

NOT DESIGNATED FOR PUBLICATION

RANDY PACKNETT * **NO. 2000-CA-2318**

VERSUS * **COURT OF APPEAL**

MARK DUSUAU AND * **FOURTH CIRCUIT**
PROGRESSIVE INSURANCE *
COMPANY * **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-2071, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge

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Judge Dennis R. Bagneris, Sr.
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(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr.,
and Judge Michael E. Kirby)

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AFFIRMED

Plaintiff-Appellant Randy Packnett (Plaintiff) appeals from a judgment granting Summary Judgment in favor of defendant Progressive Security Insurance Company (Progressive) and dismissing all of his claims against that defendant, with prejudice.

FACTS

This matter arose from an automobile accident that occurred on February 5, 1998 involving a vehicle owned and operated by Mark Dusuau (Dusuau), in which plaintiff was a guest passenger, and a vehicle operated by an unknown driver. Dusuau and plaintiff were traveling in an easterly direction on Franklin Avenue, the favored street, near its intersection with North Rocheblave Avenue “when suddenly, negligently and without warning, an unknown vehicle failed to stop at a stop sign...and struck Mark Dusuau’s vehicle on the right side where Petitioner was a passenger.” At its intersection with Franklin Avenue, North Rocheblave is controlled by a stop sign while Franklin Avenue has no traffic control mechanisms.

Plaintiff filed suit against Dusuau and Progressive, the liability insurer of Dusuau. In his petition, plaintiff alleged that Dusuau was negligent in the

operation of his vehicle in the following particulars: (1) failing to see what he should have seen, (2) failing to maintain proper and adequate control of the vehicle, (3) failing to keep a proper lookout and reasonable vigilance, and (4) failing to stop before causing an accident.

Progressive answered the suit, denying liability on the part of its insured. On June 20, 2000, Progressive filed a Motion for Summary Judgment seeking the dismissal of all claims against it based upon the absence of any evidence which, if true, would prove its insured, Dusuau, was at fault in the accident. In support of its motion, Progressive introduced into evidence an affidavit of Dusuau wherein he testified that he was proceeding in a safe and prudent manner within the posted speed limit northbound on Franklin Avenue when his vehicle was suddenly struck on the right rear quarter panel by a vehicle which had run the stop sign controlling North Rocheblave.

Plaintiff opposed the Summary Judgment, but failed to introduce any evidence in connection with that opposition. Following a hearing on July 14, 2000, the trial judge granted Progressive's Motion for Summary Judgment. It is from that judgment that plaintiff now appeals.

STANDARD OF REVIEW AND BURDEN OF PROOF

Appellate courts review summary judgment *de novo*, using the same

criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith 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.

A fact is material if it is essential to plaintiff's cause of action under the applicable theory of recovery and without which plaintiff could not prevail. Generally, material facts are those that potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute. Prado v. Sloman Neptun Schiffahrts, A.G., 611 So.2d 691, 699 (La. App. 4 Cir. 1992), writ not considered 613 So.2d 986 (La. 1993).

Under the revised law, the burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the

matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense.

Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2).

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.

The jurisprudential presumption against the granting of summary judgment was legislatively overruled by La. C.C.P. art 966 as amended. Further, the amendments level the playing field, with the supporting documentation submitted by the parties to be scrutinized equally. Under the amended statute, the initial burden of proof remains with the movant to show that no genuine issue of material fact exists. Once the movant has made a

prima facie showing that the motion should be granted, however, the burden shifts to the non-moving party to present evidence demonstrating that material factual issues remain. “Once mover has properly supported the motion for summary judgment, the failure of the non-moving to produce evidence of a material factual dispute mandates the granting of the motion. Coates v. Anco Insulations, Inc., 2000-1331, p.6 (La. App. 4 Cir. 3/21/01), __ So.2d __.

ASSIGNMENT OF ERROR

Plaintiff asserts that the trial court erred by granting Progressive’s Motion for Summary Judgment pursuant to article 966, et seq., of the Louisiana Code of Civil Procedure and not on the facts of the case. Plaintiff claims that there are genuine issues of fact in dispute, with regard to negligence and liability, and Progressive was not entitled to summary judgment as a matter of law.

DISCUSSION

Both parties are in agreement that the unidentified driver who ran the stop and struck Dusuau’s vehicle was at fault in causing the accident. Plaintiff contends, however, that Progressive’s insured, Dusuau, was also negligent and that such negligence contributed to the accident and his resulting damages.

Once Progressive introduced Dusuau's affidavit in support of its Motion for Summary Judgment, a prima facie case was made that Dusuau was free from fault in causing the accident, and under C.C.P. arts. 966 and 967, the burden shifted to plaintiff to offer evidence setting forth specific facts to show that there remained genuine issues for trial.

Plaintiff suggests that a genuine issue exists as to whether Dusuau failed to maintain his vehicle and avoid an oncoming vehicle that did not observe a stop sign. He argues that Dusuau was speeding and that he saw the other vehicle approaching the stop sign in enough time to avoid the accident. Instead of offering any evidence to support those claims, however, he merely reiterated the allegations of his petition in his opposition to Progressive's Motion for Summary Judgment.

In Billes/Manning Architects v. Accountemps, Div. Of Robert Half of Louisiana, Inc., 98-3044, p.7 (La. App. 4 Cir. 9/15/99), 742 So.2d 728, 731, we held that "[a]rgument of counsel and briefs, no matter how artful, are not sufficient to raise a genuine issue of material fact."

Plaintiff introduced no evidence, not even his own affidavit. Therefore, the uncontradicted evidence established that Dusuau was driving in a safe and prudent manner and that he was not at fault in causing the accident. As such, summary judgment was appropriate.

We affirm the trial court's judgment granting Progressive's Motion for Summary Judgment dismissing all of plaintiff's claims against it, with prejudice.

AFFIRMED