CARRIE ALLEN and KA-SANDRA ALLEN, Plaintiffs-Appellants, vs. CHRISTIAN JONATHAN KIRCH A/K/A JONATHAN CHRISTIAN and KAITLYNN DOHENY A/K/A KAITLYNN KIRCH, and/or "JOHN DOE 1-5" and/or "JANE DOE 1-5" (the last two being fictitious designations), Defendants-Respondents. **DOCKET NO. BER-L-4456-22** _____ ST. PAUL PROTECTIVE INSURANCE COMPANY, Plaintiffs-Respondents vs. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendants-Respondents, -and- KA-SANDRA ALLEN, CARRIE ALLEN, and CHRISTIAN JONATHAN KIRCH A/KA/ JONATHAN CHRISTIAN, Interested Party Defendants-Appellants **DOCKET NO.: BER-L-970-23**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: A-1501-24 CIVIL ACTION **ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY** **SAT BELOW:** **The Honorable PETER G. GEIGER, J.S.C.** **APPELLANTS' BRIEF ON APPEAL** Attorneys of Record: Melissa Peace Tomaino, Esq. Attorney ID: 01362012 William Stoltz, Esq. Attorney ID: 019302011 E: wstoltz@rosemariearnold.com LAW OFFICES ROSEMARIE ARNOLD *Attorneys for Plaintiffs/ Interested Party Defendants-Appellants Carrie Allen and Ka-Sandra Allen* 1386 Palisade Avenue Fort Lee, NJ 07024 T:(201)461-1111 F:(201)461-1666

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PRELIMINARY STATEMENT

Plaintiff/Interested Party Defendants-Appellants CARRIE ALLEN ("Carrie") and KA-SANDRA ALLEN ("Ka-Sandra") (collectively ("the Allens"), via their undersigned attorneys, hereby submits this brief in support of their motion for leave to appeal three orders issued by Peter G. Geiger, J.S.C. ("the Motion Court") on January 9, 2025 ("the January 9, 2025 Orders"). The January 9, 2025 orders granted Defendant-Respondent NEW JERSEY MANUFACTURER'S INSURANCE COMPANY's ("NJM") motion for summary judgment, and denied the Allens' motion for summary judgment, as well as the motion for summary judgment by Plaintiff-Respondent ST. PAUL PROTECTIVE INSURANCE COMPANY ("St. Paul") on the issue of whether NJM was required to indemnify and/or defend Defendant-Respondent JONATHAN KIRCH A/K/A JONATHAN CHRISTIAN ("Mr. Kirch") for an automobile accident which occurred on June 17, 2021. As set forth at length below, the January 9, 2025 Orders should be reversed because the Motion Court's order disregarded summary judgment standards and ignored clear issues of fact requiring a trial concerning Mr. Kirch's status as an authorized driver of Ms. Doheny's car. As such, it is respectfully requested that the Allens' Appeal be granted, and the January 9, 2025 orders reversed and remanded in their entirety.

STATEMENT OF PROCEDURAL HISTORY[1]

The history of this matter begins with the filing of a personal injury action against Mr. Kirch and Defendant-Respondent KAITLYNN DOHENY A/K/A KAITLYNN KIRCH ("Ms. Doheny") (collectively, "the Liability Defendants") under docket no. BER-L-4456-22 ("the Liability Action") which was commenced by summons and complaint on August 16, 2022. See Pa1-Pa5. An amended complaint was filed in the Liability Action on December 30, 2022. See Pa6-Pa10. Before an answer could be filed in the Liability Action, St. Paul commenced a Declaratory Judgment Action against NJM—naming the Allens and the Liability Defendants as interested party defendants—under docket no. BER-L-970-23 ("the Declaratory Judgment action") by summons and complaint on February 20, 2023. See Pa11-Pa20. NJM filed an answer to the Declaratory Judgment Action on April 5, 2023. See Pa21-Pa29. Ms. Doheny filed an answer to the Liability action on April 12, 2023. See Pa30-Pa33. Default was entered against Mr. Kirch in the Liability action on June 7, 2023, with a default judgment on liability being entered against him on August 9, 2023. See Pa34-Pa35; Pa38.

On August 4, 2023, an order was entered consolidating the Liability Action and the Declaratory Judgment action for discovery only. See Pa36-Pa37. After

[1] Pursuant to R. 2:6-8, the record citation abbreviations used in this brief are as follows: "Pa" refers to Plaintiff's Appendix; "T" refers to the Transcript of Oral Argument Proceedings Conducted on December 6, 2024 for the motions at issue in this case.

discovery was completed, the parties moved and cross-moved for summary judgment in the Declaratory Judgment Action on the issue of whether NJM was required to indemnify and/or defend Mr. Kirch. See Pa91-Pa310. This resulted in the January 9, 2025 Orders, in which the Motion Court ruled in favor of NJM. Specifically, the Motion Court found that Mr. Kirch did not have implied or actual permission to use Ms. Doheny's vehicle, and as such, NJM had no obligation to provide coverage or defense for Mr. Kirch. See Pa39-Pa71.

As the January 9, 2025 orders dismissed the Declaratory Judgment action in its entirety (which was consolidated with the Liability Action for **discovery** purposes **only**), the Allens initiated an appeal via notice of appeal on January 24, 2025. See Pa72-Pa79. However, this Court issued a letter on January 30, 2025 contending that the January 9, 2025 Orders were not "final" orders appealable as of right and instructing the parties to file a motion for leave to appeal within 15 days. See Pa80-Pa81. Having also received instructions to file an amended notice of appeal with the complete consolidated caption, the Allens did so on February 7, 2025. See Pa82-Pa90.

The Allens subsequently filed a motion for leave to appeal. However, during the pendency of that motion, it was discovered that the Trial Court had

dismissed the Liability action,[2] thus rendering the Court's finality concerns moot. As such, that motion was withdrawn, and the parties are now proceeding with the appeal as of right.

STATEMENT OF FACTS

Both the Liability Action and the Declaratory Judgment action arise out of a rear-end motor vehicle crash that occurred on June 17, 2021 in Teaneck, New Jersey. See Pa6-Pa10; Pa11-Pa20. Specifically, the accident occurred when the vehicle the Allens were traveling in was struck by a vehicle operated by Mr. Kirch. See Pa118-Pa119. Said vehicle was owned by Ms. Doheny. See id. As a result of this accident, the Allens both suffered severe and permanent injuries, including, but not limited to, multiple spinal disc herniations requiring treatment by multiple injections and surgery. See Pa278-Pa281. Carrie's personal injury claim was subject to a **zero threshold** because she did not own a vehicle or reside with anyone whose PIP coverage was binding upon her. See Pa281. Ms. Doheny's vehicle was insured with a policy by NJM purchased by her father, which has BI Coverage for $500,000.00 per accident. See Pa308. Ka-Sandra's vehicle was insured by St. Paul with a policy which provided $100,000/person, $300,000.00/accident Uninsured Motorist ("UM") coverage. See Pa229.

[2] The Allens' appeal of the dismissal of the liability action is the subject of a related appeal under Appellate Division Docket No. A-2524-24.

At the time of the accident, Ms. Doheny was legally married to, but separated from, Sebastian Kirch, who is Mr. Kirch's brother. See Pa124, p. 11, ll. 11-25; Pa125, p. 15, ll. 5-14; Pa130, p. 35, ll. 12-15. Ms. Doheny admitted at her deposition that she was "familiar" with her brother-in-law Mr. Kirch and had seen him "many times" prior to the June 17, 2021 accident. See Pa125, p. 15, ll. 19-23. At the time of the accident, Mr. Kirch lived "down the street" from Ms. Doheny with Sebastian Kirch. See Pa125, p. 15, l. 24 – p. 16, l. 9. Around the time of the accident, Ms. Doheny would typically see Mr. Kirch "whenever I would go down to drop the kids to see their dad, if he was home from work, he'd be there." Pa125, p. 16, ll. 10-15. Ms. Doheny described her relationship with Mr. Kirch as "friendly." Pa125, p. 16, ll. 16-20. Ms. Doheny admitted she could recognize his handwriting from birthday cards he sent to her children. See Pa132, p. 44, ll. 1-4, 6-10.

Prior to the June 17, 2021 accident, Mr. Kirch had ridden in Ms. Doheny's vehicle on multiple occasions, including to take him to his job in the next town. See Pa125, p. 17, ll. 5-20. Ms. Doheny also admitted that at the time of the accident, she knew that Mr. Kirch did not have a car of his own but had a Peruvian driver's license and a temporary card from the United States that said he was able to drive in the United States. See Pa126, p. 18, ll. 11-21.

On the date of the accident, Ms. Doheny took her vehicle to Sebastian Kirch's residence, where Mr. Kirch was also living. See Pa126, p. 21, ll. 21-24. She had gone to the home on that date because she was taking her shared children with Sebastian Kirch to see their father, and she always came along for such visits. See Pa126, p. 21, ll. 1-17. Ms. Doheny testified that on the date of the accident, she was taking a nap when she was woken up and told about the accident. See id. Prior to taking this nap, Ms. Doheny placed her keys down on the counter between the living room and kitchen, as that's where car keys were always left when people came to Sebastian Kirch's residence. Pa127, p. 22, ll. 11-17.

On the date of the accident, Mr. Kirch took Ms. Doheny's car for the purposes of running an errand for Ms. Doheny and Sebastian Kirch's children, namely, **to pick up diapers**. See Pa126, p. 20, ll. 16-23; Pa127, p. 25, ll. 4-7. Mr. Kirch attempted to call Ms. Doheny before borrowing the car but was unable to reach her because she was sleeping. See Pa142. Mr. Kirch did this because in his home country of Peru, it is permissible to borrow a car from a relative. See id. He was not aware that borrowing a car from a family member without express permission could cause insurance issues. See id.

Ms. Doheny first learned of the accident when she was woken by Sebastian Kirch, who told her what happened. See Pa127, p. 24, ll. 1-3. Ms. Doheny admitted that she never called the police to report her vehicle as stolen, nor did she ever feel

the need to, because she knew Mr. Kirch. See Pa127, p. 24, ll. 4-8, 19-25. As such, Ms. Doheny did not press charges against Mr. Kirch. See Pa127, p. 25, ll. 4-7.

NJM declined to extend coverage and defense to Mr. Kirch based on the following language from Ms. Doheny's policy: "Part A – Liability Coverage, Exclusion A.8 – that liability coverage is excluded for persons using a vehicle **without a reasonable belief** that they are entitled to do so." Pa148 (emphasis added).

LEGAL ARGUMENT

POINT I:
The January 9, 2025 Orders Should Be Reversed Because There Are Material Issues of Fact Warranting a Trial
(RAISED BELOW: Pa104-Pa111; 1T, p. 6, l. 8- p. 18, l.2)

The Allens respectfully request that the January 9, 2025 orders be reversed because they are contrary to well-established law regarding summary judgment. Specifically, the January 9, 2025 orders are erroneous because the Motion Court failed to account for clear material issues of fact relating to Mr. Kirch's implied authorization to use the car. In light of these clear material issues of fact, the January 9, 2025 Orders should be reversed.

A. The Standard of Review for Orders Deciding Motions for Summary Judgment
(RAISED BELOW: Pa104-Pa105)

This Court reviews "review[s] the decision on a motion for summary judgment de novo, applying the same standard used by the trial court." Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021). Under that standard, a party is only entitled to summary judgment if they can "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). As stated by the Supreme Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995):

> [A] determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, **when viewed in the light most favorable to the non-moving party**, are sufficient to permit a rational fact finder to resolve the alleged dispute issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

Brill, 142 N.J. at 540 (emphasis added). "In deciding whether a genuine issue as to any material fact exists, the moving papers and pleadings are considered most favorably for the party opposing the motion and all doubts are resolved against the movant." Linn v. Rand, 140 N.J. Super. 212, 216 (App. Div. 1976). "On a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Brill, 142 N.J. at 536. "[A] litigant has the right to

trial where there is the slightest doubt as to the facts." Ruvolo v. Am. Cas. Co., 39 N.J. 490, 499 (1963) (citing Peckham v. Ronrico Corp., 171 F.2d 653, 657 (1 Cir., 1948); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2 Cir., 1945)). "In the context of a summary judgment motion, the judge **does not weigh the evidence, or resolve credibility disputes**. These functions are uniquely and exclusively performed by a jury." Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13 (App. Div. 2007) (citing Parks v. Rogers, 176 N.J. 491, 502 (2003); Brill, 142 N.J. at 540).

B. The January 9, 2025 Orders Should Be Reversed Because the Record Shows that Mr. Kirch had Implied Permission to use Ms. Doheny's Vehicle on the Date of the Incident, or at a Minimum, Raised a Material Issue of Fact as to Said Implied Permission **(RAISED BELOW: Pa106-Pa111, 1T, p. 6, l. 8- p. 18, l.2)**

Turning to the merits of this case, under well-worn summary judgment standards, the January 9, 2025 orders are erroneous because the record shows that Mr. Kirch had Implied Permission to use Ms. Doheny's Vehicle on the date of the incident. At a bare minimum, the record raises a material issue of fact as to the reasonableness of his belief he was permitted to borrow his sister-in-law's vehicle. Either way, the January 9, 2025 orders are erroneous and should be reversed.

Drivers in New Jersey are subject to the "initial permission rule" which stems from the State's strong desire to provide coverage for innocent drivers involved in accidents. The breadth of the rule is designed to assure that "all persons

wrongfully injured have financially responsible persons to look for damages" and recognizes that a liability policy is "for the benefit of the public as well as the named or additional insured." Verriest v INA Underwriters Insurance Company, 142 N.J. 401, 412 - 414 (1995). Under the rule, if a person has permission to use a vehicle in the first instance, any subsequent use short of "theft or the like" while it remains in his possession, is permissive use within the terms of a standard auto policy omnibus clause. Ferejohn v Vaccari, 379 N.J. Super 82, 87 (App. Div. 2005) (citing Verriest, 142 N.J. at 411). "The use of an automobile denotes its employment for some purpose of the user; the word 'operation' denotes the manipulation of the car's controls in order to propel it as a vehicle. **Use is thus broader than operation**." Id. (Emphasis added). Further, and most applicable here, the term "use" is not synonymous with "drive;" **instead, it covers a wide variety of activities other than driving the vehicle on a public roadway and includes "permission to drive, park, ride in, repair, or otherwise employ [the] car for any related purpose**." Jacquez v Nat'l Cont'l Ins. Co., 178 N.J. 88, 100 (2003) (emphasis added).

As for what constitutes initial permission, the Courts have long held that implied permission has been defined as "actual permission **circumstantially proven**." French v. Hernandez, 184 N.J. 144, 154 (2005) (quoting State Farm Mut. Auto. Ins. Co. v. Zurich Am. Ins. Co., 62 N.J. 155 (1973)) (emphasis added). It

may arise from "**a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection signifying consent.**" Id. (emphasis added). Most notable here, the relationship between the owner and user will be important. "Not surprisingly, finding of implied permission may be more likely when the vehicle's operator is a **friend** or employee of the owner." Id. (emphasis added). As the French court held:

> Equally significant **will be a pattern of permitted use of the vehicle, which may give rise to an inference that the owner gave his consent to use on a subsequent occasion**. **Ultimately, the resolution of the issue will be fact-sensitive and depend on the totality of the circumstances**. In analyzing whether Hernandez had implied permission to drive the truck, we give plaintiff the benefit of our canon of "liberal construction of [automobile] liability insurance [policies] to effect the broadest range of protection" to those who travel on and across roadways.

Id. (quoting State Farm Mut. Auto Ins. Co., 62 NJ at 168) (emphasis added).

To this end, the Courts have found that when a vehicle is used by a relative to perform errands, there is an implied permission to use the vehicle, even if the relative's use deviates from the original purpose. For example, in Small v. Schuncke, 42 N.J. 407, 413-15 (1964) the court held that because a insured's nephew was given permission to use the car to perform errands, this permission extended to other use of the car unless it constituted theft or a similar offense. In the end, the initial-permission rule "is not concerned with the scope for which the permission is granted." Verriest, 142 N.J. at 413 (quoting Small, 42 N.J. at 407).

Here, the record shows that Mr. Kirch had implied permission to use Ms. Doheny's vehicle, or at a bare minimum, raises a material issue of fact for trial on that issue. At the time of the accident, Ms. Doheny was legally married to, but separated from, Sebastian Kirch, who is Mr. Kirch's brother. See Pa124, p. 11, ll. 11-25; Pa125, p. 15, ll. 5-14; Pa130, p. 35, ll. 12-15. Ms. Doheny admitted at her deposition that she was "familiar" with Mr. Kirch and had seen him "many times" prior to the June 17, 2021 accident. See Pa125, p. 15, ll. 19-23. At the time of the accident, Mr. Kirch lived "down the street" from Ms. Doheny with Sebastian Kirch. See Pa125, p. 15, l. 24 – p. 16, l. 9. Around the time of the accident, Ms. Doheny would typically see Mr. Kirch "whenever I would go down to drop the kids to see their dad, if he was home from work, he'd be there." Pa125, p. 16, ll. 10-15. Ms. Doheny described her relationship with Mr. Kirch as "friendly." Pa125, p. 16, ll. 16-20. Ms. Doheny admitted she could recognize his handwriting from birthday cards he sent to her children. See Pa132, p. 44, ll. 1-4, 6-10.

Prior to the June 17, 2021 accident, Mr. Kirch had ridden in Ms. Doheny's vehicle on multiple occasions, including to take him to his job in the next town. See Pa125, p. 17, ll. 5-20. Ms. Doheny also admitted that at the time of the accident, she knew that Mr. Kirch did not have a car of his own but had a Peruvian driver's license and a temporary card from the United States that said he was able to drive in the United States. See Pa126, p. 18, ll. 11-21.

On the date of the accident, Ms. Doheny took her vehicle to Sebastian Kirch's residence, where Mr. Kirch was also living. See Pa126, p. 21, ll. 21-24. She had gone to this place on that date because she was taking her shared children with Sebastian Kirk to see their father, and she always came along for such visits. See Pa126, p. 21, ll. 1-17. Ms. Doheny testified that on the date of the accident, she was taking a nap when she was woken up and told about the accident. See id. Prior to taking this nap, Ms. Doheny placed her keys down on the counter between the living room and kitchen, as that's where car keys were always left when people came to Sebastian Kirch's residence. Pa127, p. 22, ll. 11-17.

On the date of the accident, Mr. Kirch took Ms. Doheny's car for the purposes of running an errand for Ms. Doheny and Sebastian Kirch's children, namely, **to pick up diapers**. See Pa126, p. 20, ll. 16-23; Pa127, p. 25, ll. 4-7. Mr. Kirch attempted to call Ms. Doheny before borrowing the car but was unable to reach her because she was sleeping. See Pa142. Mr. Kirch did this because in his home country of Peru, it is permissible to borrow a car from a relative. See id. He was not aware that borrowing a car from a family member without express permission could cause insurance issues. See id.

Ms. Doheny first learned of the accident when she was woken by Sebastian Kirch, who told her what happened. See Pa127, p. 24, ll. 1-3. Ms. Doheny admitted that she never called the police to report her vehicle as stolen, nor did she ever feel

the need to, because she knew Mr. Kirch. See Pa127, p. 24, ll. 4-8, 19-25. As such, Ms. Doheny did not press charges against Mr. Kirch. See Pa127, p. 25, ll. 4-7.

In short, the record in this case shows that Mr. Kirch had implied permission to use Ms. Doheny's vehicle on the date of the accident, and as such, NJM should be required to provide coverage and defense. At a bare minimum, the record shows disputed issues of fact as to the reasonableness of Mr. Kirch's belief that it was ok for him to borrow Ms. Doheny's vehicle. Either way, the January 9, 2025 orders need to be reversed, and as such, the Allens respectfully request that those orders be reversed, and this matter remanded.

CONCLUSION

For the reasons set forth at length above, the Allens respectfully request that the January 9, 2025 orders reversed in their entirety and this matter remanded for further appropriate proceedings.

DATE: May 15, 2025

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CARRIE ALLEN and KA-SANDRA ALLEN, Plaintiffs-Appellants, vs. CHRISTIAN JONATHAN KIRCH A/K/A JONATHAN CHRISTIAN and KAITLYNN DOHENY A/K/A KAITLYNN KIRCH, and/or "JOHN DOE 1-5" and/or "JANE DOE 1-5" (the last two being fictitious designations), Defendants-Respondents. **DOCKET NO. BER-L-4456-22**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1501-24 CIVIL ACTION SUBMITTED ON: AUGUST 15, 2025 ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY SAT BELOW: HON. PETER G. GEIGER, J.S.C.
ST. PAUL PROTECTIVE INSURANCE COMPANY, Plaintiffs-Respondents vs. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendants-Respondents, -and- KA-SANDRA ALLEN, CARRIE ALLEN, and CHRISTIAN JONATHAN KIRCH A/KA/ JONATHAN CHRISTIAN, Interested Party Defendants-Appellants. **DOCKET NO.: BER-L-970-23**	

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT, NEW JERSEY MANUFACTURERS INSURANCE COMPANY

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STATEMENT OF FACTS

This matter arises out of an auto accident which occurred on June 17, 2021, when a vehicle operated by Christian Kirch struck the rear of the vehicle driven by Ka-Sandra Allen. Carrie Allen was a passenger in Ka-Sandra Allen's vehicle. (Pa117). The vehicle operated by Christian Kirch was a 2015 Ford Fusion owned by Kaitlynn Doheny and was insured by defendant New Jersey Manufacturer's Insurance Company. (Pa169). Kaitlyn Doheny is the sole owner of the Ford Fusion. She is the primary driver of the car. No one else normally drove the car. (Pa120 at p. 14, lines 3-7). On June 17, 2021, Christian Kirch was driving the vehicle owned by Kaitlynn Doheny without her permission.

Kaitlynn resided at 53 Harcourt Avenue, Bergenfield, New Jersey at the time of the accident. (Pa120 at p. 10, lines 12-14). Kaitlynn Doheny was legally married to Sebastian Kirch at the time of the accident, but were separated and living apart. (Pa120 at p. 11, lines 11-22). Sebastian Kirch resided on the same street as Kaitlynn Doheny at 20 Harcourt Avenue. His brother Christian Kirch, is from Peru, but was staying with Sebastian Kirch at his brother's house at the time of the accident. Both Christian and Sebastian now live in Peru. (Pa120 at p. 16, lines 1-9).

On the morning of June 17, 2021, Kaitlynn Doheny had taken her children to Sebastian Kirch's residence. She typically remains with her children when

they visit their father. (Pa120 at p. 21, lines 1-14). When Kaitlynn Doheny arrived at Sebastian Kirch's home that morning, she placed her keys on the counter in between the kitchen and the living room where they are typically placed by those entering the house. (Pa120 at p. 22, lines 11-17). During the visit, Kaitlynn Doheny's son became sleepy. She laid down with her son to take a nap. (Pa120 at p. 21, lines 1-14).

Christian Kirch took the keys to Kaitlynn's car while she was laying down with her son for his nap. She did not know that Christian Kirch had taken her car. (Pa120 at p. 21, lines 1-14). Kaitlynn Doheny was woken up by Sebastian Kirch and informed that Christian had taken her car and gotten into an accident. (Pa120 at p. 21, lines 1-14). Kaitlynn Doheny eventually came to learn that Christian Kirch may have taken her car to buy diapers for Kaitlynn and Sebastian's children. (Pa120 at p. 20, lines 16-22). However, Kaitlynn did not have a conversation with Christian about going to get diapers for the children. Christian had never run errands for Kaitlynn in the past. (Pa120 at p. 23, lines 1-8).

Kaitlynn Doheny did not contact the police about the vehicle being taken, because Sebastian Kirch had informed her about Christian's use of the car. Accordingly, Kaitlynn was aware of the vehicle's location, and that Christian Kirch was the person who had driven it. (Pa120 at p. 24, lines 4-25). Upon police

arrival following the accident, Christian Kirch presented the responding officer with a United States passport and a Peruvian Driver's License. (Pa117).

Prior to the accident, Christian Kirch had never driven Kaitlynn Doheny's car. (Pa120 at p. 19, lines 9-11). Christian Kirch has never asked to drive Kaitlyn Doheny's car. Kaitlynn Doheny has never given Christian Kirch permission to drive her car. (Pa120 at p. 19, lines 19-23). Kaitlynn Doheny testified that "it was obvious" that Christian Kirch did not have permission to drive her car, stating, "if someone had asked me [to drive my car], I would say no. That's why I would say, okay, if it was really needed, I would drive him somewhere." (Pa120 at p. 19, lines 12-18).

Kaitlynn also testified "Well, I was asleep, so I don't know why someone would take someone's car." (Pa120 at p. 22, lines 6-12). Kaitlynn is familiar with Christian Kirch, as she would see him when bringing her children to see their father, Sebastian Kirch. (Pa120 at p. 15, lines 5-14). On less than five occasions prior to the accident, Kaitlynn Doheny provided Christian Kirch with transportation in her car to his job as a favor when Sebastian Kirch asked. (Pa120 at p. 17, lines 5-19).

On July 16, 2021, Defendant New Jersey Manufacturer's Insurance Company (hereinafter "NJM") took a statement from Christian Kirch. (Pa140). Christian Kirch stated that "I was trying to call Kaitlynn... but she wasn't

answering." Christian Kirch further stated that, "I didn't know that I couldn't just take the car because I am not part of the insurance." (Pa140). Christian Kirch confirmed that he did not have permission to use the car.

> "Q: So when you took the car, permission was not given?
>
> A: No."
>
> (Pa140 at p. 2).

Christian Kirch explained his decision to take Kaitlynn Doheny's car despite not being able to obtain her permission because in Peru, "if you borrow a car from a relative, it won't be an issue." (Pa140). Kaitlynn Doheny, her father Kevin Doheny, and Christian Kirch filled out a form called Driver's Report of Automobile Accident. (Pa194). Kaitlynn Doheny confirmed that Christian Kirch filled out the "Your Auto and Driver" section of the form. She recognized his handwriting because he has signed birthday cards to her and Sebastian Kirch's children. (Pa120 at p. 44, lines 3-9).

On this same form, Christian Kirch indicated that he lacked the permission of Kaitlynn Doheny to "use" her car. On the question that asks, "Did driver have permission to use vehicle?", Christian Kirch answered: "NO". (Pa194). On this form, Christian similarly answered "NO" to the question that asked, "Was driver on errand for owner?". (Pa194). Kaitlynn Doheny stated that "I didn't ask him to go on an errand." (Pa120 at p. 30, lines 20-24).

Defendant NJM issued an Auto Policy to Kevin Doheny, Kaitlynn's father. (Pa169). Under "Part A - Liability Coverage A", NJM "will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages." (Pa169 at p. 2). However, the policy notes that "We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy." (Pa 169 at p. 2).

Specifically, "Part A - Liability Coverage Exclusion A.8" excludes from coverage any insured "using a vehicle without a reasonable belief that insured is entitled to do so." (Pa169 at p. 2). Defendants New Jersey Manufacturers Insurance Company declined to extend coverage to Christian Kirch for the subject accident. (Pa198). This denial was grounded in the language of the subject auto policy "*Part A - Liability Coverage Exclusion A. 8*." (Pa198). As a result of the accident, Ka-Sandra Allen and Carrie Allen allege injuries and filed a personal injury lawsuit against Christian Kirch and Kaitlyn Doheny. (Pa1)

PRELIMINARY STATEMENT

Defendant New Jersey Manufacturers Insurance Company (hereinafter "NJM") submits this Brief and Appendix in support of their Opposition to the Appeal filed on behalf of Ka-Sandra and Carrie Allen. The litigation which is the subject of this Appeal arises out of an automobile accident which occurred on June 17, 2021 between the Appellants and Christian Kirch. The vehicle which Christian was driving at the time of the subject accident was owned by Kaitlynn Doheny and insured by Defendant NJM. The Allen's were insured by St. Paul Protective Company at the time of the accident.

The Allen's appeal from the Orders entered on January 9, 2025 finding NJM owes no coverage to Christian Kirch for the subject accident, as he was not a permissive user of Kaitlyn Doheny's vehicle. NJM's policy states, in *Part A - Liability Coverage, Exclusion A.8,* that coverage is excluded for persons using a vehicle without a reasonable belief that they are entitled

to do so. Christian Kirch was not a resident of the NJM insured's household, and he did not have permission, either express or implied, to operate the vehicle. Both Christian Kirch and Kaitlynn Doheny confirmed that that he was never given permission to drive the vehicle. Thus, there is no question of fact which would preclude a ruling on summary judgment.

Prior to the accident, Christian Kirch had never driven the vehicle, nor had he ever asked to drive the vehicle. The limited access that Kaitlynn Doheny had granted to Christian Kirch, namely, riding as a passenger on less than five prior occurrences do not translate to permission to drive the vehicle, especially without the knowledge of the owner. Pursuant to the policy, Defendant NJM owes no duty to provide coverage, nor to defend or indemnify Christian Kirch for damages caused in the accident.

Judge Geiger correctly concluded that Christian Kirch was not a permissive user of the vehicle and that "the facts and circumstances of the case do not support the conclusion that Kirch had the requisite permission to operate the vehicle." (Pa139). Therefore, Judge Geiger endorsed NJM's position that liability coverage is excluded for a person using a vehicle without a reasonable belief that they are entitled to do so. Id. Plaintiff has failed to identify any disputed facts in their argument which would preclude a ruling on summary judgment.

In arguing that Christian Kirch had permission to use Kaitlynn Doheny's vehicle, Appellants confuse two distinct analyses under which a person can become a permissive user: the initial permission rule and implied permission. Even if Appellants were to properly apply each test, the argument fails under both avenues for permissive use. Appellants simply cannot identify any disputed

material fact in their opinion which would preclude the granting of summary judgment in this matter and the facts do not support a finding of permissive use under the initial permission rule or implied permission.

PROCEDURAL HISTORY

New Jersey Manufacturers Insurance Company adopts the procedural history as provided in the Appellants' Brief and adds the following:

Christian Kirch is a named Defendant in the underlying personal injury action brought by Ka-Sandra Allen and Carrie Allen. Default Judgement was entered against Defendant Christian Kirch on August 10, 2023. Christian Kirch's testimony has been attempted by subpoena on two separate occasions, however service was not effectuated. As a results, no depositions of Christian Kirch have been taken. St. Paul Protective Insurance Company insures Ka-Sandra Allen and Carrie Allen for underinsured motorist protection. St. Paul has instituted a declaratory judgment action seeking a finding that NJM owes liability coverage to Christian Kirch in connection with the June 17, 2021 accident and underlying personal liability action. NJM filed a cross motion for summary judgment seeking declaration that NJM owes no liability coverage to Christian Kirch nor does NJM owe a duty to indemnify or defendant Christian Kirch in connection with the underlying accident.

Oral Argument on the motions was held on December 6, 2024. On January 9, 2025, an Order was entering granting summary judgment in favor of NJM and denying the motion filed by St. Paul's.[1]

LEGAL ARGUMENT

Point I

THERE ARE NO ISSUES OF MATERIAL FACT WHICH WOULD PRECLUDE A RULING ON SUMMARY JUDGMENT BECAUSE PERMISSIVE USE IS A LEGAL QUESTION FOR THE COURT

(Raised below: 1T, p. 18, l. 5- p. 37, l. 2)

Defendant NJM respectfully requests that the January 9, 2025 orders be affirmed as the issue central to this appeal, implied permission, is a legal issue to be decided by the Court and there is no question of fact in dispute. Appellants' have failed both at the trial level, and now again on appeal, to identify any issues of material fact relating to the issue of whether Christian Kirch had permission to use Kaitlynn Doheny's vehicle on the date of the underlying accident. Appellants never identify any disputed facts because there are none. Kaitlynn Doheny brought her children to the residence of their father, Sebastian Kirch, where Christian Kirch was living at the time. At some point during the visit,

[1] St. Paul Protective Insurance Company is not challenging the January 9, 2025 decisions by way of the pending appeal.

Kaitlynn laid down with her son for his nap in another room. While Kaitlynn was napping with her son, Christian Kirch took Kaitlynn Doheny's keys from the counter and drove her vehicle for the first time, and without her permission. Kaitlynn has never asked Christian to run any errands for her, she has never given Christian permission to drive her vehicle nor has he ever driven her vehicle in the past. Christian's prior access to Kaitlynn's vehicle was limited to riding as a passenger on less than five prior occasions. These facts are undisputed, and fail to suggest that Christian Kirch had a reasonable belief that he had permission to drive the vehicle for the first time, without asking Kaitlynn, on the date of the subject accident.

Appellate courts review the trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). The appellate court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The undisputed facts demonstrate

that Judge Geiger's decision was well reasoned and warrant affirmation on appeal.

As a preliminary matter, it is crucial to highlight the Appellants' continuous misapplication and conflation of two different concepts pertaining to permissive use of a vehicle. There are three ways a person might obtain permission to use another's vehicle. The first is express permission. There is no evidence that Christian Kirch had express permission to drive Kailynn Doheny's car on the date of the underlying accident, nor does any party to this suit argue that there is. Therefore, no further inquiry is necessary into whether Christian Kirch was operating the vehicle by way of express permission.

The remaining two avenues of obtaining permission to use another's vehicle include the "initial permission rule" and "implied permission." Despite Appellants' attempt to blend these rules, they are two entirely distinct concepts. Nonetheless, Christian Kirch failed to obtain permission to use Kaitlynn Doheny's vehicle by either of these two avenues as a matter of law.

A. Christian Kirch did not obtain permissive use under the Initial Permission Rule based on his previous access to Kaitlynn Doheny's vehicle as a passenger because he did not maintain continuous possession of the vehicle.

When evaluating coverage under an automobile policy's omnibus liability clause, New Jersey courts traditionally apply the initial-permission rule".

Rutgers Cas. Ins. Co. v. Collins, 158 N.J. 542, 548 (1999). The initial-permission rule provides:

> "If a person is given permission to use a motor vehicle in the first instance, any subsequent use short of theft or the like **while it remains in his possession**, though not within the contemplation of the parties, is a permissive use within the terms of a standard omnibus clause in an automobile liability insurance policy."

Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488 (1960). Critical to this analysis is that the user of a vehicle remain in possession of the vehicle between the initial granting of permission for one purpose and the subsequent use of the vehicle for a purpose which deviates from the initial scope of the use.

Courts have held that an expansive range of conduct on the part of a driver or passenger, "short of outright theft or the like" is within the scope of an insured's or owner's permission. Id., See also Verriest v. Underwriters Ins. Co., 142 N.J. 401, 411 (1995). "The initial-permission rule, which represented the broadest interpretation of the clause at issue, best effectuates the legislative policy of providing certain and maximum coverage." Ibid. However, the New Jersey Supreme Court's support of such an expansive view of the omnibus clause is not without limit.

> "The insured has plenary authority to decide whether to permit another to use the covered vehicle. The carrier is bound by the insured's decision, and the amount of the premium does not depend upon how extensive or retrained are the insured's actions in that regard. Thus

> viewed, the omnibus clause is for the benefit of the insured rather than the insurer, the carrier's liability turning wholly upon whether the insured did or did not, in his sole discretion, choose to permit another to use the car."

State Farm Mut. Auto Ins. Co., 62 N.J. 155, 179 (1973).

Application of the initial-permission rule is a two-pronged analysis. Motor Club Fire & Casualty, 73 N.J. 425, 375 (1977). First, it must be established that the insured or owner had given initial permission to the non-insured to use the vehicle. French v. Hernandez, 184 N.J. 144, 152 (2005). "As long as the initial use of the vehicle is with the consent, express or implied, of the insured, any subsequent change in the character or scope of the use…do not require the additional specific consent of the insured." Id. The second determination that must be made is whether the subsequent use of the vehicle constitutes "theft" or the like. The court has defined "theft" in this context as "nothing less than the willful taking of another's car with the intent to permanently deprive the owner of its possession and use." Motor Club Insurance, 73 N.J. 425, 438 (1977).

The definition of the term "use" in the context of the initial permission rule covers a broad range of activities other than driving the vehicle on a public roadway and includes "permission to drive, park, ride in, repair, or otherwise employ the car for any related purpose." Jacquez v. Nat'l Cont'l Ins. Co., 178 N.J. 88, 100 (2003).

One of the essential components of the initial-permission rule is continuous possession of the vehicle by the user following the grant of permission. French v. Hernandez, 184 N.J. 144, 153 (2005). In French, an employee entered his employer's business on a non-work day, took a truck, and drove it while intoxicated causing an accident. Id. at 147. The employee had previously operated the truck under the supervision of his employer solely on private property. Id. The court found that the employee was not a permissive user because the day of the accident was several weeks after his previous use of the vehicle. Id. at 153. In other words, the employee did not remain in continuous possession of the truck from the time of his initial use for which he had permission until the day of the accident.

The law is clear that a break in possession after the original authorization does not fall within the scope of the initial permission rule. Id. "This court has never extended the initial-permission rule to a case in which the user or his delegate did not remain in continuous possession of the vehicle." Id.; See e.g., Verrierst, 142 N.J. 401, 404-405 (1995) (applying the initial-permission rule in case of continuous possession); Martusus v. Tartamosa, 150 N.J. 148, 153-57 (1997); State Farm Mut. Auto. Ins. Co. v. Travelers Ins. Co., 57 N.J. 174, 177-79 (1970); Small v. Schuncke, 42 N.J. 407, 410 (1964).

There is no question that in the present case, there was no continuous possession of the subject vehicle that would warrant the application of the initial-permission rule. Kaitlynn Doheny testified that she provided Christian Kirch transportation to his job on less than five prior occasions. (Pa 120, lines 10-19). She described these occurrences as "random". Id. Appellants' argument that Christian Kirch's previous use of the vehicle as a passenger authorizes use of the vehicle as a driver on a later date falls flat, as there was a substantial break in possession. On the day of the accident, Kaitlynn Doheny had driven her car from her own home to the home of Sebastian Kirch where Christian Kirch was residing at the time. Id. at p. 21, lines 17-24. Sometime after Kaitlyn Doheny arrived at the Kirch residence, she laid down for a nap with her child. Id. at p. 21, lines 1-14. It was while she was asleep that Christian Kirch took Kaitlynn Doheny's vehicle, *for the first time*, and *without her permission*, drove the vehicle, and was subsequently involved in the underlying accident in this matter. Id. at p. 19, lines 9-23.

Because there was no continuous possession of the vehicle by Christian Kirch, the initial-permission rule does not apply to the facts of this case. Therefore, Christian Kirch did not obtain permission to use Kaitlynn Doheny's vehicle by way of the initial-permission rule, and he was therefore engaging in

behavior that falls squarely within a coverage exception clearly outlined in the NJM policy.

Although it is clear that the application of the initial-permission rule is inappropriate here, it is still necessary to address the legislative context in which this rule arose so that Appellants' misuse of its principles is clear.

The court has clarified that the purpose of applying such a broad scope of the term "use" to encompass use as a driver, passenger, alighting from the vehicle, and other various forms of use is to protect innocent drivers. Verreist v. INA Underwriters Ins. Co., 142 N.J. 401, 413-14 (1995). The court will not punish an innocent driver who is involved in an accident because of a permissive user's breach of the owner's trust in the use of the vehicle. Id. at 411-12. The broad scope of the term "use" is specific to the initial-permission rule because of the court's interest in protecting New Jersey drivers when an owner transfers possession of their vehicle to another to use. Id. at 414. Essentially, once that permission is given, it cannot be revoked and coverage is therefore afforded for injuries caused during use which deviates from the initial purpose for which permission was given.

The understanding of why New Jersey case law supports a broad definition of the term "use" under the initial permission rule is important when addressing the Appellants' argument. Appellants incorrectly rely on the court's

definition of the term "use" in the context of the initial-permission rule to support an argument that Mr. Kirch has permission under the separate and distinct "implied permission" analysis.

B. Christian Kirch did not have implied permission to use Kaitlyn Doheny's vehicle because there is no evidence to support his claims that he believed he was permitted to drive her vehicle.

The doctrine of implied permission has been defined as "actual permission circumstantially proven." State Farm Mut. Auto. Ins. Co. v. Zurich Am. Ins. Co., 62 N.J. 155, 167-68 (1973). It may arise from "a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection signifying consent." Id. at 167. This inquiry is fact sensitive and is customarily proven by circumstantial evidence requiring the fact-finder to consider the surrounding circumstances in deciding whether the use of a vehicle was not contrary to the intent of its owner. French v. Hernandez, 184 N.J. 144, 154 (2005).

Weight is given to the relationship of the parties and to the probabilities which that relationship would normally generate. Id. (citing State Farm, 62 N.J. 155 (2005)). Courts will also consider any pattern of permitted use of the vehicle, which may give rise to an inference that the owner gave her consent to use on a subsequent occasion. Id. "While implied permission may come about from no specific ritual and is circumstantial, there must be a relationship

between the parties that garners an implied consent to the use of the other's vehicles." Id. at 179.

> "The essence of the concept is that from all the surrounding circumstances a fact-finder could reasonably conclude that the use by the putative permittee was not contrary to the intent or will of the alleged permitter. The strong public policy of this State for liberal construction of liability insurance to effect the broadest range of protection to users of the highways, would require allowance of a finding of implied permission notwithstanding that, as here, the occasion of the use by the alleged permittee was one of first instance, providing the totality of the attendant circumstances was susceptible of the requisite inference of a willing mind of the permitter."

Id. at 168 (internal citations omitted).

In other words, implied permission can be found in instances of first time use of a vehicle so long as the totality of the circumstances would demonstrate a willing mind of the owner. This is plainly not the case here. Appellants do not offer any facts or circumstances that would "garner an implied consent" to Christian Kirch's use of the vehicle. There is also no history of conduct that would lead Christian Kirch to reasonably believe he had permission to drive the car. Kaitlynn Doheny testified that she has given a ride to Christian Kirch to work on less than five prior occasions, and those times that Kaitlynn had driven Christian, she was doing so only as a favor to Sebastian Kirch. (Pa 120, at p. 18, lines 4-10). Significantly, it was not even Christian himself who asked Kaitlynn

for a ride, but rather his brother, Sebastian Kirch. (Pa 120 at p. 18, line 22-25; p. 19, lines 1-6). Kaitlynn described these occurrences as "random". Further, the fact that Kaitlynn drove Christian, instead of letting him borrow her vehicle, confirms that Christian never received implicit permission to drive the vehicle.

Kaitlynn Doheny and Christian Kirch had never discussed Christian driving Kaitlynn's car. Kaitlynn herself expressed confusion about Christian's decision to take her car without asking. (Pa 120, at p. 22, line 6-12). She testified that she has never asked Christian to run an errand for her, nor has she ever given him permission to drive her car. (Id. at p. 23, lines 1-8). Kaitlynn never explicitly told Christian that he did not have permission because she felt "it was obvious", as he had never asked, nor had they discussed it. (Id. at p. 19, lines 12-18). "If someone had asked me, I would say no. That's why I would say, okay, if it was really needed, I would drive him somewhere." Id. When asked why Christian never asked to drive her car on the date of the accident, she testified, "Well, I was asleep [when he took the car], so I don't know why someone would take someone's car. I don't know." (Pa 120 at p. 22, lines 6-12).

The argument that Christian Kirch had implied permission to use Kaitlynn Doheny's car based on the fact that she had never specifically told him that he could not is not persuasive. This is especially unpersuasive in light of the fact that he never asked her. Christian previously stated that he had tried to call

Kaitlynn to ask permission to borrow her car while she was asleep, but she did not answer. (Pa 140). It is not without reason that Christian Kirch stated that he had tried, and failed, to ask Kaitlynn Doheny for permission to drive her car. He was asking because he knew he needed to.

Appellants' implied suggestion that because Kaitlynn did not file a police report or file charges against Christian Kirch, does not support a finding of implied permission. This fact alone is not dispositive of a finding of implied permission (and is also a reference to the "nothing short of theft" prong of the initial-permission rule, which is not applicable for consideration of implied permission). Kaitlynn did not file charges or call the police, because she did not feel it was necessary at the time. (Pa 120 at p. 24, lines 4-25). Looking at the whole context of the statement, Kaitlynn did not contact the police because she was informed who had the vehicle and where it was shortly after she learned about the accident. This conversation does not suggest that she declined to file charges because he had permission to drive her vehicle.

Additionally, Appellants try to paint a "familial" relationship between Kaitlynn Doheny and Christian Kirch that would justify his decision to take another's vehicle without permission. However, a closer look at the relationship between Christian and Kaitlynn makes his decision even more curious. Despite Kaitlynn's testimony that she was not close with Christian and that she would

have never allowed him to drive her car even if he did ask her, Appellants rely on a statement made by Christian Kirch to an insurance representative to argue that their family relationship creates implied permission. At the time of the accident, Kaitlynn Doheny was legally married to, but separated from, Christian Kirch's brother, Sebastian. Kaitlynn described her relationship with her ex-brother-in-law as merely "friendly". Christian Kirch told NJM that he did not know that the use of Kaitlynn's vehicle would cause insurance issues because in his home county, Peru, it is not a problem to borrow a family member's car.

Respectfully, the customs and cultures held in Peru are not contemplated by the parties to an insurance contract in the State of New Jersey. Surely it cannot be held that one is automatically permitted to use the vehicle of someone solely on the grounds that they are family or legally related. Aside from the fact that Christian was the brother of Kaitlynn's estranged husband, Appellants cannot point to any other fact in the record which would justify a belief that he had permission to use the vehicle. Without any additional support, this "family" relationship does not support a finding of permissive use.

Finally, Appellants assert that the purpose of Christian Kirch's trip was to purchase diapers for Kaitlynn Doheny's children. If this was in fact the purpose of this trip, Christian Kirch has still failed to obtain permissive use of the vehicle, as the record is clear that Kaitlynn Doheny did not ask Christian Kirch

to purchase diapers for her on the date of the subject accident, nor has she ever requested Christian Kirch run such an errand on her behalf in the past. (Pa 120 at p. 23, lines 1-8).

Appellants cannot point to evidence that does not exist in order to fabricate a question of fact. As outlined above, the facts that *do* exist clearly support a finding that Christian Kirch did not have a reasonable belief that he could drive Kaitlynn Doheny's vehicle for the first time without her knowledge and without her permission.

At the trial level, Judge Geiger correctly held that there is no evidence which would suggest Christian Kirch was a permissive user of the Doheny vehicle. Rather, Judge Geiger found that,

> "there is no evidence suggesting that Kirch had ever been allowed to drive Doheny's vehicle in the past, nor is there any indication that he had a history of using the vehicle with or without Doheny's consent. Moreover, the record is devoid of any facts that might suggest Doheny had implicitly given Kirch permission to drive the vehicle, such as in the context of a regular arrangement or practice where he had previously been allowed to operate the vehicle. Specifically, there is no suggestion that Doheny ever authorized Kirch to use the vehicle for any purpose, including the alleged task of picking up diapers for her child."

(Pa39). Christian Kirch's limited prior access to the vehicle as a passenger cannot translate to subsequent implied permission to drive the vehicle at a later

date. Any finding to the contrary would be incongruent to the case law controlling permissive use and the expectation of the insured.

CONCLUSION

In sum, Christian Kirch did not obtain permissive use of Kaitlynn Doheny's vehicle as he did not maintain continuous possession as required under the "initial-permission rule" nor is there any circumstantial evidence which would demonstrate that he had implied permission. Christian Kirch has never been given permission to drive Kaitlynn Doheny's vehicle, nor was he ever asked to drive her vehicle. For that reason, the Court should affirm the decision of the Trial Court in granting NJM's motion for summary judgment.

Respectfully submitted,

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Attorneys for Defendant/Respondent, New Jersey Manufacturers Insurance Company

By:_____
JOHN V. MALLON

By:_____
SARA E. RACINE

Dated: August 15, 2025

CARRIE ALLEN and KA-SANDRA ALLEN, Plaintiffs-Appellants, vs. CHRISTIAN JONATHAN KIRCH A/K/A JONATHAN CHRISTIAN and KAITLYNN DOHENY A/K/A KAITLYNN KIRCH, and/or "JOHN DOE 1-5" and/or "JANE DOE 1-5" (the last two being fictitious designations), Defendants-Respondents. **DOCKET NO. BER-L-4456-22** _____ ST. PAUL PROTECTIVE INSURANCE COMPANY, Plaintiffs-Respondents vs. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendants-Respondents, -and- KA-SANDRA ALLEN, CARRIE ALLEN, and CHRISTIAN JONATHAN KIRCH A/KA/ JONATHAN CHRISTIAN, Interested Party Defendants-Appellants **DOCKET NO.: BER-L-970-23**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: A-1501-24 CIVIL ACTION **ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY** **SAT BELOW:** **The Honorable PETER G. GEIGER, J.S.C.** **<u>APPELLANTS' REPLY BRIEF ON APPEAL</u>** Attorneys of Record: William Stoltz, Esq. Attorney ID: 019302011 E: wstoltz@rosemariearnold.com LAW OFFICES ROSEMARIE ARNOLD *Attorneys for Plaintiffs/ Interested Party Defendants-Appellants Carrie Allen and Ka-Sandra Allen* 1386 Palisade Avenue Fort Lee, NJ 07024 T:(201)461-1111 F:(201)461-1666

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PRELIMINARY STATEMENT

Plaintiff/Interested Party Defendants-Appellants CARRIE ALLEN ("Carrie") and KA-SANDRA ALLEN ("Ka-Sandra") (collectively ("the Allens"), via their undersigned attorneys, hereby submits this reply brief in further support of their appeal three orders issued by Peter G. Geiger, J.S.C. ("the Motion Court") on January 9, 2025 ("the January 9, 2025 Orders"), which Defendant-Respondent NEW JERSEY MANUFACTURER'S INSURANCE COMPANY's ("NJM") motion for summary judgment, and denied the Allens' motion for summary judgment, as well as the motion for summary judgment by Plaintiff-Respondent ST. PAUL PROTECTIVE INSURANCE COMPANY ("St. Paul") on the issue of whether NJM was required to indemnify and/or defend Defendant-Respondent JONATHAN KIRCH A/K/A JONATHAN CHRISTIAN ("Mr. Kirch") for an automobile accident which occurred on June 17, 2021. In their brief, NJM mostly repeats the same logic of the Trial Court, arguing that the Allens did not demonstrate that Mr. Kirch had implied permission to use the vehicle at issue in this accident. See generally Db. As these claims were already addressed in the Allens' initial brief, there is little left to discuss on reply.

However, two issues raised in NJM's opposition merit response: 1) their ignoring that the insurance policy issued by NJM does not require the driver to have actual or implied consent, it only requires that he have a **reasonable belief**

that he was permitted to use the car, and 2) their contention that Mr. Kirch did not have implied initial permission because he did not maintain continuous possession over the vehicle. As set forth below, the policy at issue is not governed by any "permission" standard, but rather, the less stringent "reasonable belief" standard (though they contend that the evidence here would satisfy either standard). Furthermore, the Allens respectfully submit that NJM is misrepresenting **when** they are contending Mr. Kirch had initial permission to use the vehicle. They are **not** contending that Mr. Kirch had implied permission from the first moment he encountered the car; rather, they are contending that as a result of his prior actions, he had implied permission to use the car on the date of the accident. As such, NJM's contention that Mr. Kirch did not have continuous possession of the vehicle are both factually inaccurate and irrelevant to the issues raised here.

LEGAL ARGUMENT[1]

POINT I:
The Policy at Issue Only Requires that a Party Have a "Reasonable Belief" That They Are Entitled to Use the Vehicle, a Lesser Standard than Implied or Actual Permission (RAISED BELOW: Pa104-Pa111; 1T, p. 6, l. 8- p. 18, l.2)

First, it bears noting that while NJM spends a great deal of time nitpicking over the difference between "implied" permission and "initial" permission, the policy at issue in this case **is not governed by an actual or implied permission standard**. Rather, it is judged by "reasonable belief" standard. The supreme Court first explained the difference between these standards in State Farm Mut. Auto. Ins. Co. v. Zurich Am. Ins. Co., 62 N.J. 155, 167-72 (1973):

> A good capsule definition of "implied permission", for present purposes, is . . . "Implied permission is actual permission circumstantially proven." . . . The essence of the concept is that from all the surrounding circumstances a fact-finder could reasonably conclude that the use by the putative permittee was not contrary to the intent or will of the alleged permitter. The strong public policy of this State for liberal construction of liability insurance to effect the broadest range of protection to users of the highways . . . would require allowance of a finding of implied permission notwithstanding that, as here, the occasion of the use by the alleged permittee was one of first instance, providing the totality of the attendant circumstances was susceptible of the requisite inference of a willing mind of the permitter.
>
> . . .

[1] Pursuant to R. 2:6-8, the record citation abbreviations used in this brief are as follows: "Pa" refers to the Allens' Appendix; "T" refers to the Transcript of Oral Argument Proceedings Conducted on December 6, 2024 for the motions at issue in this case; "Pb" refers to the Allens initial brief on Appeal; and "Db refers to NJM's respondent's brief on appeal.

> **We find ourselves unable to agree with the determinations of the tribunals below that, in the context of a one-step relationship between owner and user as of the time of the accident, the covering language, "or reasonably believed to be with the permission of the owner", is not significantly broader in scope than "with the permission" of the owner or named insured, as the case may be.**
>
> . . .
>
> Being thus of the view that the "reasonably believed" language in the nonowned vehicle coverage clause is broader in scope than that of "with permission", or the like, we pursue the question as to the nature of the difference. In the first place, the latter formulation calls . . . for an inquiry as to the inferable state of mind of the alleged permitter. Do the circumstances imply a willing state of mind toward use by the permittee? **The former criterion, on the other hand, focuses rather on the state of mind of the claimed permittee**. Did he in fact believe, with reason, that the owner was thus willing, whether or not the fact-finder would conclude from the circumstances that the owner was actually willing. A second aspect of the difference, as we see it, is that the reasonableness of the claimed permittee's belief that the owner is willing, under the Zurich clause, is not necessarily measured by the belief of the "reasonable man" envisaged by the trial judge in this regard. **The test is, rather, the reaction of a reasonable [person] of [Plaintiff's] age, personality and social milieu, subject to such attendant influences on his judgment and mind as may be credibly discerned from the proofs.**

(internal citations omitted) (emphases added). Whether a driver had reasonable belief that they had permission to use a vehicle is traditionally an issue of fact that must be decided by the fact finder after a plenary hearing. See St. Paul Ins. Co. v. Rutgers Cas. Ins. Co., 232 N.J. Super. 582, 588-89 (App. Div. 1989) (remanding case to make findings of fact regarding drivers reasonable belief that they had permission to use the vehicle).

Here, it is undisputed that the exclusion used to deny coverage states unequivocally that it is governed by a "reasonable belief" standard. See Pa180, Pa199. Furthermore, the record is awash with evidence showing that Mr, Kirch would have had a reasonable belief that he was entitled to borrow the vehicle in question.

At the time of the accident, Ms. Doheny was married to Mr. Kirch's brother Sebastian, and the two brothers lived together "down the street" from Ms. Doheny. See Pa124, p. 11, ll. 11-25; Pa125, p. 15, ll. 5-14; Pa130, p. 35, ll. 12-15; Pa125, p. 15, l. 24 – p. 16, l. 9. Ms. Doheny would see Mr. Kirch when she dropped her children at the brothers' home. Pa125, p. 16, ll. 10-15. They had a friendly relationship and Mr. Kirch had ridden in her vehicle on multiple occasions prior to the accident because he did not have a car of his own. See Pa125, p. 16, ll. 16-20; Pa125, p. 17, ll. 5-20; Pa126, p. 18, ll. 11-21.

On the date of the accident, Ms. Doheny took her children with Sebastian Kirk to see him, and Mr. Kirk was there. See Pa126, p. 21, ll. 21-24; Pa126, p. 21, ll. 1-17. While the children were visiting with their father and uncle, she placed her keys on the counter between the living room and the kitchen, where they were accessible to Mr. Kirch. See Pa127, p. 22, ll. 11-17. Ms. Doheny then fell asleep. See id. During her nap, one of the children needed diapers, so Mr. Kirch took the car to get them. See Pa126, p. 20, ll. 16-23; Pa127, p. 25, ll. 4-7. He attempted to

call Ms. Doheny before borrowing the car but she was sleeping. See Pa142. **In his home country of Peru, it is permissible to borrow a car from a relative**, so he didn't think twice, since one of the children needed diapers. See id. He was not aware that borrowing a car from a family member without express permission could cause insurance issues. See id.

Even if the forgoing evidence was not sufficient to support a finding of implied permission (which the Allens contend it does), certainly these same circumstances would support a finding of Mr. Kirch's reasonable belief that he was entitled to borrow the vehicle. Here, the Motion court did not apply the "reasonable belief" standard, rather, it applied only the more stringent "implied permission standard. See Pa41-Pa71. In light of the language of the policy at issue, this constitutes a clear legal error that needs correction. As such, for this, and for the reasons previously provided in the Allens' initial brief, the January 9, 2025 Orders must be overturned.

POINT II:
The Allens are Contending that Mr. Kirch First had Implied Permission to Use the Vehicle *On the Date of the Accident*, and as such the Contention that He Did not Have Continuous Possession of the Car at the Time of the Accident is Both Factually Inaccurate and Irrelevant.
(RAISED BELOW: Pa104-Pa111; 1T, p. 6, l. 8- p. 18, l.2)

In their brief, NJM spends a considerable amount of time arguing that the Allens "conflated" the "initial permission" rule with the "implied permission" rule, and that the Allens couldn't demonstrate permission under either rule. See Db11-Db22. As stated in Argument Point I above, the policy at issue in this case only required showing a "reasonable belief", not actual or implied "permission." However, even if "permission" **was** the standard, the record would support finding implied permission. This brings us to NJM's arguments concerning "implied" vs. "initial" permission. While the Allens do not dispute that the "initial permission" rule and the "implied permission rules are separate concepts, the idea that these are not **interrelated** arguments is inaccurate. That is because when Courts look at whether initial permission was granted, they examine whether "the initial use of the vehicle is with the consent, express **or implied**, of the insured." French v. Hernandez, 184 N.J. 144, 152 (2005) (emphasis added). Beyond being legally inaccurate, this characterization of these two principals has caused NJM's counsel to misapprehend and/or misrepresent the nature of the Allens' argument.

To explain, NJM appears to be claiming that the Allens are claiming that Mr. Kirch had initial permission to use the vehicle from the first moment he encountered the vehicle, and as such, cannot satisfy the "initial permission" rule because he did not have continuous possession of the vehicle. See Db11-Db17. The problem is that this is not what the Allens have argued. Rather, the Allens have contended that the totality of the circumstances (including Mr. Kirch's prior contact with the car) showed that "Mr. Kirch had implied permission to use Ms. Doheny's vehicle **on the date of the accident**." Pb12-Pb14 (emphasis added). Under those circumstances, it cannot seriously be contended that Mr. Kirch did not have continuous possession of the vehicle from the time he initially took the vehicle until the time of the accident. See id.

In short, NJM relies upon a largely inaccurate and/or irrelevant "distinction" between the "initial permission" and "implied permission rule" to argue that the Allens have not established that Mr. Kirch had implied permission to use the vehicle on the date of the accident. The problem with this approach is that it results in examining each of the facts of the parties relationship **separately**, rather than **as a whole**, as required under the controlling law. See French, 184 N.J. at 154. As the Allens have previously argued, when the facts of the parties relationships are examined **as a whole**, they show that Mr. Kirch had implied permission to use Ms. Doheny's vehicle, or at a bare minimum, raised a material issue of fact as to

same. See Pb12-Pb14. In light of what, at a minimum, constitutes a material issue of fact, the Allens again request that their appeal be granted, and the January 9, 2025 orders be overturned.

CONCLUSION

For the reasons set forth at length above, and those previously set forth in their initial brief, the Allens respectfully request that the January 9, 2025 orders reversed in their entirety and this matter remanded for further appropriate proceedings.

DATE: September 8, 2025

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