NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0084

JAMIE GILMORE DOUGLAS

VERSUS

ALAN LEMON, NATIONAL FIRE & MARINE INSURANCE COMPANY, GULF INDUSTRIES, INC. WILLIAM C. GREMILLION, JR., DOORTECH, INC. AND TRINITY UNIVERSAL INSURANCE COMPANY

Judgment Rendered: June 10, 2011

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 580,386

Honorable Janice Clark, Judge

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

In this action for damages arising out of a multi-motor vehicle collision, the defendants, Alan Lemon, Gulf Industries, Inc. ("Gulf Industries"), and National Fire & Marine Insurance Company ("National Fire") (collectively referred to as the "Lemon defendants"), appeal a summary judgment granted in favor of the defendants, William C. Gremillion, Jr., Doortech, Inc. ("Doortech"), and Trinity Universal Insurance Company ("Trinity") (collectively referred to as the "Gremillion defendants"), that dismissed the plaintiff's claims against the Gremillion defendants. Based on our *de novo* review of the record, we reverse the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On July 21, 2008, Jamie Gilmore Douglas was operating her vehicle on Florida Boulevard near the intersection and traffic light at Oak Villa Boulevard in Baton Rouge, Louisiana. Travelling directly behind Douglas was a vehicle operated by Gremillion and owned by Doortech, and travelling directly behind Gremillion was a vehicle operated by Lemon and owned by Gulf Industries. While all of the vehicles were near the traffic light at the intersection, the Lemon vehicle rear-ended the Gremillion vehicle, which in turn, rear-ended the Douglas vehicle. At the time of the accident, Lemon was employed by Gulf Industries, and the vehicle he was operating was covered by a policy of liability insurance issued by National Fire.[1] Additionally, at the time of the accident, Gremillion was employed by Doortech, and the vehicle he was operating was covered by a policy of liability insurance issued by Trinity.[2]

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[1] There does not appear to be any dispute that, at the time of the accident, Lemon was in the course and scope of his employment with Gulf Industries or that he had permission to drive the vehicle at issue.

[2] There does not appear to be any dispute that, at the time of the accident, Gremillion was in the course and scope of his employment with Doortech or that he had permission to drive the vehicle at issue.

Thereafter, on July 15, 2009, Douglas commenced this action to recover damages for injuries she sustained as a result of the accident. Named as defendants were Gremillion, Doortech, Trinity, Lemon, Gulf Industries, and National Fire. In the petition, the plaintiff alleged that the accident and resulting damages were caused by the fault and negligent acts of Lemmon, and also by the fault of Gremillion by virtue of the fact that the Gremillion vehicle struck the plaintiff's vehicle from the rear. In response, the Lemon defendants filed an answer, asserting among other things, that the damages claimed by the plaintiff were caused by the actions or activities of others.

Thereafter, the Gremillion defendants filed a motion for summary judgment claiming that there were no genuine issues of material fact because Gremillion did not operate his vehicle in a negligent manner and was without fault in the accident. Specifically, the Gremillion defendants contended that the Gremillion vehicle had come to a complete stop behind the vehicle driven by the plaintiff and that the Gremillion vehicle only struck the plaintiff's vehicle as a result of the force exerted on the vehicle after it was rear-ended by the Lemon vehicle. Thus, the Gremillion defendants contended that they were entitled to summary judgment dismissing the plaintiff's claims against them.

The plaintiff did not oppose the motion for summary judgment; however, the Lemon defendants did, contending that there were genuine issues of material fact as to whether Gremillion was at fault (or comparatively at fault) in the accident, which precluded summary judgment. Specifically, the Lemon defendants contended that there were genuine issues of material fact as to: whether the Gremillion vehicle prematurely moved forward when the traffic signal turned green; whether the Gremillion vehicle maintained a safe distance from the plaintiff's vehicle; whether Gremillion maintained a careful lookout at the traffic ahead; whether the brake lights on the Gremillion vehicle were operational; and

whether the Gremillion vehicle created an unavoidable hazard for Lemon when it came to a sudden or abrupt stop. Based on these disputed issues of material fact, the Lemon defendants contended that summary judgment was inappropriate.

After a hearing, the trial court granted summary judgment because there were no genuine issues of material fact as "the record clearly shows that the [Gremillion] vehicle was stopped and not moving when it was struck from behind." A judgment in favor of the Gremillion defendants reflecting the trial court's ruling and dismissing the plaintiff's claims against the Gremillion defendants was signed on September 17, 2010, and it is from this judgment that the Lemon defendants have appealed.

On appeal, the Lemon defendants assert that the trial court mistakenly believed that the accident occurred when the Douglas and Gremillion vehicles were stopped at a red light at the intersection; however, the evidence offered in opposition to the motion for summary judgment suggested that the accident occurred after the vehicles had proceeded forward through the intersection on a green traffic light. Furthermore, the Lemon defendants contend that the trial court erred in granting the motion for summary judgment because there were genuine issues of material fact as to whether Gremillion was operating the vehicle with the commensurate degree of care and caution the circumstances required and as to whether the brake lights on the Gremillion vehicle were operational and able to warn Lemon of the sudden impending stop.

LAW AND DISCUSSION

Summary Judgment Law

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. **Granda v. State Farm Mutual Insurance Company**, 2004-2012, p. 4 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. Summary judgment is proper only if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

On a motion for summary judgment, the initial burden of proof is on the moving party. If 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 remains on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises, Inc. v. Mapp Construction, Inc.**, 99-3054, p. 4 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. However, if the moving party will not bear the burden of proof at trial on the matter before the court, 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 non-moving 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. La. C.C.P. art. 966(C)(2). Accordingly, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078, p. 4 (La. 6/30/00), 764 So.2d 37, 40; see also La. C.C.P. art. 967(B).

Summary judgments are reviewed on appeal *de novo*. **Granda**, 2004-2012 at p. 4, 935 So.2d at 701. Thus, this court uses the same criteria as the trial court in determining whether summary judgment is appropriate—whether there is a genuine issue of material fact and whether mover is entitled to judgment as a matter of law. **Jones v. Estate of Santiago**, 2003-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006. Ordinarily, the determination of whether negligence exists in a

particular case is a question of fact; therefore, cases involving a question of negligence ordinarily are not appropriate for summary judgment. **Freeman v. Teague**, 37,932, p. 4 (La. App. 2nd Cir. 12/10/03), 862 So.2d 371, 373; see also **Powers v. Tony's Auto Repair, Inc.**, 98-1626, p. 2 (La. App. 4th Cir. 4/28/99), 733 So.2d 1215, 1216, writ denied, 99-1552 (La. 7/2/99), 747 So.2d 28. This principle extends to a question of comparative fault as well. However, where reasonable minds cannot differ, a question of comparative fault is a question of law that may be resolved by summary judgment. See **Rance v. Harrison Company, Inc.**, 31,503, pp. 7-8 (La. App. 2nd Cir. 1/20/99), 737 So.2d 806, 810, writ denied, 99-0778 (La. 4/30/99), 743 So.2d 206.

A "genuine issue" is a "triable issue," that is, an issue on which reasonable persons could disagree. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. **Jones**, 2003-1424 at p. 6, 870 So.2d at 1006. In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. **Fernandez v. Hebert**, 2006-1558, p. 8 (La. App. 1st Cir. 5/4/07), 961 So.2d 404, 408, writ denied, 2007-1123 (La. 9/21/07), 964 So.2d 333. A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. **Anglin v. Anglin**, 2005-1233, p. 5 (La. App. 1st Cir. 6/9/06), 938 So.2d 766, 769. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can only be seen in light of the substantive law applicable to the case. **Dickerson v. Piccadilly Restaurants, Inc.**, 99-2633, pp. 3-4 (La. App. 1st Cir. 12/22/00), 785 So.2d 842, 844.

Applicable Legal Precepts

Louisiana Revised Statutes 32:81(A) provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and condition of the highway." In addition to the duty to follow at a reasonable and prudent distance, the driver of a motor vehicle also has a duty to maintain a careful lookout, observe any obstructions present, and exercise care to avoid them. **Ly v. State, Department of Public Safety and Corrections**, 633 So.2d 197, 201 (La. App. 1st Cir. 1993), writ denied, 93-3134 (La. 2/25/94), 634 So.2d 835.

A following motorist in a rear-end collision is presumed to have breached the duty to follow at a reasonable and prudent distance and, hence, is presumed negligent. **Ly**, 633 So.2d at 201. The effect of the presumption is that the burden of proof shifts to the driver of the following vehicle to prove a lack of fault to avoid liability. **Cheairs v. State, Department of Transportation and Development**, 2003-0680, p. 15 (La. 12/3/03), 861 So.2d 536, 545. In order to exculpate himself from liability, the following motorist must show that he kept his vehicle under control, closely observed the forward vehicle, followed at safe distance under the circumstances, or that the driver of the lead vehicle negligently created a hazard which the following vehicle could not reasonably avoid. **Veal v. Forrest,** 543 So.2d 1121, 1123 (La. App. 1st Cir. 1989). The following motorist bears the burden of showing he was not negligent. **Cox v. Shelter Insurance Company**, 2009-0958, p. 14 (La. App. 3rd Cir. 4/7/10), 34 So.3d 398, 408, writ denied, 2010-1041 (La. 9/17/10, 45 So.3d 1044.

Discussion

Because Gremillion was a following motorist, the Gremillion defendants have the burden of proving that Gremillion lacked fault or was not negligent. Thus, on the motion for summary judgment, the Gremillion defendants bore the

burden of proving that there were no genuine issues of material fact with regard to that issue. In support of their motion for summary judgment, the Gremillion defendants offered the March 18, 2010 affidavit of Gremillion, which states, in pertinent part, that he was involved in the July 21, 2008 accident involving the plaintiff; that before the accident, the vehicle he was driving had come to a complete stop; that while he was stopped, the vehicle he was driving was struck in the rear by a vehicle driven by Lemon; and that as a result of being rear-ended, his vehicle was knocked into the vehicle in front of him driven by the plaintiff.

In opposition to the motion for summary judgment, the Lemon defendants offered the deposition testimony of Lemon and the affidavit of Justin Austin, who was the guest passenger in the vehicle operated by Lemon. According to the deposition testimony of Lemon, the Doortech vehicle (or the vehicle driven by Gremillion) was ahead of him at the traffic light, and when the traffic light changed from red to green, traffic began proceeding through the intersection. After the Doortech vehicle had proceeded through or mostly through the intersection, the driver of that vehicle (Gremillion) hit his brakes hard and the front portion of the vehicle dipped down. Lemon stated that he had his eyes on the Doortech vehicle through the entire incident and never saw the vehicle's brake lights illuminate, and that the only reason he knew the vehicle was braking hard was because he saw the back of the vehicle rise up and the front of the vehicle dip down.

According to the affidavit of Justin Austin, at the time of the accident, he was a passenger in the vehicle operated by Lemon. He stated that the vehicle driven by Lemon was stopped behind the Doortech vehicle on Florida Boulevard at a traffic light intersection. When the light turned green, the Doortech vehicle moved forward, and then the vehicle that he and Lemon were in also started to move forward. From the time the vehicle he and Lemon were in started moving until the accident occurred, he was looking at the back of the Doortech vehicle.

During that time, he saw the back end of the Doortech vehicle rise up as it suddenly came to a stop, but he never saw the Doortech vehicle's brake lights come on.

Although the evidence offered by the Gremillion defendants indicates that Gremillion had come to a complete stop before the accident and that his vehicle only rear-ended the plaintiff's vehicle because of the force exerted on his vehicle after being rear-ended by Lemon, the evidence offered by the Lemon defendants suggested that after the traffic signal turned green and as the vehicles were proceeding forward through the traffic light, the Gremillion (or Doortech) vehicle abruptly stopped with such force that the front of the vehicle dipped down and the back rose up, and further, that the brake lights did not illuminate so as to warn Lemon of the impending abrupt stop. These are factual details material to a determination of fault, and under these facts, a reasonable person might conclude that Gremillion was negligent, at fault, or comparatively at fault in this accident. For this reason, we find that genuine issues of material fact exist with regard to Gremillion's fault (or comparative fault) and conclude that the trial court erred in granting the motion for summary judgment and dismissing the plaintiff's claims against the Gremillion defendants.

CONCLUSION

For the above and foregoing reasons, we reverse the September 17, 2010 judgment of the trial court granting summary judgment in favor of defendants William C. Gremillion, Jr., Doortech, Inc., and Trinity Universal Insurance Company and dismissing the plaintiff's claims against them and remand this case for further proceedings.

All costs of this appeal are assessed to defendants-appellees, William C. Gremillion, Jr., Doortech, Inc., and Trinity Universal Insurance Company.

REVERSED AND REMANDED.