NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2055

LAVON SMITH

VERSUS

JOHNDRICK FRANKLIN AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: May 6, 2011

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 577,284

Honorable Todd Hernandez, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

JJP Pettigrew, J. Concurs

HIGGINBOTHAM, J.

The plaintiff-appellant, Ms. Lavon Smith, appeals from a judgment in favor of the defendants-appellees, State Farm Mutual Automobile Insurance Company (State Farm) and Mr. Johndrick Franklin. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On April 28, 2008, Ms. Lavon Smith was walking back to her job at Gerry Lane Car dealership. As Ms. Smith was crossing Florida Boulevard near North Foster Drive, she was struck by a vehicle. The vehicle did not stop. Ms. Tammy Maake, Ms. Smith's co-worker, who was parked in a vehicle on Florida Boulevard, witnessed the accident. Ms. Maake followed the vehicle that hit Ms. Smith and obtained the license plate number. The day of the accident, the police were given the license plate number that tracked a 2008 Toyota Camry to Mr. Johndrick Franklin. Mr. Franklin was at work during the date and time of the accident. Ms. Andrea Franklin, Mr. Franklin's wife, was the primary driver of the 2008 Toyota Camry. Mr. and Ms. Franklin were both insured under the State Farm insurance policy. Ms. Smith filed the instant suit in the 19th judicial district court against defendants, Johndrick Franklin and his insurer, State Farm, seeking damages for her injuries. The matter proceeded to a bench trial, after which the trial court rendered judgment in favor of defendants, Mr. Franklin and State Farm, and dismissed the claims of Ms. Smith with prejudice. The trial court noted that Ms. Smith failed to prove that Mr. Franklin was in fact the operator of the vehicle that struck her.

It is from this judgment that Ms. Smith has appealed. In her first assignment of error, Ms. Smith contends that the trial court erred in failing to rule on whether defendant's vehicle was involved in the accident. In assignment of error number two, Ms. Smith challenges the trial court's failure to rule on whether a permissive driver of defendant's vehicle was involved in the accident. In the third and fourth

assignments of error, Ms. Smith alleges the trial court failed to rule on whether State Farm's policy covered the accident, and to award a sum for medical expenses and general damages.

LAW AND ANALYSIS

In order for State Farm to be liable there must be legal liability on the part of its insured. See **Descant v. Administrators of Tulane Educational Fund**, 93-3098 (La. 7/5/94), 639 So.2d 246, 249. Therefore, to find State Farm liable the trial court would have to determine both that the 2008 Toyota Camry owned by Mr. Franklin was the vehicle that hit Ms. Smith and that a permissive driver under the insurance policy was driving that vehicle. Thus, we will consider the first and second assignments of error together.

The trial court found, and Ms. Smith conceded, that the suit should be dismissed as to Mr. Franklin because Ms. Smith failed to meet her evidentiary burden against him. Because this factual finding is not in dispute the doctrine of manifest error has no application in our review of the trial court's decision. **Maryland Cas. Co. v. Dixie Ins. Co.**, 622 So.2d 698, 701 (La. App. 1st Cir.), writ denied, 629 So.2d 1138 (La. 1993). Thus, we must consider whether the trial court came to an improper legal determination under the undisputed facts of this case. **Id.** Ms. Smith argues that it is a question of law whether her petition sufficiently alleged that the Franklin vehicle and/or a permissive driver was involved in the accident. Appellate review of questions of law is simply to determine whether the trial court was legally correct or legally incorrect. **O'Niell v. Louisiana Power & Light Co.**, 558 So.2d 1235, 1238 (La. App. 1st Cir. 1990).

Louisiana Code of Civil Procedure article 891 provides, that the petition "shall set forth the **name**, surname and domicile of the parties." (Emphasis added.) The named defendants in this suit include Mr. Franklin and State Farm. The petition alleges negligence only on the part of Mr. Franklin; it was never amended

to include another possible defendant or cause of action. Therefore, the petition on its face did not raise the issue of a permissive driver.

Ms. Smith contends that because Louisiana is a fact pleading state, her petition and the evidence presented was sufficient to render judgment against State Farm. A final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contains no prayer for general and equitable relief. LSA-C.C.P. art. 862. Nevertheless, Article 862 does not confer jurisdiction on a trial court to decide issues that the litigants have not raised. The trial court may only grant relief warranted by the arguments contained in the pleadings and the evidence. **Wilson v. Wilson**, 30,445 (La. App. 2nd Cir. 4/9/98), 714 So.2d 35, 43. Due process requires adequate notice to the parties of the matters that will be adjudicated. **Glover v. Medical Center of Baton Rouge**, 97-1710 (La. App. 1st Cir. 6/29/98), 713 So. 2d 1261, 1262.

Louisiana Code of Civil Procedure article 1154 provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading." If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended. LSA-C.C.P. art. 1154. However, Article 1154 does not contemplate the *adding* of an issue not pleaded, but rather allows the pleading of material facts for an issue pleaded only generally or as a legal conclusion. A timely objection to an attempt to enlarge the pleadings, coupled with the failure to move for an amendment to the pleadings, is fatal to an issue not raised by the pleadings. **Barker v. Loxco, Inc.**, 432 So.2d 975, 976 (La. App. 1st Cir. 1983); **Gar Real Estate & Ins. Agency v. Mitchell**, 380 So.2d 108, 109 (La. App. 1st Cir. 1979).

For introduction of evidence to automatically enlarge the pleadings under Article 1154, the evidence admitted must **not** be pertinent to any other issue raised by the pleadings. If the evidence was admissible for any other purpose, it cannot enlarge the pleadings without the express consent of the opposing party. **Snearl v. Mercer**, 99-1738 (La. App. 1st Cir. 2/16/01), 780 So.2d 563, 572, writs denied, 01-1319, & 01-1320 (La. 6/22/01), 794 So.2d 800, 801; **Bourque v. Koury**, 95-286 (La. App. 3rd Cir. 11/2/95), 664 So.2d 553, 556. When a particular claim has not been alleged, even if evidence supporting that claim is admitted without objection, if that evidence has relevance to another issue, it cannot be said to have enlarged the pleadings to allow the court to rule on such a claim. See **Harris v. Cola**, 98-0175 (La. App. 1st Cir. 5/14/99), 732 So.2d 822, 825; **Boudreaux v. Terrebonne Parish Police Jury**, 477 So.2d 1235, 1240 (La. App. 1st Cir. 1985), writ denied, 481 So.2d 133 (La. 1986).

During trial, the attorney for State Farm objected to any questioning regarding a permissive user as irrelevant because the petition named only Mr. Franklin. The trial court noted the objection, but overruled it. Ms. Smith's attorney never requested nor was it granted that the pleading be amended to include a permissive driver. In the final judgment, the trial court clearly did not consider the issue of a permissive driver. We cannot find that the evidence regarding Ms. Franklin driving the vehicle was not relevant to the issue of Mr. Franklin's negligence. Therefore, her testimony was not sufficient to enlarge the pleadings to include the possibility of a permissive driver.

The trial court was legally correct in not ruling on the issue of whether the defendant's vehicle was involved in the accident or whether a permissive driver of the defendant's 2008 Toyota Camry was involved in the accident because those issues were not properly brought before it. To do so would have been an

impermissible judgment beyond the pleadings. **Domingue v. Bodin**, 08-62 (La. App. 3rd Cir. 11/5/08), 996 So.2d 654, 657.

Further, the parties agree that any claim against Mr. Franklin should be dismissed, therefore, resulting in a suit against State Farm alone. Louisiana Revised Statutes 22:1269B[1] provides the limited circumstances when it is proper to file direct actions against the insurer alone. There was no evidence to suggest Ms. Andrea Franklin fit in any of the categories in the statute. Therefore, a suit directly against State Farm would be improper because none of the enumerated circumstances exist. Ms. Smith's first and second assignments of error are without merit.

Because, we find no merit to Ms. Smith's first two assignments of error, we need not address her remaining assignments of error.

CONCLUSION

For the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against plaintiff-appellant, Ms. Lavon Smith.

AFFIRMED

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[1]Louisiana Revised Statutes 22:1269B provides as follows:

(1) The injured person or his survivors or heirs mentioned in Subsection A of this Section, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42 only; however, such action may be brought against the insurer alone **only when at least one of the following applies**:

(a) The insured has been adjudged bankrupt by a court of competent jurisdiction or when proceedings to adjudge an insured bankrupt have been commenced before a court of competent jurisdiction.

(b) The insured is insolvent.

(c) Service of citation or other process cannot be made on the insured.

(d) When the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons.

(e) When the insurer is an uninsured motorist carrier.

(f) The insured is deceased.

(Emphasis added)