

**DIANA DERUISE-PIERCE,
SURVIVING SPOUSE OF ROY
T. PIERCE**

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**NO. 2018-CA-0160
COURT OF APPEAL**

VERSUS

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FOURTH CIRCUIT

**UNIVERSITY HEALTHCARE
SYSTEM, L.C. D/B/A TULANE
UNIVERSITY HOSPITAL AND
CLINIC, UNIVERSITY
MEDICAL CENTER
MANAGEMENT**

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STATE OF LOUISIANA

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**CORPORATION D/B/A
UNIVERSITY MEDICAL
CENTER NEW ORLEANS,
DAVIS WENDELL OGITANI,
M.D., BRIAN CONKERTON,
R.N. AND DANIELLE
WILLIAMS-JOHNSON, R.N.**

BELSOME, J., CONCURS IN THE RESULT

I agree with the majority’s decision to reverse and remand to the trial court. However, I would remand the case to allow the Plaintiff an opportunity to conduct additional discovery, pursuant to La. C.C.P. art. 966(A)(3).¹

Admittedly, a party does not have a right to delay a decision on a motion for summary judgment until discovery is complete. However, “the law does require that the parties be given a fair opportunity to present their case.” *Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Grp.), Ltd.*, 03-1600, pp. 3-4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969 (citation omitted).²

¹ La. C.C.P. art. 966(A)(3) states: “After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.”

² With respect to an inadequate discovery claim, this court has identified the following four relevant factors to be considered:

- (i) whether the party was ready to go to trial,
- (ii) whether the party indicated what additional discovery was needed,
- (iii) whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it, and
- (iv) whether the discovery issue was raised in the trial court before the entry of the summary judgment.

Roadrunner Transp. Sys. v. Brown, 17-0040, pp. 11-12 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1273 (citation omitted).

In the instant case, the record reveals that the Plaintiff did not have an adequate opportunity to present her case. First, no discovery cutoff, expert designation, or trial deadlines were established. Next, the Plaintiff took steps to conduct additional discovery and has indicated what additional discovery is needed. Finally, the discovery issue was raised with the trial court in the Plaintiff's motion to continue.

Notably, the Defendants filed two separate motions for summary judgment, each within ten days of answering the lawsuit.³ The motions for summary judgment were continued several times. Significantly, during the last continuance, the parties agreed to continue the summary judgment hearing without date to allow for additional discovery. However, the Defendants re-set their motions without notification to the Plaintiff.

The Civil District Court Local Rules require litigants to certify that discovery is complete before obtaining a trial date. However, when discovery is not complete, the trial court may set a pre-trial scheduling order to allow a sufficient amount of discovery to be completed before trial. *See* Civil District Court Local Rule 9.14.⁴ It is evident that the rule intends to afford litigants a fair opportunity for discovery and to present a case, in conformity with La. C.C.P. art.

³ The Defendants, University Medical Center New Orleans and University Medical Center Management Corporation, filed its motion for summary judgment nine days after filing its answer, while Dr. Davis Ogitani and Danielle Johnson, R.N. filed their motion only two days after filing an answer to the lawsuit.

⁴ Rule 9.14 states:

All cases that have been allotted and all proceedings in connection therewith may, at the discretion of the Division Judge, be set for trial upon written motion filed by the counsel seeking such trial. In this instance, the motion to set shall be accompanied by a certificate that all parties have answered or preliminary defaults have been taken against them, including third-party defendants, all depositions and discovery have been completed, all exceptions and preliminary matters have been disposed of, and the matter is ready for a pre-trial conference or to be set for trial.

Alternatively, after the completion of a sufficient amount of discovery that allows the lawyers/parties to reasonably anticipate the length of the trial, any party may seek a status conference for the purpose of selecting a trial date appropriately in the future, as well as cut off dates for witness lists, expert reports, and discovery. At this status conference, a date for a pretrial conference to occur shortly before trial may also be selected. The dates selected will be reduced to a scheduling order signed the by parties and the court.

966(A)(3). However, the discretionary nature of the rule leads to inconsistent application among the courts below. Certainly, a uniform rule would safeguard the discovery protections afforded under the law. Recognizing the absence of uniformity in setting discovery deadlines below and the parties' agreement to continue the hearing without date until discovery was complete, I find that additional time for discovery is warranted.

Under these circumstances, summary judgment was premature. Consequently, the Plaintiff should be afforded a fair opportunity to present her case. *See Crawford v. City of New Orleans*, 01-0802, pp. 7-8 (La. App. 4 Cir. 1/23/02), 807 So.2d 1054, 1058 (where this Court reversed the granting summary judgment based on inadequate discovery where there was no trial set; the plaintiff identified the deposition testimony sought and the defendant agreed to participate; the plaintiff documented efforts to set the deposition; and the plaintiff filed a motion to continue due to the need for the requested discovery); *Ainsworth v. American Home Assurance Company*, 239 So.3d 359 (La. App. 4 Cir. 2/21/18), 243 So.3d 1061 (La. 6/1/18) (where this Court found summary judgment premature and remanded for additional discovery since there was no discovery or expert designation deadline, the discovery issue was raised, and the case was complex). Accordingly, I would reverse the trial court's ruling granting summary judgment and remand to allow the trial court to set a pre-trial scheduling order that would allow Plaintiff an adequate opportunity for additional discovery.