis as far as it goes, but believes that Bay Automotive's conclusion is erroneous because, while Bay Automotive looked at whether the transaction with Kerby was a lease or rental, it did not look at the nature of its trade or business.

Bay Automotive failed to consider whether it is *engaged in the trade or business* of renting or leasing vehicles. Bay Automotive is indeed a business enterprise, but in what business is it engaged? In its brief in support of its motion, Bay Automotive tries to skirt a discussion of whether it is "in the trade or business of renting or leasing vehicles" by describing itself as being "a vehicle owner who leases vehicles." On the last page of its brief, however, it describes itself as "a dealership and repair facility." That Bay Automotive did not address whether it is *in the trade or business* of renting or leasing vehicles is telling and supports the Court's conclusion that, as a matter of law, Bay Automotive is engaged in the trade or business of selling and servicing vehicles; not renting or leasing vehicles.

Allowing service customers to use a vehicle while their own vehicle is being serviced or repaired, provided they pay for the service or repair which they would be obligated to pay for anyway, is not the renting or leasing of vehicles under the definitions relied upon by Bay Automotive. Bay Automotive claims "loan" is distinguishable from "rent" or "lease" because a

loan does not contemplate "financial benefit to the owner" while rent or lease does contemplate an exchange of payment for use. Bay Automotive contends that the arrangement it had with Kerby was a lease because she had to pay for services in order to obtain the use of the vehicle. However, Kerby was not paying anything for the use of the vehicle; she was paying for the repairs. The use of the vehicle came with the repairs at no charge.

In conclusion, Bay Automotive is a car dealership and service facility; it is not engaged in the trade or business of renting or leasing vehicles. Therefore, it is not immune from liability under the Graves Amendment.[1]

The Michigan Motor Vehicle Act

The Plaintiff claims that under the Michigan Motor Vehicle Act, MCL §257.401, vehicle owners who lease vehicles have been afforded immunity or their liability has been limited to $20,000. Bay Automotive has misconstrued the statute. By its plain language, the limited liability section of MCL 257.401(3) specifically applies only to "a person engaged in the business of leasing motor vehicles . . ." For the same reason that the Graves Amendment, as discussed above, does not apply to this Defendant, this section of the Michigan Motor Vehicle Act does not apply to this Defendant.

Negligent Entrustment

Bay Automotive contends that the Graves Amendment pre-exempts "all state laws that formerly imposed liability on the owner of a leased vehicle, where the vehicle is involved in an accident through no fault of the lessor" and furthermore that the Plaintiff cannot prove that it knew Kerby was an incompetent driver. As discussed above, the Graves Amendment does not apply in this case because Bay Automotive is not engaged in the trade or business of renting or leasing vehicles. However, the Plaintiff has alleged an action for negligent entrustment. Therefore, the Court will address the sufficiency of the evidence that the Plaintiff has offered to show that Bay Automotive negligently entrusted Kerby with the use of the Malibu. When the record, viewed in the light most favorable to the Plaintiff, leaves open an issue on which

[1] Because the Graves Amendment requires that the Defendant be (1) in the trade or business of renting or leasing vehicles *and* (2) not negligent or engaged in criminal wrongdoing and the Court finds that Bay Automotive was not in the trade or business of renting or leasing vehicles, the Court need not address in this context whether Bay Automotive was negligent for purposes of the Graves Amendment. However, the Court will address whether Bay Automotive was negligent in its discussion infra regarding the Plaintiff's negligent entrustment claim.

reasonable minds could differ, granting summary disposition would be inappropriate. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in this action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The tort of negligent entrustment is comprised of two 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).

The doctrine of negligent entrustment essentially comprises a determination of whether an individual's conduct was reasonable in view of the apparent risk involved. *Bragan v Symanzik,* 263 Mich App 324, 341; 687 NW2d 881 (2004) (*Murphy, J., concurring.*)

In *Muscat v Khalil,* 150 Mich App 114, 121; 388 NW2d 267 (1986), the Court of Appeals discussed the law of negligent entrustment, indicating:

> Michigan courts have adopted the following definition of the theory from 2 Restatement Torts, 2d, § 392:
>
>> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. *Moning v Alfono,* 400 Mich 425, 443-444; 254 NW2d 759 (1977).

Subsequently, our Supreme Court, in *Fredericks v General Motors,* 411 Mich 712, 719; 311 NW2d 725 (1981), clarified the applicable standard of care determining that:

> To sustain a cause of action for negligent entrustment a plaintiff must prove that defendant 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.

This standard was further refined in *Buschlen v Ford Motor Co (On Remand),* 121 Mich App 113, 117; 328 NW2d 592 (1982), where the Court indicated that to prove negligent entrustment:

> [P]laintiffs must show either that defendant knew the entrustee was not to be entrusted or that defendant 'had special knowledge of (the entrustee) which would put defendant on notice.'

The *Fredericks* Court did not recognize a duty to inquire, on the part of the entrustor, to ensure that the chattel being entrusted was being used in a safe manner. Instead:

> [T]he entrustor must first have special notice of the peculiarities of the entrustee sufficient to put the entrustor on notice before the entrustor is under any further duty to ensure an entrusted chattel's safe use. [*Buschlen, supra* at 118.]

The Plaintiff acknowledges that he must prove that Bay Automotive knew or should have known of the unfitness or incompetence of Kerby to operate a motor vehicle. *Perin v Peuler*, 373 Mich 531, 538; 130 NW2d 4 (1964). The Plaintiff relies upon several alleged facts that, when viewed in a light most favorable to the Plaintiff, raise a genuine issue of material fact regarding whether Bay Automotive was negligent in entrusting Kerby with the Malibu. For example, Bay Automotive's Service Writer, George Mihalovich, is Kerby's uncle. According to his deposition and Kerby's deposition, Mihalovich made the arrangements for Kerby to bring her car in for repairs and for her to use the Malibu. He knew that Kerby was young and inexperienced and had a poor driving record. Mihalovich testified during his deposition that he knew Kerby had only five months prior to the accident obtained her first driver's license; that she previously owned a former parts van which was purchased from Bay Automotive and that she had been involved in an accident with that van during those five months prior to this accident.

Thus, a reasonable jury could find that Bay Automotive knew or should have known that Kerby would drive in a manner involving unreasonable risk of physical harm to herself and others and hold Bay Automotive liable for the physical harm resulting to them, *Moning v Alfono,* 400 Mich 425, 443-444; 254 NW2d 759 (1977), and granting summary disposition for the Defendant would be inappropriate.

Owner Liability

The Plaintiff alleges that the Defendant, as the owner of the Malibu, is strictly liable under the Michigan Motor Vehicle Code, MCL §257.401(1), for Kerby's negligent operation of the Malibu. MCL 257.401 provides, in relevant part:

> (1) 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.

MCL 257.401(1) establishes the vicarious liability of an automobile owner for the negligence of a driver who uses the automobile with the owner's permission. See *Phillips v Mirac, Inc,* 470 Mich 415; 685 NW2d 174 (2004). See also, *Kaiser v Allen,* 480 Mich 31, 38-39; 746 NW2d 92, 96 (2008) where the Court said:

> There is neither a percentage of fault nor a distinct amount of damages that belongs to the vehicle owner separate from those of the negligent operator. The owner of the vehicle does not need to negligently lend his car to the operator to incur legal liability-he or she merely needs to own the vehicle. As a result, under MCL 257.401(1), a vehicle owner can be held liable for a plaintiff's injuries without being a foreseeable and natural cause of the plaintiff's injuries, that is, without being a proximate cause of the plaintiff's injuries. The *purpose* behind the owner-liability statute is to hold the passive owner 100 percent liable for the operator's negligence. The basis for a vicariously liable tortfeasor's liability is entirely derivative and does not meet the statutory definition of "fault" because the owner of the vehicle does not need to be the proximate cause of the plaintiff's injuries to be held liable for them.

An "owner" is defined under MCL § 257.37 as:

> (a) Any person, firm, association or corporation 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) Except as otherwise provided in section 401a, a person who holds the legal title of a vehicle.

(c) A person who has the immediate right of possession of a vehicle under an installment sale contract.

In *Basgall v Kovach,* 156 Mich App. 323, 327; 401 NW2d 638 (1986), the Court of Appeals had an opportunity to interpret what is meant by the term "owner."

> Our Court has consistently held that the definition of owner as used in the Michigan Vehicle Code must be broadly construed to include persons who (1) have exclusive control over the vehicle for at least thirty days, (2) are named on the legal title of the vehicle, or (3) are conditional vendees, lessees or mortgagors with immediate right to possession. *Peters v Dep't of State Highways,* 66 Mich App 560, 564-565; 239 NW2d 662 (1976). There may be several owners of a motor vehicle, within the meaning of the Michigan Vehicle Code, with no one owner possessing "all the normal incidents of ownership." *Messer v Averill,* 28 Mich App 62, 65, n 2; 183 NW2d 802 (1970).

See also, *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1, 4-5; 534 NW2d 467, 468-469 (1995).

In the instant case, it is undisputed that Bay Automotive was the owner of the Malibu. It bore Bay Automotive dealer plates and was registered to Bay Automotive. It is also undisputed that Bay Automotive, via George Mihalovich, gave Kerby permission to drive the Malibu over the weekend during which the accident occurred. Therefore, granting summary disposition for the Defendant on the Owner Liability cause of action would be wholly inappropriate. Granting summary disposition for the Plaintiff, on the other hand, would be appropriate. MCR 2.116(I)(2).

Conclusion

The Graves Amendment does not provide immunity from vicarious liability for this Defendant since it only applies to those who are *in the trade or business* of renting or leasing vehicles and Bay Automotive is not in that business. Instead it is in the business of selling and servicing vehicles. For the same reason, the Michigan Motor Vehicle Act, MCL §257.401(3), which limits the liability of vehicle lessors, does not limit the Defendant's liability.

The Plaintiff has raised a genuine issue of material fact regarding whether Bay Automotive knew or should have known that Kerby was incompetent to operate the Malibu and, therefore, would be liable for negligently entrusting her with its use.

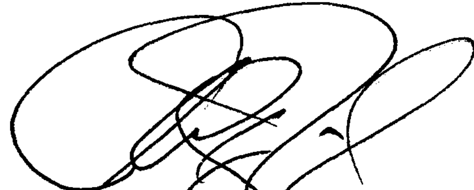
It is undisputed, however, that Bay Automotive was the owner of the Malibu and gave Kerby permission to drive it. It is also undisputed that Kerby was negligent in her operation of

the Malibu. Therefore, Bay Automotive is strictly liable for Kerby's negligence under the Owner Liability statute, MCL § 257.401(1), and the Plaintiff is entitled to summary disposition in his favor on that theory of liability. MCR 2.116(I)(2).

The Defendant's motion for summary disposition is denied. Summary disposition is granted in favor of the Plaintiff, pursuant to MCR 2.116(I)(2), on his Owner Liability theory of liability under MCL 257.401(1). The only remaining issue for trial is the amount of Plaintiff's damages.

IT IS SO ORDERED.

This Decision and Order does not resolve the last pending claim or close the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/05/09