STATE OF

LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1493

RAYMON LEE HARTZO AND DEBRA ELAINE HARTZO

VS.

AMERICAN NATIONAL PROPERTY AND CASUALTY INSURANCE COMPANY AND ALLSTATE INSURANCE COMPANY

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JUDGMENT RENDERED: DEC 2 8 2006

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ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 523,390 DIVISION N
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE MARY TERRELL JOSEPH[1], JUDGE

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BEFORE: CHIEF JUDGE CARTER, PARRO, MCDONALD, HUGHES, AND WELCH, JJ.

[1]The Honorable Mary Terrell Joseph, was appointed by the Louisiana Supreme Court Judge Pro Tempore.

Parro, J., dissents and assigns reasons.

MCDONALD, J.

The issue presented in this appeal is whether insurance policies issued by American National Property and Casualty Insurance Company, Louisiana (ANPAC-LA), provided coverage for the loss sustained by the plaintiffs. The plaintiffs in this matter, Raymon and Debra Hartzo, filed suit against American National Property & Casualty Insurance Company[2] and Allstate Insurance Company[3] (Allstate) for damages sustained when their daughter, Chandra Hartzo, was killed in an automobile accident. ANPAC issued automobile liability policies to Charles Larmon for his 1993 Mercury Sable, and to Amy Letard, as the named insured on the policy covering the 1996 Ford Taurus, which Charles was driving at the time of the fatal accident.[4]

ANPAC-LA filed a motion for summary judgment asserting that neither of the policies issued by it provided coverage because Charles did not have express or implied permission to drive the Ford Taurus at the time of the accident. The trial court granted the motion, ANPAC was dismissed from the suit with prejudice, and the judgment was certified as a final judgment in accordance with La. C.C.P. art. 1915. Both the plaintiffs and Allstate appealed the judgment. For the following reasons, we reverse.

**PROCEDURAL AND FACTUAL BACKGROUND**

At approximately 1:00 a.m. on April 15, 2004, a 1996 Ford Taurus driven by Charles Larmon collided with a 2000 Toyota Tacoma operated by Laura Chustz. Chandra Hartzo was a passenger in the Chustz vehicle. The

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[2] Plaintiffs named as a defendant American National Property and Casualty; ANPAC-LA answered stating that it was erroneously named. The record reflects that American Property and Casualty Company, which uses the acronym ANPAC, is the parent company of ANPAC-LA, which issued the insurance policy covering the Ford Taurus, as well as a policy of insurance to Charles Larmon on his personal vehicle.

[3] Allstate Insurance Company issued the automobile liability policy covering the plaintiffs' vehicle, and this policy provided uninsured/underinsured motorist coverage.

[4] Charles Larmon was also killed in the accident.

Ford Taurus was owned by Nicole Larmon[5], Charles's sister, and, as noted, was insured by an automobile liability policy issued by ANPAC-LA identifying the named insured as Amy K. Letard (Goldsby), who was Charles and Nicole's stepsister.

Three separate policies of insurance are involved in this litigation. ANPAC-LA issued policy number 17-V-J97-555-4 to Charles Larmon on his personal vehicle, a 1993 Mercury Sable. ANPAC-LA also issued the policy of insurance on the vehicle that Charles was driving at the time of the accident, the Ford Taurus. Although this policy, number 17-V-J97-226-1, was issued to Amy, the record reflects that the Ford Taurus was actually titled in Marilyn Larmon's name. The third policy was issued by American National General Insurance Company (ANGIC) to Neida Larmon, Charles and Nicole's mother, insuring Neida's personal vehicle.

ANPAC-LA filed a motion for summary judgment[6] seeking a declaratory judgment that neither of the policies of insurance issued by ANPAC-LA provided coverage because Charles did not have permission from either the named insured or the owner of the Ford Taurus to operate that vehicle. In support of its contention that Charles did not have express or implied permission to operate the Ford Taurus, therefore there was no insurance coverage, ANPAC-LA submitted the depositions of his parents, Frank Larmon and Neida Larmon, and Nicole Larmon, and the affidavits of Amy Letard (Goldsby), Marilyn Larmon, Amy's mother and Charles' step-

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[5] In their briefs to the court, all parties refer to Nicole as the "owner" of the Ford Taurus. In affidavits, both Marilyn Larmon and her daughter, Amy Letard (Goldsby), stated that the Taurus had been donated to Nicole. However, Frank Larmon, the father of Charles and Nicole and husband of Marilyn, stated in his deposition that the Taurus had been given to Nicole, but no paper work had been completed. We will refer to Nicole as the owner since she was considered by the named insured, Amy Letard, as the owner, and apparently had the authority to grant permission to operate the vehicle.

[6] Summary judgment was also urged in the same motion on behalf of American National General Insurance Company, which insured a vehicle owned by Neida Larmon.

mother, and Kirby McKenzie, an underwriting manager employed by American National Property and Casualty Company whose duties include supervision of underwriting functions for ANPAC-LA. The Hartzos filed an opposition to the motion, relying on the same evidence.

Both ANPAC insurance policies contained the same language and policy definitions, and, at issue here, is the following:

> (1) **"You"** and **"your"** mean the Policyholder named in the Declarations and spouse, if living in the same household.
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> (5) **"Insured"** or **"Insured person"** means the person, persons, or organization defined as an insured person in or with reference to a specific coverage.
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> (6) **"Non-owned car"** means a car, **utility vehicle,** or **utility trailer** not owned by, in whole or in part, or furnished or available for the regular use of either **you, your** spouse, or a **relative**. It does not include a **temporary substitute car.**
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> (10) **"Relative"** means a person living with **you** and related to **you** by blood, marriage, or adoption, including **your** ward or foster child, provided neither the relative nor the relative's spouse owns, in whole or in part, a car.
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> (11) **"Temporary substitute car"** means a car or **utility trailer** not owned by **you** or a **relative** being temporarily used with the owner's permission as a substitute for **your insured car** because of its withdrawal from normal use due to its breakdown, repair, servicing, loss, or destruction.
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> (14) **"Your insured car"** means:
> (a) the car described in the Declarations for which a premium is shown;
> (b) a **temporary substitute car**;
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> **ADDITIONAL DEFINITIONS USED IN PART I ONLY**
>
> As used in this Part, **"insured person"** means:
>
> (1) with respect to **your insured car**:
> (a) **you** or a **relative;**
> (b) a person using **your insured car** if its use is with **your** express or implied permission; and
>
> (2) with respect to a **non-owned car**:
> (a) **you** or a **relative,** provided the use is with the express or implied permission of the owner;

> No person shall be considered an **insured person** if that person uses **your insured car** without **your** express or implied permission.
> (Emphasis in the original.)

On the day of the accident, and for several months prior, Charles and Nicole resided with their mother. On that day, Charles's car was in the shop, so when he and Nicole went out to eat, Nicole drove them in her car. After dinner, Charles and Nicole went to a friend's house; Charles drove at Nicole's request because she had too much to drink. Upon leaving there, Nicole drove Charles to another friend's house, then went home, and shortly thereafter, to bed. She heard Charles return home, but did not speak to him. The keys to Nicole's car were in her purse on the kitchen table. Without asking Nicole, Charles left the house in Nicole's car and was involved in the accident. The deposition testimony of Nicole was that Charles could not use her car without permission, which she had sometimes given in the past, and sometimes withheld.

At the summary judgment hearing, ANPAC-LA argued that there were no material facts in dispute, and the facts established that Charles did not have either express or implied permission to drive the Ford Taurus. Therefore, in accordance with the terms of the automobile liability insurance policy, there was no insurance coverage. Plaintiffs argued that the policies at issue were ambiguous as to whether Charles was a relative shown as an insured driver on the declarations page of the policy, and there was a genuine issue of material fact as to whether Charles had implied permission from Nicole to drive the car. In oral reasons for judgment, the trial judge noted "[t]his is a complicated case...and it's a hard one to decide." After listening to argument and examining all the evidence, the judge found that there was

no insurance coverage under either of the ANPAC-LA policies and granted the motion for summary judgment.

This appeal was timely filed by both the plaintiffs and Allstate, which would be liable to the Hartzos under the uninsured motorist provision of their automobile liability policy if no insurance coverage was provided by the ANPAC-LA policies.

**LAW AND ANALYSIS**

Appellants assert that Louisiana cases deciding whether permission was given to trigger insurance protection under the omnibus clause[7] of an automobile liability policy favor finding permission to protect innocent victims. This court is asked to review the law and the facts and find that Charles had the implied permission of Nicole to drive the vehicle at the time of the accident. Alternatively, this court is asked to determine that the trial court improperly granted summary judgment in favor of ANPAC because there are genuine issues of material fact in dispute.

ANPAC-LA sets forth the undisputed facts, and argues that the insurance policies at issue here are not ambiguous; under these facts, the policies do not provide coverage. ANPAC-LA cites the supreme court's language in *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.,* (La. 1/14/94), 630 So.2d 759, 763, stating "Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to enforce reasonable conditions upon the policy obligations they contractually assume." Further, it contends that their policies provide coverage in compliance with La. R.S. 32:900(B)(2). We

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[7] Louisiana Revised Statutes 32:900(B)(2), referred to as the omnibus clause, requires that motor vehicle liability policies "[s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle... ."

recognize that insurers are legally allowed to limit their contractual liability. Indeed, were insurers not able to enforce reasonable conditions upon their liability, in accordance with actuarial standards and projections, their industry would be hindered in its ability to serve the important function it does in our society. However, these limits must be "reasonable," and not against public policy. We are unable to agree with ANPAC-LA's argument that the facts in this case, as adduced from the depositions submitted in connection with the motion for summary judgment, establish that ANPAC-LA is entitled to judgment as a matter of law.

The issue of "permission" has repeatedly entangled our courts, with the supreme court frequently being called upon to untie the knots.

> In the seminal case of *Parks v. Hall,* 189 La. 849, 181 So. 191 (1938), this [supreme] court addressed what constitutes permission in an omnibus clause and adopted the "initial permission" rule. Under this rule, once consent, express or implied, is granted by the insured to use the vehicle, any subsequent changes in the character or scope of the use do not require additional specific consent of the insured. *Norton v. Lewis*, 623 So. 2d 874, 875 (La. 1993). Thereafter, "coverage will be precluded only where the deviation from the use consented to amounts to theft or other conduct displaying an utter disregard for the return or safekeeping of the vehicle. *Id.* There are at least three justifications for this rule: (1) "it effectively furthers the state's policy of compensating and protecting innocent accident victim[s] from financial disaster[,] (2) the rule "serves to discourage collusion between lender and lendee in order to escape liability[.]" and (3) the rule "greatly reduce[s] a most costly type of litigation." *Id.*

*Manzella v. Doe,* 94-2854 (La. 12/8/95), 664 So.2d 398, 402.

The "initial permission rule" can only assist us in deciding this case, however, if we find that when Nicole allowed Charles to drive her car after dinner, it constituted an initial express permission from which his use later that night was a subsequent change. The facts do not support this analysis. Having found no express permission, we must determine whether Charles's

use of the car at the time of the accident was with Nicole's "implied permission."

The parties have cited numerous cases to assist us in this endeavor. After extensive review of the jurisprudence, we agree with the concurrence of former Justice Watson in *Perkins v. McDow,* 615 So.2d 312, 317 (La. 1993), that "these cases serve to point out the mischief caused by the permissive user provisions of automobile liability policies." Similarly, we agree that the solution would be to hold that the permissive use clause is contrary to public policy, especially in cases involving family members living in the same household. Louisiana statutory law requires that all vehicles have liability coverage and the denial of coverage on the basis of familial prohibitions, reconstructed post-accident, fosters litigation and does not serve the state's policy of compensating and protecting innocent accident victims.

Our review of the jurisprudence on the issue of "implied permission" also convinces us that the determination is extremely fact-sensitive and involves a balancing of legal and public policy issues that will rarely be appropriate in a motion for summary judgment. Implied permission, as opposed to express permission, must be inferred from the totality of facts and the relationships involved. On the record before us, we do not find that ANPAC-LA has established that it is entitled to judgment as a matter of law. Therefore, the portion of the judgment dismissing ANPAC Louisiana Insurance Company with prejudice is reversed and the matter is remanded for further proceedings. Costs of this appeal are assessed against ANPAC Louisiana Insurance Company.

**REVERSED AND REMANDED.**

**STATE OF LOUISIANA**

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**VERSUS**

**AMERICAN NATIONAL PROPERTY AND CASUALTY INSURANCE COMPANY AND ALLSTATE INSURANCE COMPANY**

**PARRO, J., dissenting.**

I respectfully disagree with the majority opinion for the following reasons.

On a motion for summary judgment, the initial burden of proof is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial; failure to do so shows that there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2); Clark v. Favalora, 98-1802 (La. App. 1st Cir. 9/24/99), 745 So.2d 666, 673. In considering whether a genuine issue of material fact exists, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh the evidence. Smith v. Our Lady of the Lake Hospital, Inc., 93-2512 (La. 7/5/94), 639 So.2d 730, 751.

A plaintiff who seeks to establish coverage under the omnibus clause of an automobile liability insurance policy must prove that the vehicle was being used with the express or implied permission of the named insured. Perkins v. McDow, 615 So.2d 312, 315 (La. 1993); see LSA-R.S. 32:900(B)(2). The fact of permission must be proven by a preponderance of the evidence without the aid of any presumptions. See

Manzella v. Doe, 94-2854 (La. 12/8/95), 664 So.2d 398, 402; Norton v. Lewis, 623 So.2d 874, 876 (La. 1993). Thus, once ANPAC-LA pointed out to the court that there was an absence of factual support to show that Charles's use of Nicole's vehicle was with the express or implied permission of Nicole, the plaintiffs were required to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial as to this issue.

Nicole testified by deposition that she usually did not let Charles drive her vehicle; however, after eating and consuming alcoholic beverages at a restaurant on the night in question, Nicole allowed Charles to drive them in her vehicle to their next destination, a friend's house where her boyfriend's band was practicing.[1] After staying there long enough for her to be able to drive, Nicole drove Charles to the house of another friend. After dropping him off, she proceeded to her mother's home where she and Charles had been living. She got home around 11:00 p.m. and parked her vehicle in the driveway by a garage in the backyard. Nicole went to bed at approximately 12:00 or 12:30 a.m. Prior to that time, Nicole, who had been in her room, heard Charles when he entered the house. Nicole testified that Charles was due at work that morning and was scheduled to be picked up by a car-pool buddy around 7:30 or 8:00 a.m.[2] Nonetheless, Charles took the keys to Nicole's vehicle from her purse that was on the kitchen table without asking and left in her vehicle. When she got up to smoke a cigarette between 2:30 and 3:00 a.m., Nicole noticed that her vehicle and Charles were both gone.

It is undisputed that Charles did not have Nicole's express permission to use her vehicle at the time of the accident. Charles's earlier use of Nicole's vehicle from the restaurant to the house where band practice was being held was obviously with Nicole's express permission, but that express permission did not continue once Nicole resumed control of driving the vehicle. Thus, the majority correctly concluded that the initial

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[1] Charles's vehicle was in the shop for repairs, and Nicole had driven them to the restaurant in her vehicle.

[2] According to their mother, Charles was sitting in a chair and watching television at approximately 1:30 a.m. when she advised him that he should go to bed. She explained that Charles responded that he was going to watch some television and then go to bed because he needed to get up for 7:00 a.m. for work.

express permission could no longer constitute the consent needed to withstand a subsequent change in the character or scope of the use as discussed in Manzella, 664 So.2d at 402. Accordingly, for there to be coverage under the ANPAC-LA policies, Charles would have had to have been operating the vehicle at the time in question with Nicole's implied permission.

Generally, implied permission arises from a course of conduct by the named insured involving acquiescence in, or lack of objection to, the use of the vehicle. Francois v. Ybarzabal, 483 So.2d 602, 605 (La. 1986). A personal relationship, together with other factors, may prove the required implied permission. Turner v. Alexander, 29,148 (La. App. 2nd Cir. 2/26/97), 690 So.2d 756, 758.

Nicole had permitted Charles to drive her vehicle on only two or three occasions within the couple of months since they had returned to live at their mother's home. Nicole stated that her brother had driven her vehicle on prior occasions when his car was being repaired. However, Nicole explained in her deposition that Charles understood that he was not allowed to use her vehicle without first obtaining her permission. She testified, "I was very strict with letting him use the car." Charles understood that he was not to use her vehicle under "any circumstances." When Charles asked for permission to use her vehicle, Nicole would not normally grant him permission. Many times, she opted to drive him where he wanted to go rather than allowing him to use her vehicle. Charles had never before taken the keys for Nicole's vehicle from her purse. These facts are not contradicted.

In this case, we are not faced with conflicting versions of the facts. The evidence offered in connection with ANPCA-LA's motion for summary judgment, although establishing a personal relationship between Nicole and Charles, clearly does not establish a course of conduct by Nicole involving acquiescence in, or lack of objection to, the use of the vehicle.[3] Allstate Insurance Company noted that without the testimony of Charles, the purpose for which Charles took Nicole's vehicle, or if he

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[3] Thus, the facts of this case differ from those of Prudhomme v. Imperial Fire & Casualty Insurance Company, 95-1502 (La. App. 3rd Cir. 4/3/96), 671 So.2d 1116, 1120, cited by Allstate Insurance Company.

sought to get Nicole's permission, will never be known. It further urged that it is improper to allow ANPAC-LA to benefit from Allstate's inability to obtain evidence that would contradict that of Nicole. Although Charles's death made it more difficult for the plaintiffs to meet their burden of proof in this case, the parties opposing the motion for summary judgment had the opportunity to offer evidence to establish a course of conduct between Nicole and Charles that gave rise to implied permission.[4] Nonetheless, no evidence was offered to contradict Nicole's testimony to the effect that rarely, if ever, did she allow Charles to use her vehicle and that Charles understood that he was not to use Nicole's vehicle without first obtaining her permission.[5] Thus, the fact that Nicole never formally revoked her permission for Charles to drive her car on the night in question, other than by resuming driving control, is irrelevant under the facts of this case. Furthermore, the fact that the determination as to implied permission is extremely fact-sensitive and involves a balancing of legal and public policy issues alone is insufficient to preclude this issue from being resolved in the context of a motion for summary judgment.

For these reasons, I would affirm the trial court's granting of ANPAC-LA's motion for summary judgment, because the plaintiffs failed to satisfy their burden of proof with factual support sufficient to establish that they would be able to show at trial that Charles's use of the vehicle at the time of the accident was with Nicole's implied permission. Accordingly, I respectfully dissent from the majority opinion.

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[4] Furthermore, the parties had the opportunity to fully cross-examine Nicole during her deposition, and her deposition testimony was unwavering and consistent.

[5] Charles's mother testified in her deposition that she also would not permit Charles to drive her vehicle. One of her reasons for this policy was based on the fact that Charles had wrecked one of her cars in the past.