STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2002 CA 2412

DERRICK HURST

VERSUS

KENNETH W. JUDSON AND
ILLINOIS NATIONAL INSURANCE COMPANY

RDR

Judgment Rendered: ***July 2, 2003***

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Appealed from the
21st Judicial District Court
In and for the Parish of St. Helena
State of Louisiana
Trial Court Number 16,963

The Honorable Robert H. Morrison, III, Judge Presiding

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Robert J. Carter **Russell C. Monroe** **Greensburg, Louisiana**	**Counsel for Plaintiff/Appellee** **Derrick Hurst**
William E. Willard **Mark G. Murphey** **Baton Rouge, Louisiana**	**Counsel for Defendants/Appellants** **Kenneth W. Judson and** **Illinois National Insurance Co.**

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BEFORE: KUHN, DOWNING AND GAIDRY, JJ.

Downing, J. specially concurs.
KUHN, J. CONCURS
GAIDRY, J. CONCURS WITH REASONS

DOWNING, J.

The issue in this appeal is whether the "no pay, no play" provision of La. R.S. 32:866 is applicable where a driver of an automobile backs into an uninsured automobile operated by a non-owner. This case arises out of an automobile accident where defendant, Kenneth Judson, backed his automobile into a parked, uninsured automobile owned by the mother of plaintiff, Derrick Hurst, who had taken his mother's automobile to get gasoline. The trial court found that the "no pay, no play" provision of La. R.S. 32:866 was inapplicable and rendered judgment in favor of Hurst for personal injury damages he suffered. Judson and his insurer, Illinois National Insurance Company (collectively, Judson), appeal this issue. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

On November 25, 1999, Hurst drove his mother's car to Swifty's gas station to get gas. Upon arriving at Swifty's, Hurst stopped in line behind Judson, who was filling up his vehicle with gasoline. Hurst, realizing he had to wait for a moment, decided to put his vehicle in park and turn off the engine. After Judson got back in his vehicle, he placed it in reverse and collided with Hurst's vehicle. At this time, Hurst's vehicle was still in park with the engine off. Hurst was injured as a result of the accident.

Hurst subsequently filed suit on June 6, 2000. Judson and Illinois National Insurance Co., Judson's automobile liability insurer, were named as defendants. At the trial on the merits, Judson asserted that the "no pay, no play" provisions of La. R.S. 32:866 barred Hurst from recovering any damages that amounted to less than $10,000.00. The trial court disagreed and rendered judgment in favor of Hurst awarding him $8,346.40, together with legal interest from date of judicial demand and trial costs. Judson filed

this appeal, assigning one assignment of error. He argues that, "The Trial Court erred as a matter of law by not applying the 'No Pay, No Play' Statute in this case, thereby requiring Hurst/appellee to forfeit the first ten thousand dollars of recovery."

DISCUSSION

Affirmative Defense

Under the terms of La. R.S. 32:866, recovery for the first $10,000.00 in damages an owner or operator of an automobile suffers from bodily injury is precluded where the owner or operator of a motor vehicle "fails to own or maintain compulsory motor vehicle liability security." La. R.S. 32:866(A)(1). At the time of the accident at issue in this case, La. R.S. 32:866[1] provided in pertinent part as follows:

> **§ 866. Compulsory motor vehicle liability security; failure to comply; limitation of damages**
>
> A. (1) There shall be no recovery for the first ten thousand dollars of bodily injury and no recovery for the first ten thousand dollars of property damage based on any cause or right of action arising out of a motor vehicle accident, for such injury or damages occasioned by an owner or **operator** of a motor vehicle involved in such accident **who fails to own or maintain compulsory motor vehicle liability security.**
>
> . . . .
>
> B. Each person who is involved in an accident in which **the other motor vehicle was not covered by compulsory motor vehicle liability security** and who is found to be liable for damages to the owner or operator of the other motor vehicle may assert as an affirmative defense the limitation of recovery provisions of Subsection A of this Section. (Emphasis added.)

Here, pursuant to the provisions of La. R.S. 32:866(B), Judson asserted the limitations of recovery set forth in La. R.S. 32:866(A)(1) as a defense. And the burden is on Judson, as the party asserting the affirmative defense, to prove that defense by a preponderance of the evidence.

McDonald v. Champagne, 340 So.2d 1025, 1026 (La.App. 1 Cir. 1976).

Accordingly, we have examined the record in this matter to evaluate whether a preponderance of evidence supports Judson's assertion of this affirmative defense. And we review judgments for correctness, not reasons for judgment. *See* ***Huang v. Louisiana State Board of Trustees for State Colleges and Universities,*** 99-2805, p. 5 n.3 (La.App. 1 Cir. 12/22/00), 781 So.2d 1, 6 n.3. "The court of appeal reviews judgments and, where the court of appeal believes that the trial court reached the proper result, the judgment will be affirmed." ***Huang,*** 99-2805 at p. 5, 781 So.2d at 6.

Here, we conclude the trial court did not err in entering judgment in Hurst's favor because we find no evidence in the record supporting an essential element of proof in support of Judson's affirmative defense; Judson has introduced no evidence at trial tending to show that Hurst "fail[ed] to own or maintain compulsory motor vehicle liability security," nor any evidence that his mother's automobile "was not covered by compulsory motor vehicle liability security."

Parked Automobile

Judson argues that the issue for us to decide is whether Hurst should be permitted to claim he was not "operating" an automobile, thus avoiding the application of La. R.S. 32:866(A), solely because the automobile was parked at a gas station at the time of the accident. Because of the above disposition, we do not decide this issue.

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[1] In ***Progressive Security Insurance Co. v. Foster,*** 97-2985, p. 14 (La. 4/23/98), 711 So.2d 675, 684, the Louisiana Supreme Court held that the words "occasioned by" as used in this statute means "suffered by."

DECREE

For the foregoing reasons, the judgment of the trial court in favor of Hurst is affirmed. All costs of this appeal to be paid by Judson and his insurer, Illinois National Insurance Company.

AFFIRMED.

* *

DOWNING, J., specially concurring.

I write this specially concurring opinion to state an additional ground on which I would affirm the judgment of the trial court. It is undisputed that Hurst was not the owner of the allegedly uninsured automobile he was operating. And we are aware of no law, and Judson has cited none, compelling a non-owner of an automobile to own or maintain motor vehicle liability insurance.[2] Accordingly, the trial court committed no error in concluding that the terms of La. R.S. 32:866 were inapplicable to Hurst.

We are aware of the strong policy against rewarding uninsured motorists involved in accidents. However, the language of the statute is clear and should be applied accordingly. The statute imposes remedial measurers on owners or operators "who [fail] to own or maintain compulsory motor vehicle liability security." La. R.S. 32:866(A). Since Hurst is under no apparent duty to obtain compulsory motor vehicle liability security in connection with the vehicle at issue, we cannot conclude that he has failed to do so.

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[2] *Cf.* La. R.S. 32:865 which imposes potential criminal liability for a non-owner who knowingly drives an uninsured automobile and La. R.S. 32:872(B) which requires suspension of the license of an uninsured owner or operator involved in an accident unless the owner or operator posts security in an amount determined by the commissioner of motor vehicles.

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GAIDRY, J., concurs and assigns reasons.

I agree with the result herein, mandated on the evidentiary grounds described, but not for the reasons assigned by the trial court. The trial court clearly erred in concluding that the evidence demonstrated that "there was no policy of liability insurance in effect" on the vehicle operated by plaintiff and in deciding the case on the grounds that La. R.S. 32:866 was inapplicable under the facts relating to the vehicle's status of operation. As no evidence in support of the statute's affirmative defense was introduced, there was no need to reach the merits of the statute's applicability to the factual scenario.

I am compelled to concur by reason of *dictum* in the specially concurring opinion which may result in misinterpretation of the effect of the statute. It is quite true that there is no law which compels a person who does not own a motor vehicle to own or maintain a motor vehicle liability policy. But as the specially concurring opinion concedes, there are statutes which prohibit anyone from operating a motor vehicle which is not covered by liability insurance or alternative security. La. R.S. 32:866 was plainly

intended to reinforce the public policy inherent in those statutes by imposing a limited and appropriate limitation upon a permissible tort action by the owner or operator of a "motor vehicle . . . not covered by *compulsory* motor vehicle liability security." La. R.S. 32:866(B). The statute does not penalize an uninsured owner operator, as suggested in the special concurrence herein. *Progressive Insurance Company v. Foster*, 97-2985, pp. 8-9 (La. 4/23/98), 711 So.2d 675, 682.

I agree that the language of the statute is clear and should be applied accordingly. But the special concurrence fails to consider the statute's language in its entirety. The Section (A) language quoted must be read with Section (B)'s language in interpreting the statute's meaning and effect. If plaintiff had no primary motor vehicle liability insurance of his own, or was not covered as an omnibus insured as a permissive operator of a nonowned vehicle, the absence of an express, affirmative duty to buy his own policy is immaterial to application of La. R.S. 32:866.