

CITATION: MYERS-GORDON v. MARTIN, 2013 ONSC 5441
COURT FILE NO.: CV-13-179
DATE: 2013/08/29

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KELLY MYERS-GORDON, a mentally
incapable person by her Litigation Guardian,
Cynthia Gordon, CYNTHIA GORDON,
personally, AMY GORDON, CHRISTY
GORDON, STEPHEN MYERS-GORDON
and STEPHEN GREGORY MYERS

Plaintiffs

- and -

RANDY MARTIN, KAREN MARTIN,
CHRISTINA BEAUREGARD, CODY VAN
EVERY and STATE FARM AUTOMOBILE
INSURANCE COMPANY

Defendants

)
)
) S. Gencher and J. Waxman, for the
) Plaintiffs
)

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)
)
)
) C.K. Boggs, for the Defendant, Karen
) Martin
) J. Greve, for the Defendant, State Farm
) Automobile Insurance Company;
) P. Karsten, for the Defendant Cody Van
) Every;
) S. Fay, for the defendant, Christina
) Beauregard
)

) **HEARD:** 27 June, 2013
)

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No: CV-10-89-A1

BETWEEN :

EUGENE FAGAN, CAROL FAGAN,
MACKENZIE MILMINE, ANDREA
MCRAE, CATHERINE LEONARD and
BRIAN FAGAN

Plaintiffs

- and -

RANDY MARTIN, KAREN MARTIN,
CHRISTINA BEAUREGARD and THE CO-
OPERATORS GENERAL INSURANCE
COMPANY

Defendants

- and -

CODY VAN EVERY

Third Party

C.K. Boggs for Karen Martin
D. Strangio for The Cooperators General
Insurance Company

P. Karsten for Cody Van Every

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No. CV-10-104 A1

BETWEEN :

FRANK MCLAUGHLIN, SANDRA
MCLAUGHLIN, JESSICA MCLAUGHLIN,

JAMES MCMAHON and MARIE
MCMAHON

Plaintiffs

- and -

RANDY MARTIN, KAREN MARTIN,
CHRISTINA BEAUREGARD and BRANT
MUTUAL INSURANCE COMPANY

Defendants

-and-

CODY VAN EVERY

Third Party

ONTARIO

SUPERIOR COURT OF JUSTICE

Court File No: CV-11-136-A1

BETWEEN :

KRISTEN MAIE HARROTT, MARINA
HARROTT, JUSTIN HARROTT and
BRENNAN HARROTT

Plaintiffs

- and -

RANDY MARTIN, KAREN MARTIN,
BRANT MUTUAL INSURANCE
COMPANY, CHRISTINA BEAUREGARD
and DENNIS WARREN

C.K. Boggs, for the Karen Martin

P. Karsten for Cody Van Every

C. K. Boggs, for the Defendant, Karen
Martin
S. H. Fay and L. Schroeder, for the
Defendant, Christina Beauregard and
Dennis Warren

-and- Defendants)
)
)
) P. Karsten, for the Third Party, Cody Van
CODY VAN EVERY Every
Third Party

The Hon. Mr. Justice Kent

REASONS FOR RULING ON MOTION

Introduction:

[1] Karen Martin a defendant in all four actions, moves for summary judgment dismissing the four actions brought against her. The issue for the court to determine is whether Karen Martin gave her son Randy Martin, age 17, permission to drive her motor vehicle on the night of 25-26 September, 2009.

Background:

[2] In the early hours of 26 September, 2009, Randy Martin, while impaired and driving his mother's 2005 Dodge Durango, was involved in a tragic accident that killed two young persons and seriously injured two others.

[3] On 25 September 2009, Karen Martin was away from the Martin home. She had left her Durango at her home and left the keys to that vehicle in her bedroom. That evening, Randy made plans to spend time with friends. Before leaving home, he went into his mother's bedroom, found her keys to the Durango and took both the keys and the Durango.

[4] Randy then picked up several friends, purchased and consumed alcohol and attended a party. At approximately 1:20 a.m. on 26 September 2009 Randy was driving over the speed limit, while impaired, and without stopping went through an intersection controlled by a stop sign. Shortly thereafter, he struck the four young persons who were standing next to a parked vehicle.

[5] As a result of the foregoing misconduct, Randy was charged with two counts of impaired driving causing death, two counts of driving causing bodily harm and one count of leaving the scene of an accident that had caused bodily harm.

[6] Randy pleaded guilty and admitted all the facts set out in a statement agreed to by Crown counsel and his own counsel. Those agreed-to facts included an admission by Randy that he was driving the Durango at the time of the accident without his mother Karen Martin's permission. Karen Martin maintains that to be the case.

[7] If the court on this motion determines that admission to be in fact the situation, there is no genuine issue requiring a trial and all four actions as against Karen Martin should be dismissed.

Consent:

[8] Consent to possess and drive a motor vehicle can be given by its owner either expressly or impliedly. It is common ground among all counsel that Karen Martin did not give Randy Martin express consent at the relevant time. Where counsel differ is on whether the issue of implied consent can be decided on a summary judgment motion and, if so, should it be decided in this case on this motion.

[9] Where an issue is discrete, the contentious factual issues are limited, and the motions judge is satisfied that a full appreciation of the evidence and issues required in order to make dispositive findings can be achieved, a determination can be made on a summary judgment motion.

[10] If that cannot be achieved without the full machinery of a trial, the motions judge should not make a determination on a summary judgment motion. See: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONSC 764 at para. 50.

[11] Determining the issue of implied consent on a summary judgment motion is not unprecedented. See: *Fyfe v. Bassett* 2012 ONSC 5125 and *Oliveira v. Mullings* [2007] O.J. No. 2119.

[12] This is not a case involving significant contentious facts. The moving party relies upon the evidence of three parties who have all been examined for discovery. Primary reliance is based upon the evidence of Randy Martin.

[13] None of the responding parties have adduced evidence. The court must assume, therefore, that they have put their “best foot forward” as required by law. Those responding parties are not entitled to sit back on this motion and rely on the possibility that more favorable facts may develop at trial. See: *Combined Air* para. 56.

[14] This court concludes that the issue of implied consent may be decided in this case on this motion for summary judgment. Specifically, this court will determine whether, on a balance of

probabilities, the defendant Karen Martin has satisfied the court that her son, Randy Martin, had possession of and was operating her vehicle at the time of the accident without her consent.

Indicia of Implied Consent:

[15] Implied consent, or lack of implied consent, is not to be determined solely at the specific time of the accident. See: *Mugford v. Weber* [2004] A.J. 508 (C.A.). A negative answer to the hypothetical question of whether consent had been given, if made after the accident, may not relieve the owner of liability. See: *Mugford* at para. 44.

[16] It is therefore necessary to examine what other courts have found to be indicia of implied consent.

[17] See: *Cameron v. Halverson*, [2004] A.J. No. 1786 (Q.B.) in which a daughter was found to have given her implied consent to her unlicensed father to drive her vehicle by leaving it in her parents' driveway when she went away. She knew her father had driven her vehicle in the past and she had only given him a gentle admonishment. By giving him access to the vehicle and the keys, she had given her implied consent to its use.

[18] See also: *Korencik v. Hartwell*, 2007 ABQB 459, where parents had left a vehicle with their son to conduct repairs. Instead, he drove to a party and was involved in an accident. The Court determined that a son was given possession and had access to the keys and the son did not believe that he required express permission to operate the vehicle that evening. The evidence did not support that the parents required specific consent to operate the vehicle.

[19] In *Traders General Insurance v. McCubbin*, [2009] O.J. No. 4478, Justice Belobaba determined that the son did not have explicit consent to drive the vehicle but he did have implied consent. The evidence demonstrated that the respondent allowed the son to drive the truck on private roads and when he learned the son had been occasionally driving on public roads, simply told the son to be careful. On the day of the accident, the son had another licensed driver with him, but not one with four years' experience, as required by conditions of the son's licence.

[20] In the 2008 decision of *Seegmiller v. Langer et al.*, [2008] O.J. No. 4060, the court found that there was consent to possession despite the condition of non-operation. A registered owner's daughter and the daughter's boyfriend were not licensed and were prohibited from driving the vehicle in question until they had their licences. The vehicle was parked in the driveway of the mother's home where she lived with her daughter and the daughter's boyfriend. The keys were left on a hook inside of the door of the house. The keys were not specifically given by the mother to the daughter or her boyfriend and, while the mother was away from the home, the daughter and her boyfriend took the vehicle, drove it on the highway and were involved in an accident. Justice Strathy found that the mother was liable as the owner of the vehicle as she had consented to her daughter and boyfriend having possession and control of the vehicle even though they had been prohibited from operating it. Justice Strathy reviewed the case law and distilled from it the following eight principles:

1. The question of whether a motor vehicle is in the possession of some person without the consent of the owner is a question of fact to be determined by the evidence in a particular case.

2. The meaning of possession is a question of law but the application of that definition to any particular set of facts is not a question of law alone.

3. Possession is a concept capable of different meanings and there are different types of possession. The primary definition of possession contemplates power, control or dominion over property.

4. Once ownership of a vehicle is established, the onus passes to the owner to establish that the vehicle was, without the consent of the owner, in the possession of some person other than the owner.

5. The owner's vicarious liability is based on possession, as opposed to operation of the vehicle.

6. Consent to possession of a vehicle is not synonymous with consent to operate it.

7. If possession is given, the owner will be liable even if there is a breach of a condition attached to that possession, including a condition that the person in possession will not operate the vehicle.

8. Breach of conditions placed by the owner on a person's possession of the vehicle, including conditions as to who may operate the vehicle, do not alter the fact of possession.

[21] Where an owner of a vehicle consents to a situation where she has no control over the physical use or possession of a vehicle, by not requesting that keys be returned or expressly

revoking prior consents, then the courts will follow the overriding goal of public protection and find implied consent. See: *Ezzedine v. Dalgard* [2006] A.J. No. 1431 para. 88

[22] The Supreme Court of Canada decision of *Deakins v. Aarsen*, 1970 CarswellOnt 209, involved the negligent operation of a motor vehicle by the vehicle owner's son's girlfriend. The court explained that the intimacy of the son and the girlfriend's relationship, the son's carefree attitude in leaving the keys in the ashtray of the unlocked vehicle, taken together with the fact that on a previous occasion he had instructed his girlfriend on how to drive the vehicle and that she had driven it on her own at least one other time, "clearly justified" the learned trial judge's finding that there was implied consent.

[23] In *Abstainers' Insurance Co. v. Vavaroutsos*, 1993 CarswellOnt 2909, a girl was involved in an accident after driving an uninsured family vehicle. It was customary for the girl to ask permission if she wanted to drive the other family vehicles, but she was specifically told not to drive the uninsured vehicle. The daughter had driven the uninsured vehicle to and from work on approximately 5 other occasions, which was claimed to be unbeknownst to the owner. On the day of the accident, she took a set of keys that were left unsecured in a bowl near the front door of the home. The court determined there to be a finding of implied consent.

[24] Furthermore, in *Korody v. Bell*, [2009] O.J. No. 1716 (S.C.) [*Korody*], the owner's testimony was held to contain numerous shortcomings and inconsistencies, especially with respect to the driver's previous use of the vehicle at issue. On the totality of the evidence therefore, it was ultimately held that the driver assumed that he had the implied consent of the

owner and was objectively justified in making that assumption. The issue of implied consent was decided after a trial.

[25] Lastly, the case of *Emond v. Reid* [1993] O.J. No. 1349 (G.D.) [*Edmond*] was a case where, at trial, one of the issues was whether the driver of the vehicle at issue was driving with the owner's consent. Implied consent was found after the owner admitted that she was fully aware that the driver almost regularly took her car without her express permission by simply taking the keys from her purse. Nonetheless, the owner did not change her habits, change the location of the keys or confront the driver as to his "non-authorized" possession of the vehicle.

Analysis of Implied Consent Issue:

[26] In this case, the strongest facts supporting a finding of implied consent are as follows:

1. On a number of occasions prior to the accident Randy had driven the Durango with Karen's permission when both Karen and Randy knew that he was not legally authorized to do so.
2. Randy and Karen both knew before the accident that Karen was driving the vehicle herself despite not being legally authorized to do so, her licence having been suspended.
3. There are inconsistencies as between Karen's evidence and Randy's evidence and Cody Van Every's evidence regarding Randy's use of the vehicle prior to the accident.

4. Karen left the keys to the vehicle at home when she went away. Randy knew where the keys were located and was aware that they were accessible.

5. Karen never reported to the police that the vehicle was taken without her consent on the night of the accident.

6. The issue of Randy having taken the vehicle on the night of the accident without Karen's consent was not discussed between Karen and Randy, for a significant period after the accident.

[27] It is arguable that suspicion is aroused that Karen Martin did not report to the police that the Durango was possessed and driven by Randy Martin without her consent. It is, however, more probable that the magnitude of a tragic accident would make it likely that consent, or lack thereof, would not be the first thing on the mind of a parent and child when they initially speak to one another after the accident.

[28] Karen Martin said at her examination for discovery that she did discuss the issue of consent with Randy the first time that she discussed the accident in detail. In any event, the issue turns on Randy's belief at the relevant time.

[29] Randy described his taking of the keys and the Durango vehicle as "I went with it". This appears to indicate a conscious decision to do something he was not permitted to do more than it indicates an understanding on his part that he had his mother's consent to possess and drive the Durango vehicle.

[30] Certainly, Karen Martin could have done more to exert control over her vehicle. She could have inquired further into Randy's plans for the time she was to be away. She could have taken safeguards with the keys. She could have said, "don't drive the Durango while I'm away".

[31] There is, however, no evidence that Randy Martin was a young man who could not be trusted, that he was a delinquent or even troublesome. He has never said that he believed he had consent to possess and drive the Durango.

Credibility:

[32] As previously stated, a belated raising of the consent issue by Karen Martin could arouse one's suspicion. Similarly, the fact that she has, herself, regularly driven her vehicle even though she is unlicensed is indicative of a lack of concern for legal conditions and obligations. More importantly, it is a poor example that she set for her son.

[33] Nevertheless it is Randy's credibility that is more the issue. Counsel for the responding parties argue that Randy's credibility should be assessed by the jury in the context of a trial. They point out that discovery transcripts are not a full record. Randy was, however, examined (and cross-examined) at discovery by five experienced counsel and his evidence appears consistent. The test is subjective. It is what Randy believed at the time that is determinative.

Result:

[34] While it can be acknowledged that a full and complete cross examination of Randy in the context of a trial might enable the court to more subtly assess his credibility, I am persuaded that the materials provided to this motions court and the submissions of counsel have enabled this

court to have a full appreciation of the evidence and to accept the evidence of Randy Martin as credible.

[35] I am driven to the conclusion that a trial is unnecessary. The moving party has met the test for summary judgment on the issue of implied consent and summary judgment should be granted dismissing all four actions as against Karen Martin.

Costs:

[36] If counsel are unable to agree on costs, submissions may be made in writing limited to four pages together with a costs outline.

KENT, J.

Released: August 29, 2013

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COURT FILE NO.: CV-13-179/CV-10-89-A1/CV-10-104-A1/CV-11-136-A1
DATE: 2013/08/29

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KELLY MYERS-GORDON, a mentally incapable
person by her Litigation Guardian, Cynthia Gordon,
CYNTHIA GORDON, personally, AMY
GORDON, CHRISTY GORDON, STEPHEN
MYERS-GORDON and STEPHEN GREGORY
MYERS

S. Gencher and J. Waxman, for the Plaintiffs

- and -

RANDY MARTIN, KAREN MARTIN,
CHRISTINA BEAUREGARD, CODY VAN
EVERY and STATE FARM AUTOMOBILE
INSURANCE COMPANY

C.K. Boggs, for the Defendant, Karen Martin
J. Greve, for the Defendant, State Farm Automobile
Insurance Company;
P. Karsten, for the Defendant Cody Van Every;
S. Fay, for the defendant, Christina Beauregard

REASONS FOR JUDGMENT

KENT, J.