

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

JEW

FIRST CIRCUIT

2018 CA 0404

JOE WOOD

VERSUS

ALLSTATE PROPERTY AND CASUALTY INSURANCE

JUDGMENT RENDERED: DEC 13 2018

Appealed from the
19th Judicial District Court
Parish of East Baton Rouge • State of Louisiana
Docket No. C-644,908 • Section 24
Honorable R. Michael Caldwell, Judge Presiding

Luke J. Thibodeaux, II
J. Chandler Loupe
Baton Rouge, Louisiana

ATTORNEYS FOR APPELLANT,
PLAINTIFF – Joe Wood

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ATTORNEYS FOR APPELLEE,
DEFENDANT - Allstate
Property and Casualty
Insurance Company

BEFORE: PETTIGREW, McDONALD, WELCH, CRAIN, AND CHUTZ, JJ.

JP Pettigrew, J. Dissents

WELCH, J.

The plaintiff, Joe Wood, appeals a summary judgment dismissing his claims against the defendant, Allstate Property and Casualty Insurance Company (“Allstate”). For the following reasons, we reverse.

FACTS

According to Mr. Wood’s petition for damages, he was operating a 2008 Toyota Rav4 on January 10, 2015, and was stopped while waiting to exit a Murphy Gas station in Denham Springs, when an unknown individual rear-ended his vehicle, resulting in injuries to Mr. Wood and damage to his vehicle.¹ Mr. Wood asserted that he called the Livingston Parish Sheriff’s Office to report the collision. Mr. Wood alleged that the unknown vehicle and driver remained at the scene during this time, but that he was “unable to obtain any information from the [tortfeasor] driver.” Mr. Wood further alleged that when the Livingston Parish Sheriff’s Office deputy arrived on the scene, “the deputy misidentified himself and refused to write a report or provide the [tortfeasor’s] information to” Mr. Wood. Mr. Wood named Allstate, in its capacity as his uninsured/underinsured (“UM”) insurer, as the only defendant in his petition.

In response, Allstate filed a motion for summary judgment, arguing that Mr. Wood could not “demonstrate the existence of factual support for his claim that there was physical contact with any vehicle in the alleged accident at issue,” as was required under its policy for UM coverage. Allstate further argued that Mr. Wood could not “show by an independent and disinterested witness that the alleged injury was the result of the action of a driver of another vehicle, whose identity is unknown and thereby classified as uninsured,” as is required for UM coverage to apply in

¹ Although there are multiple references in the record to the alleged accident having occurred on January 10, 2014, it is clear that the accident occurred on January 10, 2015.

instances where no physical contact occurred, pursuant to La. R.S. 22:1295 and its policy. In support of its motion, Allstate submitted a copy of its policy² and a copy of Mr. Wood's deposition.

Mr. Wood opposed Allstate's motion, arguing that an accident did occur which involved physical contact and that Allstate failed to initiate or make any investigative measures as required by the UM statutes. Mr. Wood further argued that his wife, Christine Wood, was an independent and disinterested witness in this matter. In support of his opposition to Allstate's motion, Mr. Wood submitted a compact disc ("CD") containing several recorded phone conversations, Mr. Wood's affidavit, Mrs. Wood's affidavit, and various correspondence from Allstate.³

The matter proceeded to a hearing on November 6, 2017, at which time the trial court considered the arguments of counsel and the evidence introduced by both sides, without objection, on Allstate's motion for summary judgment. The trial court granted summary judgment in favor of Allstate, signing a judgment on November 20, 2017, dismissing Mr. Wood's claims against Allstate, with prejudice. It is from this judgment that Mr. Wood has appealed.

LAW AND DISCUSSION

A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether

² The Allstate policy, no. 915 794 529, had liability limits of \$25,000.00 per person, \$50,000.00 per accident.

³ With regard to the CD, La. C.C.P. art. 966(A)(4) provides that the only documents that may be filed in support of or in opposition to a motion for summary judgment are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. Articles 966 and 967 do not permit a party to use unsworn and unverified documents as summary judgment evidence, and attaching such documents to an opposition to a motion for summary judgment does not transform them into competent summary judgment evidence. Nonetheless, the trial court must consider any documents to which there is no objection. La. C.C.P. art. 966(D)(2). We note there was no objection by Allstate when Mr. Wood sought to introduce the CD at the summary judgment hearing. Thus, the trial court was constrained to consider same, as we have done in our *de novo* review. See **Mariakis v. North Oaks Health System**, 2018-0165, pp. 10-11 (La. App. 1 Cir. 9/21/18), ___ So. 3d ___, ___, 2018 WL 4523956, at *5.

summary judgment is appropriate; *i.e.*, whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. See La. C.C.P. art. 966(A)(3); see also **Turner v. Rabalais**, 2017-0741 (La. App. 1 Cir. 12/21/17), 240 So. 3d 251, 255, writ denied, 2018-0123 (La. 3/9/18), 237 So. 3d 1193. The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. La. C.C.P. art. 966(A)(4).

The burden of proof to show that no material factual issues exist is on the mover, in this case, Allstate. However, because Allstate will not bear the burden of proof at trial, Allstate is not required to negate all essential elements of the adverse party's claim, *i.e.*, Mr. Wood's claims. Rather, Allstate must point out to the trial court that there is an absence of factual support for one or more elements essential to Mr. Wood's claim. Thereafter, the burden is on Mr. Wood to produce factual support sufficient to establish the existence of a genuine issue of material fact or that Allstate is not entitled to judgment as a matter of law. See La. C.C.P. art. 966(D)(1). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in light of the substantive law applicable to the case. **Pumphrey v. Harris**, 2012-0405 (La. App. 1 Cir. 11/2/12), 111 So. 3d 86, 89.

In ruling on a motion for summary judgment, the trial court'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. **Guardia v. Lakeview Regional Medical Center**, 2008-1369 (La. App. 1 Cir. 5/8/09), 13 So. 3d 625, 628. A trial court cannot make credibility decisions on a motion for summary judgment. **Monterrey Center, LLC v. Education Partners, Inc.**, 2008-

0734 (La. App. 1 Cir. 12/23/08), 5 So. 3d 225, 232. In deciding the motion, the trial court must assume that all of the witnesses are credible. See Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181 (La. 2/29/00), 755 So. 2d 226, 236.

Allstate asserted in its motion for summary judgment that Mr. Wood would be unable to demonstrate factual support for his claim that there was physical contact with another vehicle during the alleged accident, and/or show by an independent and disinterested witness that the alleged damages resulted from the action of the driver of another vehicle whose identity was unknown or who was uninsured/underinsured.

Louisiana Revised Statutes 22:1295 governs UM coverage and states, in pertinent part, as follows:

(1)(d) ... The coverage provided under this Section shall not provide protection for any of the following:

(i) Damage where there is no actual physical contact between the covered motor vehicle and an uninsured motor vehicle, unless the injured party can show, by an independent and disinterested witness, that the injury was the result of the actions of the driver of another vehicle whose identity is unknown or who is uninsured or underinsured.

[. . .]

(f) Uninsured motorist coverage shall include coverage for bodily injury arising out of a motor vehicle accident caused by an automobile which has no physical contact with the injured party or with a vehicle which the injured party is occupying at the time of the accident, provided that the injured party bears the burden of proving, by an independent and disinterested witness, that the injury was the result of the actions of the driver of another vehicle whose identity is unknown or who is uninsured or underinsured.

The Allstate policy at issue in the instant case provides for UM coverage and specifically sets forth, in pertinent part, as follows:

An uninsured auto is:

[...]

- (3) a hit-and-run **motor vehicle** which causes:
- (a) **bodily injury** to an insured person by physical contact with the insured person or physical contact with a **motor vehicle** occupied by that person.
 - (b) property damage to **your** insured auto by physical contact with **your** insured auto.

[...]

- (5) a **motor vehicle** which causes:
- (a) **bodily injury** to an insured person without physical contact with the insured person or a **motor vehicle** which that insured person was occupying at the time of the accident. The injured insured person must show, by an independent and disinterested witness, that the **bodily injury** was the result of the actions of the driver of another **motor vehicle** whose identity is unknown or who is uninsured or underinsured; or
 - (b) property damage to **your** insured auto without physical contact with **your** insured auto. **You** must show, by an independent and disinterested witness, that the property damage to **your** insured auto was the result of the actions of the driver of another **motor vehicle** whose identity is unknown or who is uninsured or underinsured.

In Mr. Wood's deposition, submitted by Allstate in support of its motion for summary judgment, he testified as follows:

Q. [by Kelly R. Englert, counsel for Allstate] Okay. And what do you -- I guess this January 10, 2015 accident, what happened? What do you remember about that accident?

A. [by Mr. Wood] I was pulling out of the Murphy gas station. I was exiting onto Highway 16. I was trying to make a right, so my vehicle was turned slight to the right. I was leaned forward looking left and in doing so, **I was bumped in the rear.**

Q. Were you at a complete stop?

A. Yes.

[...]

Q. And what type -- if you can describe the impact for me. What did it feel like?

A. I don't want to sound sarcastic, **but getting hit from the rear**, I don't know how to describe --

Q. **What happened to your body upon impact?** Did --

A. **It was jerked forward** and stopped by the seatbelt.
[Emphasis added.]

Mr. Wood testified that an accident did in fact occur on January 10, 2015, wherein physical contact with another vehicle was made during the accident. Allstate's reliance on La. R.S. 22:1295 is not applicable under these facts, given that Mr. Wood testified that there was contact with another vehicle. Mr. Wood's testimony is sufficient to establish the existence of a genuine issue of material fact regarding the element of whether physical contact occurred. See La. C.C.P. art. 966(D)(1). Thus, the trial court erred in granting Allstate's motion for summary judgment. A genuine issue of material fact exists.⁴

CONCLUSION

For the above and foregoing reasons, the November 20, 2017 judgment of the trial court, granting Allstate's motion for summary judgment and dismissing Mr. Wood's claims with prejudice, is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed against Allstate.

REVERSED; REMANDED.

⁴ We pretermitted discussion of any remaining assignments of error.