

NOV 26 2002

NOT DESIGNATED FOR PUBLICATION

SHIMEKO STOKES

NO. 02-CA-609

VERSUS

FIFTH CIRCUIT

ALLSTATE INSURANCE COMPANY AND
TERRICK HARDEN

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 540-358, DIVISION "E"
HONORABLE GREG GERARD GUIDRY, JUDGE PRESIDING

NOVEMBER 26, 2002

**WALTER J. ROTHSCHILD
JUDGE**

Panel composed of Judges James L. Cannella, Susan M. Chehardy
and Walter J. Rothschild

JAMES MINGE

BERIT C. HANNA

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DEFENDANT/APPELLEE

AFFIRMED

WAR
JSC
SMC

In this automobile accident case, the trial court rendered summary judgment in favor of defendant Ford Motor Company. Plaintiff now appeals. For reasons stated herein, we affirm the trial court's judgment.

Plaintiff, Shimeko Stokes, filed the instant petition for damages on June 11, 1999 on the basis of injuries she received in a single-vehicle accident that occurred on March 18, 1999. At the time of the accident, plaintiff was a passenger in a 1998 Ford Explorer owned by Randolph Eldridge and operated by Terrick Harden. The accident occurred as Harden attempted to make a left turn onto 9th Street in Kenner and the vehicle traveled into the gravel shoulder where it skidded and rolled over as it traveled back onto the asphalt roadway. In her original petition, plaintiff named as defendant Terrick Harden and Allstate Insurance Company. Plaintiff subsequently amended her petition to include as defendants the owner of the vehicle, Randolph Eldridge, and Ford Motor Company, the manufacturer of the vehicle involved in this accident.

In the amending petition plaintiff alleged that Ford was liable pursuant to the Louisiana Products Liability Act, La. R.S. 9:2800.51, et seq., in that a characteristic of the Ford Explorer was unreasonably dangerous, namely, it had a propensity to roll over. Ford answered this petition with a general denial of the

allegations, and further averred that the sole cause of the accident and resulting injuries was the negligence of the driver of the vehicle and of plaintiff herself.

Thereafter, Ford brought a motion for summary judgment on the basis that plaintiff lacked evidence to establish the essential elements of her products liability claim. In support of this motion, defendant submitted copies of depositions of the investigating officer and an eyewitness to the accident, as well as the deposition of the plaintiff. Defendant also submitted the affidavit of James Mason, a design analysis engineer for Ford, who stated that the vehicle involved in this case was not defective and that the accident was caused by the actions of the driver which were not reasonably anticipated by Ford.

Plaintiff opposed this motion and submitted the affidavit of a proposed expert, Robert Lipp, who opined that the accident was caused in this case by a defect in the tires on the Ford Explorer, rather than solely by the actions of the driver of the vehicle. Following a hearing, the trial court granted Ford's motion for summary judgment on November 6, 2001, dismissing plaintiff's claims against Ford. The trial court assigned no reasons for judgment. Plaintiff filed a motion for new trial, which was denied. This appeal followed.

In this appeal, plaintiff argues that the affidavit of Robert Lipp presents genuine issues of material fact regarding the cause of the accident and is sufficient to defeat summary judgment. Plaintiff argues that the trial court's summary judgment was therefore erroneous.

Summary judgments are reviewed on appeal de novo. Smith v. Our Lady of the Lake Hosp., 639 So.2d 730, 750 (La.1994); Moody v. United Nat'l Ins. Co., 98-287 (La.App. 5 Cir. 9/29/98), 743 So.2d 680, writ denied, 98-2713 (La. 12/18/98), 734 So.2d 678.

An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any

genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. Smith, supra; Magnon v. Collins, 98-2822 (La.7/7/99), 739 So.2d 191.

The rules governing summary judgments are found in La.C.C.P. art. 966 and 967. A motion for summary judgment shall only 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 966(B).

Although summary judgment is favored, the burden of proof nonetheless remains with the movant. If the movant will not bear the burden of proof at trial on the matter before the court on motion for summary judgment, however, then the movant may merely point out to the court that there is an absence of factual support for one or more elements essential to the plaintiff’s claim. The burden then shifts to the non-moving party to present evidence demonstrating that genuine issues of material fact remain. La. C.C.P. art. 966C(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the adverse party to produce evidence of a material factual dispute mandates the granting of the motion. Foster v. Consolidated Empl. Sys., Inc., 98-948 (La.App. 5 Cir. 1/26/99), 726 So.2d 494, writ denied, 99-0523 (La. 4/30/99), 741 So.2d 14.

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La.C.C.P. art. 967; Townley v. City of Iowa, 97-493 (La.App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

La.C.C.P. art. 967 provides that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to

the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Article 967 does not preclude from consideration expert opinion testimony in the form of an affidavit or deposition submitted in support of or opposition to a motion for summary judgment. Assuming no credibility determination is at issue, the trial judge must consider this evidence if he or she determines that such evidence would be admissible at trial. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, (La. 2/29/00), 755 So.2d 226, 237. However, in order to be considered on a motion for summary judgment, the affidavit of the expert must include a statement of his qualifications and a sufficient basis for reaching his conclusion. See, Prince v. K-Mart Corp., 01-1151 (La. App. 5 Cir. 3/26/02), 815 So.2d 245, 248.

In the present case, appellant contends that the affidavit of Robert Lipp creates issues of material fact which preclude summary judgment in this matter. Plaintiff's claims against Ford Motor Company are based on the provisions of the Louisiana Products Liability Act, La. R.S. 9:2800.51, et seq. La. R.S. 9:2800.54 provides that the manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

Plaintiff relies on the provisions of La. R.S. 9:2800.56, which provides as follows:

A product is unreasonably dangerous in design, if, at the time the product left its manufacturer's control:

- (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
- (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design

and the adverse effect, if any of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide adequate warning to users and handlers of the product.

In its motion for summary judgment, Ford submitted that there is an absence of factual support for plaintiff's allegations of a design defect in the tires on the vehicle involved in this accident. In support of this motion, defendant submitted the affidavit of James Mason, a Ford Design Analysis Engineer, who is charged with the responsibility of providing technical support and analysis regarding vehicle performance in accidents. The affidavit listed the affiant's educational and professional background, and further stated that the affiant was familiar with the design characteristics of the 1998 Ford Explorer. The affiant stated that based on his education, training and experience, the Ford Explorer involved in this accident was not defective and that the accident was caused by actions of the driver.

The burden then shifted to plaintiff to present evidence demonstrating that material issues of material fact remain as to whether the Ford vehicle in this case was defective. To meet this burden, plaintiff submitted the affidavit of Robert Lipp, who concluded that the vehicle rolled over in this case because the impact with the pavement caused the right rear tire to deflate. Mr. Lipp also opined that deflation should not have occurred.

However, a review of Mr. Lipp's affidavit indicates that it fails to include a statement of his qualifications which renders him capable of rendering an opinion in this case. The affidavit fails to contain a statement as to how the affiant obtained knowledge, skill, experience, training or education to reach a conclusion concerning the causation of this vehicular accident. In order to reach of the level

of authority to give opinion testimony, a proposed expert must first be qualified to render such an opinion. La. C.E. Art. 702.

In fact, in Mr. Lipp's affidavit, there is no affirmative showing that affiant was competent to testify on matters of motor vehicle design or accident reconstruction or to render the opinion on causation stated therein. Although Mr. Lipp's resume was attached to the affidavit, this document does not indicate how Mr. Lipp is qualified to render an opinion about motor vehicle design or tire characteristics or any other element of proof that plaintiff was required to demonstrate under the products liability act.

In Prince v. K-Mart Corp., 01-1151 (La. App. 5 Cir. 3/26/02), 815 So.2d 245, 248, this Court held that the trial judge did not err in disregarding an expert's opinion because his affidavit did not state his qualifications and failed to include a methodology for reaching the conclusion. Likewise, in the present case, we find that the affidavit presented by plaintiff is insufficient to satisfy plaintiff's burden of proof that the Ford Explorer involved in this accident was defective. Accordingly, summary judgment is appropriate in this case.

For the reasons assigned herein, the judgment of the trial court granting the summary judgment of Ford Motor Company and dismissing plaintiff's claims against them is hereby affirmed. Costs of this appeal are to be paid by plaintiff.

AFFIRMED



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

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JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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CERTIFICATE

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