

JESSIE FAZZIO

*

NO. 2002-C-1239

VERSUS

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COURT OF APPEAL

**PROGRESSIVE SECURITY
INSURANCE COMPANY, ET
AL.**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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ON APPLICATION FOR WRITS DIRECTED TO
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 90-810, DIVISION "C"
Honorable Wayne Cresap, Judge

JOAN BERNARD ARMSTRONG

JUDGE

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet
Murray and Judge James F. McKay, III)

MURRAY, J., CONCURS IN THE RESULT.

JOSEPH C. CASLER
MORSE, MCGINTY & ASSOCIATES
1515 POYDRAS STREET, SUITE 880
NEW ORLEANS, LOUISIANA 70112

COUNSEL FOR DEFENDANT-RELATOR

AFFIRMED.

STATEMENT OF THE CASE

In this personal injury action arising out of a motor vehicle accident, defendant-relator Progressive Security Insurance Company (“Progressive”) seeks supervisory review of a trial court judgment denying its motion for summary judgment as to the action brought by its insured, plaintiff Jessica Fazio.

Plaintiff filed the instant action on June 16, 2000, naming as defendants Patricia Maury, Lisa Maury, Rosalie Maury, Louisiana Farm Bureau Insurance Companies (collectively referred to as “the Maury defendants’), Progressive, and the State of Louisiana—DOTD. Progressive is plaintiff’s auto liability insurer.

The Maury defendants filed a motion for summary judgment in 2001. Progressive subsequently filed a separate motion for summary judgment, adopting by reference the motion filed by the Maury defendants, and arguing that it, as plaintiff’s UM carrier, was entitled to summary judgment if none of the Maury defendants was at fault in causing the accident. The trial court denied both motions. The Maury defendants sought supervisory writs in this court. This court granted the Maury defendants’ writ application, and the case against them was dismissed. Plaintiff did not apply to this court for a rehearing, and Progressive represents that plaintiff did not seek review in the Louisiana Supreme Court.

Progressive subsequently reurged its motion for summary judgment, citing this court's decision in the Maury defendants' writ application. The trial court denied the motion and this application for supervisory writs followed.

FACTS

Exhibit F to Progressive's writ application is a "State of Louisiana Uniform Motor Vehicle Traffic Crash Report." The report sets forth the details of the October 11, 1999 two-vehicle collision giving rise to this action. The accident occurred at the intersection of U.S. Highway 51 and U.S. Highway 190 in Hammond, Louisiana. Plaintiff was driving a vehicle west on Hwy. 51 when she encountered a malfunctioning traffic signal that led her to believe it was green (the red signal was out, and the green lense of the Hwy. 51 signal reflected green light from the green signal for Hwy. 190 traffic). Patricia Maury was driving a vehicle north on Hwy. 190 on the actual green signal when plaintiff's vehicle proceeded through the Hwy. 51 signal and struck the right front of her vehicle. No citations were issued to either plaintiff or Patricia Maury.

ANALYSIS

Appellate courts review the grant or denial of a motion for summary

judgment de novo. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230. 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). A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. Id.

La. C.C.P. art. 966(C)(2) provides that where, as in the instant case, the party moving for summary judgment will not bear the burden of proof at trial, his burden does not require him to negate all essential elements of the adverse party's claim, 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. Thereafter, if the adverse party fails to produce factual

support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. Id.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by La. C.C.P. art. 969. La. C.C.P. art. 966(A)(2). Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish those ends. Id. Nevertheless, despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507, p. 2 (La. 12/08/00), 775 So.2d 1049, 1050. A court cannot make credibility determinations on a motion for summary judgment, and must assume that all of the affiants are credible. See Independent Fire Insurance Co. v. Sunbeam Corp., 99-2181, p. 16, 755 So.2d at 236.

The only remaining defendants to plaintiff's action are Progressive and the DOTD. The trial court acknowledged this court's earlier decision granting summary judgment in favor of the Maury defendants, but noted that as between plaintiff and Progressive there was a contract, and it was going to

uphold the contract.

Progressive's argument is that if there is no tortfeasor motorist, then there can be no UM coverage. Progressive's argument is directed solely to UM coverage. Plaintiff alleged in her petition that on the date of the accident "there was in full force and effect a policy of motor vehicle liability insurance, including uninsured motorist, issued by the defendant, Progressive Securities Insurance Company, to the plaintiff, Jessica Fazzio." Plaintiff did not specifically allege coverage other than liability and UM. In Progressive's first motion for summary judgment, it moved the court to enter summary judgment in its favor dismissing plaintiff's claim against it, representing in its accompanying one-paragraph memorandum that "[Progressive] as the UM insurer of the plaintiff has also been named as the defendant in this lawsuit" Progressive did not pray for summary judgment solely as to the issue of UM coverage. Progressive's second motion for summary judgment, at issue in the instant case, simply reurged its first motion.

Progressive does not attach to its writ application a copy of the policy it issued to plaintiff. Nor does Progressive specifically represent that its policy provides only liability and UM coverage for plaintiff. Its argument appears to assume that fact. However, the burden is on Progressive to

establish that UM coverage is the only issue. Under these circumstances, there is a genuine issue of material fact as to the extent of coverage provided to plaintiff under her Progressive policy. Therefore, there is no error in the trial court's denial of Progressive's motion for summary judgment.

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.