

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1670

MISTY DUPONT, INDIVIDUALLY, AND ON BEHALF OF HER MINOR
DAUGHTER, CHARLIE MERCEDES KING, AND JARED CHAISSON

VERSUS

STATE OF LOUISIANA, THROUGH ITS DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT;
JAMES D. "BUDDY" CALDWELL;
GILCHRIST CONSTRUCTION COMPANY, LLC;
SAFECO INSURANCE COMPANY OF AMERICA; AND
GENERAL INSURANCE COMPANY OF AMERICA

Judgment Rendered: JUN - 1 2012

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 564,563

THE HONORABLE WILLIAM A. MORVANT, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

This is an appeal from a judgment that dismissed the plaintiffs' suit for damages resulting from a one-car accident. On March 25, 2007, around 2 p.m., Jared Chaisson was driving his Toyota truck south on Louisiana Highway 97 in Acadia Parish with two passengers, his girlfriend Misty Dupont, who was in the front passenger seat, and her one-year-old daughter, Charlie Mercedes King, who was in the back seat. Mr. Chaisson traveled the highway on a daily basis. As Mr. Chaisson encountered a curve in the road he looked down to adjust the radio and ran off the right side of the road. Mr. Chaisson then overcorrected and the truck crossed the other lane, left the roadway, and went across a ditch and into a field and rolled over, landing on its wheels. All three of the car's occupants were injured.

Thereafter, on February 28, 2008, Mr. Chaisson and Ms. Dupont (individually and on behalf of her daughter, Charlie) filed a petition for damages naming as defendants the State of Louisiana, through the Department of Transportation and Development (DOTD), James D. "Buddy" Caldwell, in his capacity as Attorney General of Louisiana, Gilchrist Construction Company, LLC (Gilchrist Construction), which had worked on the roadway prior to the accident, Safeco Insurance Company of America (Gilchrist's insurer), and General Insurance Company of America (named as insurer of DOTD).

The plaintiffs asserted that Mr. Chaisson's vehicle left the roadway due to defective conditions of the roadway and that the accident was due to the fault and negligence of DOTD and Gilchrist Construction. The defendants filed answers and exceptions. Thereafter, on February 14, 2011, Gilchrist Construction filed a Motion for Summary Judgment, and on March 4, 2011, DOTD filed a Motion for Summary Judgment.

On April 28, 2011 plaintiffs filed a Motion for Continuance, asking that the defendants' summary judgment hearings be reset from May 16, 2011 to a later date. On May 6, 2011 DOTD filed an Opposition to the Motion for Continuance, and an Objection to the Request for Production filed by plaintiffs.

On May 12, 2011 plaintiffs filed a Motion for Leave to file a late opposition to DOTD and Gilchrist Construction's Motions for Summary Judgment, and asked that the same be considered plaintiffs' Motion for Summary Judgment, and be set contemporaneously with the defendants' Motions for Summary Judgment.

After a hearing on May 16, 2011, the district court ruled and gave its oral reasons for judgment:

I've got in front of me right now a faxed copy of the motion for leave that was filed by plaintiff to file a late opposition and to file - - have its opposition be considered a motion for summary and have it set for hearing. Plaintiff actually asked that it be set tomorrow, the 17th, but I was assuming plaintiff meant today at the same time. And the Court denied the motion for leave based on the fact that the opposition was filed late in violation of the Uniform Rule 9.9(B) and 966(B) of the Code of Civil Procedure despite the fact that, as I've previously indicated, these summary judgments have been pending for three to four months and were continued previously. Also, with regard to the motion for summary judgment, I didn't receive it in my office until Thursday afternoon, which was the time when a reply memo by the moving party would have been due in order to be timely, asking that I set a motion for summary judgment two working days after filing, which also violates Rule 9.8(B), 9.9(B), and 966(B) of the Code of Procedure. I think there was plenty of time based on the February and early March filing of these motions for summary judgment to get a timely opposition in, and for the reasons the Court indicated in denying leave of court to file a late opposition, the Court is likewise going to grant the plaintiffs' motion to strike - - I mean, the defendant's motion to strike plaintiffs' opposition as untimely.

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The basis of the motions for summary judgment are that plaintiff can't prove a defect existed in the roadway much less any other element of the case. And in reviewing this, I looked at the deposition excerpts of Trooper Arnold Hanks who did the investigation of this accident, as well as the deposition excerpts of Mr. Chaisson, and the inescapable conclusion from reading those depositions, as well as the other documents submitted in support, is that no defect existed. Mr. Chaisson by his own admission indicated that the accident was caused by his inattention. Apparently, the child was crying in the back of the

truck. He looked down, started fooling with the radio for a few seconds, and when he looked up, he had drifted off the road. But both of Trooper Hanks' and Mr. Chaisson's deposition excerpts show there was no defect, there was no dropoff, there was proper signage, contrary to the allegations of the petition, and the roadway had just been resurfaced and was in excellent condition. And no one testified as to the existence of some roadway defect. So I look at the Supreme Court's pronouncement in *Samaha v. Rau*, and at the summary judgment stage, if plaintiff can't prove one element of its case, summary judgment is appropriate. And in this case, I don't think plaintiff [can show that] - - the record before the Court shows the existence of a defect in the roadway and that this caused or contributed to the accident in question. So for those reasons, the Court is going to grant the motion for summary judgment on behalf of Gilchrist, as well as the motion for summary judgment on behalf of the Department of Transportation and Development.

The plaintiffs' Motion for Leave to file a late Opposition to the Motions for Summary Judgment filed by defendants was denied; the plaintiffs' Motion for Continuance of the hearing on the motions for summary judgment by defendants was denied; Gilchrist Construction's Motion to Strike plaintiffs' Opposition to the Motions for Summary Judgment was granted; the Motions for Summary Judgment filed by Gilchrist Construction and DOTD were granted; the plaintiffs' suit was dismissed at plaintiffs' cost; and the Motion to Compel filed by Gilchrist Construction was rendered moot by the dismissal of the suit.

The plaintiffs are appealing that judgment, and make nine assignments of error, asserting that: (1) the district court should have granted plaintiffs' Motion to Continue DOTD's summary judgment hearing; (2) the district court should have granted leave to plaintiffs to file their Opposition to DOTD's Motion for Summary Judgment; (3) the district court should have granted plaintiffs' Motion to Continue DOTD's summary judgment hearing; (4) the district court should have granted plaintiffs' Motion to Continue Gilchrist's summary judgment hearing; (5) the district court improperly struck plaintiffs' Opposition to DOTD's Motion for Summary Judgment, (6) the district court improperly struck plaintiffs' Opposition to Gilchrist's Motion for Summary Judgment; (7) the district court improperly

allowed a hearing on Gilchrist's Motion to Strike without adequate time for plaintiffs to brief same; (8) the evidence showed that Gilchrist negligently resurfaced the roadway, causing the accident, and creating genuine issues of material fact preventing summary judgment; and (9) the evidence showed that DOTD negligently supervised the roadway project, causing the accident, and creating genuine issues of material fact preventing summary judgment.

ASSIGNMENTS OF ERROR NOS. 1, 2 AND 5

In these assignments of error, plaintiffs assert that the district court should have granted their Motion to Continue DOTD's summary judgment hearing as DOTD did not oppose it, that the district court should have granted them leave to file their Opposition to DOTD's Motion for Summary Judgment as DOTD did not object to leave and did not oppose it, and that the district court improperly struck plaintiffs' Opposition to DOTD's Motion for Summary Judgment as DOTD never filed a motion to strike.

DOTD did oppose the Motion for Continuance by filing a Memorandum in Opposition to Plaintiffs' Motion to Continue the rule on the motions for summary judgment and also filed an objection regarding the burdensome nature of discovery requests propounded by the plaintiffs. As the suit had been filed more than three years earlier, and one continuance had already been granted, we find no abuse of discretion in the district court's decision to deny the plaintiffs leave to file their Opposition to DOTD's Motion for Summary Judgment and no abuse of discretion in the district court's decision to deny plaintiffs' Motion to Continue the DOTD's summary judgment hearing and in striking plaintiffs' Opposition to DOTD's Motion for Summary Judgment.

ASSIGNMENTS OF ERROR NOS. 3 AND 4

In these assignments of error, plaintiffs assert that the district court erred in not granting their Motion to Continue Gilchrist's summary judgment hearing and

DOTD's summary judgment hearing, as they were unable to conduct discovery due to DOTD's willful obstruction of the discovery process.

The summary judgment hearing had previously been continued from a scheduled March 28, 2011 hearing. Further, as the case had been pending for more than three years, plaintiffs had ample time to conduct investigations and propound discovery to acquire evidence to support their claims. Thus, after a thorough review of the record we cannot say that the district court abused its discretion in denying the Motion to Continue the summary judgment hearing.

ASSIGNMENTS OF ERROR NOS. 6 AND 7

In these assignments of error, the plaintiffs assert that the district court improperly struck plaintiffs' Opposition to Gilchrist's Motion for Summary Judgment and improperly allowed a hearing on Gilchrist's Motion to Strike without allowing adequate time for the plaintiffs to brief the same.

Louisiana Code of Civil Procedure article 966(B) provides that the adverse party may serve opposing affidavits and such affidavits and memoranda must be served at least eight days prior to the date of the hearing unless the Rules for Louisiana District Courts provides to the contrary. Louisiana District Court Rule 9.9(b) also provides that the opposition shall be served at least eight days prior to the scheduled hearing. Thus, we cannot say that the district court abused its discretion in ruling that plaintiffs' Opposition to Summary Judgment, which was filed four days prior to the scheduled hearing, was stricken, and in allowing the hearing on the Motion to Strike to go forward without allowing plaintiffs to file a brief.

ASSIGNMENTS OF ERROR NOS. 8 AND 9

In these assignments of error, the plaintiffs assert that the evidence clearly identified that Gilchrist Construction negligently resurfaced the roadway, causing the accident, and that DOTD negligently supervised the roadway project causing

the accident; thus, they assert there are genuine issues of material fact preventing summary judgment.

In a motion for summary judgment, the burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support 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. La. C.C.P. art. 966(C)(2).

Mr. Chaisson testified in his deposition that he took his eyes off of the roadway when Charlie started crying in the backseat, in order to adjust the radio, and when he looked up, he had drifted off the road. Trooper Arnold Hanks, who investigated the accident, found no defect in the roadway. The depositions of Mr. Chaisson and Trooper Hanks showed no defect in the road, no dropoff, and no improper signage. There was no evidence of a roadway defect. Thus, after a *de novo* review we find that the plaintiffs failed to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial, and there is no genuine issue of material fact.

For the foregoing reasons, the district court judgment, which denied plaintiffs' Motion for Leave to file late opposition to defendants' motions for summary judgment, granted Gilchrist Construction's Motion to Strike plaintiffs' Opposition to the Motions for Summary Judgment, granted the motions for summary judgment filed by DOTD and Gilchrist Construction, and dismissed plaintiffs' case, is affirmed. Plaintiffs are assessed with costs.

AFFIRMED.