

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0581

JONATHAN A. JAMES

VERSUS

**DHL EXPRESS (USA), INC., DANIEL E. THOMS
AND SCOTTSDALE INSURANCE COMPANY**

Judgment Rendered: October 29, 2010

On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
Docket No. 558,774

Honorable Janice Clark, Judge Presiding

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Jonathan A. James

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DHL Express (USA), Inc. and
Scottsdale Insurance Company

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Parro, J., concurs.

HUGHES, J.

This is an appeal from a summary judgment dismissing an action for personal injuries arising out of a vehicular accident. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 5, 2006, at approximately 5:05 p.m., Jonathan A. James was operating his 2002 Harley Davidson motorcycle near the intersection of Siegen Lane and Industriplex Boulevard in Baton Rouge, Louisiana, when he was involved in a collision with a 2003 Ford E-250 delivery van driven by Daniel E. Thoms. Immediately before the accident, Mr. James was attempting to maneuver his motorcycle from the driveway of a Shell station, located on the western side of Siegen Lane, across all seven lanes of travel on Siegen Lane, to reach Siegen's northbound turn lane, located on the eastern side of Siegen Lane, in order to make a right turn onto Industriplex Boulevard. Upon entering his turn into Siegen Lane's northbound turn lane, Mr. James' motorcycle was broadsided by Mr. Thoms' delivery van. Prior to the accident, Mr. Thoms had completed his day of deliveries for his employer, DHL Express (USA), Inc. ("DHL"), was returning to the office, and had moved into Siegen Lane's northbound turn lane in anticipation of turning right onto Industriplex Boulevard. As a result of the accident, Mr. James claims to have suffered both personal injuries and property damages.

On August 30, 2007 Mr. James filed suit for damages against Mr. Thoms, DHL, and Scottsdale Insurance Company ("Scottsdale"), urging the fault of Mr. Thoms in causing the accident. Mr. James also alleged that at the time of the accident, Mr. Thoms was acting in the course and scope of his employment with DHL, who was therefore asserted to be vicariously liable for Mr. Thoms' negligence. Also, Scottsdale was alleged to have issued an insurance policy,

naming DHL as an insured, which provided liability coverage to both DHL and Mr. Thoms.

All defendants filed answers in this suit denying the fault of Mr. Thoms.¹ DHL and Scottsdale filed a motion for summary judgment contending that the accident in question was due solely to the fault of Mr. James and that he was without any evidence that Mr. Thoms had acted negligently or caused the accident.

Following a hearing on October 26, 2009, the trial court granted DHL and Scottsdale's motion for summary judgment and dismissed Mr. James' suit as to those defendants; judgment was signed on February 11, 2010. Mr. James has appealed this judgment, contending that summary judgment was inappropriate in this case, as issues of fact remain as to whether the following alleged actions of Mr. Thoms were substantial factors in bringing about the accident: whether Mr. Thoms abruptly accelerated and/or abruptly entered into the turn lane just before impact with the plaintiff; whether Mr. Thoms kept a proper lookout; whether Mr. Thoms was traveling at an excessive rate of speed for the conditions, in violation of LSA-R.S. 32:64(A); whether Mr. Thoms' alleged negligence contributed to any "sudden emergency;" and whether Mr. Thoms had the last clear chance to avoid the accident. In support of the trial court judgment in their favor, the defendants/appellees contend on appeal that Mr. Thoms was lawfully operating his vehicle at the time of the accident, while Mr. James "entered into a lane of travel that was occupied without giving fair notice and in violation of multiple Rules of the Road."

¹ Mr. Thoms' answer was filed after summary judgment was rendered in favor of DHL and Scottsdale.

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 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. See 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.

Louisiana Traffic Regulations

Louisiana Revised Statute 32:124 provides: "The driver of a vehicle about to enter or cross a highway from a . . . driveway . . . shall yield the right of way to all approaching vehicles so close as to constitute an immediate hazard."

In interpreting this statute, our courts have repeatedly held that a driver entering a highway from a private driveway has a *primary or high duty* to avoid a collision. This duty becomes more onerous as the hazards increase and requires a motorist to use every reasonable means available to ascertain that his entry onto the highway may be made in safety. Further, such a driver is required to keep a lookout for vehicles upon the highway and to desist from entering until it is apparent to a reasonably prudent person that such can be done in safety. **Wells v. Allstate Insurance Company**, 510 So.2d 763, 767 (La. App. 1 Cir.), writ denied, 514 So.2d 463 (La. 1987).

Conversely, the driver on the favored street generally may rely on the assumption or presumption that those vehicles entering the roadway from less favored positions, such as a private drive, will not drive into the path of favored traffic and is not required to look out for or search in anticipation of careless drivers who might enter his right of way from a private driveway in violation of the statute. See Battaglia v. Texas Farmers Insurance Company, 98-2607, p. 3 (La. App. 4 Cir. 3/31/99), 732 So.2d 119, 121, writ denied, 99-1579 (La. 9/17/99), 747 So.2d 564.

Nevertheless, a lawfully proceeding driver on the favored highway is under a *duty of ordinary care* to the intruding vehicle to avoid an impending accident only in those circumstances where speed, control, time, and distance afford him a reasonable opportunity to do so; the burden of proving those circumstances is upon the intruding driver. See Silvio v. Rogers, 580 So.2d 434, 436-37 (La. App. 2 Cir. 1991).

Further, we note that LSA-R.S. 32:79 provides, in pertinent part: “Whenever any roadway has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”

Application of Law to Facts

In the instant case, Mr. James testified by deposition that the accident occurred on Tuesday, September 5, 2006, at approximately 5:05 p.m., and that the preceding Monday was Labor Day. Mr. James admitted that over the Labor Day weekend he had consumed drugs and alcohol. On the day of the accident, Mr. James further stated that he had driven his motorcycle to Siegen Lane, accompanied by a passenger, Alexandra Jimenez. Mr. James admitted that he dropped Ms. Jimenez off at the Shell station because he was en route to meet a man on Honore Lane who was going to “hook [him] up” with drugs.

Mr. James left the Shell station parking lot through the driveway exiting onto Siegen Lane and drove across the three southbound lanes leading toward I-10 and the center turning lane, which he said were free of traffic. Then, Mr. James proceeded to navigate his motorcycle through the three northbound lanes leading toward Airline Highway, which were “jammed” with “bumper to bumper” stopped traffic, waiting to proceed through the traffic signal at Siegen’s intersection with Industriplex Boulevard. Mr. James drove his motorcycle “straight across” the northbound lanes between the stopped cars. He intended to pull into the outside turn lane, turn left in that lane and proceed north about 100 to 150 feet to the Industriplex Boulevard intersection, turn right onto Industriplex Boulevard, and make another right onto a side street that connects to Honore Lane. Mr. James denied that he had intended to turn directly onto Honore Lane at its intersection with Siegen Lane, because he said he would have had to “cut across traffic at an

angle, . . . going the wrong way in the turn lane, to get to the mouth of Honore Lane.” When Mr. James began to enter the turn lane, he did not see any vehicles in it, but a split second before the accident he saw the van driven by Mr. Thoms accelerating toward him. Mr. James believed the stopped traffic in the northbound lanes would have no trouble seeing him because his motorcycle was “a big bright LSU purple Harley.”

Mr. Thoms testified in his deposition that before the accident he had exited I-10 onto Siegen Lane, northbound, and that as he approached the Siegen/Industriplex intersection, he moved into the easternmost or outside turn lane. Mr. Thoms further stated that Mr. James’ motorcycle suddenly appeared in the turn lane, emerging from between the stopped cars in the adjoining lanes, and that “by the time I saw him . . . I was already on him . . . [and it] was too late to do anything but slam on the brakes.” Mr. Thoms stated that he could not previously see Mr. James between the stopped cars, because Mr. James was “reclined” on his motorcycle, which was low to the ground. Further, Mr. Thoms stated that Mr. James was “looking straight forward” and not checking for traffic. Mr. Thoms estimated that he was traveling about thirty-five miles per hour and that Mr. James was going between fifteen to twenty miles per hour at the time of the accident. According to Mr. Thoms, the accident occurred near the intersection of Siegen Lane and Honore Lane. Mr. James denied that the accident took place “directly in front of Honore Lane,” but was “further down.”

Having closely examined the evidence presented on motion for summary judgment, we conclude that the defendants satisfied their burden to show that Mr. Thoms was driving his vehicle in a lawful manner and did not contribute to the cause of the instant accident. Rather, the accident was caused solely by the actions of Mr. James in proceeding across Siegen Lane through heavy traffic in violation of both LSA-R.S. 32:79 and LSA-R.S. 32:124, and in entering a turn lane from

between stopped cars, when a reasonably prudent person would have recognized that such a maneuver could not be done in safety.

Since the defendants established that there was an absence of factual support for one or more elements essential to the Mr. James' action (i.e. that Mr. Thoms was negligent), it was then necessary, in order for Mr. James' action to remain viable, that he produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. We cannot find that Mr. James sustained this burden.

When Mr. James was asked by counsel, during his deposition, if he had any idea the impact was going to occur before it happened, Mr. James responded by snapping his fingers. Counsel then asked Mr. James whether his response was a "yes" or a "no." Mr. James indicated that the accident took place in a "split second," and further stated:

When I began my maneuver between the cars, the turn lane was absolutely empty. There was no one coming down the turn lane. And in the time it took me to come out from behind that last car, the truck was right there, I mean literally right there.

* * *

. . . I mean I was lucky to have seen the vehicle a split second before impact. And I started to get my leg up off the ground, but didn't - -

Mr. James further acknowledged that there were "[h]undreds" of cars in the three northbound lanes that he traversed before entering the turn lane, and that Siegen Lane is "particularly [busy] during rush hour."

Mr. James also testified that he saw Mr. Thoms' face through his windshield and that his face had a look of "[t]error, fright." Mr. James testified that he did not hear either Mr. Thoms applying his brakes or his horn sounding; he stated that Mr. Thoms' "foot never came off the accelerator." Mr. James described the accident as a "full on T-bone from the right side."

We conclude that the testimony of Mr. James only supports that of Mr. Thoms. The accident occurred in heavy rush hour traffic. Mr. James entered Mr. Thoms' lane of travel so suddenly that Mr. Thoms had no time to react. Mr. Thoms was travelling lawfully. Mr. James was executing a hazardous maneuver in violation of highway safety regulations. Thus we find Mr. James failed to rebut the evidence presented by the defense that Mr. Thoms was not negligent and did not cause the accident in question. Accordingly, we conclude that the trial court did not err in entering summary judgment in favor of the defendants.

CONCLUSION

For the reasons assigned herein, the summary judgment granted in favor of DHL Express (USA), Inc. and Scottsdale Insurance Company is affirmed. All costs of this appeal are to be borne by the plaintiff/appellant, Jonathan A. James.

AFFIRMED.