FILED
MAR 26 1985
CLERK SUPREME COURT
343

IN THE COURT OF APPEALS OF IOWA

STATE AUTOMOBILE AND CASUALTY UNDERWRITERS, Plaintiff-Appellee, vs. **MARVIN E. RUTH,** as Administrator of the Estate of RICKY RAY RUTH, Deceased; **MARVIN E. RUTH;** and **ANNE MARIE RUTH,** Defendants-Appellants, and **LON TYE BRAMMER,** and **GARY HOWARD** d/b/a **HOWARD BODY SHOP,** Defendants-Appellees.	Filed March 26, 1985 4-467 83-1629

Appeal from the Iowa District Court for Mills County - Paul H. Sulhoff, Judge.

Defendants appeal from judgment for plaintiff insurer in an action seeking declaratory judgment of non-liability under the provisions of an insurance policy issued to the driver of the car in which defendant's son was killed. REVERSED.

James A. Pratt of Heithoff, Pratt & Heithoff, Council Bluffs, for defendant-appellant Ruth.

Marvin L. Vannier of Sciortino & Vannier, Council Bluffs, for defendant-appellee Brammer.

John D. Sens of Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs, for defendant-appellee Howard.

Dennis Leu of the Peters Law Firm, P.C., Council Bluffs, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ., but considered en banc.

SACKETT, J.

On September 11, 1982, Ricky Ruth died as a result of a one-car accident. The car was owned by defendant Howard and was being driven by defendant Brammer. Earlier Brammer had been issued an automobile insurance policy by plaintiff State Auto. The policy promised to pay any damages for bodily injury or property damage which Brammer might be required to pay because of an auto accident. However, the policy had a non-owner liability clause excluding coverage when the insured was using a non-owned vehicle without a reasonable belief that he or she was entitled to do so.

On February 15, 1983, State Auto filed a petition for declaratory judgment asking the court to determine that it was not liable to Brammer under the policy for any damages recovered against him in the lawsuit arising out of Ricky Ruth's death. State Auto alleged that Brammer was using the Howard automobile without a reasonable belief that he was entitled to do so and thus, was excluded from coverage. State Auto also sought an injunction to stay prosecution of defendant Ruth's wrongful death suit. State Auto's request for a stay of the Ruth action was granted and the matter concerning State Auto's liability proceeded to trial.

The evidence indicated that Ricky Ruth, Brammer, and Howard's son, Scott, were friends. This was a transaction among friends — friends who exchanged vehicles with some regularity. At least on four other occasions, Scott Howard had allowed Brammer to use the Mustang which was later involved in the fatal accident. On the first occasion, Scott asked Brammer if he wanted to drive the car; the second time, Brammer took the car without permission to tell Scott's mother that Scott was hurt; the third time, Scott was with Brammer when he drove; and the fourth time, Brammer had specific permission.

On the day of the accident, Rod Mumm, another friend, took the car involved and drove it to Omaha. When he returned, Scott Howard was leaving the body shop. Howard told Brian Malone, another friend, to tell Mumm to put the car

keys in the glove compartment. Although Brammer took no part in that conversation and had not asked Howard if he could use the car that day, Brammer stated that he thought Howard left the keys in the glove compartment in case Brammer needed to use the car.

Brammer testified that on the evening of September 11, 1982, he, his date, and Ricky Ruth were driving around in another friend's truck and drinking beer. When the truck was low on gas, the three teenagers decided to get a car belonging to another friend, Brian Malone. Malone had told Brammer earlier that Brammer could use the car. Ricky Ruth suggested that they use the Howard car rather than Malone's. Brammer went along with the idea. He knew that Scott Howard had left the keys in the glove compartment. Brammer testified that he thought he had permission to use the Howard Mustang because he had always been allowed to use it in the past whenever he asked and because Scott had left the car open and the keys in the glove compartment. Scott Howard testified that Brammer did not have actual permission to use the car.

The trial court found that the greater weight of the evidence established that Brammer did not reasonably believe he had permission to drive the Howard auto at the time of the accident. The court ordered that State Auto be released from any responsibility to defend or indemnify Brammer for any judgment resulting from Ruth's wrongful death action. The Ruths have appealed.

This case was filed and tried in equity and our standard of review is de novo. We consider on appeal whether the trial court acted properly in issuing a declaratory judgment in favor of the plaintiff finding that it was not required to provide either a legal defense or coverage for defendant Brammer.

Brammer's State Auto policy excluded coverage for liability incurred when the insured was using a non-owned vehicle "without a reasonable belief" that he or she was entitled to do so. We must remember we are looking at the belief of the insured, not whether or not he had actual permission.

The Iowa courts have not interpreted the term "reasonable belief" within the context of non-owner liability coverage. The New Jersey Supreme Court did define the term in State Farm Mut. Auto. Ins. Co. v. Zurich Am. Ins. Co., 62 N.J. 155, 299 A.2d 704 (1973). The insurance policy at issue in Zurich contained a clause providing non-owner coverage to:

> (2) Any relative, . . . provided his actual operation or (if he is not operating) the actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission. . . .

Id. at 162, 299 A.2d at 708 (emphasis added).

The court held that the phrase "reasonably believed" is broader in scope than the phrase "with the permission of." The court rejected an objective "reasonable man" test to determine whether there was a "reasonable belief" and instead adopted the following test:

> The test is, rather, the reaction of a reasonable boy of [the defendant's] age, personality and social milieu, subject to such attendant influences on his judgment and mind as may be credibly discerned from the proofs.

Id. at 171-72 299 A.2d at 712.

After applying the factors set forth in the Zurich test, we find substantial evidence that defendant's insured reasonably believed that he could use the Howard vehicle.

In the past, Brammer had used the car involved in the accident and other cars owned by Howard. While previously Brammer had usually had oral permission to drive, we are concerned with his "understanding" on the day of the accident.

During his deposition, Brammer gave the following responses when asked about what happened at the body shop on the day in question:

> A. When they left for Shady Lanes, I thought — he put the — he said "Go ahead and put the keys in the glove compartment and leave it locked." And I thought that's what he meant by — he was going to let me drive it, if I needed it. (emphasis added).

> A. Yeah. I thought he wanted me — just in case I needed it. I thought he put them in there so — just in case I needed it.

The only evidence as to the belief on the night of the accident is that Brammer thought he could use the car if he needed it.

Considering the ages of these young men, the history of their friendship, the casual relationship with each other as to the prior use Brammer had made of Scott's car, and Brammer's testimony that he thought the keys were put in the glove compartment so he could use the car if he needed it, we determine the evidence supports a finding that Brammer did have a reasonable belief.

The findings of the trial court releasing State Auto from its obligation to defend or indemnify Brammer is reversed.

REVERSED.

All judges concur except Snell, J., who dissents.

SNELL, J. (dissenting)

I respectfully dissent.

State Auto's contractual responsibility did not provide liability coverage for any person:

> 8. Using a vehicle without a reasonable belief that that person is entitled to do so.

We are here concerned with what was Lon Brammer's reasonable belief when he took Scott Howard's car to drive. Did he then have a reasonable belief that he was entitled to take it? We are not applying an objective test or prudent person rule. Nor are we looking for some ubiquitous young man who exchanges cars with his friends. The exclusion applies if the evidence shows that Brammer did not have a reasonable belief that he could take the car without permission. This belief cannot be fanciful, spurious, or expedient. It must be based, as is any belief, on a foundation of past experiences and knowledge.

Lon Brammer's past experience was that whenever he took Scott Howard's car he had express permission, or in the one case of medical emergency, implied permission. The latter was while Scott was being treated by the doctors; Brammer took the car to tell Scott's mother of the injury. Scott saw him take it and made no objection.

Brammer testified that whenever he borrowed anybody's car he had to have permission. This included cars belonging to his mother, his step-dad, and his other high school friends. Brammer's conversation quoted by the majority only supports the idea that the keys were in the glove compartment and "he was going to let me drive it if I needed it." Even this wording indicates that permission had not then been given but would be later, based on need. Nothing in the conversation negates the requirement that permission is required, as in the past. Moreover, the statement by Scott Howard "Go ahead and put the keys in the glove compartment and leave it unlocked" was made to Brian Malone, who relayed it to Rodd Mumm.

Brammer merely heard the relayed message to Rod Mumm. Scott Howard testified the reason he had the keys put in the glove compartment was so that if it had to be moved or if it was in the way, it could be.

Brammer's state of mind on the night of the accident is also shown by his conversation prior to taking the Howard car. He was riding with his date and Rick Ruth. With the pickup running low on gas, Brammer decided to get Brian Malone's car. Rick Ruth wanted to get Howard's Mustang to drive it. Brammer testified:

> Q. Did you tell him, wait, let's go get Brian Malone's car? A. Well, I said I had permission from Brian to go get the car so let's go get that and he says, no. Let's get the Mustang. So—Scott left the keys in it, I guess he figured, you know, we could take it.
>
> Q. So you told Rick "I've got permission to drive Brian Malone's let's go get that?" and he encouraged you to get the Mustang? A. Yes.
>
> Q. Was the only reason you took the Mustang because Rick wanted to? A. Yeah.

Brammer also testified:

> Q. What was your understanding as to your right to drive that vehicle, prior to the day of this accident? A. He had to tell me I could drive it.
>
> Q. Did you, at all, prior to the day of this accident, believe that you had the right to take and drive the automobile without receiving direct verbal permission from Scott? A. No.

The Howard car was not used by Brammer in a medical emergency trip; it was a joy ride. In my opinion, the evidence does not support a conclusion that Brammer had a reasonable belief that he was entitled to use it on the night of the accident. I would affirm the trial court.