NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CW 0365

RONNIE TODD DAVIS

VERSUS

NATIONAL INTERSTATE INSURANCE COMPANY, SERVICE TRANSPORT COMPANY, AND JOHN V. SCOTT

VGW by
JEW by

Judgment Rendered: DEC 2 3 2015

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Iberville, Louisiana
Docket Number 71,251

Honorable J. Robin Free, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff in a lawsuit arising out of a multi-vehicle, multi-collision accident. Plaintiff appeals a partial summary judgment granted in favor of defendants, dismissing plaintiff's claims related to any alleged mental and/or emotional injuries sustained by plaintiff as a result of plaintiff seeing the deceased body of the driver of another vehicle involved in the accident. We find that the trial court erred in certifying the judgment as immediately appealable, but exercise our supervisory jurisdiction and reverse the partial summary judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On February 4, 2011, at approximately 12:29 a.m., plaintiff, Ronnie Todd Davis, was operating a tractor-trailer, owned by Superior Carriers, on eastbound Interstate 10 near the end of the elevated portion of the Atchafalaya Basin Bridge. Davis noticed that a collision had recently occurred in front of him, involving a Ford F-150 pickup truck and a U.S. Xpress, Inc. tractor-trailer. There were no emergency personnel, signs, or warnings of the collision. Plaintiff purportedly was able to come to a complete stop and avoid crashing into the collision scene. However, as plaintiff came to a complete stop, the tractor-trailer he was operating was struck from behind by another tractor-tractor, being operated by defendant, John V. Scott, and owned by Service Transport Company ("Service Transport"). According to plaintiff, the rear-end collision with Scott's tractor-trailer thrust plaintiff's tractor- trailer forward, causing him to strike the Ford F-150 pickup truck that was involved in the initial collision. Upon coming to a stop after being rear-ended by defendant Scott, plaintiff exited his tractor-trailer and saw the deceased driver of the Ford F-150, Jonas T. Richmond, under or near plaintiff's trailer axle.

On February 2, 2012, Davis filed a petition for damages, naming John V. Scott, Service Transport, and National Interstate Insurance Company ("National Interstate"), in its capacity as the insurer of Service Transport, as defendants.[1]

On December 6, 2013, Scott, Service Transport, and National Interstate filed a motion for partial summary judgment, seeking a dismissal of plaintiff's claims for mental anguish and/or emotional distress that were unrelated to the physical injuries that plaintiff allegedly sustained in the accident. Defendants averred that summary judgment and a dismissal of these claims was appropriate because the undisputed material facts of the case demonstrate that:

1. Plaintiff does not fit within the class of persons allowed to bring a claim for bystander damages under Lejeune v. Rayne Branch Hospital, 556 So. 2d 559 (La. 1990) and LSA-C.C. art. 2315.6; and
2. Plaintiff was not directly involved in the incident that caused the injury/death of Mr. Richmond, or the injury-causing event was not the result of a breach of duty owed by defendants to plaintiff, as required by the court's decisions in Clomon v. Monroe City School Board., 572 So. 2d 571 (La. 1990) and Guillory v. Arceneaux, 580 So. 2d 990 (La. App. 3rd Cir.), writs denied, 587 So. 2d 694 (La. 1991).

In his opposition to the motion for summary judgment, plaintiff conceded that he does not fit within the class of persons allowed to bring a claim for bystander damages under the Lejeune case and LSA-C.C. art. 2315.6. However, plaintiff argued that summary judgment was not appropriate herein, where there are unresolved material issues of fact as to whether he was an "active participant" in the incident that caused the injury and death of Mr. Richmond and, accordingly,

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[1]Plaintiff subsequently filed a supplemental and amended petition, naming the estate of Jonas T. Richmond and Mr. Richmond's insurer, State Farm Fire and Casualty Company, as additional defendants. However, plaintiff later dismissed all of his claims and causes of action against Mr. Richmond's estate and State Farm, reserving his rights against Scott, Service Transport, and National Interstate.

as to whether he is entitled to mental anguish damages under the Clomon and Guillory decisions.

Following a hearing, the trial court granted defendants' motion for partial summary judgment. A written judgment was signed on April 28, 2014, granting defendants' motion for partial summary judgment and dismissing "any claims asserted by plaintiff against [defendants] which relate to any alleged mental and/or emotional injuries sustained by plaintiff as a result of his seeing the deceased body of Mr. Jonas Richmond."

Subsequently, plaintiff filed a motion to designate the judgment as final for purposes of an immediate appeal,[2] which the defendants opposed. Following a hearing on plaintiff's request to designate the judgment as final, the trial court designated the judgment as final for purposes of immediate appeal, finding that there was no just reason for delay.

DESIGNATION OF JUDGMENT AS FINAL

Appellate courts have a duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. Motorola, Inc. v. Associated Indemnity Corporation, 2002-0716 (La. App. 1st Cir. 4/30/03), 867 So. 2d 715, 717. A partial summary judgment rendered pursuant to LSA-C.C.P. art. 966(E) may be immediately appealed during ongoing litigation only if it has been properly designated as a final judgment by the trial court. LSA-C.C.P. art. 1915(B). Although the trial court designates a partial summary judgment to be a final judgment under Article 1915(B), that designation is not determinative of this court's jurisdiction. Van ex rel. White v. Davis, 2000-0206 (La. App. 1st Cir. 2/16/01), 808 So. 2d 478, 480.

[2]Louisiana Civil Code of Procedure article 1915(B) provides that when a court renders a partial summary judgment as to one or more but less than all of the claims, demands, issues, or theories, the judgment shall not constitute a final judgment, unless designated as a final judgment by the court after an express determination that there is no just reason for delay.

When the trial court does not give reasons for certifying the judgment as immediately appealable, this court must make a *de novo* determination of whether the certification was proper, considering the criteria set forth in R.J. Messinger, Inc. v. Rosenblum, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122. Pursuant to R.J. Messinger, this court will consider: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court may have to consider the same issue a second time; and (4) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. In designating a judgment as final, the overriding inquiry is whether there is no just reason for delay. R.J. Messinger, 894 So. 2d at 1122-1123.

Applying the R.J. Messinger factors to the facts of this case, we first note that in the instant case, there has been no stipulation or determination of defendants' liability and/or negligence. Accordingly, any claim by plaintiff against defendants for mental anguish damages as a result of seeing the body of the decedent would be rendered moot if the trier of fact were to find that the collision involving plaintiff's tractor-trailer and defendant Scott's tractor-trailer did not result from any negligence on the part of defendant Scott. As to the relationship between the adjudicated and non-adjudicated claims, the active participant mental anguish claim can be resolved independently of plaintiff's remaining claim for mental anguish damages. See Dust Graphics, Inc. v. Diez, 2006-0323 (La. App. 1st Cir. 12/28/06), 951 So. 2d 270, 273. Allowing an immediate appeal from a judgment deciding a single **element** of a claim for mental anguish damages in a lawsuit, where multiple claims of damages are sought, which are all based on the same wrongful conduct giving rise to the lawsuit, only encourages multiple appeals and piecemeal litigation, causing unnecessary delay in the resolution of the lawsuit.

Gray & Co. Inc. v. State ex rel. Dept. of Transportation, Office of Highways, 2010-2325, p. 4 (La. App. 1st Cir. 6/10/11) (unpublished). Accordingly, we conclude that the trial court erred in certifying the judgment herein as final for purposes of an immediate appeal.

However, this court does have the discretion to convert an appeal to an application for supervisory writs and rule on the merits of the application. As recognized by the Louisiana Supreme Court:

> The Louisiana Constitution confers appellate jurisdiction upon the courts of appeal over "all civil matters" and "all maters appealed from family and juvenile courts" and supervisory jurisdiction over "cases which arise within its circuit." La. Const. art. V, § 10(A). Moreover, the jurisprudence indicates that the decision to convert an appeal to an application for supervisory writs is within the discretion of the appellate courts. *See In re Medical Review Penal of Freed*, 05-28 (La. App. 5 Cir. 4/26/05), 902 So. 2d 472, at 473 ("[C]onverting appeals to writs will be left to the discretion of the panel.")

Stelluto v. Stelluto, 2005-0074 (La. 6/29/05), 914 So. 2d 34, 39. In Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So. 2d 878 (La. 1981) (*per curiam)*, the Louisiana Supreme Court directed appellate courts to consider an application for supervisory writs under their supervisory jurisdiction, even though relief may be ultimately available to the applicant on appeal, when the trial court judgment was arguably incorrect, a reversal would terminate the litigation (in whole or in part), and there was no dispute of fact to be resolved. Best Fishing v. Rancatore, 96-2254 (La. App. 1st Cir. 12/29/97), 706 So. 2d 161, 166-167.

While plaintiff's mental anguish claims are not dependent upon each other for resolution, they do appear to be inextricably related from an evidentiary standpoint and would render it difficult for the trier of fact to delineate and separate the elements of the allowable versus non-allowable mental anguish claims. Moreover, because the partial summary judgment appealed from dismisses one **element** of plaintiff's mental anguish damage claim and ultimately prevents

plaintiff from introducing evidence as to only this element of his claim at trial, it is questionable whether plaintiff would have an adequate remedy by review on appeal after a trial, absent the grant of a new trial. Accordingly, we find that judicial economy and the interests of justice are best served by asserting our plenary power to exercise supervisory jurisdiction at this time. For these reasons, we convert the appeal to an application for supervisory review and address the merits of the matter. See Gray, 2010-2325 at p. 5; Bollinger Shipyards Lockport, LLC v. American Intern. Specialty Lines Ins. Co., 2012-0351, p.5 (La. App. 1st Cir. 4/10/13) (unpublished), writ denied, 2013-1061 (La. 6/21/13), 118 So. 3d 420.

SUMMARY JUDGMENT

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, admissions, affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issues of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2). On a motion for summary judgment, the initial burden of proof is on the mover. If the moving party will not bear the burden of proof at trial, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, but rather to point out 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 he will be able to satisfy his evidentiary burden at trial. If the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. LSA-C.C.P. art. 966(C)(2).

A summary judgment is reviewed *de novo* on appeal, viewing the record and all reasonable inferences that may be drawn from it in the light most favorable to

the non-movant and using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 765 (*per curiam*). A motion for summary judgment is warranted only if there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(C)(1). In ruling on a motion for summary judgment, a 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. All doubts should be resolved in the non-moving party's favor. Hines, 876 So. 2d at 765.

LAW ON MENTAL ANGUISH DAMAGES

We begin our analysis of this case with consideration of the law and jurisprudence addressing mental anguish claims for viewing the injury and/or the death of a third person. In 1990, the Louisiana Supreme Court in Lejeune recognized a cause of action, under certain circumstances, for mental anguish damages resulting from an individual viewing the injury of someone with whom the individual had a close relationship. The plaintiff therein alleged that she sustained damages when she entered her comatose husband's hospital room and discovered that he had sustained wounds, which were being cleaned by a student nurse, as a result of being bitten and gnawed upon by a rat shortly before she entered the room. Lejeune, 556 So. 2d at 561-562. The plaintiff sought mental anguish damages from the hospital as a result of the incident. After recognizing that "[r]odents gnawing on a patient's comatose body is particularly repulsive," the Supreme Court affirmed the trial court judgment that had overruled the hospital's exception of no cause of action, concluding that "mental pain and anguish sustained by a non-traumatically injured person because of injury to a third person is compensable in circumstances that fit [certain guidelines]." Lejeune, 556 So. 2d at 571. As set forth in Lejeune: (1) the claimant must either view the accident or

injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition; (2) the injured person must suffer such harm that it can reasonably be expected that a person in the claimant's positon would suffer serious mental anguish from the experience; (3) the emotional distress sustained must be serious and reasonably foreseeable; and (4) there must be close relationship between the victim and the claimant. Lejeune, 556 So. 2d at 570.

In response to the Lejeune decision, the legislature enacted LSA-C.C. art. 2315.6, codifying the guidelines for recovery pronounced in Lejeune. However, the legislature further defined the close relationship that must be present by specifying that only spouses, children, grandchildren, fathers, mothers, brothers, sisters, grandfathers, and grandmothers of the injured party could bring such an action.

Following Lejeune, the Supreme Court, in Clomon, concluded that the plaintiff therein was not barred from recovering damages for her negligently inflicted emotional distress, despite the fact that the plaintiff suffered no contemporaneous physical injury and was not closely related to the deceased victim of the accident, as required by Lejeune. The plaintiff in Clomon struck and killed a four-year old boy while he was crossing the street, after he was dropped off by a school bus. The school bus driver prematurely deactivated the warning lights and drove away, leaving the boy alone to cross the street to his home. The plaintiff sought emotional distress damages from the school board for the school bus driver's negligence. Clomon, 572 So. 2d at 572. The Supreme Court concluded that the plaintiff was entitled to damages for her severe emotional distress under the facts of the case, as "the Lejeune court did not intend to modify or interrupt ... decisions permitting recovery for emotional distress from a tortfeasor who owed the plaintiff a special, direct duty created by law, contract or

special relationship." Clomon, 572 So. 2d at 575. Accordingly, the Supreme Court found that a special duty was owed by the bus driver to the plaintiff pursuant to LSA-R.S. 32:80, governing the receipt and discharge of children from school buses and, accordingly, the plaintiff was permitted to recover for her severe emotional distress.[3] Clomon, 572 So. 2d at 577-578.

While the majority opinion in Clomon was decided on the basis of the existence of a special, direct duty created by law, Justice Watson and Justice Hall wrote separate concurring opinions, noting another distinguishing fact in Clomon that set Clomon apart from Lejeune. Specifically, the concurring justices each opined that, unlike Lejeune, Clomon was not a bystander case. Rather, under these facts, the plaintiff was **physically involved** in the accident and, therefore, as a **participant** in the accident, she should be entitled to recover for her emotional damages, just as she would be if she had suffered physical damages or a combination of the two. Clomon, 572 So. 2d at 579.

After the Clomon decision, the Third Circuit, in Guillory, addressed the precise issue of whether a motorist can recover mental anguish damages resulting from an accident in which she did not sustain any physical injuries, but in which she was an active participant. Guillory, 580 So. 2d at 991. In Guillory, the plaintiff was traveling on the interstate during icy weather conditions, when she came upon the body of Pamela Arceneaux lying in the highway. Arceneaux had lost control of her vehicle and struck a guardrail; she then exited her vehicle and was struck by an eighteen-wheeler. As a result of the accident between the eighteen-wheeler and Arceneaux, she was lying injured on the roadway when plaintiff Guillory came upon the accident scene. The plaintiff was apparently

[3]The Supreme Court also rejected the defendants' argument that plaintiff's recovery for such damages was barred by her own contributory negligence. Clomon, 572 So.2d at 578-579.

unable to avoid running over Arceneaux.[4] Guillory, 580 So. 2d at 991-992. Guillory filed suit for the mental anguish that she suffered as a result of the accident, naming Arceneaux's liability insurer, the driver and owner of the eighteen-wheeler, and the Louisiana Department of Transportation and Development, as defendants. Guillory, 580 So. 2d at 992.

In maintaining the trial court's denial of the defendants' exception of no cause of action, the appellate court reasoned that the plaintiff's mental anguish damages were not grounded on her emotional damages as a bystander, as was the case in Lejeune. The appellate court further noted that unlike Clomon, there was no "direct, special statutory duty" owed to the plaintiff by defendants. Guillory, 580 So. 2d at 992. The court then discussed the concurring opinions of Justices Watson and Hall in the Clomon decision and ultimately concluded that the plaintiff had stated a cause of action in that mental anguish claims are allowed when being made by a party who was an **actor/participant** in the incident causing the injury and possible death of the victim. Guillory, 580 So. 2d at 994-995.

ANALYSIS

At oral argument of this matter, defendants presented the argument that summary judgment was appropriate because plaintiff cannot establish that he is within that class of persons to whom a cause of action is granted in LSA-C.C. art. 2315.6. Specifically, they contend that following the enactment of LSA-C.C. art. 2315.6, by Acts 1991, No. 782, §1, mental anguish damage claims for witnessing the injury or the death of a third party are no longer recognized, even for "active participants" in the injury-causing event, unless the guidelines set forth in LSA-

[4]The plaintiff in Guillory alleged in her petition that when she came upon Arceneaux, "she attempted to brake, but was unable to stop and ran over Arceneaux, who ended up trapped beneath [plaintiff's] vehicle." The court noted that in her petition, plaintiff had alleged that "Arceneaux is now deceased and the implication is that Arceneaux may have died as a result of being struck by [plaintiff's] vehicle." Guillory, 580 So. 2d at 992.

C.C. art. 2315.6 are satisfied, including the restriction on precisely which "close relatives" can bring such an action.

We disagree with this argument. Louisiana Civil Code article 2315.6 governs claims of "[individuals] who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, [who seek to] recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury[.]" LSA-C.C. art. 2315.6(A). By its very wording, the language of article 2315.6 addresses claims of individuals who "view" an event causing injury to another and does not govern claims of individuals who are **participants** in an event causing injury to another person. Following the approach of the concurring justices in Clomon and the Third Circuit in Guillory, we conclude that a plaintiff, who is an active participant in an event and who allegedly, by the negligence of another, causes injury to a third person may state a claim for his mental anguish or emotional distress resulting therefrom. See Guillory, 580 So. 2d at 995-998; and Clomon, 572 So. 2d at 579 (Watson, J., and Hall, J., concurring).

Indeed, plaintiff concedes that this factual situation does not present a Lejeune recovery situation, entitling him to damages under LSA-C.C. art. 2315.6. Rather, plaintiff asserts that the facts of this case are similar to the facts in Clomon and Guillory and that pursuant to these cases, he was an "active participant" in the injury-causing accident, or alternatively, that issues of fact remain as to whether he was an "active participant" in the injury-causing accident.

Nonetheless, defendants further argue that summary judgment and a dismissal of plaintiff's claim for mental anguish and emotional trauma allegedly suffered by plaintiff as a result of "seeing [Mr.] Richmond's deceased body" was proper, because plaintiff was not directly involved in the accident that actually caused injury or death to Mr. Richmond. Defendants argue that in this case, not

only is there no evidence that plaintiff caused injury to the decedent, "plaintiff has not even alleged as much." Defendants contend that plaintiff has not come forward with any evidence to support even the possibility that Mr. Richmond died as a result of plaintiff's tractor-trailer running over him, rather than as a result of the initial collision between Mr. Richmond's Ford F-150 and the U.S. Xpress, Inc. tractor-trailer. Defendants contend that the **only** evidence in the record as to when or how Mr. Richmond was injured or killed is contained in plaintiff's own deposition testimony, wherein plaintiff acknowledged that the responding state trooper and others assessed that Mr. Richmond died before "[plaintiff] got to that point [the scene of the initial collision]."

In support of the motion for summary judgment, defendants submitted: (1) plaintiff's petition for damages; (2) excerpts from the deposition of the responding state trooper, along with the accident report discussed during his deposition and attached as an exhibit to the deposition; and (3) excerpts from plaintiff's deposition. At the outset, we note that most if not all of the "facts" set forth in this evidence offered by defendants, including the deposition excerpts, consists of hearsay, either in the form of plaintiff's understanding of others' assessments of the events at issue or the trooper's recitation of the accounts of others. Moreover, we note that this evidence offered by defendants does not demonstrate the absence of a genuine issue of material fact, but, rather, is conflicting.

Turning first to the trooper's report, and pretermitting the propriety of allowing its introduction, we note that the accident report indicates that Mr. Richmond and his vehicle unquestionably had been involved in another crash moments before the series of accidents at issue. His vehicle was stopped or disabled in the roadway because of that crash. According to the trooper's account of his conversation with Mr. Richmond's wife, Mr. Richmond called his wife after

that initial crash and told her that he was "alright," but the phone line then "went dead."

According to the trooper's recitation in the accident report of the accounts of the other drivers and witnesses, Mr. Richmond was sitting in the driver's seat of his truck with the driver's door open when the U.S. Xpress, Inc. tractor-trailer hit his vehicle, the force of which threw Mr. Richmond from his truck with Richmond then lying partially on the left shoulder. The report further recites that plaintiff told the trooper that he saw the U.S. Xpress, Inc. tractor-trailer strike Mr. Richmond's vehicle, and he immediately applied his brakes, coming to a stop, but that plaintiff's tractor-trailer was then struck from the rear by the Service Transport tractor-trailer driven by Scott, pushing him into Mr. Richmond's vehicle and Mr. Richmond himself.

Notably, in reciting the account of the events in the accident report, the trooper indicated that the statements of the drivers and witnesses differed as to the relevant chain of events. Moreover, to the extent that the accident report addresses the timing of Mr. Richmond's death, it conflicts with plaintiff's understanding, as stated in his deposition, of the assessments made by the responding officers at the scene. In pertinent part, the state trooper's summary in the accident report states that it is "unknown . . . weather [sic] the initial impact with vehicle 2 [the U.S. Xpress, Inc. tractor-trailer] killed Mr. Richmond or if it was when he was struck by vehicle 3 [plaintiff's tractor-trailer]."[5]

In the present case, because defendants will not bear the burden of proof at trial regarding plaintiff's claim for mental anguish damages, defendants were required to point out that there is an absence of factual support for one or more elements essential to plaintiff's claim. LSA-C.C.P. art. 966(C)(2). Defendants'

[5]Moreover, and more importantly, the excerpt of the transcript of the trooper's deposition testimony submitted by defendants in support of the motion for summary judgment contains no discussion or questions as to the trooper's opinion on the "timing" of Mr. Richmond's death.

own conflicting evidence submitted in support of the motion for summary judgment supports plaintiff's argument that summary judgment was inappropriate because issues of fact remain as to the timing of Mr. Richmond's death in what is clearly a complex multi-vehicle, multi-collision accident. This issue of fact is certainly "material" to defendants' argument that summary judgment is proper because the collision with plaintiff did not cause Mr. Richmond's death, and, therefore, plaintiff was not an "active participant" in the injury causing accident, as was the case in Clomon and Guillory. Moreover, while the accident report conflicts with the statements made by plaintiff in his deposition, plaintiff's deposition testimony also does not conclusively establish the cause or timing of Mr. Richmond's death. Rather, plaintiff merely testified as to the opinion of others, and there is no further evidence of record to support these opinions. Accordingly, on *de novo* review of the evidence, we disagree with defendants that summary judgment was appropriate, given that material issues of fact remain as to whether plaintiff caused injury and/or the death of Mr. Richmond.

Likewise, we disagree with defendants' argument that if plaintiff is considered an "active participant," summary judgment is still appropriate as there is no evidence, nor has it been alleged that defendant Scott's negligence (i.e., rear-ending plaintiff's vehicle as they approached the accident scene) caused plaintiff to "run over Mr. Richmond's deceased body." Plaintiff specifically alleges in his petition:

> Upon seeing the crash site[,] the plaintiff slowed his tractor trailer and came to a complete stop[,] avoiding the crash scene. As plaintiff came to a complete stop[,] his tractor trailer was suddenly and violently struck in the rear[,] causing the plaintiff's tractor trailer to be thrust forward[,] causing it to strike [Richmond's] Ford 150 pickup truck that had been involved in the previous crash. Upon coming to a stop after the second impact and exiting his tractor trailer[,] [plaintiff] saw the deceased driver of the F150 pickup truck [Mr. Richmond] under or near his trailer axle.

Defendants did not attach any documentary evidence to their motion for partial summary judgment to rebut plaintiff's statements that: (1) defendant Scott rear-ended plaintiff's tractor trailer; (2) the rear-end collision forced plaintiff's tractor-trailer into Mr. Richmond's Ford F-150 pickup truck; or (3) following the collision, plaintiff saw the deceased body of Mr. Richmond under or near his trailer axle. Simply stated, the evidence that was submitted by defendants fails to demonstrate an absence of a genuine issue of material fact such that they are entitled to judgment as a matter of law. Instead of demonstrating, based on established facts, that there is an absence of factual support for an element of plaintiff's claim, the evidence submitted by defendants, which consists almost entirely of hearsay statements of the accounts of others, demonstrates that a genuine issue of material fact remains, i.e., the issue of whether Scott's negligence in striking plaintiff's tractor-trailer propelled plaintiff into Mr. Richmond, either contributing to or causing his injuries or death.

Accordingly, we find that defendants failed to meet their initial burden of showing "an absence of factual support for one or more elements essential to the adverse party's claim," as needed to establish entitlement to judgment in their favor, as a matter of law. While defendants are not required to negate all essential elements of their adverse party's claim, they are required to show the absence of any factual support for such. Here, they failed to do so. Therefore, the burden never shifted to plaintiff, as defendants failed to prove their entitlement to summary judgment. See Asberry v. The American Citadel Guard, Inc., 2004-0920 (La. App. 1st Cir. 5/6/05), 915 So. 2d 892, 895. Thus, we find error by the trial court in granting defendants' motion for partial summary judgment as to one

element of one of plaintiff's damage claims, i.e., for mental and/or emotional injuries as a result of seeing the deceased body of Mr. Richmond.[6]

CONCLUSION

For the above and foregoing reasons, we conclude that the April 28, 2014 judgment of the trial court was improperly designated as final for purposes of immediate appeal; we convert this appeal to an application for supervisory writs; and we grant the writ, finding that the trial court erred in granting defendants' motion for partial summary judgment. The trial court's judgment of April 28, 2014, granting partial summary judgment in favor of defendants, National Interstate Insurance Company, Service Transport Company, and John V. Scott, and dismissing any claims asserted by plaintiff, Ronnie Todd Davis, related to any alleged mental and/or emotional injuries sustained by plaintiff as a result of seeing the deceased body of Mr. Jonas T. Richmond, is hereby reversed. The case is remanded for further proceedings.[7] Costs of this appeal are assessed to defendants, National Interstate Insurance Company, Service Transport Company, and John V. Scott.

APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY WRITS; WRIT GRANTED; REVERSED AND REMANDED.

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[6]Indeed, as the record demonstrates, the trial court itself (and counsel) had difficulty in formulating and expressing precisely what the court was ruling on and dismissing. Further, as noted by plaintiff, if allowed to stand, the ruling at issue would present an evidentiary dilemma in determining what evidence plaintiff could present to establish his "remaining" mental anguish claims for damages.

[7]In so ruling, we express no opinion as to the ultimate merits of this or any other of plaintiff's claims or any of defendants' defenses thereto.