NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0247

RAYMON LEE HARTZO AND DEBRA ELAINE HARTZO

VERSUS

AMERICAN NATIONAL PROPERTY AND CASUALTY INSURANCE COMPANY AND ALLSTATE INSURANCE COMPANY

Judgment Rendered: OCT 22 2010

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 523,390, DIVISION "A" SECTION "27"

THE HONORABLE TODD W. HERNANDEZ, JUDGE

* * * * * * *

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

Whipple - J. concurs, finding there was no showing to defeat the earlier express permission.

McClendon, J. dissents and assigns reasons.

McDONALD, J.

This matter is before us on appeal from a judgment from the Nineteenth Judicial District Court in favor of the plaintiffs, Raymon L. and Debra E. Hartzo, based on a finding that the driver of the vehicle involved in a fatal automobile accident had the permission of the owner to drive the car. For the following reasons, the judgment is affirmed.

In the early morning hours of April 15, 2004, Charles Larmon was operating his sister Nicole's Ford Taurus when it collided head-on with a Toyota Tacoma driven by Laura Chustz. Both Charles Larmon and Chandra E. Hartzo, a passenger in the Chustz vehicle, were killed in the collision. The 1996 Taurus was insured by an American National Property and Casualty Insurance Company (ANPAC) policy. Charles's automobile, a Mercury Sable that was in the shop undergoing repairs at the time of the accident, was also insured by ANPAC.

A petition for damages was filed by the Hartzos in August 2004, naming as defendants, ANPAC and Allstate Insurance Company, which provided insurance to the Hartzo family under a policy that included uninsured motorist coverage. In December 2004, ANPAC filed a motion for summary judgment seeking a declaratory judgment that the policies issued by ANPAC did not provide coverage for the accident. It argued that Charles Larmon did not have either explicit or implicit permission to drive the Taurus as required by both ANPAC policies for coverage to apply.

On November 18, 2004, Allstate tendered its uninsured motorist policy limit of $100,000.00 to Raymon and Debra Hartzo. In December 2004, Allstate filed a cross-claim against ANPAC and a third-party demand against the estate of Charles Larmon praying for an award for reimbursement to Allstate for all sums paid to Raymon and Debra Hartzo under the uninsured motorist and medical payments coverages of their policy. On June 16, 2004, Allstate issued a check for $2,000.00

to Mr. and Mrs. Hartzo representing the medical payments coverage available under its policy.

In April 2005, after hearing the motion for summary judgment, the district court found in favor of ANPAC, and the matter was dismissed. The Hartzos and Allstate appealed. See *Hartzo v. American Nat. Property and Cas. Ins. Co.*, 05-1943 (La. App. 1 Cir. 12/28/06), 951 So.2d 1120, *writ denied*, 07-0184 (La. 3/16/07), 952 So.2d 702.

A five-judge panel of this court found that Charles did not have express permission to drive the vehicle. However, it was noted that the issue of implied permission involves a balancing of legal and public policy decisions and must be inferred from the totality of facts and the relationships involved. Based on the record on the motion for summary judgment, it was determined that ANPAC was not entitled to judgment as a matter of law. Therefore, the judgment was reversed and the matter remanded for a trial on the merits.

The matter came before the district court as a bench trial on July 21, 2009. The parties stipulated that Charles Larmon was 100% at fault for the accident and that the owner of the vehicle was Nicole Larmon.[1] The parties further stipulated to the introduction of documents supporting Allstate's claims of subrogation for amounts paid under its uninsured motorist and medical payment coverages. After recognition of the stipulations by the court, Allstate did not participate further in the trial.

The district court heard the testimony of Raymon Hartzo, Debra Hartzo, Nicole Larmon, Frank Larmon, Neida Larmon, and Kirby McKenzie, a director of underwriting working for ANPAC. Neida Larmon is the mother of Charles and

[1] The insurance policy covering the vehicle was issued to Amy Letard and listed Amy Letard, Marilyn Larmon, (Amy's mother, who at the time of the accident was married to Frank Larmon Charles's and Nicole's father,) and Nicole Larmon as "PR" and Charles Larmon as "REL" According to the testimony of Kirby McKenzie, "PR and REL refers to the rating status of the driver; "PR" meaning principal operator status, REL meaning related policy status; in other words, that driver is rated on a related policy under the account."

Nicole, with whom they were both living at the time of the accident. At the conclusion of the trial, ANPAC made a motion for involuntary dismissal, which was denied by the court, and the matter was taken under advisement.

On August 4, 2009, the court issued a ruling finding that the policies at issue (on the Ford Taurus and on the Mercury Sable) were ambiguous as to coverage for Charles, as a named insured or permissive operator. Considering the totality of the evidence, the court found that Charles had the express and implied permission of Nicole to operate the 1996 Ford Taurus. The court also noted that Charles's understanding or state of mind at the time he used Nicole's car could not be determined, but the evidence established by a clear preponderance that he had permission. Finding that Charles had both the express and implied consent to use the Ford Taurus, the court found that Charles was afforded coverage under both policies. General damages in the amount of $475,000.00 were awarded to both Raymon and Debra Hartzo, as well as special damages in the amount of $8,832.02 for funeral expenses. Judgment so ordering was signed on August 19, 2009. This appeal by ANPAC timely followed.

ANPAC alleges six assignments of error. It contends that the trial court was manifestly erroneous in finding that Charles Larmon had the permission of Nicole Larmon to operate the vehicle involved in the accident. Legal error was alleged on three bases: (1.) By finding express permission because the law of the case was that there was no express permission under *Hartzo v. American National Property and Casualty Ins. Co.,* 05-1493 (La. App. 1st Cir. 12/28/06), 951 So.2d 1120;(2.) By finding coverage under the ANPAC policy issued to Charles Larmon because his use of his sister's vehicle was without her permission, thereby precluding coverage under the "temporary substitute car" provision of his policy; and (3.) By

ignoring supreme court precedent, *Malmay v. Sizemore,* 493 So.2d 620 (La. 1986). ANPAC also alleged that the damages were excessive.[2]

An appellate court should not set aside the factual findings of a trial court absent manifest error or unless clearly wrong. *Oubre v. Eslaih,* 03-1133 (La. 2/6/04), 869 So.2d 71, 76. The manifest error standard of review applies to all factual findings, including a finding relating to the factual (as opposed to legal) sufficiency of evidence to warrant application of a legal theory or doctrine. *Barnett v. Saizon,* 08-0336 (La. App. 1st Cir. 9/23/08), 994 So.2d 668, 672. This standard of review also applies to mixed questions of law and fact. *Id.* On review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently. *Bonin v. Ferrellgas, Inc.,* 03-3024 (La. 7/2/04), 877 So.2d 89, 95. Appellate review of a question of law is simply a decision as to whether the trial court's decision is legally correct or incorrect. *Harris v. Metropolitan Life Ins. Co.,* 09-0034 (La. App. 1st Cir. 2/5/10), 35 So.3d 266, 273.

Initially, we find that *Malmay v. Sizemore,* 493 So.2d 620 (La. 1986), is factually distinguishable from the present case. We also note that "the issue of whether a person operated an automobile with the express or implied permission of the named insured is to be determined according to the circumstances of the particular case." *Malmay,* 493 So.2d at 623. In *Malmay,* the person who had given permission for the car to be driven was not the owner, and had been expressly told by the owner not to allow anyone else to drive. In this case, Nicole clearly had the right to give permission.

Further, because the issue of express permission is not dispositive in this case, we pretermit discussion of possible legal error in not following the law of the

[2] ANPAC also asserts that Charles Larmon was not a "relative" afforded coverage under the policy owned by Nicole Larmon; however, as the trial court made no finding relative to that issue, we do not consider it as an assignment of error.

case doctrine and requiring a finding that there was no express permission. Even assuming that a finding that there was no express permission was mandated, it is still necessary that the issue of implied permission be decided.

The applicable law has been thoroughly and carefully reviewed, as has the entire record. We confine analysis in this opinion, however, primarily to the issue of the trial court's factual finding that Charles had the implied permission of Nicole to operate the vehicle and, thus, was afforded coverage under the policy insuring the Ford Taurus and as a permissive driver of a temporary substitute vehicle under the coverage on Charles's Mercury Sable as well. We note that Charles was a member of Nicole's household, her brother, and had driven her car earlier that evening and on other occasions. We do not find that the trial court's decision that the totality of the evidence supported a finding that Charles had the implied permission of Nicole to operate the vehicle is manifestly erroneous. Although the limited facts in this case could be interpreted to reach a contrary result, we do not find the decision of the trial court to be clearly wrong.

The trial court's damage award is challenged by ANCO as being excessive. The trial court's determination of the amount of an award of damages is a finding of fact. *Ryan v. Zurich American Ins. Co.,* 07-2312 (La. 7/1/08), 988 So.2d 214, 219. The initial inquiry must always be directed at whether the trial court's award for the particular injuries and their effects upon this particular injured person is a clear abuse of the trier of fact's great discretion. *Rando v. Anco Insulations, Inc.,* 08-1163, 08-1169 (La. 5/22/09), 16 So.3d 1065, 1094. It is only after articulated analysis of the facts discloses an abuse of discretion, that the award may on appellate review, for articulated reasons, be considered either excessive or insufficient. *Id.* We do not find that the award of $475,000.00 to each of Chandra's parents in this case is a clear abuse of the trial court's great discretion.

Accordingly, the judgment is affirmed. Costs are assessed to appellant, American National Property and Casualty Insurance Company.

AFFIRMED.

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McCLENDON, J., dissents and assigns reasons.

I respectfully disagree with the majority to the extent that it finds that Charles Larmon had the implied permission of Nicole Larmon to operate the vehicle and, thus, was afforded coverage under the respective insurance policies. 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. **Lee v. Taylor**, 00-1361, p. 5 (La.App. 1 Cir. 12/15/00) 808 So.2d 407, 410 (per curiam). The plaintiffs had the burden of proving the implied permission of the insured under the insurance policies. **Id.**, 00-1361 at p. 4, 808 So.2d at 410. I do not agree that plaintiffs have met their burden of proof.

During trial, Nicole testified that she had allowed Charles to operate her vehicle on one or two prior occasions. However, Nicole also testified that such use had been permitted under very limited circumstances and that she had reservations about Charles using her car. Normally, Nicole would either tell Charles he did not have permission or she would take him on whatever errands he needed to run. Charles's mother and father both testified that there was a family policy against using one another's vehicle without the express permission of the owner. None of this testimony was contradicted.

Nicole expected Charles to ask her for permission to use her car and, to Nicole's knowledge, Charles had never used said car without her permission. Nicole leaving her

purse on the kitchen table simply cannot be construed as a tacit invitation for Charles to go through her purse, take her keys, and drive her car.

After careful review of the entire record, the totality of the evidence clearly does not support a finding of implied permission. Nor does the record establish express permission. **Hartzo v. American Nat. Property and Cas. Ins. Co.**, 05-1493 (La.App. 1 Cir. 12/28/06), 951 So.2d 1120, 1125, writ denied, 07-0184 (La. 3/16/07), 952 So.2d 702. Thus, there was no reasonable factual basis from which the trial court could have inferred consent. Accordingly, I respectfully dissent.