

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT


NUMBER 2007 CA 2391

ALICE HAWKINS AND THOMAS HAWKINS

VERSUS

**GLYNN RIVET & SONS, INC., RIVET REALTY, L.L.C., GLYNN RIVET,
PARISH OF IBERVILLE AND TOWN OF ROSEDALE**

Judgment Rendered: May 2, 2008


**Appealed from the
Eighteenth Judicial District Court
in and for the Parish of Iberville,
State of Louisiana**


Docket Number 61866


The Honorable Alvin Batiste, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

WHIPPLE, J.

Plaintiffs, Alice and Thomas Hawkins, appeal from a judgment of the trial court: granting defendants' motion for new trial; vacating a previous judgment denying defendants' motion for summary judgment; and granting defendants' re-urged motion for summary judgment dismissing plaintiffs' claims. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

On December 9, 2003, at approximately 8:20 p.m., plaintiff, Alice Hawkins, was driving her 1997 Nissan Altima in a westerly direction on Augusta Road near its intersection with Louisiana Highway 77, when she encountered "thick mud sludge" on the highway causing her to lose control of her vehicle. Hawkins' vehicle skidded and flipped over, coming to rest on the passenger side of the vehicle, with the front of the vehicle pointing north into the ditch.

On December 9, 2004, Alice and her husband, Thomas Hawkins (hereinafter "plaintiffs"), filed the instant suit for damages, seeking recovery for injuries Alice allegedly received to her "neck, back, and to her body as a whole" and damages as a result of this accident. Named as defendants in the suit were Glynn Rivet & Sons, Inc., Rivet Realty, L.L.C., Glynn Rivet, the Parish of Iberville, and the Town of Rosedale.¹ Plaintiffs essentially alleged that defendants Rivet, Rivet Realty, L.L.C. and Glynn J. Rivet & Sons, Inc. (hereinafter the "Rivet defendants") were the owners of immovable property located adjacent to the area where Alice lost control of her vehicle, that these defendants engaged in farming operations, which caused mud to be tracked onto the roadway, and that their actions created a hazardous condition for passing

¹By an amended petition, plaintiffs dismissed, without prejudice, their claims against Rivet Realty, L.L.C. and added Louisiana Farm Bureau Casualty Insurance Company as a defendant.

motorists. Thomas also asserted a loss of consortium claim arising from Alice's alleged injuries.

On June 21, 2006, the Rivet defendants filed a motion for summary judgment, contending that Rivet or one of his employees had scraped the roadway near the accident site three to four times a day, or as needed, to remove debris from the roadway using a ten-foot grader blade attached to a tractor while loading and hauling sugar cane from November 23, 2003 to November 30, 2003. The Rivet defendants further contended that the sugar cane harvest in the area near the accident site had been completed on November 30, 2003, at which time the travel surface of Augusta Road had been scraped clean of debris with a grader blade and that no debris resulting from sugar cane hauling by Glynn J. Rivet Sons, Inc. remained thereafter on the travel surface of the roadway. In support of their motion, the Rivet defendants offered the affidavit of Glynn J. Rivet.

Plaintiffs filed an opposition to the motion for summary judgment, offering in support excerpts of the deposition testimony of Lawrence Badeaux, the Mayor of the Village of Rosedale; Deputy Michael Edward Gaudet; and Glynn J. Rivet; and the affidavits of Alice Hawkins and Joyce Arbuckle.

The matter was heard before the trial court on June 19, 2006. On August 9, 2006, the trial court rendered judgment, denying the Rivet defendants' motion for summary judgment, but ordering plaintiff to produce, within fifteen days, supplemental responses to Rivet defendants' first set of discovery, to specifically provide all evidence including "the name and contact information of any witness which may show that Glynn J. Rivet and/or Glynn J. Rivet and Sons, Inc., caused mud to accumulate on Augusta Road on November 30, 2003, and that Glynn J. Rivet and/or Glynn J. Rivet and Sons, Inc., . . . allowed this mud to remain on

Augusta Road over the nine day period between November 30, 2003, and the time of the accident on December 9, 2003.”²

On August 31, 2006, the Rivet defendants filed a motion for new trial, seeking to have the trial court reconsider its judgment denying their previous motion for summary judgment. The Rivet defendants contended in the motion that plaintiffs had failed to produce any witnesses or evidence as ordered by the trial court, and that on August 3, 2006, counsel for the Rivet defendants had received a letter from plaintiffs’ counsel advising that plaintiffs had no additional evidence to submit in response to the court’s order, other than the evidence previously offered by plaintiffs at the July 19, 2006 hearing.

The trial court heard the motion for new trial on the motion for summary judgment on December 5, 2006. At the conclusion of the hearing, the trial court granted the Rivet defendants’ motions for new trial and summary judgment, and vacated its previous judgment of August 9, 2006, which had denied the Rivet defendants’ initial motion for summary judgment. In doing so, the trial court relied on Racca v. St. Mary Sugar Cooperative, Inc., 2002-1766 (La. App. 1st Cir. 2/23/04), 872 So. 2d 1117, writ denied, 2004-0698 (La. 5/7/04), 872 So. 2d 1083, finding that once the Rivet defendants pointed out an absence of factual support for the element of causation under a duty-risk analysis, i.e., that the Rivet defendants were responsible for the mud on Augusta Road at the time of the accident, the burden shifted to plaintiffs to establish that they would be able to satisfy their evidentiary burden of proof at trial on this element. The trial court determined that since plaintiffs had submitted no additional evidence to show that the Rivet defendants had allowed this mud to remain on Augusta Road over the nine-day period between November 30, 2003, and the time of the accident on

²The Village of Rosedale also filed a motion for summary judgment, which was denied by the trial court by judgment dated August 18, 2006.

December 9, 2003, plaintiffs had failed to show that they could prevail at trial on all of the essential elements of a negligence claim. A final judgment was signed by the trial court on December 19, 2006.

Plaintiffs appeal from the December 19, 2006 judgment of the trial court, contending that the trial court erred: (1) in granting the Rivet defendants' motion for new trial; and (2) in finding that plaintiffs did not meet their burden of producing evidence to show a genuine issue of material fact.

DISCUSSION³

In plaintiffs first assignment of error, they contend that the trial court erred in granting the motion for new trial on the basis that the August 9, 2006 judgment denying the Rivet defendants' motion for summary judgment was clearly contrary to the law and evidence. See LSA-C.C.P. art. 1972 (1). Plaintiffs also assign error to the trial court's grant of summary judgment as re-urged by the Rivet defendants. Both of these assignments of error challenge the trial court's interpretation of the Racca case and its reliance thereon.

Although we recognize that Racca is somewhat factually similar to the instant case, we find Racca distinguishable from the instant case in that here, unlike Racca, the evidence presented creates material issues of fact that preclude a grant of summary judgment in either party's favor.

A motion for summary judgment is a procedural device used to avoid a full-scale trial where there is no genuine factual dispute. Horn v. LaCoste, 2000-

³At the outset, we note that in their brief on appeal, the Rivet defendants argue plaintiffs' appeal was abandoned because their brief was not filed within thirty days after a notice of abandonment issued herein pursuant to Uniform Rules – Courts of Appeal, Rule 2-8.6. Although we question whether the Rivet defendants have properly raised this issue before this court, as they failed to file a motion to dismiss or an answer to appeal, we nonetheless note that the notice of abandonment issued by this court specified that plaintiffs had until February 3, 2008, to file their brief or the appeal would be dismissed as abandoned. However, February 3, 2008 was a Sunday, and February 4 and 5, 2008, were legal court holidays. Thus, plaintiffs' brief was actually due February 6, 2008. LSA-R.S. 1:55; LSA-C.C.P. art. 5059; Succession of Bracy, 457 So. 2d 1297 (La. App. 1st Cir. 1984). Because plaintiffs' brief was postmarked February 6, 2008, it is timely. See Uniform Rules – Courts of Appeal, Rule 2-13.

0965 (La. App. 1st Cir. 6/22/01), 793 So. 2d 319, 323, writ denied, 2001-2615 (La. 12/14/01), 804 So. 2d 633. It should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

The burden of proof is on the movant. But if the movant will not bear the burden of proof at the trial of the matter, the movant is not required to negate all essential elements of the adverse party's claim, but rather to point out an absence of factual support for one or more essential elements. Thereafter, if the adverse party fails to provide factual evidence 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, and summary judgment is properly granted. LSA-C.C.P. art. 966(C)(2).

In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. Fernandez v. Hebert, 2006-1558 (La. App. 1st Cir. 5/4/07), 961 So. 2d 404, 408, writ denied, 2007-1123 (La. 9/21/07), 964 So. 2d 333. 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. Anglin v. Anglin, 2005-1233 (La. App. 1st Cir. 6/9/06), 938 So. 2d 766, 769. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits. Fernandez v. Hebert, 961 So. 2d at 408.

Summary judgments are reviewed on appeal *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Malbrough v. Halliburton Logging Services, Inc., 97-0378 (La.

App. 1st Cir. 4/8/98), 710 So. 2d 1149, 1151, writ denied, 98-1212 (La. 6/19/98), 720 So. 2d 1217.

In the affidavit of Glynn Rivet offered by the Rivet defendants, he attested, in part:

- he has farmed sugarcane along the northern and southern boundaries of Augusta Road for a number of years prior to the accident in question;
- during sugarcane harvest season, either he personally or a representative of Rivet and Sons, scraped Augusta Road near the accident site three to four times a day, or as needed to remove debris, with a ten-foot grader blade attached to a tractor;
- each day prior to leaving the loading site, Rivet personally or an employee of Rivet and Sons ensured that debris was not left on the roadway;
- between November 23, 2003 and November 30, 2003, Augusta Road was continuously cleared of debris while hauling sugarcane from the operation near the accident site;
- the sugarcane harvest was completed on November 30, 2003; and
- after completion of all loading and hauling on November 30, 2003, the travel surface of Augusta Road was immediately scraped clean of debris with a grader blade and no other debris remained on the travel surface of the roadway.

However, in opposition to the motion for summary judgment, plaintiffs offered Glynn Rivet's deposition testimony, wherein he conceded that during the harvest season of 2003: (1) he was not aware of any other sugarcane farmers who were conducting operations on Augusta Road; (2) that the soil was put on the road by the tractors and wagons coming from the fields with soil on their tires;

and (3) that he had not seen mud on Augusta Road that his company did not put there.

Plaintiffs also offered the affidavit testimony of Joyce Arbuckle, who attested, in part:

- she was aware of the accident involving Alice Hawkins on December 9, 2003;
- on the day after the accident, she observed the skid marks in the mud;
- she recalled the mud being thick on Augusta Road at the site of Alice Hawkins' accident on the day after the accident;
- she recalled Charles Harris driving a tractor the day following Hawkins' accident clearing mud from Augusta Road; and
- the mud she observed on Augusta Road the day after Hawkins' accident had been on Augusta Road for at least four days prior to Hawkins accident, perhaps longer.

Moreover, the investigating officer indicated in his narrative in the police report that “[d]ue to the dirt being on the roadway [prior] to rainfall and on the shoulder with no-where (sic) to drain it made a slick sludge on the roadway.”

On review, we find that the documents offered in support of the Rivet defendants' motion for summary judgment do not resolve all issues of fact and that material issues of disputed fact remain given Rivet's testimony that he put soil on the roadway while harvesting in the Fall of 2003, and that he had not seen mud on Augusta Road that his company did not put there. Moreover, although he testified that either he or a representative of Glynn J. Rivet & Sons, Inc. cleaned and cleared the traveled portion of the roadway three to four times a day, and in particular, immediately scraped Augusta Road clean of “debris” after the completion of loading and hauling on November 30, 2003, Arbuckle's affidavit contradicts these claims. Specifically, Arbuckle attested that there was mud on

the Augusta Road for at least four days prior to Hawkins' accident and that Charles Harris was driving a tractor clearing mud from Augusta Road the day after Hawkins' accident. The police report also indicates that dirt had been on the road prior to the rainfall. Thus, material issues of disputed fact remain, which are not resolved by the conflicting proof offered herein. Because resolution of these disputed facts affect plaintiffs' ultimate success against the Rivet defendants, they are material. See Anglin v. Anglin, 938 So. 2d at 769.

Given the above evidence offered on summary judgment, and, in particular, the law enforcement officer's report that mud was present and remained despite the Rivet defendants' claims, we are faced with a clear dispute over whether the roadway was cleaned and cleared of dirt, mud, or debris after November 30, 2003, the purported completion of sugarcane harvesting, and before December 9, 2003, the date of Alice Hawkins' accident. Resolution of these factual issues can only occur by the weighing of conflicting testimony and determinations of credibility. Thus, the doubts as to this dispute must be resolved against granting the motion and in favor of trial on the merits. See Fernandez v. Hebert, 961 So. 2d at 408.

Accordingly, we find merit to plaintiffs' assignments of error.

CONCLUSION

Based on the above and foregoing reasons, the December 19, 2006 judgment of the trial court is reversed and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed against defendants/appellees, Glynn Rivet, Glynn Rivet & Sons, Inc., and Louisiana Farm Bureau Casualty Insurance Company.

REVERSED AND REMANDED.