

NOT DESIGNATED FOR PUBLICATION

CHRISTOPHER SCHEELER * NO. 2001-CA-0372
VERSUS * COURT OF APPEAL
GLENN TURNAGE, EILEEN * FOURTH CIRCUIT
TURNAGE, AND STATE FARM * STATE OF LOUISIANA
INSURANCE COMPANY *

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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 89-786, DIVISION "E"

Honorable Jacques A Sanborn, Judge

Judge Dennis R. Bagneris, Sr.

(Court composed of Chief Judge William H. Byrnes, III,
Judge Dennis R. Bagneris, Sr., and Judge Terri F. Love)

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CASUALTY COMPANY**

AFFIRMED AS AMENDED

Plaintiff/Appellant Christopher Scheeler appeals the trial court's maintaining of an Exception of No Cause of Action/ Motion for Summary Judgment in favor of defendants Glenn and Eileen Turnage and State Farm Insurance Company ("State Farm") and "dismissing plaintiff's petition reserving to plaintiff any and all other causes of action which he may have."

FACTS AND PROCEDURAL HISTORY

On February 11, 1999, plaintiff, while acting in his capacity as a St. Bernard Parish Sheriff's Office patrol officer, was called to the home of Eileen Turnage to handle a disturbance between her daughter and her son, Glenn Turnage. An altercation ensued between plaintiff and Glenn Turnage as plaintiff was attempting to place Glenn Turnage under arrest. Plaintiff's knee was injured in the melee.

On February 10, 2000, plaintiff filed suit against Glenn Turnage, Eileen Turnage, and State Farm Insurance Company ("State Farm"), Eileen Turnage's homeowner's insurer. Although service was requested on Glenn and Eileen Turnage, the Sheriff filed notices in the record indicating that service could not be made because those defendants had moved. State Farm answered the suit on its own behalf only, and filed an Exception of No Cause of Action and/or Motion for Summary Judgment. Therein it alleged

that plaintiff had no cause of action for any arbitrary and capricious penalties or attorney's fees, and that plaintiff had failed to state a cause of action against it or alternatively, that it was entitled to summary judgment, on any claims by plaintiff against its insured, Eileen Turnage, due to the "Professional Rescuers Doctrine." Plaintiff opposed State Farm's exception/motion.

Following a hearing on May 12, 2000, the trial court entered judgment "in favor of the defendants, Glenn and Eileen Turnage and State Farm Insurance Company, and against the plaintiff" maintaining the defendants' exception/motion and "dismissing plaintiff's petition reserving to plaintiff any and all other causes of actions which he may have." In its reasons for judgment, the trial court discussed this court's opinion in Meunier v. Pazzo, 97-0047 (La. App. 4 Cir. 6/18/97), 696 So. 2d 610, wherein we upheld the trial court's barring of any recovery by the plaintiff, a police officer, for injuries sustained during the performance of her professional duties. The trial court's reasons quoted our reasoning in Meunier, writing that:

The court reasoned that "[a] professional rescuer injured in the performance of his or her professional duties assumes the risk of such injury and is not entitled to damages from a third party." However the court recognized two exceptions. "First, a professional rescuer may recover for injuries caused by the defendant's gross or wanton negligence. Second, a professional rescuer may recover for injuries caused by a risk independent of the emergency or problem the professional rescuer assumed the duty to remedy." *Id.* at 613."

In addressing the first exception to the doctrine, the trial court stated that it had reviewed plaintiff's arguments and was not in agreement that Eileen Turnage's actions or lack thereof rose to the level of gross and/or wanton negligence. The court went on to state that it:

[C]annot in good conscience find that the defendant, even though she is a commissioned St. Bernard Sheriff's Deputy, should have informed the arresting officer about the tendencies of the arrestee, assisted a fellow officer in trouble, and/or should have called for assistance for the arresting officer. This court is of the opinion that an off duty deputy who has the occasion to call the St. Bernard Sheriff's Office, which happens to be her employer, for help should not be held to a higher standard than a civilian who calls with a similar situation.

Therefore, the trial court opined that Eileen Turnage "acted in a reasonable manner given the situation and at no time did her alleged lack of action and/or involvement rise to the level of gross or wanton negligence."

Going on to address the second exception to the Professional Rescuer's Doctrine, the trial court found that plaintiff's injury was "a direct result of his response to a disturbance call and his corresponding arrest of the defendant, Glenn Turnage." Accordingly, the court reasoned that "plaintiff was acting in his professional capacity and that plaintiff knowingly assumed the risk which caused him harm: a risk necessarily included in his duty as a police officer."

The trial judge also discussed in his reasons the public policy

considerations recognized in Meunier in favor of our reluctance to find a special duty owing to professional rescuers. In Meunier we stated that if proprietors were fearful of liability resulting from injury to police officers by third parties, proprietors might resort to self-help rather than summoning the police to their premises. Because such situations would create additional risks to the public, we affirmed the trial court's determination that the defendants in Meunier did not owe a duty to the plaintiff to prevent the injuries she sustained during the course and scope of her professional duties.

The trial court issued its judgment and reasons on July 13, 2000. Plaintiff timely filed a motion for devolutive appeal.

DISCUSSION

Plaintiff assigned three errors in this appeal. First, plaintiff avers that the trial court erred in granting the exception of no cause of action and/or motion for summary judgment in favor of Glenn and Eileen Turnage when only State Farm filed such exception and motion. Next, he avers that the trial court erred in granting an exception of no cause of action in favor of any defendant, because the pleadings clearly state a cause of action against all the defendants, and because State Farm's exception of no cause of action addressed only his claim for statutory penalties and attorney's fees for its alleged arbitrary and capricious refusal to pay his claim. Finally, plaintiff

avers that the trial court erred in granting the motion for summary judgment in favor of any appellee without any affidavits and discovery filed and considered herein, because the pleadings clearly show genuine issues of material fact and because defendants failed to show that they were entitled to judgment as a matter of law.

Plaintiff does not challenge the trial court's maintaining the exception of no cause of action in favor of State Farm as to his claim for statutory penalties and attorney's fees. Accordingly, the trial court's maintaining of State Farm's exception of cause of action as to plaintiff's claims under La. R.S. 22:1220 is affirmed.

In its brief to this court, counsel for State Farm points out that the trial court's July 13, 2000 judgment incorrectly referred to him as representing both Glenn and Eileen Turnage and State Farm. Additionally, State Farm acknowledges that its exception and motion did not seek relief as to plaintiff's claims against Glenn Turnage, and it concedes that the judgment is incorrect insofar as it purports to dismiss those claims.

Accordingly, the judgment is amended to correctly reflect that Thomas G. Buck appeared at the May 12, 2000 hearing only on behalf of his client, State Farm, and to remove the reference to judgment being rendered in favor of Glenn Turnage.

In his first assignment of error, plaintiff claims that the trial court erred in granting the exception and/or motion in favor of Glenn and Eileen Turnage when only State Farm filed the exception and motion. As we mentioned earlier, this argument, as it relates to Glenn Turnage, is moot. The only claim that plaintiff brought directly against State Farm was that for penalties and attorney's fees. As mentioned previously, the dismissal of plaintiff's claim in that regard is affirmed because plaintiff failed to challenge that ruling on appeal. In regards to Eileen Turnage, State Farm correctly points out that it could have no liability other than that based on the actions of its insured, Eileen Turnage. Accordingly, her liability was clearly at issue before the trial court. Plaintiff cites no law in support of his argument to the contrary. This assignment of error is without merit.

In plaintiff's second assignment of error, he asserts that the trial court erred in granting the exception of no cause of action in favor of any defendant, because he clearly stated a cause of action against all of the defendants, and because State Farm's exception only addressed his claim for statutory penalties and attorney's fees. Again, as we mentioned previously, plaintiff has not challenged the trial court's maintaining of the exception of no cause of action with regard to his claims for penalties and attorney's fees. Plaintiff also argues in this assignment of error that the professional

rescuer's doctrine has no pertinence to the exception of no cause of action.

The trial court's judgment simply states the "[d]efendants (sic) Exception of No Cause of Action/Motion for Summary Judgment is maintained." We note, however, that State Farm alternatively alleged that plaintiff's claims against its insured Eileen Turnage be dismissed because he had failed to state a cause of action **or** that it was entitled to summary judgment with regards to those claims. Our reading of the trial court's reasons for judgment without doubt convinces us that the court's intent was to dispose of the merits of plaintiff's claims against State Farm's insured, Eileen Turnage. Accordingly, we interpret the trial court's judgment to be granting summary judgment, as opposed to maintaining an exception of no cause of action, in favor of State Farm with regards to plaintiff's claims against its insured. Plaintiff's second assignment of error also lacks merit.

Plaintiff asserts in his final assignment of error that the trial court erred in granting the motion for summary judgment in favor of any of the defendants because no affidavits or discovery was filed in conjunction with the motion. He avers that the pleadings clearly show the existence of genuine issues of material fact and that defendants failed to establish that any of them were entitled to judgment as a matter of law under La. C.C.P. art. 966. Plaintiff cites no authority for his assertion that a summary

judgment should only be granted where the mover has supported his motion with affidavits and/or discovery. Likewise, plaintiff does not assert that he had any outstanding discovery that would be dispositive to the issues before the trial court on State Farm's motion. These arguments are unpersuasive.

In Richter v. Provence Royal Street Co., L.L.C., 97-0297 (La. App. 4 Cir. 10/8/97), 700 So. 2d 1180, we stated that the existence of a duty is a question of law that may be resolved by summary judgment.

Appellate courts review summary judgments *de novo*, asking the same questions as do the trial courts: whether any genuine issues of material fact exist, and whether the mover is entitled to judgment as a matter of law.

Meunier, 97-0047, p. 2, 696 So. 2d at 612.

With regard to the merits of State Farm's summary judgment, plaintiff claims that his allegations against Eileen Turnage fit into the exceptions to the professional rescuer's doctrine, as recognized in Meunier. Plaintiff alleged in his petition that as he began arresting Glenn Turnage, he was pushed back to the ground and while he protected his revolver from Glenn Turnage, "he wrestled with the defendant on the floor, up against the wall, against a table, and into various pieces of furniture." His allegations against Eileen Turnage were that she (1) negligently failed to inform and/or explain to him the dangerous, unpredictable and violent tendencies of her son and

negligently failed to assist him in the confrontation with her son, especially considering that she was, and had been for some time, a commissioned officer for the St. Bernard Sheriff's Office, (2) negligently failed to exercise her duties and responsibilities as a commissioned officer for the St. Bernard Sheriff's Office, (3) negligently failed to call 911 and/or the St. Bernard Sheriff's Office for assistance for plaintiff, and (4) negligently failed to move the furniture when plaintiff and her son were in a confrontation. In essence, plaintiff avers that Eileen Turnage owed him a "heightened duty" as her invitee and as a fellow officer, and that her failure to arrest, warn, assist and/or call for additional assistance amounted to gross and wanton negligence. Additionally, plaintiff claims that Eileen Turnage's failure to move the furniture during his confrontation with her son created a risk independent of the problem or emergency he assumed the duty to remedy. Citing Holdsworth v. Renegades of Louisiana, Inc., 516 So. 2d 1299 (La. App. 2 Cir. 1987), plaintiff asserts that although Louisiana jurisprudence has recognized that under the professional rescuer's doctrine there is no duty owed by the proprietor to protect a police officer from the actions of a patron on the premises, "there is a duty the proprietor owes not to commit any acts of negligence or when the proprietor fails to inform the rescuer of the circumstances."

We disagree. Plaintiff cites no authority for his claim that Eileen Turnage owed him a duty above and beyond that of an ordinary homeowner because she happened to be a St. Bernard Sheriff's Department officer and we decline to create such a heightened duty. Eileen Turnage called the Sheriff's Office, in her capacity as a private citizen, for assistance involving a domestic dispute between her son and daughter. Clearly, plaintiff's argument that she was grossly or wantonly negligent in her failure to warn him of the dangerous propensities of her son is flawed. He was called to Eileen Turnage's home precisely because her son was dangerous and because she wanted him arrested.

Finally, plaintiff mischaracterized the Second Circuit's holding in Holdsworth. What the court actually stated therein was that the proprietor who had summoned a police officer to quell a disturbance at its nightclub owed "a duty to refrain from inflicting an injury on the policeman; to exercise ordinary care to avoid injuring the officer by **affirmative acts of negligence** after he was summoned; and, **if [the proprietor] was aware of a dangerous condition and had reason to believe the policeman was unaware of it, to warn him.**" Holdsworth, 516 So. 2d at 1302. (emphasis added). Plaintiff did not allege that Eileen Turnage committed any affirmative acts of negligence that led to his injury. Likewise, there was no

dangerous condition of which plaintiff was unaware that would create a duty to warn on the part of Eileen Turnage. The dangerous condition was that which plaintiff was summoned to diffuse.

CONCLUSION

The trial court's July 13, 2000 judgment is amended to correctly reflect that Thomas G. Buck appeared at the May 12, 2000 hearing only on behalf of his client, State Farm, and to remove the reference to judgment being rendered in favor of Glenn Turnage.

The judgment is affirmed in all other respects, at plaintiff's cost.

AFFIRMED AS AMENDED