S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

DIANE L. DRIELICK, Personal Representative of the Estate of STEPHEN J. DRIELICK, Deceased,

MAY 19 1986

Plaintiff-Appellant,

-vs-

No. 82596

DELYNNE M. DRIELICK, Personal Representative of the Estate of JOHN S. DRIELICK, Deceased, and SANDRA P. MATUREN,

Defendants-Appellees,

and

SAGINAW COUNTY BOARD OF ROAD COMMISSIONERS, GERALD W. MILLER, and JERRY MILLER'S ELKS TAVERN,

Defendants.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,

Plaintiff-Appellee, Cross-Appellant,

-vs-

No. 82719

DELYNNE M. DRIELICK, Personal Representative of the Estate of JOHN DRIELICK, Deceased,

Defendant,

and

DIANE L. DRIELICK, Personal Representative of the Estate of STEPHEN DRIELICK, Deceased,

Defendant-Appellant, Cross-Appellee,

and

DETROIT AUTOMOBILE INTER INSURANCE EXCHANGE, a Michigan corporation,

Defendant-Appellee.

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

Plaintiff-Appellee, Cross-Appellant,

-vs-

No. 83385

DELYNNE M. DRIELICK, Personal Representative of the Estate of JOHN DRIELICK, Deceased,

Defendant,

and

DIANE L. DRIELICK, Personal Representative of the Estate of STEPHEN DRIELICK, Deceased,

Defendant-Appellant,
Cross-Appellee,

and

DETROIT AUTOMOBILE INTER INSURANCE EXCHANGE, a Michigan corporation,

Defendant-Appellee,
Cross-Appellee.

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BEFORE: Beasley, P.J.; Holbrook, Jr. and L. F. Simmons,* JJ.

BEASLEY, J.

Plaintiff in the principal action involved herein, Diane L. Drielick, personal representative of the estate of Stephen J. Drielick, deceased, filed suit against defendants, DeLynne M. Drielick, personal representative of the estate of John S. Drielick, deceased, Sandra P. Maturen, Saginaw County Board of Road Commissioners, Gerald W. Miller and Jerry Miller's Elks Tavern, seeking recovery of damages which resulted from the wrongful death of Stephen Drielick in an automobile accident. Stephen Drielick had been a passenger in a car owned by defendant Maturen and driven by defendant John Drielick when the accident occurred. Defendant John Drielick also died as a result of the accident. Pursuant to stipulation of the parties, a consent judgment was entered against defendant Saginaw County Board of Road Commissioners and Gerald W. Miller in the amount of $12,000. Also pursuant to stipulation of the parties, plaintiff's claim against defendant Jerry Miller's Elks Tavern was dismissed.

Defendant Maturen moved for summary judgment under GCR 1963, 117.2(3), now MCR 2.116(C)(10), claiming that no genuine issue of material fact existed as to whether defendant John Drielick had driven her car with her express or implied consent or knowledge, as required for liability under MCL 257.401; MSA 9.2101. Thus, defendant Maturen argued that since defendant John Drielick had not driven her car with her

* Circuit Judge, sitting on Court of Appeals by assignment.

consent or knowledge, she was entitled to judgment as a matter of law. The trial judge agreed with defendant Maturen's argument and granted her motion for summary judgment. Plaintiff appeals as of right.

After plaintiff in the principle action filed her complaint, defendant John Drielick's no-fault insurer, State Farm Fire and Casualty Company, instituted a declaratory judgment action against the estate of Stephen J. Drielick, the estate of John S. Drielick, and the Detroit Automobile Inter-Insurance Exchange [DAIIE], seeking a declaration that its insured, John Drielick, was not entitled to coverage under the insurance policy. DAIIE was the no-fault insurer for the owner of the automobile involved in the accident, defendant Maturen. State Farm moved for summary judgment pursuant to GCR 117.2(3), claiming that no genuine issue of material fact existed as to whether various policy exclusions applied to John Drielick as a driver of Maturen's automobile, and that it was entitled to judgment as a matter of law. The trial judge found that since there was no genuine issue of material fact that John Drielick had driven Maturen's automobile outside the scope of Maturen's permission, a policy exclusion did apply in this situation. Therefore, the trial judge granted State Farm's motion for summary judgment. Plaintiff in the principle action, Diane L. Drielick (estate of Stephen J. Drielick), appeals as of right.

DAIIE also made a motion for summary judgment claiming that it was entitled, as a matter of law, to a judgment declaring that since its insured was not liable in the principle action filed herein, it could not be held liable. The trial judge, after finding that defendant Maturen was entitled to summary judgment, granted DAIIE's motion for summary judgment. Plaintiff in the principle action, Diane L. Drielick (estate of Stephen J. Drielick) and State Farm appeal as of right.

These cases arise out of an automobile accident involving one automobile, a Corvette owned by defendant Maturen.

The deposition testimony of defendant Maturen and her husband revealed that a week before the accident, Maturen had left her car and its keys with defendant John Drielick so that he could perform some repair work on the brakes. Maturen could not remember giving any specific instructions to defendant John Drielick concerning the use of the car at the time she originally gave the car to him.

The depositions indicate that a few days later, just prior to when the Maturens were leaving on vacation, they went to see John Drielick to inquire as to when he would be finished with her car. They were told by John Drielick that he had not yet received the parts he needed to finish the brake repairs. The Maturens decided to leave the car with John Drielick during their vacation so that he could complete the repairs. At this time, the Maturens say they told John Drielick not to drive their car other than to test check the brakes in order to complete the repairs.

Deposition testimony also revealed that several days after the Maturens left on vacation, defendant John Drielick had, at around 11:00 p.m. at night, told his brother's mother-in-law that he and his brother, Stephen Drielick, were going to "test drive" Maturen's car. During the "test drive" of the car, John and Stephen Drielick stopped at a series of bars and became visibly intoxicated. After leaving the last bar, John Drielick lost control of Maturens' car and smashed against a stone and concrete abutment, killing himself and his passenger-brother, Stephen Drielick.

On appeal, plaintiff first asserts that the trial judge erred in granting defendant Maturen's motion for summary judgment on her claim under the automobile owner liability statute, MCL 257.401; MSA 9.2102, which provides in pertinent part:

> "The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle whether such negligence consists of a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in such operation as the rules of the common law requires. The owner shall not be liable,

however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge."

As previously indicated, the trial judge found that no genuine issue of material fact existed that would possibly lead to a conclusion that John Drielick was driving Maturen's car with her express or implied consent or knowledge at the time of the accident. Thus, the trial judge concluded that defendant Maturen was entitled to judgment as a matter of law under the owner's liability statute.

In making his ruling on this issue, we find that the trial judge erroneously restricted Maturen's consent to the terms of her original permission (only driving necessary for repairing the brakes). In reaching our conclusion, we note that the Michigan Supreme Court has expressly addresed this issue in Roberts v Posey,[1] where the owner of an automobile allowed another man to use his automobile only for the limited purpose of picking up his paycheck. When the man was late in returning the car, the owner searched extensivley for him and even eventually called the police to report his car as missing. It was later revealed that the man using the car had an accident with the car while on an independent joyride the next day. In holding that the exception to owner's liability under MCL 257.401; MSA 9.2101 did not apply in this situation, the Roberts court stated:

"The statute absolves the owner from liability only when the vehicle is being driven without his express or implied consent or knowledge. The consent or knowledge, therefore, refers to the fact of the driving. It does not refer to the purpose of the driving, the place of the driving, or to the time of the driving.

"The purpose of the statute is to place the risk of damage or injury upon the person who has the ultimate control of the vehicle.

"The owner who gives his keys to another, and permits that person to move several thousand pounds of steel upon the public highway, has begun the chain of events which leads to damage or injury.

"The statute makes the owner liable, not because he caused the injury, but because he permitted the driver to be in a position to cause the injury."[2]

The Roberts court went on to discuss the evidentiary presumption of statutory consent or knowledge which arises upon proof that the owner gave the driver permission to use the car:

"The presumption that a motor vehicle, taken with the permission of its owner, is thereafter being driven with his express or implied consent or knowledge is not overcome by evidence that the driver has violated the terms of the original permission, nor is it overcome by evidence of good faith efforts by the owner to get the vehicle returned voluntarily by the driver."[3]

The Roberts holding was later reaffirmed in Cowan v Strecker.[4]

In the within case, it is undisputed that defendant Maturen gave John Drielick permission to drive her car for the purpose of testing her brakes. Furthermore, under Roberts, the fact that John Drielick may have driven Maturen's car, in violation of her original permission, is irrelevant for purposes of the owner's liability statute. In addition, there was no evidence presented that defendant Maturen sought to revoke the permission she had given to John Drielick to drive the car. In fact, there was no evidence that Maturen was even seeking to get her car returned at the time of the accident, as was the case in Roberts. Based on this factual setting, we are satisfied that the evidentiary presumption that John Drielick was driving Maturen's car with her consent or knowledge was established by the deposition testimony considered at the time of defendant Maturen's motion for summary judgment. Therefore, we conclude that the trial judge erred in granting defendant Maturen's motion for summary judgment based on the non-existence of a genuine issue of material fact on whether John Drielick was driving Maturen's car with her consent or knowledge.

Due to our disposition of this first issue on appeal, we conclude that plaintiff and State Farm are correct in arguing that the trial judge erred in granting summary judgment to Maturen's no-fault insurer, DAIIE. Maturen is the named insured in the policy issued by DAIIE and could possibly be held liable to plaintiff under MCL 257.401; MSA 9.2101. Our review of the terms of the policy issued by DAIIE to Maturen indicates that if Maturen is held liable, DAIIE will be required to cover Maturen's obligation arising out of the ownership of her automobile. Therefore, DAIIE is not entitled to summary judgment in this matter.

Last, plaintiff, on appeal, argues that the trial judge erred in granting State Farm's motion for summary judgment based on an exclusion in the no-fault insurance policy issued to defendant John Drielick. The policy expressly provides that it covers the insured for liability arising from the use of a non-owned car. However, the policy's separate definition of a non-owned car also provides:

> "'Non-owned car - as used in Sections I and II means a car not:
> "(1) owned by,
> "'(2) registered in the name of, or
> "'(3) furnished or available for the regular or frequent use of:
> "you, your spouse, or any relatives.
> "The use has to be within the scope of consent of the owner or person in lawful possession of it.'" (Emphasis added.)"

In its motion for summary judgment, State Farm argued that there was no genuine issue of material fact that its insured, John Drielick, had operated a non-owned car outside the scope of the owner's permission and, thus, it was entitled to judgment in this case as a matter of law. On appeal, plaintiff rebuts State Farm's argument in two ways.

First, plaintiff argues that the applicable policy exclusion is invalid under the Michigan Supreme Court decision in State Farm Mutual Automobile Ins. Co. v Ruuska.[5] In addressing this argument, we first note that in Ruuska there was no majority opinion and, therefore, it is of diminished precedential value.[6] In finding that the insurer in Ruuska was liable to its insured, three Justices held that a definition of a non-owned vehicle which excluded an automobile owned by a relative who resided in the same household was void. The three Justices based their conclusion on their finding that the no-fault act requires an insurer to provide its insured with residual liability coverage for certain losses caused by "the use of a motor vehicle", and the non-owned car definition improperly restricted this required coverage. In reaching this conclusion, the three Justices expressly noted that their decision was limited to the facts of Ruuska, where the insured had used the independently insured car of her father with whom she resided.

Another Justice agreed that the insurer was liable in Ruuska, but expressly rejected the reasoning of the lead opinion by noting:

"The no-fault act does not require residual liability insurance covering all vehicles a person may drive. Residual liability insurance is required for residual tort liability arising out of the ownership, maintenance or use of the vehicle in respect to which a policy is required to be maintained and in effect. An insurer is not required by the no-fault act to provide portable coverage when the owner drives another insured vehicle." (Footnote omitted.)[7]

The concurring Justice went on to say that the exclusion of a vehicle owned by a relative who resides in the same household from the policy definition of a "non-owned" automobile is unconscionable and contrary to the reasonable expectations of an insured under a policy that expressly covers losses that result from the use of a non-owned automobile.

The three dissenting Justices agreed with the concurring Justice that the no-fault act does not require residual liability insurance covering all vehicles an insured may drive. However, the three dissenters went on to find that it was presumptuous to guess what the reasonable expectations of the insured may have been. They concluded that the exclusionary language was not ambiguous or unconscionable and, thus, was enforceable.

In applying Ruuska to the policy exclusion in the definition of a "non-owned automobile" in the within case, we first note that the lead opinion did not address an exclusion based on the scope of the owner's permission as is involved herein. Since this lead opinion in Ruuska was to be limited to the specific facts in that case, we decline to extend it to the policy exclusion in this case. In fact, the exclusion of an insured's operation of a non-owned automobile beyond the scope of the owner's permission appears to be consistent with the no-fault act. This exclusion appears to be a reasonable extension of MCL 500.3113; MSA 24.13113, which provides in pertinent part:

"A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

"(a) The person was using a motor vehicle which he had taken unlawfully, unless he reasonably believed that he was entitled to take and use the vehicle."

However, even if the policy exclusion would be void under the reasoning of the lead opinion in Ruuska, we note that the validity of the reasoning in this opinion is in serious doubt. In Ruuska itself, four Justices expressly rejected the basis of the lead opinion in finding that the no-fault act did not require residual liability insurance covering all vehicles an insured may drive. In addition, the Michigan Supreme Court recently indicated, without expressly deciding, that the no-fault act does not require an insurer to provide portable coverage when the owner drives another insured vehicle.[8] Therefore, we conclude that the lead opinion in Ruuska does not require us to find the policy exclusion in the within case void where the insured, John Drielick, was driving a non-owned automobile insured by another (defendant Maturen).

The concurring opinion in Ruuska also does not apply to invalidate the exclusion in this situation. As indicated, the exclusion for the use of a non-owned vehicle beyond the scope of the owner's permission is largely consistent with the no-fault act. Furthermore, such an exclusion is not contrary to the reasonable expectations of the insured in the same way an exclusion of a car owned by a relative who resides with the insured may be. An insured would more reasonably expect the automobiles excluded in the Ruuska policy provision not to be excluded from the definition of a non-owned automobile, whereas an insured would reasonably expect the policy to include limitations on his use of a non-owned automobile.

Based on the factual distinction between the policy in Ruuska and the exclusion in this case, we conclude that the mere fact that the exclusion was included in the policy definition of a non-owned automobile rather than as a separate policy exclusion does not render the exclusion unconscionable or contrary to the reasonable expectations of the

insured. Since, upon a fair reading of the entire insurance policy, the terms of the policy exclusion in this case are clear, unambiguous and not in contravention of public policy or the no-fault act, the policy exclusion is valid and enforceable.[9]

Having failed to establish that the policy exclusion is void, plaintiff goes on to claim that the trial court erred in granting summary judgment to State Farm since a genuine issue of material fact exists as to whether the policy exclusion applies in this case. Plaintiff claims that it may be possible to establish that State Farm's insured, John Drielick, was using the non-owned automobile "within the scope of the consent of the owner or person in lawful possession of it". We agree.

Deposition testimony properly considered at the time of State Farm's motion for summary judgment revealed that John Drielick had said that he was taking Maturen's car for a "test drive". Although testimony revealed that the "test drive" was performed prior to the brake repairs being completed, the "test drive" may have still been linked to the repair work. In addition, the deposition testimony revealing that John Drielick proceeded to visit a few bars during the "test drive" does not completely preclude a possible finding that he was driving Maturen's automobile within the "scope of her consent". Furthermore, we note that the only testimony establishing that Maturen had limited John Drielick's use of her automobile to repair purposes was that of Maturen and her husband. The insured, who was the only other party to the alleged conversation, is deceased. Deposition testimony also revealed that Maturen's husband had allowed John Drielick to use his automobile on a previous occasion.

In this factual setting, we believe that the interpretation of the meaning of the policy exclusion language "within the scope of the consent of the owner" and the application of such an interpretation to the facts in this case should

be left to the trier of fact. The trier of fact should be allowed to assess the credibility of the witnesses, to determine the actual scope of Maturen's consent for John Drielick to use her car, and to decide whether the policy exclusion applies in this situation. Therefore, we conclude that the trial judge erred in granting State Farm's motion for summary judgment.

However, in reaching our conclusion on this issue, we expressly find that plaintiff's assertion that the insured himself was "a person in lawful possession of Maturen's car" for purposes of the policy exclusion and, thus, could himself set the "scope of consent" for use of the car, would render the policy exclusion meaningless and, thus, is without merit. Upon remand of this case, which is required since all the motions for summary judgment were erroneously granted, plaintiff cannot validly assert this interpretation of the policy exclusion. We also refuse to address State Farm's assertion that other policy exclusions apply in this situation, since the trial judge has not yet had a chance to address these issues. On remand, State Farm may raise the application of these other policy exclusions in the trial court.

REVERSED and REMANDED.

/s/ William R. Beasley
/s/ Donald E. Holbrook, Jr.
/s/ Louis F. Simmons, Jr.

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[1] 386 Mich 656; 194 NW2d 310 (1972).

[2] Id. at pp 661-662.

[3] Id. at pp 664-665.

[4] 394 Mich 110; 229 NW2d 302 (1975).

[5] 412 Mich 321; 314 NW2d 184 (1982).

[6] People v Anderson, 389 Mich 155; 205 NW2d 461 (1973).

[7] Ruuska, supra, at pp 342-343.

[8] DAIIE v Widling, 420 Mich 549; 362 NW2d 227 (1984).

[9] See Raska v Farm Bureau Mutual Ins. Co. of Michigan, 412 Mich 355; 314 NW2d 440 (1982).