

IN THE COURT OF APPEALS OF IOWA

No. 1-999 / 11-0801
Filed February 29, 2012

**AMERICAN STANDARD INSURANCE
COMPANY OF WISCONSIN,**
Plaintiff-Appellee,

vs.

**RYAN KEITH NELSON and
MELISSA MARIE BUSS,**
Defendants-Appellants.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

Melissa Buss and Ryan Nelson appeal the district court's order finding American Standard Insurance Company has no duty to defend or indemnify Nelson in a lawsuit brought by Buss. **REVERSED AND REMANDED.**

Randy J. Wilharber and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., West Des Moines, for appellant Buss.

Arthur Eric Neu, Carroll, for appellant Nelson.

Scott K. Green, West Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Ryan Nelson and Melissa Buss appeal the district court's order finding American Standard Insurance Company of Wisconsin has no duty to defend or indemnify Nelson in a lawsuit brought by Buss arising out of an all-terrain vehicle (ATV) accident on June 15, 2008. Nelson and Buss assert the district court incorrectly concluded that Nelson's use of the ATV exceeded the scope of the implied consent of the ATV's owner, Michael Anderson. For the reasons stated below, we reverse and remand.

I. BACKGROUND AND PROCEEDINGS. On June 14, 2008, Ryan Nelson was one of eight guests at a party at Michael Anderson's home. Anderson was an over-the-road truck driver who had rented a room in the house for approximately sixteen months, and stored his vehicles, including an ATV, in a garage on the property. Nelson contends that he and others at the party were operating Anderson's ATV in Anderson's presence. At some point in the evening Anderson and three others left the party to go into town to a bar. The other guests including Nelson and Melissa Buss stayed behind at the residence. Shortly after midnight on June 15, Nelson decided to take Buss for a ride on the ATV and rolled the vehicle into a ditch resulting in injuries to Buss. On March 25, 2010, Buss filed a lawsuit against Nelson and Anderson seeking compensation for her injuries.

American Standard issued a liability insurance policy on the ATV to Anderson. The policy does not provide coverage if the person operating the ATV did not have the owner's permission or exceeded the scope of the owner's

permission. Due to this exclusion, American Standard filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify Nelson in the lawsuit filed by Buss because Nelson did not have Anderson's consent to operate the ATV.

A nonjury trial was held on April 6, 2010. At trial Anderson testified the ATV was stored with the keys in an unlocked garage. He testified he gave a number of people permission to use the ATV under varying conditions. He stated the only time he gave Nelson expressed permission to ride the ATV was when he was in Fort Dodge with Nelson. Anderson also testified there were occasions when he was present on the property where others would use the ATV, including Nelson, but would not expressly ask for his permission to do so. In addition, Anderson never communicated any restrictions on the use of the ATV to Nelson.

Anderson acknowledged that he was made aware of an incident where Nelson took the ATV off the property for a couple of days while Anderson was out of town working. The ATV was returned to the garage before Anderson returned home. When Anderson was told of Nelson's use he became "extremely mad or upset about the situation." However, Anderson did not communicate his displeasure to Nelson in any way. Anderson did take the keys out of the ATV for a time, though he was not sure how long the keys were removed from the ATV or when they were put back.

On the night of the accident, Anderson did not recall whether his ATV was parked in or outside the garage, and did not recall whether anyone at the party

was riding the ATV. He did testify no one at the party specifically asked him for permission to ride the ATV. When he left for the bar that night, Anderson did not communicate to Nelson or anyone else on the property that his ATV was not to be ridden, nor did he communicate any restrictions on the use of the ATV.

Deputy William Croghan also testified at trial. Croghan investigated the accident after he was notified that Buss was at the hospital for injuries sustained in an ATV accident. He took measurements of the location of the accident, which was approximately 100 yards from the property where Anderson was staying. He spoke with Anderson, Buss, and Nelson during the course of his investigation. Croghan reported that when asked whether he had been given explicit permission to operate the ATV, Nelson stated he had not but had borrowed it. Initially Croghan was going to charge Nelson with operating a motor vehicle without consent of the owner, but Anderson requested that no charges be brought.

Nelson testified that he had routinely operated the ATV both in and outside the presence of Anderson, and it was his understanding that Anderson was aware of his use of the ATV. Anderson never placed any restrictions on his use of the ATV. Nelson stated it was a common occurrence for people on the property to ride the ATV, and Nelson had never seen anyone ask Anderson for permission. Nelson admitted to removing the ATV from the property for a few days while Anderson was out of town, and believed this was an acceptable practice. Nelson confirmed that Anderson never discussed the incident with him or ever communicated his displeasure with Nelson's action. Nelson testified the

ATV was parked in the yard in the area of the party the night of the accident. It was not in the garage or shed where it was normally housed. Nelson stated that several people had ridden the ATV, and he had not seen anyone ask for permission.

Finally, Melissa Buss testified that on the date of the accident she was on the property, and observed others at the party operating the ATV in Anderson's presence. Prior to the time Anderson left the property, Buss did not receive any direction or restrictions from Anderson on the use of the ATV, nor did she observe Anderson giving any direction or restrictions to anyone else.

After taking all evidence under advisement, the district court issued its decision on May 2, 2010. The court found that there were times when Anderson was present where people would ride the ATV without specifically asking permission. It found Nelson did remove the ATV from the property for several days without first getting expressed permission from anyone. While Anderson was upset that the ATV had been taken off the property, the court found he did not contact police or confront Nelson. The court found this incident was the only evidence the ATV was operated on a roadway prior to the accident.

The court articulated the issue to be,

whether Nelson could have reasonably implied from all the circumstances, that because Anderson had manifested his consent to Nelson to operate the ATV on the acreage, he had also consented to Nelson operating the ATV when he was not around and in an unlawful place, the roadway.

The court concluded that Nelson did not have implied consent. The court found the evidence presented showed Nelson was the only person to have operated

the ATV on the roadway, and Nelson had never seen anyone else operate the ATV on the roadway in or outside Anderson's presence. While the court acknowledged that Anderson did learn Nelson rode the ATV off the property, there was no evidence Nelson knew that Anderson was aware he had taken the ATV off the property. Thus, the court concluded Nelson could not have implied from Anderson's silence that he approved of the use. The court stated it did not believe it was necessary for Anderson to expressly restrict Nelson from operating the ATV on the roadway, which was an illegal place, to avoid liability. The court ordered that American Standard had no obligation to defend or indemnify Nelson in the lawsuit brought by Buss.

Buss and Nelson appeal this ruling, contending that American Standard failed to prove Nelson's use of the ATV exceeded the scope of the implied consent he received from Anderson.

II. SCOPE OF REVIEW. On appeal our scope of review of a declaratory judgment action depends on how the action was tried to the district court. *Lindsay v. Cottingham & Butler Ins. Servs., Inc.*, 763 N.W.2d 568, 572 (Iowa 2009). In this case, both parties agree the case was tried in equity, and thus, our scope of review is de novo. Iowa R. App. P. 6.907. Under a de novo review, we examine the facts and law, and decide the issues anew. *SDG Macerich Props., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 584 (Iowa 2002). While we are not bound by the factual findings of the district court, we do give them some weight especially the determinations of the witnesses' credibility. *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 97 (Iowa 2011).

III. IMPLIED CONSENT. American Standard filed the declaratory judgment action in an effort to establish Nelson did not have Anderson's permission to operate the ATV on the night of the accident. If Nelson was a nonpermissive driver under the liability policy issued to Anderson, American Standard would not owe Nelson a defense or indemnification in the lawsuit filed by Buss.¹ American Standard concedes that Iowa courts analyze the omnibus clause in an insurance policy, such as the one in the footnote below, the same way that the courts analyze the consent required under Iowa's owner liability statutes.² *Schneberger v. U.S. Fid. & Guar. Co.*, 213 N.W.2d 913, 917 (Iowa

¹ The American Standard policy defines an insured person under the policy as follows:

1. You.
2. Any person using your insured motorcycle.
3. Any other person or organization. This applies only to legal liability for acts or omissions of
 - a. Any person covered under this Part while using your insured motorcycle.
 - b. You while using any motorcycle or trailer other than your insured motorcycle. This other motorcycle or trailer must not be owned or hired by that person or organization.

But the following are not insured persons:

1. Any person using your insured motorcycle without your permission.
2. Any person using your insured motorcycle with your permission but who exceeds the scope of that permission.
3. Any person using a vehicle without that permission of the person having lawful possession.
4. Any person using a vehicle with the permission of the person having lawful possession, but who exceeds the scope of that permission.
5. The United States of America or its agencies.
6. Any person for bodily injury or property damage due to that person's operation of a vehicle as an employee of the United States Government when the provisions of the Federal Tort Claims Act apply.

The definition of motorcycle under the policy includes all terrain vehicles regardless of the number of wheels.

² The parties and the district court refer to Iowa Code section 321.493(2)(a) which provides an owner of a motor vehicle is liable for the damage caused by the negligence

1973) (“Therefore cases involving determination of the consent issue under the Omnibus Clause are applicable to consent cases arising under the Iowa owner’s liability statute.”).

Ownership of a vehicle creates a rebuttable presumption that the vehicle was operated with the owner’s consent. *Farm & City Ins. Co. v. Gilmore*, 539 N.W.2d 154, 159 (Iowa 1995). This inference is weak and is meant “to compel the owner to identify those operating the vehicle and explain by what authority, if not his own, it was being driven.” *De Bolt v. Daggett*, 416 N.W.2d 102, 105 (Iowa Ct. App. 1987). The presumption does not alter the burden of proof, and the presumption can be negated by proof that there was no consent. *Van Zwol v. Branon*, 440 N.W.2d 589, 591 (Iowa 1989). Consent can be either express or implied from the circumstances and the consent can also be limited or conditional. *Moritz v. Maack*, 437 N.W.2d 898, 900 (Iowa 1989). In this case there is no question that Nelson was not given express consent. Thus, the issue becomes whether Nelson had implied consent to operate the ATV, and if so, whether there were any limitations or conditions to his use.

Implied consent is found in “a sufferance of use or a passive permission deduced from failure to object to a known past, present, or intended future use under circumstances where the use should be anticipated.” 61 C.J.S. *Motor Vehicles* § 867, at 139 (2002). Implied consent is determined from facts and

of the driver of his vehicle if the vehicle is driven with his consent. However, this section only applies to vehicles that may be used on the highways. The Code actually provides more specifically for owner liability in the operation of an ATV in section 321.19 which provides, the owner of an all-terrain vehicle is liable for injury or damage caused by the operation of the ATV if the owner was operating ATV or the operator had the owner’s consent to operate the ATV at the time of the injury or damage.

circumstances of each case, and is normally proven through evidence of usage and practice over a sufficient period of time prior to the usage in question. 7 Am. Jur. 2d *Automobile Insurance* § 227, at 785 (2007). It can be shown through the relationship between the parties or a course of practice, including a lack of objection to the use signifying acquiescence or consent. *Id.* Implied consent can be found in such things as leaving the keys in the car while the vehicle is in the charge of another under such circumstances that would suggest to a reasonably prudent person that the automobile would be moved. *De Bolt*, 416 N.W.2d at 105. It can even be found in the silence of the owner after discovering the use of the vehicle. 7 Am. Jur. 2d *Automobile Insurance* § 227, at 786 (2007).

In this case, the evidence showed that there was no significant relationship between Anderson and Nelson. They attended a class together in high school, and would only see each other at the social gatherings at Anderson's house. Anderson left the key with the ATV, which was housed in an unlocked garage. Anderson had on one occasion given Nelson express permission to drive the ATV in Fort Dodge. Nelson operated the ATV on the property where Anderson lived without seeking expressed permission both in and outside of Anderson's presence. Nelson also took the ATV off the property for a couple of days while Anderson was out of town working. Upon his return, Anderson was told of the incident, and testified he was extremely upset. However, Anderson never communicated his displeasure to Nelson in any way. Anderson stated he took the keys out of the ATV for a period of time, but there was no evidence that Anderson told Nelson that the keys had been removed

because of Nelson's actions. Despite being displeased with Nelson's use of the ATV, Anderson later observed Nelson operating the ATV on the property the night of the accident, and made no comment to Nelson or anyone else at the party regarding the use of the ATV before he left. From the evidence produced at trial, we find Nelson did have implied consent to operate the ATV.

Finding Nelson had implied consent to operate the ATV does not end our inquiry. Despite giving consent for another to use a vehicle, an owner can limit his liability by placing limitations or conditions on this consent. *Briner v. Hyslop*, 337 N.W.2d 858, 869 (Iowa 1983). The owner can restrict the use of the vehicle by specifying the time, place, and purpose for which the vehicle can be used. *Id.* at 870. If the driver materially violates the restrictions placed on the use of the vehicle, he is deemed to be using the vehicle without the consent of the owner. *Id.* However, the owner cannot escape liability for the actions of the driver by placing restrictions on the manner in which the vehicle is used, such as telling the driver that if he exceeds the speed limit he no longer has permission to drive. *De Bolt*, 416 N.W.2d at 104.

American Standard asserts that if we were to find there was implied consent here, the consent had an invisible fence around it limiting the use of the ATV to the property surrounding Anderson's residence. American Standard claims this restriction on the place where the ATV could be used makes sense because the ATV was not "street legal." Buss and Nelson contend that there is no evidence that Anderson ever placed any limitation on Nelson's use of the ATV. The district court appears to agree with American Standard finding that

while Anderson had manifested consent for Nelson to operate the ATV, he did not consent to Nelson operating the ATV “in an unlawful place, the roadway.” The district court concluded it was not necessary for Anderson to expressly restrict Nelson from operating the ATV on the roadway because the roadway was an illegal place for the ATV to be operated.

Buss and Nelson maintain this finding is in error as the court implied a limitation on the use of the ATV simply because the limitation made sense under the law. Buss and Nelson contend that for a limitation to be found, it must be found from the actions or words of the owner. They claim no such roadway limitation can be found here because Anderson was aware that Nelson had previously operated the ATV on the roadway and never communicated to Nelson in word or action that he disapproved of the use. Because Anderson had allowed a custom or practice to develop where Nelson was allowed to operate the ATV and was allowed to operate it on the roadway without any objection or reservation by Anderson, Buss and Nelson contend American Standard cannot now, after the accident, effectively argue that there was a roadway limitation on Nelson’s use.

After a thorough review of the record provided, we find that there is insufficient evidence to show that any limitation was placed on the use of the ATV. While the ATV was used on the property the night of the party before the accident, Nelson’s use of the ATV was not limited to the property over the sixteen months Anderson had lived there. It is undisputed that the ATV was used by several different people at times when Anderson was and was not present.

There is a lack of credible evidence to support a finding that there was a restriction which would prevent the operation of the ATV on the roadway or on nearby property, where the accident ultimately occurred. As Anderson was aware of Nelson's prior use of the ATV both on and off the Anderson property, and indicated no limitations to Nelson, it is reasonable that Nelson could use the ATV without restrictions. If Anderson did not want his ATV used that night, as it had been used by Nelson in the past, he should have placed expressed or implied restrictions on its use before he left the night of the party. He could have taken the key. He could have told Nelson not to ride it, or to keep it on the property if it was ridden. Anderson could also have put the ATV back in the garage before he left.

There was never any restriction placed on Nelson as to time, place, or purpose concerning the use of the ATV. As previously noted, Iowa courts have required that if there are any limitations on the use of a vehicle, it is up to the owner to prescribe them. See *State Farm Mut. Auto. Ins. Co. v. Emp's Mut. Cas. Co.*, 500 N.W.2d 80, 82–83 (Iowa Ct. App. 1993) (holding the organizational owner of the vehicle consented to the employee's personal use of the vehicle by failing to communicate a restriction, and permitting a course of conduct to be established that was condoned or overlooked by the organization). As the use of the ATV was not a result of a clandestine action by Nelson, we find that Nelson had implied consent to use the ATV based upon the history of its use. Finally, the use of the ATV did not violate any restriction as to time, place, or purpose. Accordingly, the ruling of the district court is reversed and we remand to the

district court for the entry of an order declaring American Standard Insurance Company of Wisconsin has a duty to defend and indemnify Nelson in the lawsuit brought by Buss.

REVERSED AND REMANDED.

Eisenhauer, C.J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent. I agree that this declaratory action was tried in equity and our review of this action is de novo. *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006). Although we are not bound by the district court's findings if supported by substantial evidence as we are in a law action, in equity actions, we "give weight to the findings of fact made by the trial court . . . especially with respect to the credibility of witnesses." *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000). Here, the district court determined that no implied consent existed under these circumstances. In support of this determination, the district court concluded:

The issue before the court in this case is whether Nelson could have reasonably implied from all the circumstances, that because Anderson had manifested his consent to Nelson to operate the ATV on the acreage, he had also consented to Nelson to operate the ATV when he was not around and in an unlawful place, the roadway. In this Court's view, he did not have implied consent. Nelson was apparently the only person that ever operated the four-wheeler on the roadway. There is no evidence that he ever observed anyone else operate the ATV on the roadway. Anderson never told him he could drive the ATV on the roadway and there is no evidence Anderson ever observed Nelson or anyone else operating the ATV on the roadway. Although Anderson had learned that he had ridden the ATV to his home, there was no evidence to suggest that Nelson knew that Anderson was aware that he had so used the ATV. Accordingly, Nelson could not have implied from Anderson's silence that Anderson approved of the use. In sum, this Court does not believe that it was necessary to expressly restrict Nelson from operating the vehicle on the roadway, an illegal place to avoid liability.

Considering the district court's conclusions were fact-specific and that the court had the opportunity to view the demeanor of the witnesses, I would give weight to the court's findings. Moreover, both Nelson and Anderson informed

law enforcement officers during the investigation of the accident that Nelson did not have permission to operate the ATV, although Anderson asked the officers to not criminally charge Nelson. I believe Nelson materially deviated from any implied consent to operate Anderson's ATV in both time and place. I would affirm.