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MVA.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0204

LISA VIERING AND STEPHEN VIERING

VERSUS

LIBERTY MUTUAL INSURANCE COMPANY AND/OR
LM GENERAL INSURANCE COMPANY, AARON
MICHAEL DICK, BARRY DICK, AND FEATHER & FIN
RANCH, INC.

Judgment Rendered: SEP 27 2017

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2014-13231

Honorable Reginald Badeaux, Judge

James E. Shields, Sr.
Gretna, Louisiana

Attorney for Appellants
Plaintiffs – Lisa Vierung and
Stephen Vierung

D. Russell Holwadel
Heather England Reznick
New Orleans, Louisiana

Attorneys for Appellee
Defendant – Barry Dick

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

Mr. McClendon J. Agrees and Assigns additional reasons.

WELCH, J.

The plaintiffs/appellants, Lisa Viering and Stephen Viering, appeal a trial court judgment granting summary judgment in favor of the defendant/appellee, Barry Dick, on the issue of liability for negligent entrustment. For the reasons that follow, we vacate the judgment of the trial court, and remand this matter for a contradictory hearing.

FACTUAL BACKGROUND

On June 24, 2014, at approximately 12:40 p.m., plaintiff, Lisa Viering, was operating a friend's van and travelling in an easterly direction on U.S. 190 near its intersection with LA. 433. At the same time, the defendant, Aaron Michael Dick, was permissively operating a Mercury Mountaineer owned by his father, defendant, Barry Dick, in a westerly direction on the same highway. It is undisputed that the Dick vehicle crossed the centerline of the road and struck the front left of the van being operated by Mrs. Viering. Unfortunately, Mrs. Viering sustained serious injuries as a result of the accident. According to the motor vehicle traffic crash report, Aaron Dick submitted to a series of standardized field sobriety tests and no impairment was determined.

PROCEDURAL HISTORY

On July 17, 2014, the plaintiffs filed their initial petition for damages naming as defendants, Aaron Dick, Barry Dick, Liberty Mutual (Barry Dick's automotive insurer), and Feather & Fin Ranch, Inc. ("Feather and Fin").¹ The petition asserted liability on the part of Barry Dick on the basis that he owned the vehicle that Aaron Dick was driving at the time of accident. The petition alleged that Aaron Dick was an employee of Feather & Fin and acting within the course and scope of his employment at the time of the accident. Based on the allegations

¹ Feather & Fin is a family-owned business associated with the Dick family.

regarding Aaron Dick's status as an employee, the petition asserted Feather & Fin was liable under the doctrine of respondent superior and/or principal agent.²

In October of 2015, Barry Dick filed a peremptory exception raising the objection of no cause of action asserting that the petition was insufficient to state a cause of action that he was independently responsible for the plaintiffs' damages.³ On January 21, 2016, prior to the scheduled hearing on Barry Dick's exception of no cause of action, the plaintiffs filed a second amended petition specifically asserting a claim for negligent entrustment against Barry Dick.

The second amended petition alleged that Aaron Dick was performing errands for Barry Dick, individually, and for Feather & Fin on the date of the accident. With regard to Barry Dick's liability, the plaintiffs alleged that Barry Dick knowingly entrusted his vehicle to Aaron Dick, despite knowing that Aaron Dick's driver's license was suspended and that he was on parole for a drug offense. The second amended petition also named as a defendant, Travelers Casualty Insurance Company of America ("Travelers"), in its capacity as the liability insurer of Feather & Fin.

At a hearing addressing Barry Dick's exception of no cause of action, it was conceded by the parties that the allegations of negligent entrustment contained in the second amended petition rendered Barry Dick's exception moot. The plaintiffs subsequently filed third and fourth amended petitions, which relate solely to the plaintiffs' claims regarding Feather & Fin's liability as the alleged employer of

² On November 10, 2014, an amended petition was filed adding Progressive Security Insurance Company, the plaintiffs' uninsured/underinsured motorist coverage provider, and Progressive Paloverde Insurance Company, the uninsured/underinsured motorist coverage provider for the van being operated by Mrs. Viering at the time of the accident.

³ We note that the record lacks a full copy of the memorandum in support of Barry Dick's exception of no cause of action. However, related information in the record reveals that Barry Dick's exception of no cause of action asserted that the plaintiffs' allegations that Barry Dick was the owner of the vehicle operated by Aaron Dick were insufficient to state a claim that Barry Dick was independently liable for the plaintiffs' losses.

Aaron Dick, and acts of fraud, deceit, and bad faith by Liberty Mutual and Travelers.

Relevant to the instant appeal, on August 30, 2016, Barry Dick filed a motion for summary judgment seeking the dismissal of the plaintiffs' claims against him for negligent entrustment.⁴ Specifically, the motion asserted that the plaintiffs lacked evidence to demonstrate that Barry Dick knew or should have known that Aaron Dick was incompetent to drive on the day of the accident. The motion was supported by Barry Dick's affidavit, selected portions of Aaron Dick's deposition, the official accident report from the June 24, 2014 accident, and a document entitled "Addendum to Conditions of Parole."

In their **timely opposition** to the motion for summary judgment, the plaintiffs alleged various facts, which they purport support a finding that Barry Dick was liable for negligent entrustment. The plaintiffs stressed Barry Dick's knowledge of Aaron Dick's criminal background, "use and misuse of drugs and alcohol," status as a parolee, and lack of a driver's license. Further, the plaintiffs averred that Aaron Dick's deposition testimony that the accident was caused by his falling asleep at the wheel, coupled with the fact that the accident happened very shortly after Barry Dick loaned him the vehicle, support a finding that Barry Dick knew that his son was impaired when he gave him the keys. Finally, the plaintiffs maintained that the motion for summary judgment merely reasserted the same arguments unsuccessfully raised by Barry Dick in his previously denied exception of no cause of action.

Pursuant to La. C.C.P. art. 966(B)(2), the plaintiffs' opposition to the motion for summary judgment attached the district court's March 17, 2016 judgment denying Barry Dick's exception of no cause of action, the entire transcript of

⁴ Barry Dick's motion for summary judgment was filed in August of 2016. As such, it is governed by the version of La. C.C.P. art. 966 amended and reenacted by La. Acts 2015, No. 422, § 1 (effective date of January 1, 2016).

Aaron Dick's deposition, and various court minutes and printouts related to Aaron Dick's criminal record. Neither Barry Dick nor the plaintiffs objected to the documents filed in support of their respective positions. See La. C.C.P. art. 966(D)(2).

October 11, 2016 Hearing

A contradictory hearing on Barry Dick's motion for summary judgment was held on October 11, 2016. Also set for hearing on the same day were various motions filed by Travelers against the plaintiffs, including Travelers' motion for summary judgment asserting that there was no coverage under the Travelers' policy issued to Feather & Fin because there was no evidence to demonstrate that Aaron Dick was an employee on the date of the accident; a motion to quash the La. C.C.P. art. 1442 corporate deposition of Travelers; and an opposition to the plaintiffs' motion for leave to file their fourth amended petition. Also on the docket was the plaintiffs' motion to continue the hearing on Travelers' motion for summary judgment filed six days before the scheduled hearing. In their motion to continue, the plaintiffs maintained the hearing on Travelers' motion for summary judgment should be continued until Travelers' motion to quash its corporate deposition was ruled upon. The plaintiffs did not file an opposition memorandum to Travelers' motion for summary judgment, only the aforementioned motion to continue.

Review of the transcript from the October 11, 2016 hearing reveals that counsel for Travelers argued its motions first. The district court granted Travelers' motion for summary judgment, and the motion to quash the La. C.C.P. art. 1442 corporate deposition of Travelers. The district court then denied the plaintiffs' motion for leave of court to file the fourth amended petition, and the plaintiffs'

motion to continue the hearing on Travelers' motion for summary judgment.⁵ There was no direct discussion or argument regarding Barry Dick's motion for summary judgment. Nevertheless, when ruling on the motions related to the claims against Travelers, the district court also appeared to grant Barry Dick's motion for summary judgment, to wit:

THE COURT:

And there being no opposition being filed, you [plaintiffs' counsel] waive any oral argument to that, and I grant **both summary judgments**, dismissing this matter with prejudice.

I will certify this as a final appeal of a judgment. [Emphasis added.]

Following this statement by the district court, an exchange was held between the district court and counsel for the plaintiffs wherein counsel for the plaintiffs urged consideration of the plaintiffs' motion to continue the hearing on Travelers' motion for summary judgment. Following this discussion, counsel for the plaintiffs was instructed by the district court to direct any further argument to the court of appeal. At no point during the hearing was argument or substantive discussion entertained regarding Barry Dick's motion for summary judgment. At the end of the hearing, counsel for Barry Dick had the following exchange with the district court:

[Counsel for Barry Dick]:

Are you going to grant the motion for summary judgment for Barry Dick as well?

THE COURT:

Oh, yes. Yes. I granted that as well.

In a judgment signed October 28, 2016, the district court granted Barry Dick's motion and dismissed the plaintiffs' suit against Barry Dick with prejudice. The plaintiffs now appeal the district court's October 28, 2016 judgment granting

⁵ The plaintiffs filed a separate appeal from the ruling on Travelers' motions, which is addressed in a separate opinion by this court. See **Viering v. Liberty Mutual Insurance Co.**, 2017-0205 (La. App. 1st Cir. 09/27/17), ---WL---

Barry Dick's motion for summary judgment. The plaintiffs maintain that the district court erred in denying the plaintiffs the opportunity to present oral argument at the October 11, 2016 hearing, as well as in failing to find that the evidence presented revealed genuine issues of material fact as to their claims of negligent entrustment. Finally, the plaintiffs aver that the district court erred in denying the plaintiffs' motion for leave of court to file a fourth amended petition "dismissing [plaintiffs'] cause of action and pleading of negligent entrustment." As set forth below, as a result of the 2015 legislative amendment to La. C.C.P. art. 966 (La. Acts 2015, No. 422, § 1) we find merit in the plaintiffs' assertion that the failure to hear arguments in connection with Barry Dick's motion for summary judgment was in error. We note that this is a matter of first impression.

LAW AND DISCUSSION

Requirement of Hearing for Summary Judgment

As noted above, the plaintiffs timely filed their opposition to Barry Dick's motion on September 28, 2016, which was more than fifteen days before the scheduled hearing as required by La. C.C.P. 966(B)(2); however, they did not file an opposition to Travelers' motion for summary judgment. The plaintiffs surmise that the district court denied summary judgment on the erroneous belief that the plaintiffs had not filed a timely opposition to Barry Dick's motion for summary judgment. The plaintiffs suggest that had they been allowed to argue, they would have had the opportunity to point out certain facts supporting their claim for negligent entrustment.

The fundamental question in all cases of statutory interpretation is legislative intent. **SWAT 24 Shreveport Bossier, Inc. v. Bond**, 2000-1695 (La. 6/29/01), 808 So.2d 294, 302; **Succession of Boyter**, 99-0761 (La. 1/7/00), 756 So.2d 1122, 1128. The meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and by placing a construction

on the law that is consistent with the express terms of the law and with the obvious intent of the legislature in enacting the law. **SWAT 24 Shreveport Bossier v. Bond**, 808 So.2d at 302; **Succession of Boyter**, 756 So.2d at 1129. A statute must be applied and interpreted in a manner that is logical and consistent with the presumed purpose and intent of the legislature. **Swat 24 Shreveport Bossier v. Bond**, 808 So.2d at 302; **Succession of Boyter**, 756 So.2d at 1129.

The articles of the Louisiana Code of Civil Procedure are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves. La. C.C.P. art. 5051. When the language of an article of the Louisiana Code of Civil Procedure is clear and free from ambiguity, its letter is not to be disregarded under the pretext of pursuing its spirit. La. C.C.P. art. 5052. Finally, it is presumed that the legislature acts with full knowledge of well-settled principles of statutory construction. **Sultana Corporation v. Jewelers Mutual Insurance Company**, 2003-0360 (La. 12/3/03), 860 So.2d 1112, 1119.

As a result of the 2015 amendments to La. C.C.P. art. 966(B), the parties must now attach all documents in support of or in opposition to their motion for opposition. Further, all objections to any documents submitted for the district court's consideration must be raised in the opposition or reply memorandum. La. C.C.P. art. 966(D)(2). As a result, parties are precluded from submitting or objecting to evidence at the hearing on the motion. Yet, despite the inability to present or object to documents at the hearing, a contradictory hearing is mandated by the La. C.C.P. arts. 963 and 966.

Louisiana Code of Civil Procedure article 963 provides, in pertinent part, as follows:

If the order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion shall be served on and tried contradictorily with the adverse party.

The rule to show cause is a contradictory motion.

Similarly, regarding the requirement of a contradictory hearing La. C.C.P. art. 966(C) provides, in pertinent part, as follows:

(1) Unless otherwise agreed to by all of the parties and the court:

(a) A contradictory hearing on the motion for summary judgment shall be set not less than thirty days after the filing and not less than thirty days prior to the trial date.

The word “shall” is mandatory. La. C.C.P. art. 5053. We note that the phrase “contradictory hearing” in the 2015 amendment to La. C.C.P. art. 966 is new.⁶ As discussed below, under the previous version of the La. C.C.P. art. 966, the district court was required to “hear” the motion for summary judgment. A reading of La. C.C.P. art. 966, as amended, evidences the legislative intent, in the absence of an agreement otherwise, that a contradictory hearing on the motion for summary judgment shall be set not less than thirty days after filing and not less than thirty days prior to the trial date. Such a reading is supported by the text of La. C.C.P. art. 963, which mirrors the express requirement of a contradictory hearing for contradictory motions, like the summary judgment.

We recognize that Louisiana District Court Rule 9.18 provides: “[o]ral argument is a privilege, not a right, and is within the court’s discretion.” We also acknowledge that the district court has great discretion in the construction, interpretation, application, and enforcement of its own rules. **Vincent v. Vincent**, 2011-1822 (La. App. 4th Cir. 5/30/12), 95 So.3d 1152, 1161. However, we find that in those instances where a party follows the procedural requirements of La.

⁶ We could find no established definition of “contradictory hearing” in the context of civil motions; however, La. C.C.P. art. 963 makes clear that it must be “served on and tried contradictorily with the adverse party.” The calling of witnesses is not permitted at the hearing on a summary judgment, and all documents in support of and in opposition to the motion must be submitted prior to the hearing. Thus, we are constrained to find that in selecting the phrase “contradictory hearing” the legislature intended that both parties, including the adverse party, be afforded the privilege of oral argument, except in those cases where the memorandum or opposition is untimely filed in violation of La. C.C.P. art. 966(B).

C.C.P. art. 966, the legislature's inclusion of the phrase "contradictory hearing" in La. C.C.P. art. 966(C)(1)(a) signals the intent that both parties be allowed to appear and present argument. We note that the only reference to forfeiture of the privilege of oral argument is Louisiana District Court Rule 9.9(e), which provides that parties who fail to timely file their memorandum in support of the motion for summary judgment or opposition may forfeit the privilege of oral argument.⁷

A hearing on the motion for summary judgment, regardless of whether evidence can be admitted or not, serves the important purpose of allowing parties and/or their counsel to present argument and engage with the tribunal. As the Louisiana Supreme Court pronounced in **Bastrop State Bank v. Samson Levy**, 106 La. 586, 31 So. 164, 165 (1901):

Judicial tribunals are established to administer justice between litigants, and the first and most important step to that end is the ascertainment of the truth of the controversies which come before them. It is only when the truth is ascertained that the law can be properly applied in the just settlement of disputes.

It is a well-established principle that the judiciary's foremost functions are to hear cases and, based on the evidence presented, render judgments. See La. C.C.P. art. 1.

Finally, we find the instant matter distinguishable from this court's previous decision in **Walker v. LeBlanc**, 2012-0764 (La. App. 1st Cir. 12/21/12), 111 So.3d 1069, writ denied, 2013-0539 (La. 4/12/13), 110 So.3d 1080, wherein this court found no error in the district court's ruling on the motion for summary judgment solely on the memoranda of the parties without allowing oral argument or conducting a hearing. *Id.* at 1073-1074. At the time **Walker v. LeBlanc** was

⁷ Louisiana District Court Rules 9.8(b) and 9.9(a), (b), and (c), as amended October 7, 2015, effective January 1, 2016, provide that all time delays associated with the filing of memorandums, oppositions, and replies associated with motions for summary judgment will be governed by La. C.C.P. art. 966, not the court rules. We find nothing in the text of La. C.C.P. art. 966 or the Louisiana District Court Rules to indicate that the provisions granting privilege of oral argument referenced in Rules 9.9(e) and 9.18 are no longer applicable to motions for summary judgment.

decided La. C.C.P. art. 966(D) required that the district “court shall hear and render judgment on the motion for summary within a reasonable time.” This court, noting that all parties submitted multiple memoranda with exhibits for the district court’s consideration, found that there was “absolutely no indication that the district court failed to consider or ‘hear’ the positions and/or the evidence in support” before making the decision to grant the summary judgment. *Id.* at 1074. This court also found relevant the fact that neither party filed an order requesting that a hearing be set pursuant to Rule 9.8 of the Louisiana Rules for District Courts. *Id.*

In contrast, La. C.C.P. art. 966(C)(1)(a) now expressly provides that a district court must set a contradictory hearing on the motion for summary judgment unless the parties and district court agree otherwise. Further, the instant matter was properly set for a hearing and the parties were represented by counsel at the hearing. Finally and relevantly, here, the hearing transcript indicates that the district court may have failed to consider the plaintiffs’ opposition and documents in support before ruling based on the mistaken belief that the plaintiffs had not filed a timely opposition to Barry Dick’s motion for summary judgment.

We conclude that La. C.C.P. art. 966 as amended in 2015 clearly intends that the hearing will be contradictory with adverse counsel or parties present such that it affords the adverse party a reasonable opportunity to appear and to present argument. We find the district court erred in failing to allow the plaintiffs an opportunity to present oral argument opposing Barry Dick’s motion for summary judgment. Thus, we vacate the portion of the district court’s judgment granting the motion for summary judgment and remand with instructions that the matter be set

for a contradictory hearing.⁸ Finding merit to this assignment of error, we preterm discussion of the plaintiffs' remaining assignments of error.

CONCLUSION

For the foregoing reasons, the district court's October 28, 2016 judgment granting the motion for summary judgment filed by Barry Dick is vacated, and we remand the matter to the district court to set Barry Dick's motion for summary judgment for a contradictory hearing. The costs of this appeal are assessed to the defendant/appellee, Barry Dick.

VACATED AND REMANDED.

⁸ We express no opinion as to the merits of the motion for summary judgment. Instead, we hold only that the procedure employed with regard to the contradictory hearing was improper.

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 **McCLENDON, J.,** agreeing.

I agree with the result reached by the majority, finding it to be consistent with my dissent in **Walker v. LeBlanc**, 12-0764 (La.App. 1 Cir. 12/21/12), 111 So.3d 1069, writ denied, 13-0539 (La. 4/12/13), 110 So.3d 1080.