NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 0955

MARCUS TATE AND CHRISTINA TATE,
INDIVIDUALLY, AND ON BEHALF OF HIS MINOR
CHILDREN, MARCUS TATE, ASHLEIGH TAYLOR,
AND MARKIA JOHNSON

VERSUS

KRISTINA'S TRANSPORTATION, LLC, WALLACE, RUSH,
SCHMIDT, INC., NATIONAL LIABILITY & FIRE INSURANCE
COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY
AND HALLMARK SPECIALTY INSURANCE COMPANY

Judgment Rendered: DEC 21 2018

* * * * * * *

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 656236

Honorable Todd W. Hernandez, Judge

* * * * * * *

Pride J. Doran
Quincy L. Cawthorne
Dwazendra J. Smith
Opelousas, LA

Attorneys for Appellants
Plaintiffs – Marcus Tate and Christina
Tate, Individually, and on behalf of
his minor children, Marcus Tate,
Ashleigh Taylor and Markia Johnson

Michael J. Remondet, Jr.
Lafayette, LA

Attorney for Appellee
Defendant – Hallmark Specialty
Insurance Company

* * * * * *

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Pettigrew, J. Concurs

WELCH, J.

In this action for damages, the plaintiffs, Marcus Tate and Christina Tate, individually and on behalf of their minor children, appeal a summary judgment granted in favor of defendant, Hallmark Specialty Insurance Company ("Hallmark"), which dismissed the plaintiffs' claims against Hallmark with prejudice. For reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On March 16, 2017, the plaintiffs filed a petition for damages, naming as defendants Kristina's Transportation, LLC ("Kristina's); Wallace, Rush, Schmidt, Inc. ("Wallace Rush");[1] National Liability & Fire Insurance Company ("National"); National Union Fire Insurance Company ("National Union"); and Hallmark. According to the allegations of the petition, on August 28, 2016, Denis Yasmir Amaya-Rodriguez was driving a commercial vehicle/bus, which was owned by Kristina's, westbound on Interstate 10 in St. John the Baptist Parish near the Belle Terre Boulevard exit ramp in LaPlace. The vehicle driven by Mr. Amaya-Rodriguez collided into the left side of a stationary St. John the Baptist Parish fire truck and then struck the rear of a 2012 Toyota Camry driven by the plaintiff, Marcus Tate, which collision pushed the Camry into the rear of a Chevrolet Silverado. The vehicle driven by Mr. Amaya-Rodriguez then struck three firemen that were standing on the shoulder of the interstate, which pushed them over the rail and into the water below. Mr. Amaya-Rodriguez then struck a Nissan Titan and eventually came to a stop. The plaintiffs alleged that as a result of the accident, Marcus Tate was severely injured, and therefore, sought damages

[1] According to the record, on March 24, 2017, Wallace Rush filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Louisiana. On April 10, 2017, proceedings in this suit against Wallace Rush were stayed until further order of the court. See 11 U.S.C. § 362.

for his injuries. Additionally, Marcus Tate's wife, Christina Tate, and children sought damages for their loss of consortium.

The plaintiffs alleged that at the time of the accident, Mr. Amaya-Rodriguez was believed to have been the agent and/or employee in the course and scope of his agency and/or employment for defendants, Kristina's and/or Wallace Rush. The plaintiffs also alleged that National had issued and, at the time of the accident there was in effect, a policy of automobile liability insurance insuring the vehicle owned by Kristina's and driven by Mr. Amaya-Rodriguez. The plaintiffs also alleged that National Union and Hallmark had issued and, at the time of the accident there was in effect, a commercial general liability policy insuring Wallace Rush. The plaintiffs maintained that the negligence of Mr. Amaya-Rodriguez, Kristina's, and Wallace Rush were the proximate cause of Marcus Tate's injuries, and that Kristina's, Wallace Rush, and their insurers were liable for his damages.

Hallmark filed an answer generally denying the allegations of the plaintiffs' petition and asserting various affirmative defenses. Hallmark also asserted that its policy did not provide coverage for the claims asserted by the plaintiffs and that it was not obligated to defend or indemnify its insured under the facts alleged in the petition. On May 8, 2017, less than two months after the petition for damages was filed, Hallmark filed a motion for summary judgment seeking the dismissal of the plaintiffs' claims against it on the basis that there were no genuine issues of material fact that the bus driven by Mr. Amaya-Rodriguez and involved in the accident was not a "specifically described auto" under the commercial automobile policy issued by Hallmark to Wallace Rush; therefore, no coverage existed for the allegations contained in the plaintiffs' petition. In support of the motion for summary judgment, Hallmark relied on: a copy of the plaintiffs' petition for damages; a certified true and complete copy of its insurance policy with Wallace Rush, which was in effect from May 4, 2016 through May 4, 2017 ("the insurance

policy"); a copy of an endorsement modifying the business auto coverage form from the policy ("the endorsement"); and a copy of the Uniform Motor Vehicle Traffic Crash Report ("the accident report").

The plaintiffs, in their timely[2] filed opposition to Hallmark's motion for summary judgment, objected to Hallmark's use of the policy, the endorsement, and the accident report on the basis that the documents were not among the documents enumerated in La. C.C.P. art. 966(A)(4) that could be filed in support of a motion for summary judgment. Given the lack of proper documents offered in support of Hallmark's motion for summary judgment, the plaintiffs argued that Hallmark's motion for summary judgment was not supported; thus, Hallmark failed to meet its initial burden on the motion and summary judgment was inappropriate. In addition, the plaintiffs objected to Hallmark's motion for summary judgment on the basis that there had not been an opportunity for adequate discovery because the motion for summary judgment was filed less than two months after the petition for damages and because there existed genuine issues of material fact that precluded summary judgment.

In a reply memorandum to the plaintiffs' opposition to Hallmark's motion for summary judgment, Hallmark offered an additional document—the affidavit of Linda Flatter, the Director of Claims for Hallmark, and attached thereto was the policy and the endorsement.

A hearing on the motion for summary judgment was held on July 24, 2017. In written reasons for judgment, the trial court overruled the plaintiffs' objections to Hallmark's filing of the policy and the endorsement in support of its motion for summary judgment, stating that those exhibits were admissible under La. C.C.P. art. 966(A)(4). However, the trial court granted the plaintiffs' objection to

---

[2] The plaintiffs' opposition to Hallmark's motion for summary judgment was filed on July 5, 2017, and the hearing on the motion was held on July 24, 2017. Thus, the plaintiffs' opposition to Hallmark's motion for summary judgment was timely. See La. C.C.P. art. 966(B)(2).

Hallmark's filing of the accident report. The trial court then found that the evidence offered by Hallmark in support of its motion for summary judgment established that there were no genuine issues of material fact that Hallmark did not insure the vehicle involved in the accident forming the basis of the plaintiffs' lawsuit and that the policy issued by Hallmark to Wallace Rush did not provide coverage for the allegations in the plaintiffs petition. Therefore, the trial court granted Hallmark's motion for summary judgment and dismissed the plaintiffs' claims against Hallmark with prejudice. A judgment in accordance with the trial court's ruling was signed on September 13, 2017 and it is from this judgment that the plaintiffs appeal.

On appeal, the plaintiffs contend that the trial court erred in: (1) considering the certified copy of the insurance policy and the copy of the endorsement, because those exhibits were not proper summary judgment evidence pursuant to La. C.C.P. art. 966(A)(4) and those exhibits were properly and timely objected to by the plaintiffs in their opposition to the motion for summary judgment pursuant to La. C.C.P. art. 966(B)(2) and (D)(2); (2) considering the affidavit of Linda Flatter and the policy and the endorsement that were attached thereto since that affidavit was attached to the Hallmark's reply memorandum and La. C.C.P. art. 966(B)(3) expressly precludes the filing of additional documentation with a reply memorandum; (3) granting the motion for summary judgment because there was no opportunity for adequate discovery as required by La. C.C.P. art. 966(A)(3) because Hallmark's motion for summary judgment was filed less than two months after the petition for damages was filed; and (4) granting Hallmark's motion for summary judgment because the motion was not properly supported.

LAW AND DISCUSSION

When reviewing summary judgments, appellate courts conduct a *de novo* review of the evidence, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Talbert v. Restoration Hardware, Inc.**, 2017-0986 (La. App. 1st Cir. 5/31/18), 251 So.3d 532, 535, writ denied, 2018-1102 (La. 10/15/18), 253 So.3d 1304. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(A)(3). 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). No additional documents may be filed with a reply memorandum. La. C.C.P. art. 966(B)(3).

Louisiana Code of Civil Procedure article 966(A)(4) contains "the exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment" and it "intentionally does not allow the filing of documents that are not included in the exclusive list … unless they are properly authenticated by an affidavit or deposition to which they are attached." La. C.C.P. art. 966, comment (c), Official Revision Comments—2015. Additionally, the court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. La. C.C.P. art. 966(D)(2). Any objection to a document shall be raised in a timely filed opposition or reply memorandum. *Id.* The court shall consider all objections prior to rendering judgment, and shall specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider. *Id.*

On a motion for summary judgment, the burden of proof rests on the mover. La. C.C.P. art. 966(D)(1). When the mover will bear the burden of proof at trial, it must be determined that his supporting documents are sufficient to resolve all material issues of fact. Only if they are sufficient does the burden shift to the opposing party to present evidence showing that an issue of material fact exists, because he can no longer rest on the allegations or denials in his pleadings at that point. **Neighbors Federal Credit Union v. Anderson**, 2015-1020 (La. App. 1st Cir. 6/3/16), 196 So.3d 727, 734. If the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defenses, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is then on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

Only when a motion for summary judgment is made *and supported* may an adverse party not rest on the mere allegations or denials of his pleadings. La. C.C.P. art. 967(B). On a motion for summary judgment, regardless of whether the opposing party files an opposition or counter-affidavits, the moving party must first show that all critical elements of the opposing party's case have been put to rest. This is because the burden of proof is on the mover to present a *prima facie* case. If the mover does not make a *prima facie* case, the burden never shifts to the opposing party, and the opposing party has nothing to prove in response to the motion for summary judgment. **Hat's Equipment, Inc. v. WHM, L.L.C.**, 2011-1982 (La. App. 1st Cir. 5/4/12), 92 So.3d 1072, 1076; **Richardson v. GEICO**

Indemnity Company, 2010-0208 (La. App. 1st Cir. 9/10/10), 48 So.3d 307, 312, writ denied, 2010-2473 (La. 12/17/10), 51 So.3d 7.

Summary judgment is appropriate for determining issues relating to insurance coverage. In determining whether a policy affords coverage for an incident, the insured (or plaintiff) bears the burden of proving that the incident falls within the policy's terms. However, an insurer seeking to avoid coverage through summary judgment must prove that some exclusion applies to preclude coverage. **Miller v. Superior Shipyard and Fabrication, Inc.**, 2001-2683 (La. App. 1st Cir. 11/8/02), 836 So.2d 200, 203.

As previously set forth, herein, Hallmark filed a motion for summary judgment seeking the dismissal of the plaintiffs' claims against it on the basis of a lack of coverage under the policy, and in support thereof relied on a copy of the plaintiffs' petition for damages, the policy, the endorsement, and the accident report. The plaintiffs, in their timely filed opposition to the motion for summary judgment, objected to the policy, the endorsement, and the accident report, on the basis that the exhibits were not proper summary judgment evidence. While the trial court excluded the police report, the trial court ruled that the policy and the endorsement were admissible under La. C.C.P. art. 966(A)(4). However, based on our review of the law and two documents at issue (*i.e.*, the policy and the endorsement), we find the trial court's ruling in this regard is in direct conflict with the express language of La. C.C.P. art. 966(A)(4)—the policy and the endorsement are not "pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions" nor were those two documents attached to an affidavit or deposition. Since the policy and endorsement were not documents allowed by La. C.C.P. art. 966(A)(4) to be filed in support of a motion for summary judgment and the plaintiffs timely objected to those documents, the trial court erroneously failed to sustain the plaintiffs'

objection and erroneously considered those documents in ruling on Hallmark's motion for summary judgment. To the extent that the trial court considered the policy and the endorsement because those two documents were attached to the affidavit of Linda Flatter, which was attached to Hallmark's reply memorandum, we likewise find this constitutes error. Louisiana Code of Civil Procedure article 966(B)(3) expressly prohibits additional documents from being filed with a reply memorandum.

When the documents improperly filed with Hallmark's motion for summary judgment are excluded, the only document offered by Hallmark in support of its motion for summary judgment on the issue of a lack of insurance coverage is the plaintiffs' petition for damages. Based on our *de novo* review of the record and the applicable law, we find this evidence is insufficient to meet Hallmark's initial burden of proof on the motion for summary judgment to establish that there was no genuine issue of material fact as to a lack of coverage under the policy and that it was entitled to judgment as a matter of law. Accordingly, the burden of proof never shifted to the plaintiffs to show that an issue of material fact existed. Given the insufficient evidence presented by Hallmark, the plaintiffs had nothing to prove in response to Hallmark's motion for summary judgment and were entitled to rest on the allegations of their petition. See **Neighbors Federal Credit Union**, 196 So.3d at 734; **Hat's Equipment**, 92 So.3d at 1076; see also La. C.C.P. art. 967(B). Thus, Hallmark's motion for summary judgment was improvidently granted and we reverse the September 13, 2017 judgment of the trial court. [3]

[3] We note that the plaintiffs have also challenged the trial court's ruling on the motion for summary judgment on the basis that there was not an opportunity for adequate discovery. However, because we find that a reversal of the trial court's judgment is warranted for the reasons set forth herein, we decline to address this issue.

CONCLUSION

For all of the above and foregoing reasons, the September 13, 2017 judgment of the trial court granting summary judgment in favor of and dismissing the plaintiffs' claims against Hallmark Specialty Insurance Company is reversed. This matter is remanded to the trial court for further proceedings. All costs of this appeal are assessed to the defendant/appellee, Hallmark Specialty Insurance Company.

REVERSED AND REMANDED.