NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1377

RICHARD COLLINS

VERSUS

US AGENCIES CASUALTY INSURANCE COMPANY, RICHARD CAVIN, AND BRIDGET HELTON[1]

Judgment Rendered: February 12, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 549,799

Honorable R. Michael Caldwell, Judge

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

[1] Although "Bridget Helton" was originally named as a defendant, the petition was later amended to designate this defendant as "Bridget Jumonville."

HUGHES, J.

This is an appeal from a summary judgment dismissing an insurer from a suit arising out of an automobile accident, on the basis of a lack of permission for use of the vehicle by the tortfeasor. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On November 24, 2005 Richard Cavin, while driving a vehicle owned by Bridget Jumonville, was involved in an accident with a vehicle driven by Richard Collins. On November 27, 2006 Mr. Collins filed the instant suit for damages, which he allegedly sustained in the accident. Named as defendants were: Mr. Cavin, Ms. Jumonville, and Ms. Jumonville's motor vehicle insurer, U.S. Agencies Casualty Insurance Company (U.S. Agencies).

U.S. Agencies subsequently filed a motion for summary judgment, contending that because Mr. Cavin did not have permission from Ms. Jumonville to drive her vehicle, there was no coverage under the motor vehicle liability insurance policy it provided to her. After a September 15, 2008 hearing on the motion, the district court granted the motion and dismissed the suit against U.S. Agencies. This appeal by Mr. Collins followed.[2]

LAW AND ANALYSIS

Motion for Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those

[2] Prior to filing this appeal, Mr. Collins applied to this court for supervisory review. Mr. Collins' application was denied by this court on April 3, 2009, upon a ruling that the summary judgment was a final, appealable judgment. See **Collins v. U.S. Agencies Casualty Insurance Company**, 2008 CW 2386 (La. App. 1 Cir. 4/3/09) (unpublished).

disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover 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 mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern a district court's consideration of whether summary judgment is appropriate. **Samaha v. Rau**, 2007-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30.

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.**, 2004-0806 at p. 1, 876 So.2d at 765-66.

On motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof

on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. LSA-C.C.P. art. 966(C)(2).

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in LSA-C.C.P. art. 967, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B). See also **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107, p. 9 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 79-80; **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-39.

Omnibus Clause Coverage

Every owner's or operator's "Motor Vehicle Liability Policy" is required by LSA-R.S. 32:900, except as otherwise provided, to insure the person named therein *and any other person*, as insured, "using any such motor vehicle or motor vehicles ***with the express or implied permission*** of such named insured," against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle. (Emphasis added.) This type of policy provision is referred to as an "omnibus clause." See **Manzella v. Doe**, 94-2854 (La. 12/8/95), 664 So.2d 398, 401.

In **Manzella v. Doe**, 664 So.2d at 402, the supreme court reiterated prior jurisprudence holding that a plaintiff has the burden of proving the fact of initial use with express or implied permission of the insured to make coverage effective under an omnibus clause (citing **Francois v. Ybarzabal**, 483 So.2d 602, 605 (La. 1986) and **Perkins v. McDow**, 615 So.2d 312 (La. 1993)). Moreover, the supreme court stated that the fact of initial permission must be proved by a preponderance of the evidence without the aid of any presumptions. **Id.** Further, the supreme court stated that implied permission generally "arises from a course of conduct by the named insured involving acquiescence in, or lack of objection to, the use of the vehicle." **Id.**

In the instant case, the only evidence presented on motion for summary judgment was the deposition testimony of Bridget Jumonville. Ms. Jumonville testified that on the date in question, Richard Cavin was her boyfriend, and that they had been dating approximately two to three months. Mr. Cavin was visiting Ms. Jumonville at her home on the day of the accident, and after having an argument with him, Ms. Jumonville noticed her

car keys were missing. Ms. Jumonville testified that Mr. Cavin took her keys and car without her permission. Ms. Jumonville further testified that Mr. Cavin had never driven her car before and had never asked for permission to drive the car. Ms. Jumonville testified that she never allowed anyone to drive her car. Ms. Jumonville stated that after the accident, she did not continue to date Mr. Cavin.

The plaintiff in this case had the burden of proving that Mr. Cavin had Ms. Jumonville's permission to drive her car in order for Mr. Cavin to have been covered under the omnibus clause of Ms. Jumonville's motor vehicle insurance policy. The evidence presented in this case established that Mr. Cavin did not in fact have permission to drive Ms. Jumonville's car; no evidence to the contrary was produced by the plaintiff/appellant. Therefore, we conclude that the U.S. Agencies policy did not provide coverage for the accident at issue herein and that U.S. Agencies was entitled to summary judgment dismissing it from the case.[3]

CONCLUSION

For the reasons assigned, we affirm the summary judgment granted by the district court in favor of U.S. Agencies Casualty Insurance Company, Inc., dismissing it from the suit. All costs of this appeal are to be borne by plaintiff/appellant Richard Collins.

AFFIRMED.

[3] We note that we find no support for the plaintiff/appellant's position in the cases cited in brief on appeal, as these cases dealt with instances in which the tortfeasor had previously, on other occasions, obtained permission for use of the insured's vehicle.