AMRAT BHATKA	*	**NO. 2003-CA-0388**
VERSUS	*	**COURT OF APPEAL**
ANTHONY B. MASON, AND US AGENCIES CASUALTY INSURANCE COMPANY, AS LIABILITY INSURER OF ANTHONY B. MASON AND ANY OTHER LIABILITY INSURER(S) OF ANTHONY B. MASON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-1323, DIVISION "A"
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay III, Judge David S. Gorbaty)

MURRAY, J., CONCURS WITH REASONS

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AFFIRMED

This is an automobile accident case in which summary judgment has been granted against the plaintiff, Amrat Bhatka (Amrat), owner of the car, and in favor of the driver of the other car, Anthony B. Mason, and his insurer, U.S. Agencies Casualty Insurance Company, Inc. (U.S. Agencies); and the plaintiff appeals.

FACTS

Amrat's car, a 1993 Mazda 626, was being driven by his son, Hiren Bhatka (Hiren) when on October 13, 2000, it collided with a 1968 Cadillac driven by Mason. The Bhatka car was insured by Progressive Insurance Company, and the policy specifically excluded Hiren. Amrat made a claim for property damage against Mason and U.S. Agencies, alleging total destruction of the Mazda; and U.S. Agencies refused to pay. Suit was filed on the basis that Mason failed to yield, but fault has not been determined. Mason and U.S. Agencies answered, arguing that they were not liable to plaintiff for the first $10,000.00, unless plaintiff could prove he had a valid policy of liability insurance, essentially asserting an affirmative defense under La. R.S. 32:866(A)(1). Mason and U.S. Agencies filed the motion for summary judgment which was granted November 14, 2002, presumably on

the basis that La. R.S. 32:866(A)(1) applied so that an owner of an insured vehicle, who allows an excluded driver to operate the insured's vehicle, is uninsured for the first $10,000.00. Requests for admissions established that Hiren had the express or implied permission of Amrat to drive the car.

No written reasons for judgment were given, but the judgment states that the ruling was based on oral reasons. The transcript of the hearing establishes that the defendants argued that Amrat was uninsured because he had specifically excluded Hiren on the policy. The plaintiff argued that the statute would not allow recovery for personal injuries if Hiren made a claim, but that it did allow recovery for property damage incurred by Amrat since he, as owner of the car, had insurance in place, citing A.K. Durnin Chrysler-Plymouth, Inc. v. Jones, 2001-0810 (La. App. 1 Cir. 5/10/02), 818 So.2d 867. The trial court stated that because the driver had specifically been excluded under the policy, the policy did not apply to afford recovery for the property damage.

In Durnin, the First Circuit was faced with a similar situation as here. The owner of the car had a liability provision in effect but had specifically excluded her spouse, who was driving the car when the accident occurred, which was determined to be the fault of the other driver. Whether the spouse had been given express or implied permission to drive the vehicle

was not explained in the opinion. The owner had the car repaired by plaintiff who was the automobile repair shop. The plaintiff then filed suit seeking sequestration of the car and recovery for the repair amount, $9, 505.15. Named as defendants were the owner of the car, her insurer, and the insurer of the other car. The insurer of the owner was subsequently dismissed. The plaintiff then filed a motion for summary judgment, but later characterized the motion as a motion for partial summary judgment, seeking a determination of the effect of La. R.S. 32:866. The trial court granted partial summary judgment and declared the statute inapplicable. The court also certified the judgment as a partial final judgment. On appeal, the First Circuit affirmed. After reviewing the well established standard of review under a motion for summary judgment and the rules of statutory interpretation, which we adopt, the court found La. R.S. 32:866 inapplicable and found that the owner of the car, who was making a claim for property damage, owned or maintained compulsory motor vehicle liability in accordance with the statute. The court found that La. R.S. 32:900(L) allowed the owner to exclude her spouse on the policy. The court therefore affirmed the trial court and found that the owner could recover under the policy.

Subsequently, the Third Circuit declined to follow Durnin in Lantier

v. State Farm Mut. Auto. Ins. Co., 2002-0301 (La. App. 3 Cir. 10/2/02), 827 So.2d 597, writ denied 2002-2628 (La. 12/13/02), 831 So.2d 991,and found that in fact the vehicle was uninsured. The owner had specifically excluded her brother on the policy. She loaned the car to her mother, and the brother took the car to run errands and was subsequently rear-ended causing property damage. She sued the insurer of the other driver, among others. The insurer filed a motion for summary judgment based on La. R.S. 32:866 which was granted, and the owner appealed. The Third Circuit affirmed, citing Jasper v. Progressive Insurance Co., 99-1479 (La. App. 3 Cir. 2/9/00), 758 So.2d 848, wherein the plaintiff was rear-ended while operating an uninsured vehicle owned by another person, and the court found that the statute barred recovery by the plaintiff because he was the "operator" of an uninsured vehicle. The court held:

> While Durnin is more factually similar to the case at bar than is Jasper, we are not bound by a decision of the first circuit and cannot agree with an interpretation of the statute that allows a party to recover their damages when they have excluded a person from coverage on their policy and then allowed that person to operate the vehicle. Such an interpretation is in contravention of the legislative intent of reducing the number of uninsured motorists on the highways and leads to absurd consequences.
>
> Accordingly, we find that under the facts of this case, Jody was the owner of what was in effect an uninsured vehicle and, as such, her claim for property damage to her vehicle is barred by application of La. R.S. 32:866.

Lantier, p.2-3, 827 So.2d at 598.

Judge Woodard concurred, stating:

> I believe in order to find that [the owner]'s vehicle was, in effect, "an uninsured vehicle and, as such, her claim for property damage to her vehicle is barred by application of La. R.S. 32:866," as the majority has found, one must ascertain whether she gave her brother permission to drive her vehicle, which she entrusted to her mother. There is not enough in the record to demonstrate [the owner]'s express permission; thus, the question becomes whether permission was implied, which involves her intent. While jurisprudence is well settled that determining intent on summary judgment is rarely appropriate, 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." (emphasis added.) Her statement, that it would not have bothered her for her brother to use her car, shows a lack of objection. (citations omitted.)

Lantier, p. 3, 827 So.2d at 599.

This Court chooses to distinguish Durnin where it was not clear that the owner granted permission for the driver to use the car and to follow Lantier. The plaintiff admitted he gave his son permission to drive the car. A party cannot recover their damages when they have excluded a person from coverage on their policy and then allowed that person to operate the vehicle. Such an interpretation would be in contravention of the legislative intent of reducing the number of uninsured motorists on the highways and would lead to absurd consequences.

AFFIRMED