

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0926

WILLIE R. THOMAS AND VIRLEE THOMAS

VERSUS

**THERESA BERRY, ACCC INSURANCE COMPANY
AND/OR AMERICAN CENTURY CASUALTY COMPANY,
AND STATE FARM INSURANCE COMPANY**

—
**On Appeal from the 20th Judicial District Court
Parish of West Feliciana, Louisiana
Docket No. 20,566, Division "A"
Honorable George H. Ware, Jr., Judge Presiding**
—

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered December 21, 2011

RB
SP
TMT

PARRO, J.

The plaintiffs, Willie R. Thomas and Virlee Thomas, appeal a summary judgment in favor of the defendants, dismissing the plaintiffs' claims, with prejudice. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of a motor vehicle accident that occurred on May 3, 2008. Plaintiff, Willie R. Thomas was operating a Yamaha motorcycle northbound on Solitude Road in West Feliciana Parish as defendant, Theresa Berry,¹ was driving a 1990 Buick LeSabre southbound on the same road. As Mr. Thomas came around a steep downhill curve in the road, he crossed the center line and collided with Ms. Berry's vehicle in her lane, causing both vehicles to land in the ditch on Ms. Berry's side of the road. Mr. Thomas also landed in the same ditch after the collision.

Mr. Thomas subsequently filed suit against Ms. Berry and her automobile liability insurer, American Century Casualty Company (American Century), as well as against his uninsured motorist insurer State Farm Mutual Automobile Insurance Company (State Farm), seeking damages for the injuries he allegedly sustained in the accident. His wife, Virlee Thomas, also joined in the petition, seeking damages for loss of consortium, past and future mental anguish and distress, and loss of enjoyment of life.

Ms. Berry and American Century filed a motion for summary judgment, contending that, because the accident occurred in Ms. Berry's lane of travel, an adverse presumption of negligence should be applied to Mr. Thomas. These defendants further argued that, since Mr. Thomas had no evidence to exculpate himself other than his own self-serving testimony, he could not rebut the presumption of negligence, and his claims should be dismissed. State Farm filed a separate motion for summary judgment adopting the arguments of the other defendants.

Both motions were tried together; however, at the first hearing, the trial court deferred its ruling until the parties were able to consult with accident reconstruction

¹ In her deposition, Ms. Berry states her full name as Theresa Berry Hughes; however, in the pleadings and in other places throughout the proceedings she is referred to simply as Theresa Berry. Therefore, in this opinion, we will refer to her as Ms. Berry.

experts. At the second hearing, the trial court determined that Mr. Thomas could not carry his burden of proof. Specifically, the trial court stated:

Well, the Court is of the opinion that Mr. Thomas cannot now[,] nor could he at trial[,] come anywhere close to answering his burden, and to the Court at least it appears that the evidence is overwhelming that he was at fault in this accident and that summary judgment should be granted. So judgment will be signed accordingly.

It is from this judgment that the plaintiffs have appealed.

SUMMARY JUDGMENT

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover 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).

An appellate court's review of a summary judgment is a *de novo* review based on the evidence presented to the trial court, using the same criteria used by the trial court in deciding whether a summary judgment should be granted. Buck's Run Enterprises, Inc. v. Mapp Const., 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable or material fact. All doubts should be resolved in the non-moving party's favor. Hines v. Garrett, 04-0806 (La. 6/25/04), 876 So.2d 764, 765.

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. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. Id. at 765-66.

On a motion for summary judgment, the burden of proof remains with the

movant. However, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the moving party's burden on the motion is to point out to the court that there is an absence of factual support for one or more elements essential to 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, and the moving party is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(C)(2).

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967(A), an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B).

DISCUSSION

In the instant case, the plaintiffs' petition alleges that the accident occurred when Ms. Berry negligently crossed the center line and entered his lane of travel on Solitude Road, forcing him to take evasive action. Mr. Thomas contends that this evasive action ultimately resulted in his colliding with Ms. Berry's vehicle, leaving the roadway, and landing in the ditch on Ms. Berry's side of the road. Conversely, the defendants submitted affidavit and deposition testimony demonstrating that Ms. Berry never crossed the center line and that the accident occurred entirely in her lane of travel.

Sergeant Lynn Bonaventure, a supervisor for uniform patrol for the West Feliciana Parish Sheriff's Office, was the investigating officer for the accident at issue in this matter. Sergeant Bonaventure testified by deposition that he responded to a notification from dispatch about the accident at approximately 11:39 p.m. on May 3, 2008. When he arrived at the scene of the accident, representatives from the fire

department and EMS, as well as other deputies from the sheriff's office were already present.

In his deposition, Sergeant Bonaventure described Solitude Road and the scene of the accident. According to Sergeant Bonaventure, in the area of the accident, there is a concrete bridge, after which the road veers a little to the right, followed by a straight area. Solitude Road then continues uphill into a curve to the left.² At that point in the road, there are no shoulders on the side of the road, but there are ditches on both sides in some places. Sergeant Bonaventure testified that the accident occurred "basically ... at the bottom of the hill, just coming out of that curve, into that straight away going back toward the bridge." He further noted that there were no lines marked on the road at that time, but there were some reflectors, although not all of them were in place.

Sergeant Bonaventure testified that, when he arrived at the scene of the accident, he saw Ms. Berry's car in the ditch on her side of the road. He also saw Mr. Thomas and his motorcycle in the same ditch. He further testified that the debris from the accident was in Ms. Berry's lane of travel or in the ditch on her side of the road. Sergeant Bonaventure also testified concerning a single line of skid marks that he saw at the scene of the accident. According to Sergeant Bonaventure, these skid marks, which began in Mr. Thomas's lane and crossed into Ms. Berry's lane, came from Mr. Thomas's motorcycle.

Ms. Berry testified by deposition that she was driving on the flat part of Solitude Road towards the curve, after just having crossed over a bridge. According to Ms. Berry, she was not driving more than thirty miles per hour, when she saw a single light approaching from the other direction at a rapid rate of speed. Ms. Berry testified that the driver of the motorcycle skidded into her and collided with her vehicle in her lane of travel, forcing her into the ditch after impact. She stated that she had no opportunity

² Sergeant Bonaventure appears to have described Solitude Road from the perspective Ms. Berry would have had on the night of the accident.

to stop or turn her vehicle to avoid the collision because it happened too quickly.

The defendants also submitted the report and affidavit of Michael G. Sunseri, an accident reconstruction specialist. Mr. Sunseri noted that the posted speed limit on Solitude Road in the area of the accident is thirty-five miles per hour. He further stated that he took measurements of the road in that area and that the northbound lane, Mr. Thomas's lane of travel, is approximately nine feet wide, and the southbound lane, Ms. Berry's lane of travel, is approximately ten feet wide. Mr. Sunseri stated that, based on these measurements, he believed Mr. Thomas had enough room to avoid the impact if he had simply stayed in his own lane. Specifically, he opined that Mr. Thomas had approximately six feet on his side of the road in which to avoid the impact, even if Ms. Berry had strayed into the middle of the road. He further stated that, if Mr. Thomas had been traveling the posted speed limit, he should have been able to come to a complete stop on his side of the road before the collision.³ In addition, Mr. Sunseri opined, based on his almost thirty years of experience in investigating and reconstructing traffic crashes, that it was very unusual for a driver to go to the left when confronted with a vehicle traveling in the middle of the road as Mr. Thomas had claimed. Finally, Mr. Sunseri noted that the investigating officer had not recorded sufficient physical evidence to determine whether Ms. Berry had crossed into the middle of the roadway. Although Mr. Sunseri acknowledged that this may have occurred, he believed it was more likely than not that Mr. Thomas went to the outside of the downhill curve and entered the lane in which Ms. Berry was traveling. He further believed that the accident could have easily been avoided had Mr. Thomas stayed in his own lane and/or slowed to a stop on his side of the road.

Mr. Thomas does not dispute that he entered Ms. Berry's lane of travel or that the collision took place in her lane. Instead, he testified in his deposition that he was

³ Mr. Sunseri based this finding on Mr. Thomas's deposition testimony that he had ten to fifteen seconds from the time he first saw Ms. Berry's headlights until the crash. He further based this finding on an assumption that his reaction time would have been 1.5 seconds. Based on this data and the assumption that Mr. Thomas was traveling the posted speed limit, Mr. Sunseri concluded that Mr. Thomas should have been able to come to a complete stop within four seconds and that his stopping distance would have been 144 feet.

forced to enter Ms. Berry's lane because she was in the middle of the road or in his lane. Specifically, Mr. Thomas testified that he noticed the lights of an oncoming vehicle as he was approaching the curve at approximately forty to forty-five miles per hour. According to Mr. Thomas, as he came around the curve, he realized that Ms. Berry's car was in the middle of the road and that she was not moving over. Mr. Thomas then determined that he had only two choices: (1) either he could pull out of the turn and pull into Ms. Berry's lane to try to avoid the collision; or (2) he could lay his motorcycle down in the road in his own lane. Mr. Thomas testified that he believed if he had chosen the second option, Ms. Berry would have run over him, causing more severe injuries and perhaps death.

In addition, the plaintiffs submitted the report of A. J. McPhate,⁴ a mechanical engineer and accident reconstruction expert. Mr. McPhate indicated that the damage to the vehicles, as well as their final resting positions, was consistent with Mr. Thomas's description of the accident. Specifically, Mr. McPhate indicated that the fact that both vehicles wound up in the ditch on Ms. Berry's side of the road was consistent with Mr. Thomas's claim that he was moving to his left as Ms. Berry was moving to her right. Mr. McPhate acknowledged that the accident occurred in Ms. Berry's lane of travel; however, he contended that speed was not a factor in the accident.⁵ Most importantly, in an effort to support Mr. Thomas's theory of how the accident occurred, Mr. McPhate stated:

It has been my experience that motorists that encounter an oncoming vehicle in their lane of travel will often go left to avoid the collision. In such cases, more often than not, the encroaching vehicle will move to its right[,] and the collision will take place in the encroacher's proper lane. This scenario seldom leaves sufficient physical evidence to conclusively determine the sequence of events. This is the case here.

While the defendants were the movants at the hearing on the motion for summary judgment, the plaintiff would have borne the burden of proof on the issues of

⁴ The plaintiffs did not submit Mr. McPhate's findings in an affidavit.

⁵ No support is provided for his contention that speed was not a factor in the accident.

liability and negligence at trial. Therefore, the defendants only had to point out that there was a lack of support for one or more elements essential to the plaintiffs' claim, which would then require the plaintiffs to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial. See LSA-C.C.P. art. 966(C)(2). It is undisputed that the accident took place in Ms. Berry's lane of travel. At the hearing on the motions for summary judgment, the defendants pointed out that there is a lack of physical evidence to suggest that Ms. Berry ever crossed into Mr. Thomas's lane of travel, which is Mr. Thomas's sole justification for crossing into Ms. Berry's lane. Rather, the claim that Ms. Berry was in Mr. Thomas's lane is based on nothing other than Mr. Thomas's own self-serving testimony and Mr. McPhate's opinion that drivers often go to the left to avoid vehicles that are encroaching into their lanes.

In addition, while the evidence submitted by the plaintiffs would normally appear to require the trial court to make impermissible credibility decisions in a motion for summary judgment when compared to the evidence submitted by the defendants, Mr. Thomas was also subject to an adverse presumption of negligence, because he was in the wrong lane at the time of the accident. When a collision occurs between two vehicles, one of which is in the wrong lane of travel, there is a presumption that the driver in the wrong lane was negligent, and the burden is on him to show that the collision was not caused by his negligence. Hano v. Louisiana Dept. of Transp. and Development, 519 So.2d 796, 798 (La. App. 1st Cir. 1987), writ denied, 523 So.2d 861 (La. 1988); see also, Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La. 2/20/95), 650 So.2d 742, 746; Thomas v. Hodges, 10-0678 (La. App. 1st Cir. 10/29/10), 48 So.3d 1274, 1281 n.5, writ denied, 10-2637 (La. 2/11/11), 54 So.3d 1109; Gatlin v. Kleinheit, 09-0828 (La. App. 1st Cir. 12/23/09), 34 So.3d 872, 875, writ denied, 10-0084 (La. 2/26/10), 28 So.3d 280.

A *de novo* review of the record indicates that the plaintiffs failed to provide evidence to rebut this adverse presumption of negligence. There is nothing in the

record to support Mr. Thomas's claim that Ms. Berry was ever in the middle of the road or encroaching in his lane on the night of the accident. There are no skid marks from Ms. Berry's vehicle, and all of the debris from the accident was either in her lane or in the ditch on her side of the road. It is undisputed that the collision occurred in her lane. There is simply no physical evidence to support Mr. Thomas's claim; rather, the physical evidence contradicts Mr. Thomas's version of the events. Therefore, after a thorough *de novo* review of the evidence submitted at the hearing on the motions for summary judgment and considering the adverse presumption of negligence against the plaintiffs in this matter, we find that summary judgment was properly granted in favor of the defendants.

DECREE

For the foregoing reasons, the judgment of the trial court granting the motions for summary judgment filed by Theresa Berry, American Century Casualty Company, and State Farm Mutual Automobile Insurance Company is affirmed. All costs of this appeal are assessed to the plaintiffs, Willie R. Thomas and Virlee Thomas.

AFFIRMED.