NOT DESIGNATED FOR PUBLICATION

JAMES CONSTRUCTION GROUP	*	**NO. 2005-CA-0416**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
HERMAN CLIFTON, JESSIE SMITH, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	*	**STATE OF LOUISIANA**
	*	
	*	

* * * * * * *

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
HAROLD J. BECNEL, JR.	**NO. 2005-CA-0417**
VERSUS	
HERMAN CLIFTON, JESSIE SMITH, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, JAMES CONSTRUCTION GROUP, LLC, AND ABC INSURANCE COMPANY	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 2003-12133 C/W 2003-15252, DIVISION "H-12"
HONORABLE PIPER GRIFFIN, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF CHIEF JUDGE JOAN BERNARD ARMSTRONG, JUDGE PATRICIA RIVET MURRAY, AND JUDGE

MAX N. TOBIAS, JR.)

DONNA BRAMLETT WOOD
SUZANNE WRIGHT
MCCRANIE SISTRUCK ANZELMO HARDY MAXWELL & MCDANIEL
3445 NORTH CAUSEWAY BOULEVARD
SUITE 800
METAIRIE, LA 70002
COUNSEL FOR JAMES CONSTRUCTION GROUP

WM. RYAN ACOMB
CHAUNTIS T. JENKINS
PORTEOUS, HAINKEL & JOHNSON
704 CARONDELET STREET
NEW ORLEANS, LA 70130
COUNSEL FOR STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

AFFIRMED.

This is an appeal of a motion for summary judgment granted in favor of the defendant, State Farm Mutual Automobile Insurance Company ("State Farm"). For the following reasons, we affirm.

On 25 November 2002, a 2002 Ford truck, owned by Jesse Smith ("Smith") and driven by Herman Clifton ("Clifton"), was involved in an accident on the Pontchartrain Expressway in New Orleans, Louisiana. At the time of the accident, Angelo Iafrate Construction, LLC, now know as the James Construction Group ("James"), was involved in a construction project on the Pontchartrain Expressway. Harold Becnel ("Becnel"), an employee

of James, was seated in his work vehicle, allegedly within the designated construction zone, when the truck driven by Clifton struck him.

Two petitions for damages were filed in the Civil District Court for the Parish of Orleans in connection with this accident. In matter number 2003-12133 on the docket of the Civil District Court, James filed suit against Clifton, Smith, and State Farm (the insurer of Smith's truck). In case number 2003-15252 on the docket of the Civil District Court, Becnel filed suit against Clifton, Smith, State Farm, and James. On 26 April 2004, the trial court consolidated the matters.

On 4 November 2004, State Farm filed a motion for summary judgment on the basis that Clifton was not a permissive user of the 2002 Ford truck owned by Smith. In support of the motion for summary judgment, State Farm introduced the depositions of Smith and Smith's stepson, Leon Richmond ("Richmond"), and a copy of State Farm's insurance policy, which defines an "insured" as a person using the vehicle with the consent of the policyholder. Smith stated in his deposition that he loaned the truck to Richmond in Chicago to visit a friend in New Orleans, with the specific instruction that Richmond was not to let anyone else drive the truck. Richmond corroborated this fact in his deposition. Richmond further testified in his deposition that he met Clifton for the first time on the

date of the accident. After socializing with friends at the House of Blues, the group returned to the house where Richmond was staying with his friend Maria. Richmond testified that he left the truck keys on the kitchen counter and went to sleep. Sometime, thereafter, Clifton took the keys, drove the vehicle, and was involved in the accident. Richmond specifically stated that he never gave Clifton permission to use the truck. Richmond also stated that he never reported the truck stolen because he did not learn that the truck was missing until after he was notified of the accident.

In opposition to the summary judgment, and in support of its argument that Clifton had permission to use the truck, James introduced a copy of the accident report. It is the position of James that because the vehicle was never reported stolen or missing, Clifton must have been a permissive user. Moreover, James argued that because Richmond left the keys out in the open at a party and placed no restrictions on the vehicle's use, there is a question of material fact as to whether Clifton was a permissive user. For the following reasons, we reject this argument.

The summary judgment procedure is favored in Louisiana and designed to secure the just, speedy, and inexpensive determination of every action and shall be construed to accomplish these ends. La. C.C.P. art. 966A (2). This court reviews grants of summary judgment *de novo* using the same

standard applied by the trial court in deciding the motion for summary judgment. *Schmidt v. Chevez,* 00-2456, p. 4 (La. App. 4 Cir. 1/10/01), 778 So. 2d 668, 670. According to this standard, a summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B.

The party seeking the summary judgment has the burden of affirmatively showing the absence of a genuine issue of material fact. *Allen v. Integrated Health Services, Inc*., 32,196, p. 3 (La. App. 2 Cir. 9/22/99), 743 So. 2d 804, 806. A fact is "material" if its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. *Schmidt, supra,* citing *Moyles v. Cruz*, 96-0307, p. 3 (La. App. 4 Cir. 10/16/96), 682 So.2d 326, 328. Simply stated, a "material" fact is "one that would matter on the trial on the merits." *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751. The opponent to a properly supported motion for summary judgment may not rest on the mere allegations or denials of his or her pleadings but must respond with affidavits, evidence, or as otherwise provided by law setting forth specific facts showing that a genuine issue of material fact exists for

trial. *Coates v. Anco Insulations, Inc.*, 00-1331, p. 5 (La. App. 4 Cir. 3/21/01), 786 So. 2d 749, 753.

DISCUSSION:

In granting State Farm's motion for summary judgment, the trial court determined that Clifton did not qualify as a permissive user of Smith's truck and, therefore, was not insured under the omnibus clause of State Farm's insurance policy. In *Mercadel v. Tran*, 92-0798, p. 3 (La. App. 4 Cir. 3/29/94), 635 So.2d 438, 440, this court discussed the omnibus law as follows:

> An omnibus clause is a clause in an automobile insurance policy which extends the term "insured" to include the named insured and also includes any other person while using the vehicle provided the actual use of the vehicle is by the named insured or with his permission or consent. *George J. Couch, Couch Cyclopedia of Insurance Law 2d.*, vol. 12 at 616 (1981). The purpose of the clause is to protect the named insured, the persons covered under the clause, i.e. permittees and the public generally. *Id*. at 618. It is designed to extend liability insurance coverage to persons, other than the insured, who have the insured's permission to use the vehicle. Therefore permission, either express or implied, is a fact that must be proven for coverage to attach under an omnibus clause.

The burden of proof is on the plaintiff to establish every fact essential to his or her claim and that his her claim is within the insurance policy coverage. *Id*. The question of permission must be proved by a

preponderance of the evidence without the aid of any presumptions. *Manzella v. Doe*, 94-2854, p. 5 (La. 12/8/95), 664 So.2d 398, 402; *Norton v. Lewis*, 623 So.2d 874, 876 (La. 1993). 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." *Manzella*, quoting *Francois v. Ybarzabal*, 483 So.2d 602, 605 (La. 1986). 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 v. Sizemore*, 493 So.2d 620, 623 (La. 1986).

In the present case, Smith's testimony was uncontradicted that he specifically prohibited Richmond from letting anyone else drive his truck. Richmond's testimony was also uncontradicted that he did not give Clifton express or implied permission to drive the truck on the night of the accident. As previously discussed, the uncontradicted evidence is that Richmond left the keys on the kitchen counter and went to bed. Clifton took the keys and drove the vehicle without speaking to Richmond. No consent, actual or implied, was given for Clifton to use the truck that night or on any previous occasion.

The record is devoid of evidence that James presented any

countervailing evidence to support its contention that Clifton had permission to drive Smith's truck. Because James did not satisfy its evidentiary burden, no genuine issue of material fact remained. Accordingly, we conclude that the trial court properly granted State Farm's motion for summary judgment.

CONCLUSION:

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.