

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1689

R.H.P. by Jmm
JEK by Jmm
Jmm
**GERALDINE TAYLOR, HERMAN WILSON,
ALEXANDER WRIGHT, INDIVIDUALLY
AND ON BEHALF OF HIS MINOR CHILDREN,
ANDRE WRIGHT AND ALEXANDER WRIGHT, II,
AND OSCAR HUBBARD**

VERSUS

**NOVARTIS CROP PROTECTION, INC.,
AND RUDY LAMBERT**

**On Appeal from the 18th Judicial District Court
Parish of Iberville, Louisiana
Docket No. 53,908, Division "A"
Honorable James J. Best, Judge Presiding**

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered **JUN 24 2010**

PARRO, J.

Certain plaintiffs in this suit appeal a judgment of the trial court that granted the defendants' motion for summary judgment and dismissed their claims for damages allegedly resulting from an ammonia release. For the following reasons, we affirm.

Factual Background and Procedural History

On July 18, 1999, at approximately 9:00 p.m., ammonia was released for about 15 minutes at a facility in the St. Gabriel area belonging to Norvartis Crop Protection, Inc. (Norvartis), now Syngenta Crop Protection, Inc. Approximately 826 individuals, who allegedly were present and/or owned property in or around the St. Gabriel community, filed a suit for damages against Norvartis and others (collectively defendants).¹ In their petition, the plaintiffs alleged that as a result of the release, they suffered burning eyes, itching, burning skin, breathing difficulties, dizziness, nausea, diarrhea, headaches, anxiety, and fear for their physical well-being. They also averred that the release caused considerable fear, anguish, discomfort, and inconvenience to the people in the communities surrounding Norvartis' facility.

The defendants filed a joint motion for dismissal and/or a motion for summary judgment as to those plaintiffs who were located outside of any plume of exposure during the ammonia release, *i.e.*, the zone of danger. The experts in this case agreed that any person located outside a plume could not have been exposed to any amount of ammonia. Only 29 of the plaintiffs were, at some point in time, within the area identified by the plaintiffs' expert as the orange plume or within the plumes of exposure as shown in the air-models created by the experts for the plaintiffs and defendants. These air-models were based on actual meteorological data generated by the Norvartis weather station at the time of the release.

In opposing the defendants' motions, the plaintiffs in question asserted

¹ Initially, the plaintiffs requested class certification, but ultimately this matter was converted to a mass consolidation.

that they did not make a claim for exposure but made a claim for emotional distress, mental anguish and distress, inconvenience, and fear and fright as a result of the ammonia release, relying on Moresi v. State through Dept. of Wildlife and Fisheries, 567 So.2d 1081 (La. 1990). The claim forms of the plaintiffs in question, which were attached to their memorandum in opposition to the defendants' motions, reportedly stated that they suffered fear and fright as a result of the July 18, 1999 ammonia leak. In their memorandum, the plaintiffs urged that they were in great fear for their personal safety based on a prior release of ammonia that occurred in the area on March 2, 1999, which prompted the evacuation of a school and a televised alert announcement. They asserted that "[t]here is no doubt that the unauthorized and negligent release of the toxic and hazardous ammonia only a few months after another unauthorized and negligent release of ammonia created the special circumstances needed to demonstrate an especial likelihood of genuine and serious mental anguish, emotional distress, inconvenience and fear and fright." Furthermore, they contended that the law does not require that a person be within an exposure zone to bring a claim for mental anguish, emotional distress, inconvenience, and fear and fright. Based on these contentions, the plaintiffs maintained that they have asserted a claim for fear and fright and that a genuine issue of material fact exists, precluding summary judgment.

After considering the memoranda and attachments submitted by the parties, the trial court granted the defendants' motion for summary judgment, adopting as its own, the reasons set forth in the defendants' memorandum. Judgment was entered dismissing the claims of all of the plaintiffs who were located outside of any plume of exposure. Those plaintiffs appeal.

Discussion

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Smith v. Our Lady of the Lake

Hospital, Inc., 93-2512 (La. 7/5/94), 639 So.2d 730, 750. A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. Jarrell v. Carter, 632 So.2d 321, 323 (La. App. 1st Cir. 1993), writ denied, 94-0700 (La. 4/29/94), 637 So.2d 467. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966(A)(2); Rambo v. Walker, 96-2538 (La. App. 1st Cir. 11/7/97), 704 So.2d 30, 32. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, 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).

When the issue before the court on the motion for summary judgment is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. LSA-C.C.P. art. 966(C)(2); Buck's Run Enterprises, Inc. v. Mapp Const., Inc., 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing 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, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial; failure to do so shows that there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2); Clark v. Favalora, 98-1802 (La. App. 1st Cir. 9/24/99), 745 So.2d 666, 673.

Since the plaintiffs in question asserted that they did not make a claim for damages due to exposure to the released ammonia, we are only concerned with their claims for damages for fear, fright, emotional distress, and/or inconvenience even when a claimant was located outside any plume of

exposure. In Moresi, 567 So.2d 1081, the supreme court set forth the necessary elements to recover damages for negligently inflicted mental distress. Generally, a defendant will not be held liable for such damages under Louisiana law where its conduct was merely negligent and caused only mental or emotional disturbance unaccompanied by physical injury. See Moresi, 567 So.2d at 1095; see also Bonnette v. Conoco, Inc., 01-2767 (La. 1/28/03), 837 So.2d 1219, 1235. In Bonnette, the supreme court pointed out that in Moresi, it had noted deviations from this general rule in various situations. Bonnette, 837 So.2d at 1234. However, the supreme court refused to allow recovery for mental anguish absent a physical injury except in those cases involving "special circumstances." See Moresi, 567 So.2d at 1096. Only where there is an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious," will recovery be permitted. See Id.; Bonnette, 837 So.2d at 1235; see also Molden v. Georgia Gulf Corp., 465 F. Supp. 2d 606, 618 (M.D. La. 2006).

To prove the especial likelihood of genuine and serious mental distress under the facts of this case, the plaintiffs must first demonstrate special circumstances. More than minimal inconvenience and worry must be shown before damages may be awarded. Boyd v. Allied Signal, Inc., 07-1409 (La. App. 1st Cir. 10/17/08), 997 So.2d 111, 122. The only special circumstances urged by the plaintiffs in question was the prior release of ammonia that occurred in the area on March 2, 1999, which prompted the evacuation of a school and a televised alert announcement. This prior incident does not rise to the level of "special circumstances" sufficient to meet these plaintiffs' burden of proof. Moreover, these plaintiffs in their memorandum expressed a generalized fear as a result of this release based on the prior release. However, they failed to produce any evidence in opposing the motion for summary judgment to show that they would be able to show at the trial of this matter that they

suffered from genuine and serious mental distress arising from this ammonia release that guarantees their claims for mental distress damages are not spurious.² Therefore, summary judgment was properly granted in favor of the defendants with respect to those plaintiffs who were located outside of the plume of exposure.

Decree

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to the appellants.

AFFIRMED.

² Furthermore, the facts of this case do not fall within any of the noted deviations from the general rule set forth in Moresi. See Moresi, 567 So.2d at 1095-96.