**NOT DESIGNATED FOR PUBLICATION**

| | | |
|---|---|---|
| **DR. RAND METOYER** | * | **NO. 2000-CA-0708** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **LOUISIANA STATE RACING COMMISSION** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
| | * | |
| | * | |

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-17431, DIVISION "I-7"
Honorable Terri F. Love, Judge
* * * * * *
**Judge Dennis R. Bagneris, Sr.**
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

Arthur A. Morrell
3200 St. Bernard Avenue
Suite 107
New Orleans, LA 70119
***COUNSEL FOR PLAINTIFF/APPELLANT***

Richard P. Ieyoub
Attorney General
Kim Raines Chatelain
Assistant Attorney General

340 North Carrollton Avenue
Suite 2-B
New Orleans, LA 70119
***COUNSEL FOR DEFENDANT/APPELLEE***

**AFFIRMED**

This appeal arises from a judgment in favor of defendant-appellee, the Louisiana State Racing Commission ("LSRC," "the defendant"), granting the Motion to Dismiss and Motion for Summary Judgment filed by LSRC. The plaintiff-appellant, Dr. Rand Metoyer ("Dr. Metoyer," "the plaintiff") appeals. We affirm the judgment of the trial court.

## *FACTS AND PROCEDURAL HISTORY*

Pursuant to La. R.S. 49:964, the plaintiff instituted this suit against the LSRC by filing a Petition for Judicial Review of Adjudication in the trial court on October 3, 1997. The cause of action arises from a claim for a thoroughbred racehorse by the name of "TOP AGAIN".

On August 16, 1997, Patricia Johnston, the owner of "TOP AGAIN", entered the horse to race. On this same day, Louisiana Downs Racetrack held a "claiming race." A "claiming race" is any race in which the

ownership of every horse running therein may be transferred from the present owner to the claimant in accordance with the claiming rules and engagements that exist under the Rules of Racing. According to these Rules, the ownership of every horse running in the second race at Louisiana Downs on August 16, 1997, could be claimed by a qualified claimant if he or she submitted a valid claim and posted $7500.00 plus tax for the sale of the horse.

The claiming procedures provide that in a claiming race, any horse is subject to being claimed for its entered price by any racing interest recognized by the Racing Commission. According to the Rules, once a claim for a horse is lodged, it is irrevocable, and it is at the risk of the claimant. Further, title to a claimed horse shall be vested in the successful claimant at the time that the horse leaves the paddock. The successful claimant shall then become the owner of the horse whether he be alive or dead, sound or unsound, or injured at any time after leaving the paddock, during the race or after.

La. R.S. 4:172 provides that the stewards are the persons vested with the full authority and supervision over the daily conduct of racing at each

association. Additionally, the stewards are designated by the Rules of Racing to be the sole judge of the validity of a claim. There are three stewards assigned to each of the four licensed racetracks during a racing meet. According to La. R.S. 4:154, any person unhappy with a decision of the stewards may have it reviewed by the Racing Commission by filing an appeal within five days of such decision.

In the instant case, the plaintiff entered the claiming race and attempted to buy "TOP AGAIN" from its owner, Patricia Johnston, on August 16, 1997. The claim was disallowed and/or voided by the stewards as failing to comply with the claiming rules.

The plaintiff appealed the stewards' decision to the Racing Commission. The Racing Commission heard the matter on August 29, 1997, and they voted to uphold the stewards' decision.

Pursuant to La. R.S. 49:964, the plaintiff then filed a Petition for Judicial Review of Adjudication in the trial court on October 3, 1997. The LSRC was the only named defendant in the Petition. In response, along with an Answer to the plaintiff's Petition, on October 23, 1997, the LSRC filed a Peremptory Exception of Nonjoinder of an Indispensable Party, based on the

fact that the plaintiff did not name Patricia Johnston, the horse's owner, as a co-defendant. The LSRC argued that this was necessary because a judgment in favor of the plaintiff would unavoidably affect ownership of the horse; therefore, the horse's present owner should be joined. On November 7, 1997, the plaintiff filed a Motion to Amend the Petition and the First Amended Petition, in which he named Ms. Johnston as a co-defendant. On November 11, 1997, plaintiff's first counsel filed a Motion to Withdraw and Substitute Counsel of Record, which was granted by the trial court judge on November 14, 1997; the trial court judge also granted plaintiff's new counsel's Motion to Enroll as Counsel of Record on November 17, 1997.

On December 19, 1997, plaintiff's new counsel inexplicably filed a voluntary Motion for Partial Dismissal of Ms. Johnston from the suit. Plaintiff's counsel specified that he wanted Ms. Johnston dismissed from the suit with prejudice. The trial court judge granted this Motion on January 13, 1998. Arguing that this action by plaintiff's counsel revived its earlier Peremptory Exception of Nonjoinder of an Indispensable Party, on March 5, 1998, the LSRC filed an Opposition to the Motion to Set Trial on the Merits because, according to the LSRC, the matter was not in a proper posture for

adjudication without the horse's owner being added as a defendant. On this same basis, the LSRC filed a Motion and Order to Re-Set Exceptions for Hearing, which was signed by the trial court judge on March 13, 1998.

The record reveals that the trial court judge summarily dismissed the defendant's Exception of Nonjoinder. In response, the defendant filed a Motion for New Trial on its Exception of Nonjoinder on May 27, 1998. The trial court judge issued a judgment that she signed on June 29, 1998. In that judgment, the trial court judge granted the defendant's Exception of Nonjoinder of an Indispensable Party and set aside the earlier judgment in which she summarily dismissed the defendant's Exception. The trial court judge also ordered the defendant to join Ms. Johnston as a party defendant within fifteen days of June 29, 1998, the date of the signing of the Judgment.

On October 15, 1998, the LSRC filed a Motion to Dismiss and a Motion for Summary Judgment. Attached to the LSRC's accompanying Memo in Support of their Motion for Summary Judgment was an affidavit of Ms. Johnston. In this affidavit, Ms. Johnston testified that she did not hear from the plaintiff until after he filed his Petition for Review on October 3, 1997. Ms. Johnston indicated that she was still presently the owner of "TOP

AGAIN" and that, "in an effort to reach an amicable resolution to Dr. Metoyer's claim for 'TOP AGAIN'", she "would be willing to sell and/or otherwise transfer ownership of the horse 'TOP AGAIN' to Dr. Rand Metoyer for the claiming price plus any necessary fees, costs, or taxes related to the transfer as if the claim had been upheld." This affidavit was dated November 5, 1997. Also attached to this Memo in Support was an affidavit of Kim Hollis. Ms. Hollis testified that she was an employee of Louisiana Tech University's Equine Center Lab. Ms. Hollis further testified that on or about January 20, 1998, Ms. Johnston donated "TOP AGAIN" to the Equine Center and that "TOP AGAIN" had been a part of the equine facility every since. The hearing on these Motions took place on December 11, 1998. The trial court judge apparently took the matter under advisement and did not issue a ruling until July 21, 1999.

In the interim, the trial court judge issued an Amended Judgment on January 6, 1999, where she amended the June 29, 1998 judgment and ordered the *plaintiff* to join Ms. Johnston as a party defendant within 15 days of the January 6, 1999 signing date. As a result, on January 15, 1999, the plaintiff filed a Motion and Order to add an Indispensable Party, in which he

again added Ms. Johnston as a party defendant.

On July 21, 1999, the trial court judge granted the defendant's Motion to Dismiss and Motion for Summary Judgment and dismissed the case with prejudice. In written reasons for Judgment, the trial court stated, in pertinent part, as follows:

> .... La. C.C.P. art. 641 provides that no adjudication of an action can be made unless all indispensable parties are joined. An indispensable party to an action is any party whose interest in the subject matter would be so directly affected by the judgment that a complete and equitable adjudication cannot be made unless they are joined. After considering the law and evidence, the court found Patricia Johnston to be an indispensable party as any disposition of the case would impact the right to "TOP AGAIN" and ordered plaintiff to join her as defendant. Defendant filed a Motion to Dismiss and Motion for Summary Judgment which came for hearing on December 11, 1998 that plaintiff cannot succeed on the merits and abandoned his claim to "TOP AGAIN" when he dismissed with prejudice Patricia Johnston who subsequently donated the horse to LSU.
>
> This case is not and cannot be in a proper posture for adjudication. Granting plaintiff's prayer for relief to find his claim to "TOP AGAIN" valid would be to recognize him as owner. The court cannot adjudicate the ownership of "TOP AGAIN" without all parties whose interest will be affected joined. However, plaintiff voluntarily dismissed with prejudice Patricia Johnston who owned "TOP AGAIN" when the claim was submitted and when suit was filed. For these reasons, the court grants the motion to dismiss and motion for summary judgment filed by defendant, Louisiana State Racing Commission.

On an unknown date after this judgment, the plaintiff filed a Motion for New Trial, which was denied by the trial court. This appeal followed.

## *LAW AND DISCUSSION*

The issue before this Court is whether the trial court erred in granting the Motion for Summary Judgment and Motion to Dismiss filed by the LSRC.

In *Motton v. Lockheed Martin Corporation*, 97-0204 (La. App. 4 Cir. 12/1/97), 703 So.2d 202, this Court discussed summary judgments:

> Summary judgments are now favored, and the rules regarding such judgments should be liberally applied. *E.g., Oakley v. Thebault*, 96-0937, p. 4 (La. App. 4 Cir. 11/13/96), 684 So.2d 488, 490. Appellate courts review summary judgments *de novo*. A motion for summary judgment which shows that there is no genuine issue of material fact and that the mover is entitled to a judgment as a matter of law shall be granted. La. Code Civ. Proc. art. 966 C(1). An issue is genuine if reasonable persons could disagree. *Smith v. Our Lady of the Lake Hospital*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. *Id.* Facts are material if they potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of the legal dispute. *Walker v. Kroop*, 96-0618, p. 2 (La. App. 4 Cir. 7/24/96), 678 So.2d 580, 583.
>
> Paragraph C(2) of Article 966, added by Acts 1997, No. 483, §1, sets forth the burden of proof in a motion for summary judgment:
>
> > 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.

***Plaintiff's Dismissal of Patricia Johnson With Prejudice***

Plaintiff's counsel argues that on June 29, 1998, the trial court judge ordered the *defendant* to add Ms. Johnston as a party defendant within fifteen days. Plaintiff's counsel further argues that the defendant failed to do this; therefore, the plaintiff should not be penalized for the LSRC's failure to honor the trial court's judgment. Plaintiff's counsel does acknowledge that the trial court judge issued an Amended Judgment on January 6, 1999, where she amended the June 29, 1998 judgment and ordered the *plaintiff* to join Ms. Johnston as a party defendant within fifteen days. Plaintiff filed a Motion and Order to add an Indispensable Party, in which he again added Ms. Johnston as a party defendant. Plaintiff appears to be arguing that he should not be penalized for the defendant's failure to add Ms. Johnston as a co-defendant when the trial court judge ordered the defendant to do so in

June of 1998.

In the instant case, the LSRC moved for Summary Judgment, arguing that the plaintiff, on his own motion, made a decision to dismiss the owner of "TOP AGAIN" from the litigation with prejudice. The LSRC argues that in so doing, the plaintiff abandoned and/or forewent the opportunity of securing a judgment which effected the result prayed for in his petition: ownership of "TOP AGAIN". The LSRC further argues that because of this, the plaintiff's only remaining claim in this matter is the claim for litigation expenses. We agree with the LSRC's argument.

La. C.C.P. art. 641 involves the joinder of parties, and it provides as follows:

> A person shall be joined as a party in the action when either:
>
> (1) In his absence complete relief cannot be accorded among those already parties.
>
> (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:
>
> (a) As a practical matter, impair or impede his ability to protect that interest.
>
> (b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

According to La. C.C.P. art. 641, there is no question that Ms.

Johnston, as the owner of "TOP AGAIN," should have been added as a co-defendant in this litigation. The plaintiff ultimately prayed for the ownership of "TOP AGAIN"; therefore, it stands to reason that he would have to add the horse's owner as a co-defendant. Plaintiff's counsel did so on November 7, 1997, in an apparent response to the LSRC's Peremptory Exception of Nonjoinder of an Indispensable Party. However, plaintiff's new counsel decided not to handle the case in the same manner as previous counsel. Plaintiff's new counsel chose to voluntarily dismiss Ms. Johnston with prejudice on December 19, 1997. This Court fails to understand *why* plaintiff's counsel took this approach, and plaintiff's counsel offers no explanation or reasoning regarding his strategy in dismissing the horse's owner in his brief. The affidavit of Ms. Hollis of Louisiana Tech University's Equine Center Lab reveals that Ms. Johnston, after being dismissed as a co-defendant in this suit, subsequently donated "TOP AGAIN" to the Equine Center. This was well within Ms. Johnston's right as the owner of the horse; however, she would have been prevented from donating the horse if she would have remained a co-defendant in this matter. The voluntarily dismissal with prejudice of Ms. Johnston from this suit resulted in the loss of plaintiff's possible claim of ownership of "TOP AGAIN".

There is no need for trial on this issue. It is indisputable that Ms. Johnston, once she was dismissed as a co-defendant in this suit, was free, as the owner of "TOP AGAIN", to do with the horse what she wished. Ms. Johnston had a right to donate "TOP AGAIN" to Louisiana Tech University's Equine Center Lab, which she did. Therefore, plaintiff, even if he were to win at trial on the merits, would be unable to obtain what he's praying for in the petition: ownership of "TOP AGAIN". We find that the trial court judge did not err when she found that "plaintiff cannot succeed on the merits and abandoned his claim to 'TOP AGAIN' when he dismissed with prejudice Patricia Johnston who subsequently donated the horse...." The fact that the trial court judge later ordered the *defendant* to add Ms. Johnston as a co-defendant is of no consequence because the horse had already been donated by this time.

***Plaintiff's Claim to Litigation Expenses***

La. R.S. 49:965.1 provides that when a small business files a petition seeking judicial review of an agency decision, the petition may include a claim against the agency for recovery of reasonable litigation expenses. However, reasonable litigation expenses may be awarded *only if* the small business prevails upon the merits *and* the

court determines that the agency acted without substantial justification.

The LSRC argues that in order for the plaintiff to be awarded litigation expenses, he would have had to prevail upon the merits, and subsequently, for there to be a determination that the Racing Commission acted without substantial justification. The LSRC further argues that the trial court could not reach the decision as to litigation expenses without first rendering a fictitious judgment on the merits of the suit because the issue of ownership of "TOP AGAIN" could no longer be properly adjudicated. We agree.

Once the plaintiff voluntarily dismissed Ms. Johnston from the suit, and Ms. Johnston subsequently donated the horse, the trial court and this Court were unable to provide plaintiff with the ownership of the horse that he prayed for in his petition. Therefore, plaintiff was unable to be successful on the merits of his claim. Because of this inability to be successful on the merits, the plaintiff is not entitled to litigation expenses according to La. R.S. 49.965.1.

## ***CONCLUSION***

For the foregoing reasons, we find that the trial court was correct in

granting the defendant-appellee's Motion for Summary Judgment and Motion to Dismiss. We therefore affirm the judgment of the trial court.

**AFFIRMED**