

Plaintiff's policy provided liability coverage for damages or bodily injury for which any "insured" became legally responsible because of a vehicular accident. An "insured" under the policy includes the named insured, George Hillesland, as well as any "family member." A family member is defined as a relative of the named insured related by blood, marriage or adoption who resides in the named insured's household. It is uncontroverted that George, age 38, and Leif Hillesland, age 35, are brothers who maintained separate residences at the time of the accident.

Plaintiff points to the policy exclusion of coverage for any "insured" who is "(u)sing a vehicle without a reasonable belief that the insured is entitled to do so." Plaintiff asserts that at the time of the accident, Leif Hillesland had no such reasonable belief.

Explicit and unambiguous exclusions contained in insurance policies will be upheld. Riccio v. American Republic Ins. Co., 683 A.2d 1226, 1231 (Pa. Super. 1996), aff'd, 705 A.2d 422 (Pa. 1997). The burden of establishing the applicability of an exclusion is on the insurer. See Allstate Ins. Co. v. Brown, 834 F. Supp. 854, 857 (E.D. Pa. 1993); Erie Ins. Exch. v. TransAmerica Ins. Co., 533 A.2d 1363, 1366 (Pa. 1987).

The absence of express permission does not trigger a permissive use exclusion. The exclusion applies only if the operator was without a reasonable belief that he had the owner's

permission to drive the vehicle at the time of the accident. See American Fire and Caves. Co. v. Buckreis, 1997 WL 164239, *2 (E.D. Pa. April 2, 1997); Donegal Mutual Ins. Co. v. Eyler, 519 A.2d 1005, 1009 (Pa. Super. 1987) (basing decision on driver's belief he did not have owner's permission to drive car at time of accident and noting "permissive use of an automobile may be implied from a course of conduct in which the parties have mutually acquiesced").

Leif Hillesland acknowledged in sworn deposition testimony that he did not seek or receive permission from George Hillesland to use his vehicle on the day of the accident but unilaterally decided to take the vehicle upon finding the keys after rifling through his brother's personal effects in his brother's absence.² Leif Hillesland testified that he had never sought or received permission to use any vehicle of George Hillesland at any time prior to this incident. Most importantly, Leif Hillesland testified that he knew his brother would not have allowed him to use the vehicle, even if he had a valid driver's license.³ George Hillesland testified that he never gave his

²Leif Hillesland took the vehicle from an alleyway in which it was parked on the Friday afternoon before the accident. George Hillesland first learned the vehicle had been taken the following Monday.

³Leif Hillesland's driver's license had been suspended at the time in question for driving under the influence of alcohol (DUI). The absence of a valid license would not of itself preclude a reasonable belief that one had permission to use another's vehicle. See State Farm Mut. Auto. Ins. Co. v. Mohr, 544 A.2d 1017, 1019 (Pa. Super. 1988), alloc. denied, 557 A.2d 725 (Pa. 1989).

brother, or for that matter anyone else, permission to use the vehicle at any time and never acquiesced in such use.

The uncontroverted acknowledgment of Leif Hillesland and confirmation of George Hillesland unequivocally demonstrate that Leif Hillesland did not have a reasonable belief he was entitled to drive his brother's vehicle at the time of the accident.

Where without contradiction, the insured owner and vehicle operator testify categorically to the absence of permission, courts have granted summary judgment to insurers seeking a declaration regarding a duty to defend and indemnify in the face of a permissive use exclusion. See American Fire, 1997 WL 164239 at *3 (granting summary judgment to insurer seeking declaration of no duty to defend or indemnify by virtue of permissive use exclusion in view of uncontroverted deposition testimony of owner and driver that vehicle was driven without permission at time of accident); Donegal Mutual, 519 A.2d at 1009-10 (upholding summary judgment for insurers seeking declaration of no duty to defend or indemnify by virtue of permissive use exclusion in view of uncontroverted deposition testimony of insured vehicle owner and his brother that brother was not driving car with permission at time of accident). In such circumstances where a permissive use exclusion undeniably applies, claims against the unauthorized driver are clearly not

covered and thus he is not entitled to indemnification or a defense from the insurer.

ACCORDINGLY, this day of January, 2000, upon consideration of plaintiff's Motion for Summary Judgment (Doc. #14) and in the absence of any opposition from any defendant thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and **JUDGMENT IS ENTERED** in the above action for plaintiff and against defendants, and it is thus declared that The Ohio Casualty Insurance Company has no duty to defend or indemnify Leif Hillesland based on claims arising from the June 13, 1998 collision of the vehicles operated by Leif Hillesland and Heather Mitos.

BY THE COURT:

JAY C. WALDMAN, J.