UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2767

September Term, 2014

RICKEY CORNO JONES

v.

E. STEWART MITCHELL, INC.

Eyler, Deborah S.,
Kehoe,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 12, 2015

This appeal stems from an automobile accident in which Rickey Corno Jones, the appellant, was seriously injured. He was driving a tractor-trailer on a highway when a tanker truck suddenly cut in front of him to enter an exit ramp it was about to miss. Jones successfully avoided hitting the tanker truck, but his vehicle went out of control, careening off the highway and rolling over. The tanker truck did not stop. Jones had noticed before the accident that the tanker truck bore the logo and name of the E. Stewart Mitchell, Inc. ("ESM") trucking company, the appellee.

In the Circuit Court for Baltimore City, Jones sued ESM for negligence, and prayed a jury trial.[1] ESM filed a motion for summary judgment after the deadline in the scheduling order for doing so. The court held a hearing and granted the motion on the issue of agency. Specifically, the court ruled that evidence that ESM was the owner of the tanker truck, if credited by a jury, would raise a rebuttable presumption that the driver of that truck was acting as ESM's agent at the time of the accident; however, ESM's evidence about agency conclusively rebutted that presumption, entitling it to judgment in its favor as a matter of law.

On appeal, Jones poses two questions for review, which we have rephrased:

I. Did the circuit court err by considering ESM's motion for summary judgment when it was filed after the deadline established in the scheduling order?

II. Did the court err by granting ESM's motion for summary judgment?

[1]Jones also sued Carolina Casualty Insurance Company and "John Doe." That company and "John Doe" were served a few days later. Before either filed an answer or motion, Jones dismissed both without prejudice. After summary judgment was granted in favor of EMS, Jones noted an appeal. That appeal was dismissed for lack of a final judgment. *Jones v. E. Stewart Mitchell, Inc.*, No. 829, Sept. Term, 2013 (filed February 5, 2015). Jones then voluntarily dismissed Carolina Casualty Insurance Company and John Doe with prejudice and noted this appeal.

For the following reasons, we answer "No" to Question I and "Yes" to Question II, and shall reverse the judgment of the circuit court and remand for further proceedings.

FACTS AND PROCEEDINGS

Jones is a truck driver. Around midnight on September 1, 2011, after a ten-hour break, he started driving his tractor-trailer east on Interstate 70 ("I-70") in Maryland. His vehicle was loaded with PVC pipe.

From the time Jones entered I-70, until just before the accident, he was driving in the middle lane and a tanker truck was driving next to him, in the left lane. Jones observed that the tractor of the truck was a green Peterbilt with a white top. The tanker it was towing was silver with a platform on top, a ladder extending from the platform, chrome wheels, and chrome stacks. The name "E. Stewart Mitchell" was written in block letters on the side of the tractor and also on the side of the tanker. From his years as a truck driver, Jones was familiar with the brand markings of various trucking companies, including ESM.

The tanker truck and Jones's tractor-trailer drove next to each other for about an hour and a half. They were traveling at the same speed -- slightly below the speed limit. Neither vehicle changed lanes. At one point during the drive, Jones was able to observe the driver of the tanker truck. He was a "black guy" in his early to mid-thirties, with a "medium haircut."

I-70 East approaching Interstate 695 ("I-695"), also known as the Baltimore Beltway, is three lanes wide. There are two exits from I-70 East to the Baltimore Beltway: a left exit

(91B), which is a ramp to I-695 North, and a right exit (91A), which is a ramp to I-695 South. As Jones approached the Baltimore Beltway, he still was traveling in the middle lane and the tanker truck still was traveling in the left lane. All of a sudden the tanker truck cut in front of Jones's tractor-trailer in the middle lane and continued into the right lane, entering the Exit 91A ramp to I-695 South, which it had almost missed. Jones had to slam on his brakes to avoid hitting the tanker truck. The force blew out his right front tire, causing his vehicle to spin out of control, plow through 200 feet of guardrail, tip over, and slide on its side until coming to a rest. The driver of the tanker truck did not stop, and was never located. When police responded to the scene, Jones told them what had happened and identified the tanker truck as an ESM vehicle.[2]

Stuart Butler, Jr., another driver on I-70 East at the same time, saw the tanker truck cut in front of Jones's vehicle. Butler was driving a car just behind the two trucks. At one point, he tried to overtake the tanker truck, but it blocked him. As Butler was doing so, he saw lettering reading "E. Stewart Mitchell" on the side of the tanker. Butler also is a truck driver and he has seen ESM tanker trucks on the road before. The name is memorable to him because Stuart is his first name. Butler is not sure if he saw the ESM lettering on the tractor ***and*** on the tanker itself, or only on the tanker.

Butler described the events immediately before the accident as follows:

[2]Jones was transported to the University of Maryland Shock Trauma Unit. He sustained injuries to his head, right arm, and shoulder, and spent much of the following two months in treatment and rehabilitation. He incurred $217,462.87 in medical expenses, and $28,156.14 in lost wages.

> So as we're coming up on the two ramps that goes towards 695, I notice that the E. Stewart Mitchell truck speeds up a little bit and . . . attempts to pass [Jones's] truck, so I'm thinking everybody is going the same way because as you get down there further, it says merging traffic, but instead of the E. Stewart Mitchell truck going the way he was going, at some point he decided that he was taking the [I-695 southbound] exit, so he cut over in front of [Jones's] truck . . . and I kept on going . . . and I think I found out later on about the accident because to be honest, I didn't witness the accident itself.

On February 22, 2012, Jones filed suit in negligence against ESM. He alleged that, immediately before the accident, he saw the tanker truck and "identified and recognized [it] as one owned by [ESM,]" and that the driver was acting as the agent, employee, or servant of ESM, within the scope of the agency, when he caused the accident.

ESM answered the complaint, denying liability. The parties engaged in extensive discovery.

On April 10, 2013, ESM filed a motion for summary judgment, with supporting documents and exhibits. Jones filed an opposition, also with supporting documents, and ESM filed a reply. The motion was heard by the court on May 21, 2013, the morning of trial. The court granted the motion and entered judgment in favor of ESM on May 29, 2013.

We shall include additional facts as necessary to our discussion.

DISCUSSION

Rule 2–501 permits a circuit court to grant summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. "Whether a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal." *Tyler v. City of College*

Park, 415 Md. 475, 498 (2010). Thus, "[t]he standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is, whether the trial court's legal conclusions were legally correct." *Messing v. Bank of Am., N.A.*, 373 Md. 672, 684 (2003) (citations omitted); *see also D'Aoust v. Diamond,* 424 Md. 549, 575 (2012).

I.

Untimely Filing of Motion for Summary Judgment

On April 26, 2012, the court issued a pretrial scheduling order, pursuant to Rule 2-504. Among other deadlines, the court fixed January 20, 2013, as the last date for filing motions for summary judgment. Initially, trial was scheduled to begin on April 12, 2013. Upon the joint request of the parties, the court extended the discovery deadline from December 20, 2012, to February 18, 2013. It also rescheduled the trial date to May 21, 2013. There was no change in the date for filing dispositive motions to correlate with the other date changes, however.

As noted, ESM filed its motion for summary judgment on April 10, 2013, which was after the January 20, 2013 deadline in the court's pretrial scheduling order. In its motion for summary judgment, ESM acknowledged that it was filing the motion after the deadline in the scheduling order, but argued that this did not preclude the court from considering it. In opposing the motion for summary judgment, Jones argued that although the court has discretion to consider a motion for summary judgment filed at any time during the proceedings, it is not required to do so; and because ESM had given no explanation for its

untimely filing, the court should exercise its discretion not to entertain the motion, and therefore to deny it. As is evident, the court entertained the motion and ruled on it.

The parties reiterate these arguments on appeal. Jones adds that the circuit court at least should have conducted an "inquiry into preliminary use of its discretion," but did not do so. He argues that this Court "would be well within the bounds of reason to simply reverse the trial court and remand this matter with instructions to deny ESM's Motion for Summary Judgment simply because the motion was filed untimely and there was no inquiry into the proper use of discretion."

Rule 2-501(a) provides that"[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." Rule 2-504, entitled "Scheduling order," requires a circuit court to "enter a scheduling order in every civil action . . . ." Md. Rule 2-504(a). The scheduling order must include "a date by which all dispositive motions must be filed . . . ." Md. Rule 2-504(b)(1)(E). A motion for summary judgment is a dispositive motion.

Under former Rule 610, the predecessor to Rule 2-501, a motion for summary judgment could be filed "at any time." That language is not in the current version of Rule 2-501. But, when the current rule was adopted in 2004, the Court of Appeals added a Committee note stating: "For an example of a summary judgment granted at trial, *see Beyer v. Morgan State*, 369 Md. 335 (2002)." In *Beyer*, the Court of Appeals held, in relevant part, that a party may orally move for summary judgment on the day of trial.

In *Rodriguez v. Clarke*, 400 Md. 39 (2007), the Court considered whether the circuit court "improperly considered the [defendant's] motion for summary judgment, which was filed after the Scheduling Order's deadline for filing dispositive motions." *Id.* at 74 n.21. The Court held that "[*a*] *motion for summary judgment may be made, even orally, at any time during proceedings*." *Id.* (citing *Beyer*, 369 Md. at 359). Accordingly, a deadline for filing a motion for summary judgment in a scheduling order does not preclude a party from filing a motion for summary judgment after the deadline has passed.

In the case at bar, Jones acknowledges the *Rodriguez* precedent but argues that the circuit court should have exercised its discretion to deny ESM's motion for summary judgment because ESM did not provide a good reason for having filed the motion after the deadline in the scheduling order. As mentioned, Jones also suggests that the circuit court should have engaged in some kind of preliminary analysis before exercising its discretion to consider ESM's untimely motion.

We find no merit in these arguments. Jones provides no support for either one, and they are inconsistent with the holding in *Rodriguez* that a party may file a motion for summary judgment under Rule 2-501 at any time during the proceedings, notwithstanding a dispositive motions deadline established in a scheduling order under Rule 2-504.

Furthermore, the purpose of Rule 2-504 "is two-fold: to maximize judicial efficiency and minimize judicial inefficiency." *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997). A circuit court's consideration of a meritorious motion for summary judgment filed after the scheduling order deadline may

> further[] the purposes of the Rules, which are to be "construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." Rule 1-201. . . . Moreover, despite the fact that there [is] a Scheduling Order deadline, it would be against the interests of judicial economy for a party to be forced to move forward with trial after determining there are no genuine facts in dispute, and he or she is entitled to judgment as a matter of law, merely because the dispositive motion deadline had passed.

Benway v. Md. Port Admin., 191 Md. App. 22, 43 (2010).

Here, the objective of judicial efficiency likewise was achieved by the court's considering ESM's motion for summary judgment, even though it was filed after the dispositive motions deadline in the scheduling order. ESM filed its motion for summary judgment after the new revised deadline for the close of discovery and almost six weeks before the new trial date. That timing was contemplated by the initial scheduling order, and is preferable for filing dispositive motions, as by then the parties have had a full opportunity to uncover facts in discovery but sufficient time remains before trial for the motion to be made and responded to. (In fact, Jones filed a comprehensive opposition to the motion for summary judgment.) After the scheduling order was revised, the original date for filing dispositive motions no longer was sensible. It would have been best had that date been changed too; and any change would have moved the date to the time period in which ESM actually filed its motion.

II.

Grant of ESM's Motion for Summary Judgment

(A)

In Maryland, the owner of a motor vehicle will be liable for the negligence of the person who is operating it if the operator was the owner's agent and was acting within the scope of the agency at the time of the negligence. *See House v. Jerosimich*, 246 Md. 747, 7490 (1967); *Campfield v. Crowther*, 252 Md. 88, 96 (1969). In this context, agency is not difficult to prove because for over a century Maryland has recognized a rebuttable presumption that the operator of a motor vehicle is the agent of the vehicle's owner and is acting within the scope of the agency. *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406, 410-11 (1904) (McSherry, C.J.).

In *Grier v. Rosenberg*, 213 Md. 248, 252-53 (1957), the Court engaged in a detailed analysis of this rebuttable presumption. Grier was injured when the bus in which she was a passenger stopped suddenly to avoid hitting a car that had cut in front of it. The car sped away, but the bus driver was able to take down its license plate number. From that, the car's owner was identified as one Harry Rosenberg. Grier sued Rosenberg for negligence and the case went to trial.

In her case, Grier introduced evidence that the car was titled in Rosenberg's name. In his case, Rosenberg testified that he first learned of the accident almost six months after it happened; he "did not know or recall any activity . . . that would have involved his presence" at the time and place of the accident; and although it was possible that one of his employees was driving his car at the location of the accident at the time of the accident, he had questioned all of them and none of them had remembered any reason why he would have been doing so or why he would have been in the vicinity of the accident that day. 213 Md.

at 252. At the close of the evidence, Grier asked the court to instruct the jurors that, if they were to find that Rosenberg owned the car that caused the accident, a rebuttable presumption would arise that he was driving the car or the car was being driven by his agent acting within the scope of the agency. The trial court declined to so instruct the jury. The jury returned a defense verdict, and Grier noted an appeal.

The Court of Appeals reversed. It explained that Grier's evidence that Rosenberg owned the car was sufficient to make ownership a jury question; and if the jurors found that Rosenberg owned the car, that finding would trigger the rebuttable presumption that the car was being operated by him or by his agent, acting within the scope of the agency. The Court further explained that, if Rosenberg had introduced evidence that ***conclusively*** rebutted the presumption, he would have been entitled to judgment in his favor. The Court held, however, that Rosenberg's evidence did not ***conclusively*** rebut the presumption. Therefore, agency remained a jury question, and the jurors should have been instructed about the presumption, as requested.

The Court discussed the interplay of the presumption and the evidence offered to rebut it:

> In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find as a fact that the defendant owned the car, they must find that he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the defendant had offered no

> evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with the evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence. The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury. It would be difficult, if not impossible, to lay down a rule, that would apply in all cases, as to when the evidence is so slight that it is insufficient to be considered by the jury in rebuttal of the presumption of agency, or so conclusive as to require a directed verdict for the defendant. These matters must depend upon, and be decided by, the facts developed in each individual case.

Grier, 213 Md. at 254-55 (citations omitted).

As the Court of Appeals has explained with regard to when non-agency is established as a matter of law:

> It is presumed that the operator of an automobile is the agent, servant or employee of the owner of the vehicle acting within the scope of his employment. *Hoerr v. Hanline*, 219 Md. 413, 149 A.2d 378 (1959). This presumption is rebuttable, but to rebut the presumption as a matter of law the evidence required to accomplish this must be both ***uncontradicted and conclusive.***

Campfield, 252 Md. at 96 (bolded emphasis added).

In *McQuay v. Schertle*, 126 Md. App. 556 (1999), we discussed at length the *Grier* Court's holding regarding the rebuttable presumption of agency, summarizing it as follows:

> First, if the plaintiff has offered proof of ownership (the basic fact) that serves as proof of agency (the presumed fact) and the defendant produces either no evidence or legally insufficient evidence to refute the presumed fact of agency, the trial court should instruct the jury peremptorily that if it finds that the defendant owned the [vehicle], then it *must* find that the driver was acting as the defendant's agent. In other words, the presumed fact is established as a matter of law from proof of the basic fact.
>
> Second, if the defendant produces evidence to rebut the presumed fact

> that is so exceptionally strong as to be "conclusive" in the defendant's favor, the plaintiff may no longer rely on the presumption alone to prove the presumed fact. Instead, the burden shifts to the plaintiff to produce evidence to prove the presumed fact. If he does not do so, the fact is established in the defendant's favor (unless the plaintiff already had produced contrary evidence.)[.] In that case, the presumed fact is rebutted as a matter of law.
>
> Finally, if the defendant produces legally sufficient but not conclusive evidence to rebut the presumption, the existence *vel non* of the presumed fact is a jury question. In that circumstance, which was the one that existed in *Grier*, the presumption remains in the case as the functional equivalent of an item of evidence, and the jury must be informed about it.

126 Md. App. at 593-94 (citations and footnote omitted) (emphasis in original).

The general evidentiary rule on presumptions, adopted in 1994 as part of the enactment of the Maryland Rules of Evidence by the Court of Appeals, is based on the *Grier* Court's analysis. It reads, in relevant part:

> Rule 5-301 "Presumptions in civil actions."
>
> (a) Unless otherwise provided by statute or by these rules, in all civil actions a presumption imposes on the party against whom it is directed the burden of producing evidence to rebut the presumption. If that party introduces evidence tending to disprove the presumed fact, the presumption will retain the effect of creating a question to be decided by the trier of fact unless the court concludes that such evidence is legally insufficient or is so conclusive that it rebuts the presumption as a matter of law.

(B)

In its motion for summary judgment, ESM furnished evidence in the form of interrogatory answers; an affidavit by David Mitchell, its President and custodian of records; photographs; and other documents that we shall discuss to the extent pertinent.

ESM was in the business of transporting asphalt. It owned tanker trucks, which were driven by its employees, and it leased tanker trucks from "owner-operators," who drove them for ESM under the terms of the leases. The tanker trucks ESM owned and the tanker trucks it leased from owner-operators all were painted the same, with the ESM logo, which bears its name.[3]

Coincidentally, the day of the accident was ESM's last day of operation. In anticipation of closing operations, ESM already had sold many of its trucks and trailers.[4] As of the day of the accident, it "no longer employed the large majority of its owner-operators, and had fewer of its own trucks on the road than normal." Two weeks after the accident, on September 14, 2011, ESM sold its remaining trucks and trailers.

In its interrogatory answers, which were signed by Mitchell, ESM represented that it "did not have any drivers in the vicinity of Mr. Jones' accident at the time of the accident. ESM had several owner-operators on the date of the accident, but none of them were under dispatch for ESM at the time of the accident." It further represented that it had succeeded in contacting some of its owner-operators about the lawsuit, but none of them had admitted to being in the location of the accident at the time of the accident.

[3]During oral argument in this Court, counsel for ESM explained that ESM owned most, if not all, of its tankers. It leased the tractors, however, from the owner-operators. There was no evidence in the record bearing on whether a leased tractor would have had ESM markings on it.

[4]ESM attached sales records showing that between July 11, 2011, and August 31, 2011, it sold 13 trailers.

Mitchell submitted an affidavit stating that he had examined ESM's corporate records and attesting that ESM "has no record of any employee driver or owner-operator in the vicinity of the I-70 ramp eastbound to I-695 between the hours of midnight and 6:00 a.m. on September 1, 2011." Also, ESM "has no record of any employee driver or owner-operator under dispatch" in that vicinity at that place and time and "has no record of an African-American male in his mid-30s under dispatch between the hours of midnight and 6:00 a.m. on September 1, 2011." Mitchell asserted that any ESM owned tanker that Jones saw on the night of the accident was being towed by a tractor driven by "an owner-operator who was not under dispatch for ESM at the time."

In its memorandum of law in support of motion for summary judgment, ESM argued that Jones's evidence was legally insufficient to show that ESM was the owner of the tanker truck in question and that the driver was employed by or "under dispatch" for ESM, and therefore was acting as its agent. In his opposition memorandum, Jones countered that there was a dispute of material fact over who owned the tanker truck; that reasonable jurors could find from his testimony and that of Butler that ESM owned the tractor and the tanker trailer; and that, if the jurors were to find that ESM owned the tanker truck, that finding would give rise to a rebuttable presumption that the driver of the tanker truck was ESM's agent and was acting within the scope of his agency at the time of the accident. The burden then would shift to ESM to produce rebuttal evidence to show that the driver was ***not*** its agent. In its reply memorandum, ESM reasserted that the evidence could not support a reasonable finding of ownership by ESM because the tanker truck could have been one that ESM already had sold

or could have been operated by an owner-operator. Even if the evidence was sufficient to give rise to the rebuttable presumption, the evidence ESM had offered on the summary judgment record ***conclusively*** rebutted the presumption of agency that would arise upon a finding of ownership.

At the hearing on ESM's motion for summary judgment, ESM took a somewhat different approach than it had taken in its filings. It conceded for the sake of argument that Jones's evidence was legally sufficient to make the issue of ownership a jury question, and that a jury finding that ESM owned the tanker truck would give rise to the rebuttable presumption of agency. It then argued, as it had in its reply memorandum, that its evidence, through Mitchell, that it had no employee drivers in the vicinity of the accident at the date and time of the accident and that it did not have any owner-operators under dispatch on the day of the accident was "legally conclusive" to rebut the presumption of agency. Therefore, it was entitled to judgment as a matter of law. Jones responded that ESM's evidence was not such as to ***conclusively*** rebut the presumption of agency; therefore ESM was not entitled to summary judgment.

The court granted ESM's summary judgment motion, explaining:

> The record contains the following undisputed evidence:
>
> [Jones] identified [ESM's] corporate logo on the vehicle that [Jones] alleges was driven by the party responsible for the accident that occurred September 1, 2011 on or about. [Jones] identified the driver as an African American man in his early to mid-thirties with a medium haircut.
>
> Based on facts contained in the record and the corporate custodian of records affidavit provided by Mr. Mitchell or made by Mr. Mitchell [, t]here

> is no dispute [ESM] did not have a driver, an employee driver, or owner/operator driver, dispatched to or otherwise reported to have been in the area of the accident for the period 12 a.m. to 6 a.m. on the date of the accident.
>
> There's further notice that there is no record of a driver matching the description as provided by [Jones] dispatched to or otherwise reported to have been in the area of the accident, for the period 12 to 6 a.m. on the date of the accident. . . .

The court stated that ESM had "successfully rebutted the presumption of agency in this case," shifting the burden of production back to Jones. It concluded that Jones had "not generated evidence sufficient to overcome [ESM's] Motion for Summary Judgment as to the issue of agency. As a result, the fact of non-agency is established in [ESM's] favor and a presumed fact of agency is rebutted as a matter of law." In the absence of evidence that the driver of the tanker truck was ESM's agent acting within the scope of the agency, ESM was entitled to judgment as a matter of law.

On appeal, Jones contends the evidence ESM offered on the summary judgment record to rebut the presumption of agency was not ***conclusive***, and therefore the court's ruling was legally incorrect. He maintains that ESM's rebuttal evidence was no stronger than the rebuttal evidence offered by Rosenberg at trial in the *Grier* case.

Jones also complains that the court was incorrect to conclude that there was "no dispute [ESM] did not have a driver, an employee driver, or owner/operator driver, dispatched to or otherwise reported to have been in the area of the accident for the period 12 a.m. to 6 a.m." He argues that the court's conclusion tended to discredit his testimony that he saw a tractor bearing ESM markings towing a tanker truck with ESM markings on it, and

that it was for the jury to decide, factoring in credibility, whether the tractor was being driven by an agent of ESM. In the same vein, Jones complains that the court found that he had "conceded" that he could not generate any evidence on the issue of agency beyond the markings that he saw on the "trailer," *i.e.*, the tanker, and his description of the driver. He argues that the court "fail[ed] to appreciate the distinction between the tractor and the trailer at issue and the distinction between the standards for the application of the presumption of agency and summary judgment."

ESM responds that Jones "seems to misunderstand the interplay between evidence tending to show ownership, the rebuttable presumption of agency that arises when those facts are offered, and facts that tend to show agency." (Footnote omitted.) It asserts that the court's ruling – and the specific portions of it that Jones contests – was based upon its evidentiary findings with respect to agency, not ownership.

Although Jones at times seems to focus more on ownership than on agency, that is understandable, because it is the proof of ownership that gives rise to the rebuttable presumption of agency. Ownership is not at issue in this appeal. ESM conceded for the sake of argument on its motion for summary judgment that the evidence was legally sufficient for a reasonable jury to find that ESM owned the tractor and the tanker trailer that cut Jones off. The issue on appeal concerns agency, not ownership. Specifically, the issue is whether the evidence on the summary judgment record ***conclusively*** established that the driver of ESM's tanker truck was ***not*** ESM's agent or, if he was ESM's agent, that he was ***not acting within the scope of the agency*** at the time of the accident.

"Conclusive evidence" is evidence that is "so strong as to overbear any other evidence to the contrary" or, put another way, "so preponderates as to oblige a fact-finder to come to a certain conclusion." *Blacks Law Dictionary* 596 (8th ed. 2004). We must decide whether ESM's evidence of non-agency was so absolute that reasonable jurors would be compelled to find that the driver of ESM's tanker truck was not its agent or was its agent but was not acting within the scope of his authority. This is a matter of the legal significance of the evidence, a question we decide *de novo*. *D'Aoust,* 424 Md. at 574.

The evidence ESM put forth on the summary judgment record to rebut the presumption of agency came from its interrogatory answers and Mitchell's affidavit. The interrogatory answers simply state that,

- ESM did not have any employee drivers in the vicinity of the accident at the time of the accident.
- ESM had several owner-operators on the date of the accident, but none of them were under dispatch for ESM at the time of the accident.
- None of the owner-operators ESM had been successful in contacting had admitted to being in the location of the accident at the time of the accident.

The interrogatory answers do not state the basis for these conclusions. Mitchell's affidavit focuses on the absence of ESM records, stating that

- ESM has no record of any employee driver or owner-operator in the vicinity of the I-70 ramp eastbound to I-695 between midnight and 6:00 a.m. on September 1, 2011.
- ESM has no record of any employee driver or owner-operator under dispatch in that vicinity between midnight and 6:00 a.m. on September 1, 2011;
- ESM has no record of an African-American male in his mid 30's under dispatch between midnight and 6:00 a.m. on September 1, 2011.

It appears that the facts attested to in the interrogatory answers were inferred from the absence of records, as detailed in the affidavit. In other words, ESM does not have any record of an employee driver in the vicinity of the location of the accident for a period of six hours, in which the accident happened; therefore, ESM did not have any driver in that location at the material time. Likewise, ESM does not have any record of any owner-operator under dispatch to it during the relevant time frame; therefore, even though ESM had owner-operators at the time, none of them were under dispatch to it at the relevant time. Finally, of the people under dispatch to ESM at the relevant time, no one was an African-American male in his mid 30's.

This information raises more questions than it answers:

- How many employee drivers did ESM have at the time of the accident and where were they all?
- How many owner-operator drivers did ESM have at the time of the accident and where were they all?
- What are ESM's records supposed to show? Would they ordinarily show the route that each driver under dispatch would be expected to take? Would they show deviations from that route that would be for legitimate purposes? What does "in the vicinity" of the accident mean as far as proximity? Would ESM's records ordinarily show the exact location of each driver during the driver's route?
- How many owner-operators was ESM not able to contact?[5]

[5]We posed some of these questions to counsel for ESM during oral argument. He explained that ESM's records were "bills of lading," which are paper records completed by the drivers showing their point of departure; sometimes their time of departure; what they were carrying; and where they dropped off their load. The bills of lading did not reflect the route taken by the driver, however, and ESM did not prescribe routes, according to ESM's (continued...)

Rather than presenting evidence of what its records did not show, ESM could have presented evidence of what its records did show. It could have provided the names of each of its employees and owner-operators, their ages, their races, whether they were under dispatch on the date of the accident, and, if so, their departure and termination points. It could have attached copies of the bills of lading for each ESM owned or leased tanker truck under dispatch on the day of the accident to show that, even if a driver had taken a detour, he still would not have had any occasion to be anywhere near where the accident occurred. It could have had each employee and owner-operator complete an affidavit stating whether he was under dispatch on the day of the accident and, if so, his route on that day. This evidence, which affirmatively would have shown where all of ESM's drivers and owner-operators reasonably could have been at the time of the accident, may well have conclusively rebutted the presumption of agency. It was not presented to the court on summary judgment, as we have noted.

The evidence ESM actually presented on the summary judgment record is even less determinative than the evidence the Court of Appeals held was legally insufficient to conclusively rebut the presumption of agency in *Grier*. There, Rosenberg, the owner of the vehicle, testified that he was not driving his vehicle on the date of the accident and that he

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[5](...continued)
counsel. ESM's counsel further stated that, based upon his recollection, ESM had just three drivers on dispatch at the time of the accident and, based upon their departure and terminus points, none of them would have had any reason to be in the vicinity of the accident. ***None of this information was furnished to the court on summary judgment, however.***

had spoken to *all of his employees* and none of them had any recollection of using his vehicle on the day of the accident or of having been in the vicinity of the accident. In the instant case, ESM's evidence was that it had no record showing that any driver or owner-operator had a reason to be in the vicinity of the accident. It did not present evidence that it had spoken to *any* of its employee drivers about their whereabouts on that date and Mitchell averred only that ESM had contacted some, but not all, of its owner-operators. On the basis of the absence of any records, ESM asked the court to infer that whoever was operating the ESM tanker that cut Jones off could not have been ESM's agent or, at the very least, could not have been operating within the scope of the agency with ESM at the time of the accident. While ESM's evidence was legally sufficient for a reasonable juror to find non-agency, it did not ***conclusively*** prove that the driver of the ESM tanker truck either was not ESM's agent or was its agent but was acting outside the scope of the agency. Accordingly, on the summary judgment record presented to the court, ESM was not entitled to judgment as a matter of law.

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY THE APPELLEE.