ALBERTA MONTGOMERY AND CATHY WILTZ AS NATURAL TUTRIX OF NEIL A. LAUGAND	*	**NO. 2001-CA-0116**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS		
	*	**STATE OF LOUISIANA**
CHRISTOPHER M. KOONEY, NANCY BROWN, USAA INSURANCE COMPANY, COASTAL CONSTRUCTION AND ENGINEERS COMPANY AND THE LOUISIANA STATE DEPARTMENT OF TRANSPORTATION	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-14791, DIVISION "F-10"
Honorable Yada Magee, Judge
* * * * * *
Charles R. Jones
Judge
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love and Judge Max N. Tobias, Jr.)

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AFFIRMED

Plaintiffs/Appellants, Alberta Montgomery and Cathy Wiltz, as natural tutrix of Neil A. Laugand, appeal the district court's granting of a summary judgment in favor of USAA Casualty Insurance Company and Christopher M. Kooney. We affirm.

This lawsuit arises out of a chain-reaction collision on Interstate I-610 near the Elysian Fields Avenue exit in New Orleans. Ms. Montgomery was the driver of the first car, and Neil Laugand was her guest passenger. Mr. Kooney was the driver of the second car and Nancy Brown drove the third car in line.

The accident occurred on Friday, August 22, 1997, at approximately 10:00 p.m. At the time of the accident, Coastal Construction and Engineering Corporation (hereinafter "Coastal") was changing signs on Interstate I-610 and had set up traffic barrels reducing the two traffic lanes into one lane. The traffic was moving slowly and it was intermittently stopped. Ms. Montgomery claims that she was rear-ended by Mr. Kooney after he had been rear-ended by Ms. Brown.

On August 24, 1998, Ms. Montgomery and Ms. Wiltz, as natural tutrix of Neil Laugand, filed suit against Mr. Kooney, his liability insurer, USAA, Ms. Brown, Coastal, and the Louisiana Department of Transportation and Development (hereinafter "the DOTD"). On May 10, 2000, USAA and Mr. Kooney moved for summary judgment on the grounds that the accident was caused solely by the negligence of Ms. Brown. Ms. Montgomery and Ms. Wiltz opposed the motion.

Following a hearing, the district court granted the summary judgment in favor of USAA and Mr. Kooney and dismissed Ms. Montgomery's and Ms. Wiltz's claim against them with prejudice. That judgment was signed on June 29, 2000. On that same date, Ms. Montgomery and Ms. Wiltz filed a Motion for New Trial, which was denied *ex parte* and now they have devolutively appealed the June 29, 2000 judgment.

Applicable Law

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored

and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 (B).

"The jurisprudential presumption against the granting of summary judgment was legislatively overruled by La. C.C.P. art. 966 as amended." *Coates v. Anco Insulations, Inc.*, 2000-1331, p.5-6 (La. App. 4 Cir. 3/21/01), 786 So.2d 749, 753. Further, the amendments level the playing field, with the supporting documentation submitted by the parties to be scrutinized equally. Under the amended statute, the initial burden of proof remains with the movant to show that no genuine issue of material fact exists. 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 the 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 of the 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. La. C.C.P. art. 966 C(2).

When a motion for summary judgment is properly made and supported, a plaintiff may not rest on the mere allegations or denials of his pleading, but his response, by affidavits, depositions or answers to interrogatories, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967.

"Once mover has *properly supported* the motion for summary judgment, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion." *Coates,* 2000-1331, p. 6, 786 So. 2d at 753 (*emphasis added*).

Ms. Montgomery and Ms. Wiltz assert in their sole assignment of error that the district court committed manifest error in granting summary judgment in favor of USAA and Mr. Kooney.

USAA and Mr. Kooney argued in their Motion for Summary Judgment that, according to the allegations of Ms. Montgomery's and Ms. Wiltz's petition, the accident was caused because Ms. Brown was speeding which resulted in Mr. Kooney being rear-ended, who in turn, rear-ended them. USAA and Mr. Kooney further argued that, since both Ms.

Montgomery and Neil Laugand testified in their depositions that there had been only one impact, Mr. Kooney is not guilty of any negligence and therefore he bears no responsibility for the accident and their resulting injuries.

Ms. Mongomery and Ms. Wiltz assert in paragraph 11 of their original petition:

> Your petitioner [sic] avers that Nancy Brown upon information and belief was speeding, driving recklessly and collided with Christopher M. Kooney who then rear-ended plaintiff's car on Interstate 610 in the Parish of Orleans near its Elysian Fields Avenue exit.

Attached to USAA's and Mr. Kooney's Motion for Summary Judgment were excerpts of Ms. Montgomery's deposition wherein she testified that Ms. Brown had caused the accident. She further stated that her car had been hit only once and that she had not paid attention to the car behind her (Mr. Kooney's car) and therefore had no idea if it had stopped behind her, and that she did not see the car behind her until it had hit her. According to Ms. Montgomery, she heard a boom and windows shattering, and upon looking into her rearview mirror she had been hit.

USAA and Mr. Kooney also attached to their Motion for Summary Judgment excerpts of Neil Laugand's deposition wherein he testified that they had only been hit once and that he had not seen the vehicle that hit them

before the impact.

Citing *Staehle v. Marino*, 201 So. 2d 212 (La. App. 4 Cir. 1967), USAA and Mr. Kooney argue that when other vehicles are able to stop behind the lead automobile, the last automobile which precipitates a chain-reaction collision is negligent. They also rely on *Junker v. Lee*, 160 So. 2d 337 (La. App. 4 Cir. 1964), wherein this Court found that the weight of the evidence established that the sole and proximate cause of a four-vehicle chain-reaction collision was the inattention of the driver of the rearmost vehicle and her failing to see and realize that the vehicles ahead of her had slowed down. In *Junker*, the lead vehicle had decelerated upon his approaching a school zone, as had the second and third vehicle behind him upon observing his actions. The driver of the fourth vehicle, however, had been momentarily distracted by some children in her vehicle, and failed to notice that the traffic in front of her had slowed. As a result, she rear-ended the third vehicle, knocking it into the second vehicle and, in turn, ramming that vehicle into the first one.

In sum, USAA and Mr. Kooney submit that they met their burden on summary judgment by proving, through their use of the allegations made by Ms. Montgomery and Ms. Wiltz and the deposition testimony, that Mr. Kooney was free from negligence. They further submit that the Ms.

Montgomery and Ms. Wiltz did not, and cannot, produce any other evidence to show that the accident was caused in a different manner than that which was set forth in their petition. Consequently, USAA and Mr. Kooney submit that the judgment dismissing them from this suit with prejudice was proper and should not be overturned on appeal.

In opposition, Ms. Montgomery and Ms. Wiltz argue that there is a disputed material fact as to whether Mr. Kooney, as the middle driver, was following them too closely or had stopped too close to them, thereby failing to keep a safe distance between his vehicle and theirs. They further argue, without any supporting authority, that the question of Mr. Kooney's negligence cannot be answered on summary judgment. They claim that as following drivers in a chain-collision, both Mr. Kooney and Ms. Brown are presumed to be at fault and, therefore, Mr. Kooney and USAA bear the burden of proving that he was free from fault. In support of this proposition, Ms. Montgomery and Ms. Wiltz rely on *Dolmo v. Williams*, 99-0169 (La. App. 4 Cir. 9/22/99), 753 So. 2d 844.

In addition, they cite *Chambers v. Graybiel*, 25,840 (La. App. 2 Cir. 6/22/94), 639 So. 2d 361, wherein the court noted that given the widely divergent accounts of how the accident occurred, there were several equally reasonable findings that the jury could have made regarding the allocation of

fault between two following motorists. Accordingly, the Second Circuit perceived no manifest error in the jury's finding that the driver of the last vehicle in a chain-collision was not solely responsible for the accident because the driver of the middle vehicle did not keep enough distance between himself and the first vehicle.

In sum, Ms. Montgomery and Ms. Wiltz submit that Mr. Kooney failed to prove that he was free from fault and, therefore, the judgment by district court granting the summary judgment should be reversed and the matter should be remanded for trial on the merits.

Although cited by neither side, we find the following cases relevant to the question before us today.

Lirette v. Ott, 562 So. 2d 1067 (La. App. 4 Cir. 1990), involved a three-vehicle chain-collision. Cunningham's vehicle came to a complete stop behind Lirette. A third vehicle rear-ended Cunningham's vehicle, propelling it into the rear of Lirette's vehicle. When Lirette sued the operator of the third vehicle and his insurer, the insurer filed a third-party demand against Cunningham and his insurer. Cunningham and his insurer filed a Motion for Summary Judgment, which was granted, dismissing the third party demand against them. On appeal, it was argued that there were genuine issues of material fact as to, among other things, the distance

between Cunningham's and Lirette's vehicles. This Court rejected that argument, finding no law requiring a motorist who stops behind a line of stopped automobiles to maintain a certain distance behind the stopped vehicle in front of him. Accordingly, we affirmed the judgment of the district court granting the summary judgment in favor of the driver of the middle vehicle in the three-car chain-collision. In *Stringer v. Andrews*, 572 So. 2d 832 (La. App. 4 Cir. 1990), we affirmed the summary judgment in favor of the middle vehicle involved in a three-car chain-collision where the plaintiffs failed to show that they would be able to satisfy their burden of proof at trial. Accordingly, in *Skidmore v. Initial DSI Transport, Inc.*, 99-1066 (La. App. 5 Cir. 2/29/00), 757 So. 2d 107, the Fifth Circuit Court affirmed a summary judgment in favor of the middle vehicle involved in a three-car chain-collision where the plaintiffs offered no countervailing evidence to contradict that offered by the defendant in support of his motion.

Based on the above cited jurisprudence, the assignment or error raised by Ms. Montgomery and Ms. Wiltz's is without merit. As USAA and Mr. Kooney correctly point out, both *Dolmo* and *Chambers* are distinguishable from the case at bar because in those cases the court was faced with conflicting evidence concerning how the accidents had occurred. Plaintiffs admit as much in their brief to this Court.

According to the original petition filed by Ms. Montgomery and Ms. Wiltz, Mr. Kooney's vehicle was pushed into the rear of their vehicle by Ms. Brown's vehicle. Both Ms. Montgomery and Neil Laugand testified that they felt only one impact. They also admitted that they did not see Mr. Kooney's car behind them prior to the impact.

We find that USAA and Mr. Kooney met their burden under La. C. C. P. art. 966 showing the absence of factual support for Ms. Montgomery's and Ms. Wiltz's claim of Mr. Kooney's negligence. Accordingly, the burden shifted to the Ms. Montgomery and Ms. Wiltz to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial. Although Ms. Montgomery and Ms. Wiltz alleged in their original and supplementing petitions that Mr. Kooney was guilty of negligence in several respects, they failed to come forward with proof of any such negligence on Mr. Kooney's part. Ms. Montgomery and Ms. Wiltz were not entitled to rest on the bare allegations of their pleadings that Mr. Kooney was negligent because of his following them too closely and his failing to keep a proper lookout and to apply his brakes. Instead, pursuant to La. C.C.P. art. 967, Ms. Montgomery and Ms. Wiltz were required to set forth specific facts showing that there was a genuine issue of material fact for trial. Because of the testimony that there was only

one impact and that no party saw Kooney's vehicle prior to its impact with their vehicle, they cannot prove that Mr. Kooney was at fault in causing the accident. As a result, USAA and Mr. Kooney proved that there were no genuine issues of material fact and they were entitled to judgment as a matter of law.

Decree

For the foregoing reasons, the judgment of the district court granting summary judgment in favor of USAA and Mr. Kooney and dismissing the claims of Ms. Montgomery and Ms. Wiltz with prejudice, is hereby affirmed.

AFFIRMED