TANYA MADERE	*	**NO. 2017-CA-0723**
VERSUS	*	**COURT OF APPEAL**
LOUISE GAUTREAUX COLLINS, M.D. AND OCHSNER MEDICAL CENTER - KENNER, LLC	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOBRANO, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent. I would reverse the district court's May 25, 2017 judgment, which granted summary judgment in favor of Dr. Collins and dismissed Madere's claims with prejudice, and I would remand this matter for further proceedings. I disagree with the majority's conclusion that, under the particular circumstances of this case, Dr. Collins was alleviated from the procedural requirement to file a re-urged motion for summary judgment with all supporting exhibits.

On August 16, 2016, the district court allowed introduction of Dr. Burnett's expert affidavit and denied summary judgment. Following this Court's denial of supervisory writ, Dr. Collins sought, and the Louisiana Supreme Court granted, Dr. Collins' writ application. In its January 9, 2017 writ grant, the Supreme Court ruled as follows: "Granted. The district court abused its discretion." *Madere v. Collins*, 2016-2011 (La. 1/9/17), 208 So.3d 370. Neither remand instructions, relief granted language, nor further reasons were provided by the Supreme Court.

The majority opinion of this Court points to and seemingly adopts language in a concurring opinion by Justice Scott J. Crichton, stating that "a remand is warranted—ordering the district court to hear the motion for summary judgment without consideration of the untimely affidavit." The Supreme Court majority's

ruling, however, contained no directive to the district court. There is no language setting aside or otherwise disturbing the district court's denial of summary judgment. Thus, I find that, at the time Dr. Collins filed her "motion for rehearing and/or new trial," the district court's ruling denying summary judgment remained intact.

This Court has held that a district court "erred as a matter of law when it reconsidered its previous denial of summary judgment through the procedural vehicle of a motion for new trial and then rendered a final summary judgment dismissing [the] suit with prejudice." *Magallanes v. Norfolk S. Ry. Co.*, 2009-0605, p. 5 (La. App. 4 Cir. 10/14/09), 23 So.3d 985, 988-89. Instead, the "proper procedure for obtaining a reconsideration of the motion for summary judgment which has been denied is to re-urge the motion itself by re-filing it prior to trial." *Id.*, 2009-0605 at p. 4, 23 So.3d at 988 (citations omitted).

I recognize the distinction noted by the majority between the procedural posture of this case when compared to *Magallenes* and its progeny.[1] In the *Magallenes* line of cases, the district court reconsidered its own rulings in the absence of properly filed and supported motions for summary judgment, with no intervening supervisory or appellate review. In the case presently on appeal, the district court sought to comply with what it perceived to be a decree from the Supreme Court. I find, however, that while the Supreme Court pointed out the district court's error and found an abuse of discretion in considering an untimely affidavit, the Supreme Court did not disturb the denial of summary judgment in its ruling. Thus, where summary judgment has been denied, I find the *Magallenes* line of cases instructive as to the proper procedure to re-urge a motion for summary judgment.

[1] *See, e.g., Daniels v. SMG Crystal, LLC*, 2013-0761 (La. App. 4 Cir. 12/4/13), 128 So.3d 1272; *Condon v. Logan*, 2015-0797 (La. App. 4 Cir. 3/30/16), 190 So.3d 778.

La. C.C.P. art. 966(D)(2) provides that "[t]he court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made." Comment (k) of the 2015 comments to La. C.C.P. art. 966 explains that "[s]ubparagraph (D)(2) makes clear that the court can consider only those documents filed in support of or in opposition to the motion. This rule differs from Federal Rules of Civil Procedure, Rule 56(c)(3), which allows the court to consider other materials in the record." *See also Washington v. Gallo Mech. Contractors, LLC*, 2016-1251, p. 6 (La. App. 4 Cir. 5/17/17), 221 So.3d 116, 121 ("unlike its federal counterpart, Article 966 D(2) does not allow the trial court to consider the record as a whole in deciding a motion for summary judgment").

Thus, La. C.C.P. art. 966(D)(2) only permits the district court to consider those documents filed in support of or in opposition to the particular summary judgment motion before the district court. This article does not authorize the district court to consider other materials found elsewhere in the record in support of a motion for summary judgment.

Here, after the Supreme Court rendered its ruling, the district court reconsidered Dr. Collins' original motion for summary judgment, with the evidence originally introduced in support of that motion, while excluding the untimely affidavit of Dr. Burnett. Dr. Collins, however, did not re-file her original motion for summary judgment with the evidence she originally introduced in support of her motion. It is evident from the record that, in revisiting Dr. Collins' original motion for summary judgment, the district court failed to consider and rule on the particular motion and evidence before it – Dr. Collins' motion for rehearing and/or new trial. Under these circumstances, I find the district court erred as a matter of law in granting summary judgment and dismissing Madere's claims against Dr. Collins with prejudice.

I also find that the issue as to whether Dr. Burnett's affidavit can be admitted into evidence to oppose a motion for summary judgment filed by Dr. Collins is now moot because of the unique procedural posture of this case and Dr. Collins' procedural decisions.[2] The abuse of discretion stemming from the district court's August 16, 2016 evidentiary ruling cannot be cured at this time due to the manner in which Dr. Collins decided to procedurally pursue her case after the district court's August 16, 2016 evidentiary ruling admitting an untimely affidavit and after the Supreme Court's January 9, 2017 writ grant. The Supreme Court's January 9, 2017 ruling, either interpreted pursuant to the majority opinion in this case as a writ granted/relief granted or pursuant to my dissent as a writ granted/relief denied, cannot give any practical relief at this stage of the case.

I would therefore reverse the district court's judgment granting summary judgment in favor of Dr. Collins, and remand the case for further proceedings.

[2] *See Cat's Meow, Inc. v. City of New Orleans Through Department of Finance*, 98–0601, p. 8 (La.10/20/98), 720 So.2d 1186, 1193 ("An issue is moot when a judgment or decree on that issue has been deprived of practical significance or made abstract or purely academic.")