

**LETHA H. DUNCAN, WIFE
OF/AND LAWRENCE E.
DUNCAN**

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NO. 2008-CA-0728

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

JADE SERVICES LIMITED

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STATE OF LOUISIANA

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BELSOME, J. DISSENTS WITH REASONS.

The majority’s opinion circumvents the issue of conflicting testimony regarding the duty to warn allegations by focusing solely on the conclusion that Appellants failed to establish a pre-existing defect. As the majority readily acknowledges, a genuine dispute exists regarding whether or not Donald Browning advised Howard Rose that USG planned to use a forklift to lift and carry the bags of lime inside the shipping containers. Conflicting testimony can present a genuine issue of material fact if it is related to a plaintiff’s theory of recovery. See *Windham v. Murray*, 2006-1275, p. 7-8, (La.App. 4 Cir. 5/30/07) 960 So.2d 328, 333 (conflicting testimony regarding owner’s factual knowledge of dog’s presence on property and/or violent propensity precluded summary judgment).¹ This writer would find that the question of fact presented to defeat summary judgment is sufficient under these facts and circumstances, as the conflict in testimony between

¹ In *Windham*, this Court also noted the following with respect to genuine issues of material fact:

The Louisiana Supreme court recently set out guidelines for determining the existence of a genuine issue of material fact in two cases. In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony or weigh evidence. A fact is “material” if it is one that would matter at trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits. *Suire v. Lafayette City-Parish Consol. Govt.*, 04-1459, p. 11 (La.4/12/05), 907 So.2d 37, 48. A “genuine issue” is a “triable issue,” that is, an issue on which reasonable persons could disagree. *Jones v. Estate of Santiago*, 03-1424, p. 6 (La.4/14/04), 870 So.2d 1002, 1006. In determining whether an issue is “genuine,” courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence.

Windham v. Murray, 960 So.2d at 330-331.

Mr. Browning and Mr. Rose is relevant to Appellants' theory that Appellees had a duty to warn USG against using the forklifts inside the containers. Whether Appellants can ultimately prevail on this theory is another matter. Therefore, I respectfully dissent.