NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 2454

WALTER ANTIN, JR.
TRUSTEE OF THE ANTIN FAMILY II TRUST

VERSUS

TAREH TEMPLE, JAMES LEE AND
SAFEWAY INSURANCE COMPANY OF LOUISIANA

Judgment rendered December 21, 2007

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Appealed from the
City Court of Hammond
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 1-0502-0037
The Honorable Grace Bennett Gasaway

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McClendon, J. Concurs with the Results without Reasons

BEFORE: CARTER, C.J., GUIDRY, PETTIGREW, McCLENDON,
AND WELCH, JJ.

Carter J. agrees in part and dissents in part for reasons assigned

PETTIGREW, J.

Defendant, Safeway Insurance Company of Louisiana (Safeway), appeals a trial court judgment granting summary judgment in favor of the plaintiff and sustaining the peremptory exception pleading the objection of no right of action filed by third-party defendant, National General Assurance Company (National General). We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises from an automobile accident that occurred on November 22, 2004, involving a Land Rover owned by plaintiff, Antin Family II Trust (Antin), and a vehicle owned by James Lee and driven by Tareh Temple (Lee vehicle). The accident occurred when the Lee vehicle collided with the Antin vehicle, which was legally parked at the time. The Antin vehicle sustained considerable damage as a result of the accident.

At the time of the accident, the Lee vehicle was insured by a liability policy issued by Safeway, which provided property damage coverage of $10,000.00 per accident. On at least two occasions, Antin made demand upon Safeway for recovery of the damage to the vehicle, including the cost of towing the vehicle, the cost of the rental of a replacement vehicle, and the diminished value of the vehicle.[1] Safeway never responded to these demands, and Antin made a claim with National General, the insurer of the Antin vehicle. National General subsequently paid Antin a total of $7,628.05 for the repairs to the Antin vehicle pursuant to the policy's collision coverage.

Thereafter, National General made demand for reimbursement of these payments from Safeway, contending that it was subrogated to Antin's rights. On February 10, 2005, Safeway paid $7,231.27 to National General on its subrogation claim; however, Safeway never addressed Antin's claims prior to paying National General. Therefore, on February 25, 2005, Antin filed suit against Lee, Temple, and Safeway, seeking recovery for the damages resulting from the accident. Shortly after the lawsuit was filed, Safeway paid Antin $881.00, representing towing and rental

[1] Antin did not specify the amount sought for diminished value in these demand letters; however, the letters advised Safeway that the vehicle was available for inspection in connection with that claim. Safeway apparently never inspected the vehicle.

expenses, but Safeway made no payment to Antin for the diminished value of the vehicle.

On November 28, 2005, Antin filed a motion for partial summary judgment, seeking a judgment against Safeway for the sum of $9,119.00, the alleged remaining balance of Safeway's $10,000.00 policy limits, less the earlier payment to Antin of $881.00. In opposition, Safeway contended, in part, that it had already paid $7,231.27 to National General for the physical damage to the vehicle. Safeway also filed a motion for leave to file a third-party demand against National General, seeking reimbursement of the amount paid in settlement of National General's subrogation claim. Safeway's motion was granted, but Antin's motion was denied because of a problem with service of the supporting affidavits.

Antin subsequently filed a second motion for partial summary judgment. In addition, National General filed a peremptory exception pleading the objection of no right of action in response to Safeway's newly filed third-party demand. After a hearing, the trial court signed a judgment granting Antin's motion for partial summary judgment and ordering Safeway to pay damages to Antin in the amount of $9,119.00. The judgment further sustained the peremptory exception raising the objection of no right of action and dismissed Safeway's claim against National General. This appeal by Safeway followed.

SUMMARY JUDGMENT

Summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art 966(A)(2). Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. **Duplantis v. Dillard's Dept. Store**, 2002-0852, p. 5 (La. App. 1 Cir. 5/9/03), 849 So.2d 675, 679, writ denied, 2003-1620 (La. 10/10/03), 855 So.2d 350. A motion for summary judgment will be granted 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. LSA-C.C.P. art. 966(B).

In support of the motion for partial summary judgment, Antin submitted the affidavits of Walter Antin, Jr.[2] and Anthony Marullo. Attached to Mr. Marullo's affidavit was a letter from him dated July 13, 2005, indicating that he had inspected the Antin vehicle and had noticed collision damage to the vehicle's left rear and side and its right front and side. Mr. Marullo further stated that the repair of the vehicle had been well done, but that it was still readily apparent that the vehicle had been in an accident. Finally, Mr. Marullo opined that the value of the Antin vehicle had been diminished $10,000.00 as a result of the damage sustained in the accident.

Safeway did not submit any affidavits or other evidence to dispute Mr. Marullo's conclusion. Instead, Safeway simply attempted to introduce portions of Mr. Marullo's deposition that seemingly contradicted Mr. Marullo's earlier statements concerning the date on which Mr. Marullo first inspected the Antin vehicle. Mr. Marullo suggested that he had inspected the vehicle prior to issuing his inspection letter dated July 13, 2005; however, in his deposition taken on August 24, 2006, Mr. Marullo testified that he had first inspected the vehicle only one month prior to the deposition. Neither attorney questioned Mr. Marullo about this discrepancy during the deposition. On appeal, Safeway contends that this discrepancy in the inspection dates is a genuine issue of material fact that precludes summary judgment. We disagree.

A fact is "material" when its existence or non-existence may be essential to the plaintiff's cause of action under the applicable theory of recovery. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. The specific date on which Mr. Marullo inspected the vehicle is not essential to Antin's cause of action, because regardless of the date of inspection, Mr. Marullo's conclusion remained the same. In both his deposition[3] and the letter attached to his affidavit, Mr. Marullo stated that his inspection of the vehicle had led him to conclude that the Antin vehicle had diminished in value by $10,000.00 due to the accident. Furthermore, we

[2] Mr. Antin is the trustee of the Antin Family II Trust and the driver of the Antin vehicle on the day of the accident.

[3] The plaintiff entered the complete deposition into the record without objection at the hearing.

note that Safeway did not introduce any evidence to contradict Mr. Marullo's conclusion. Accordingly, we find that Safeway's argument is without merit.[4]

NO RIGHT OF ACTION

The peremptory exception pleading the objection of no right of action challenges whether plaintiff has an actual interest in bringing the action. See La. C.C.P. art. 927(A)(5). Whether a person has a right of action depends on whether the particular plaintiff belongs to the class in whose favor the law extends a remedy and raises the issue of whether plaintiff has the right to invoke a remedy that the law extends only conditionally. **Northshore Capital Enterprises v. St. Tammany Hospital District #2**, 2001-1606, p. 4 (La. App. 1 Cir. 6/21/02), 822 So.2d 109, 112; writ denied, 2002-2023 (La. 11/1/02), 828 So.2d 584. In other words, an exception of no right of action asks whether the plaintiff has an interest in judicially enforcing the right asserted. **Id.**

On appeal, Safeway contends that the trial court erred in sustaining the objection of no right of action and dismissing its third-party demand against National General. Safeway's third-party demand is based on the theory that National General received a payment it was not owed, and that National General is bound to return the payment pursuant to La. C.C. art. 2299.[5] In opposition, National General contends that it was owed the payment it received, as it had a legitimate subrogation claim against Safeway.

Subrogation is the substitution of one person to the rights of another. La. C.C. art. 1825. When subrogation results from a person's performance of the obligation of another, that obligation subsists in favor of the person who performed it, who may avail himself of the action and security of the original obligee against the obligor, but the obligation is extinguished as to the original obligee. An original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee. See La. C.C. art. 1826. Moreover, under the "make whole doctrine," an

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[4] Safeway also contends that the trial court erred in accepting Mr. Marullo as an expert in this matter. As an initial matter, we note that a trial court has great discretion in determining whether to qualify a witness as an expert, and such discretion will not be disturbed on appeal in the absence of manifest error. **Burdette v. Drushell**, 2001-2494, p. 13 (La. App. 1 Cir. 12/20/02), 837 So.2d 54, 65, writ denied, 2003-0682 (La. 5/16/03), 843 So.2d 1132. After a thorough review of the record, we find no error in the trial court's decision to qualify Mr. Marullo as an expert considering his vast experience in the business of buying, selling, and repairing vehicles.

[5] Louisiana Civil Code article 2299 provides "[a] person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it."

insurance company may not enforce its subrogation rights until the insured has been fully compensated for its injuries. See **Roberts v. Richard**, 99-259, p. 4 (La. App. 3 Cir. 7/28/99), 743 So.2d 731, 733, writ denied, 99-2527 (La. 11/19/99), 749 So.2d 677.

In light of these principles, we conclude that Safeway has a right of action against National General to seek return of the payment it made on National General's subrogation claim. At the time the payment was made, Antin had not been fully compensated for its loss resulting from the accident; thus, National General's subrogation claim could not yet be enforced against Safeway.

CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court judgment granting the motion for partial summary judgment and ordering Safeway Insurance Company of Louisiana to pay the sum of $9,119.00 to the Antin Family II Trust. We further reverse that portion of the trial court judgment sustaining the peremptory exception pleading the objection of no right of action and dismissing the third-party claim against National General Assurance Company. The costs of this appeal are assessed equally to Safeway Insurance Company of Louisiana and National General Assurance Company.

AFFIRMED IN PART AND REVERSED IN PART.

WALTER ANTIN, JR.
TRUSTEE OF THE ANTIN
FAMILY II TRUST

VERSUS

TAREH TEMPLE, JAMES LEE
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CARTER, C.J., DISSENTING IN PART.

I agree with the affirmation of the grant of summary judgment. However, after de novo review, I would affirm the trial court's judgment sustaining the peremptory exception raising the objection of no right of action. Thus, I respectfully dissent in part.