NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2015 CA 1391

JUSTIN COTTON

VERSUS

PATRICK KENNEDY, BREAD BIZZ, INC., AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

CONSOLIDATED WITH

2015 CA 1392

NEDRA N. ROGERS, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, JAYDEN COTTON, AND TERRY COTTON

VERSUS

PATRICK KENNEDY, BREAD BIZZ, INC., STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (IN ITS CAPACITY AS LIABILITY CARRIER AND UIM CARRIER), JUSTIN COTTON, AND IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY

Judgment rendered: SEP 19 2016

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 625140 c/w 625196

The Honorable Donald Johnson, Judge Presiding

* * * * *

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* * * * *

BEFORE: WELCH, CRAIN AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

In this appeal, defendants/appellants in a consolidated suit challenge the trial court's dismissal of two co-defendants/alleged joint tortfeasors from one suit on the grant of a motion for summary judgment unopposed by plaintiffs where one of the dismissed co-defendants is a plaintiff in the companion consolidated suit in which appellants are defendants. Appellees also raise the issue of appellants' right to appeal in a motion to dismiss the appeal. For the following reasons, we deny the motion to dismiss and reverse the trial court's judgment in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Justin Cotton (hereinafter referred to as "Mr. Cotton") filed suit seeking damages from a motor vehicle accident occurring on November 2, 2012 in Baton Rouge, Louisiana. Mr. Cotton alleged that as he and Patrick Kennedy, the driver in the other vehicle, turned right in adjacent turn lanes, Mr. Kennedy veered into his lane, striking his vehicle. Mr. Cotton named as defendants Mr. Kennedy, Bread Bizz, Inc. as Mr. Kennedy's employer and the owner of the vehicle, and State Farm Mutual Automobile Insurance Company as the liability insurer (hereinafter referred to collectively as the "Bread Bizz defendants"). The passengers in Mr. Cotton's vehicle filed a separate suit. Nedra N. Rogers, individually and on behalf of her minor son, Jayden Cotton, and Terry Cotton named the Bread Bizz parties as defendants and added the following defendants: Mr. Cotton and his liability insurer, Imperial Fire & Casualty Insurance Company, and State Farm in its capacity as underinsured motorist carrier and liability carrier (hereinafter referred to as the "Cotton defendants"). Ms. Rogers and Terry Cotton specifically alleged in the alternative that if the accident was not solely the Bread Bizz defendants' fault, then Mr. Cotton was at fault.

The Bread Bizz defendants answered both suits and asserted that the sole

and proximate cause of the accident was Mr. Cotton's negligence. The suits were consolidated on March 17, 2014. The Bread Bizz defendants requested a jury trial in both suits.

The Cotton defendants filed a motion for summary judgment in the Rogers suit seeking dismissal of the claims against them. On April 9, 2015, in the Cotton suit, Mr. Cotton filed a "MEMORANDUM ADOPTING AND IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT BY IMPERIAL FIRE & CASUALTY INSURANCE COMPANY and JUSTIN COTTON."[1] The trial court heard arguments on the motion for summary judgment filed in the Rogers suit and granted the motion, dismissing the claims against the Cotton defendants with prejudice. From this judgment, the Bread Bizz defendants appeal. The Cotton defendants filed a motion to dismiss the appeal, contending that appellants have no right to appeal. The motion to dismiss the appeal was referred to this panel to consider with the merits of the appeal.

LAW AND ANALYSIS

In their motion to dismiss the appeal, the Cotton defendants contend that only a party aggrieved by a trial court judgment has the right to an appeal, citing State, Department of Transportation & Development v. Estate of Summers, 527 So.2d 1099, 1100 (La.App. 1 Cir. 1988) and Nunez v. Canik, 576 So.2d 1080, 1083 (La.App. 3 Cir. 1991). According to the Cotton defendants, because the court did not determine liability for the accident, the factfinder is not precluded from apportioning fault to them (the Cotton defendants) at trial. Because the Bread Bizz defendants can only be found liable for their percentage of fault pursuant to

[1] Mr. Cotton asserts in his brief that his memorandum adopting the motion for summary judgment constitutes the filing of a motion for summary judgment in his suit, citing La. C.C.P. art. 853. However, La. C.C.P. art. 853 provides that "[a] statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading in the same court." La. C.C.P. art. 853 does not provide for the adoption of a motion for summary judgment through a memorandum.

La. C.C.P. art. 2323(A) and 2324(B)[2], the Cotton defendants assert that they (the Bread Bizz defendants) are not aggrieved and thus have no right to appeal. The Cotton defendants also point out that, unlike the plaintiffs, the Bread Bizz defendants did not assert any claim against them.

Louisiana Code of Civil Procedure 2082 provides that "[a]ppeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." Appeals are favored and aided by the courts. Emmons v. Agric. Ins. Co., 245 La. 411, 424, 158 So.2d 594, 599 (1963). "A party to a suit is given an unqualified right to appeal from [an] adverse final judgment and need not allege and show a direct pecuniary interest in order to be entitled to appeal." Id.; Delanzo v ABC Corp., 572 So.2d 648, 650 (La.App. 5 Cir. 1990); McCann v. ABC Ins. Co., 93-1789 (La.App. 4 Cir. 7/14/94), 640 So.2d 865, 868; Andrade v. Shiers, 516 So.2d 1192, 1193 (La.App. 2 Cir. 1987). A person need not have a judgment directly against it in order to appeal that judgment. Emmons, 158 So.2d at 599; Delanzo, 572 So.2d at 650.

The Cotton defendants' reliance on the Summers and Nunez cases is

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[2] La. C.C. art. 2323(A) states, in pertinent part:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not reasonably ascertainable.

La. C.C. art. 2324(B) states:

> If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

misplaced as they are not factually analogous.[3] The Bread Bizz defendants rely on the cases cited above which involve multiple defendants where the courts maintained the appeal of one defendant from a judgment dismissing co-defendants, even where the plaintiff did not appeal. In Emmons, the Supreme Court found that a set of defendants could appeal the dismissal of a co-defendant, notwithstanding the plaintiff's failure to appeal the dismissal of his claims against the dismissed party; the court reasoned that the defendants' appeal was tantamount to filing a third party action against the co-defendant where the appealing defendants could be held solidarily liable with the dismissed defendants. In Delanzo, the Fifth Circuit held that in a products liability case, a co-defendant manufacturer had a very real interest in determining whether the plaintiff could make a case against the defendant retail distributor and was an "aggrieved party" entitled to appeal the grant of summary judgment dismissing that defendant from the suit; the court noted the dismissed defendant's conduct "may have a direct bearing on the ultimate outcome of the litigation against the manufacturer." 572 So.2d at 650. In McCann, the Fourth Circuit maintained the appeal of the Louisiana Patient's Compensation Fund from a judgment granting a directed verdict in favor of the defendant physician, alleged to be solidarily liable, in a medical malpractice action. 640 So.2d at 869. In Andrade, the Second Circuit maintained the appeal of defendant homeowners from the grant of a motion for summary judgment dismissing plaintiff's demand against the homeowner's insurer, a co-defendant.

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[3] In Summers, this Court maintained an appeal where the appellant misstated the date of the judgment in her motion for appeal in a case involving two separate final judgments on different dates; unlike the case at bar, the improperly appealed judgment did not affect appellant in any way. 527 So.2d at 1102. In Nunez, the appellant answered plaintiff's appeal seeking additional grounds for the grant of a motion for summary judgment in its favor. The Third Circuit stated that a party appealing a judgment in his favor did not have the right to appeal to have the judgment based upon a different ground. 576 So.2d at 1083.

516 So.2d at 1193. The Court found that as parties defendants, the homeowners were aggrieved by the judgment that implicitly decreed that their insurer did not have a duty to defend the claim on their behalf or to pay any part of a judgment on the merits if the homeowners should be cast in judgment. Id.

However, more recent cases under the comparative fault regime control this matter. In Grimes v. Louisiana Medical Mutual Insurance Co., 2010-0039 (La. 5/28/10), 36 So.3d 215, 217, the Louisiana Supreme Court explained that when a judgment dismisses one of several cumulated actions by the plaintiff, if the plaintiff does not appeal the adverse judgment, the judgment acquires the authority of a thing adjudged. "In such cases, the filing of an appeal from the judgment of the trial court by another party only brings 'up on appeal the portions of the judgment that were adverse to [that party],' but not 'the portions of the judgment that were adverse to plaintiffs.'" Id. quoting from Nunez v. Commercial Union Ins. Co., 00-3062 (La. 2/16/01), 780 So.2d 348, 349. Grimes involved the appeal by the remaining defendants from the grant of a summary judgment in a tort suit dismissing one defendant where the plaintiff did not appeal the dismissal. 36 So.3d at 216. The court held that the appeal brought up the portions of the judgment that were adverse to the remaining appellants/defendants. Grimes, 36 So.3d at 217. The court concluded that those defendants, if they were able to prove the fault of the dismissed defendant's employee, were entitled to a reduction in judgment by the percentage of fault allocated to that defendant in accordance with the principles of comparative fault set forth in La. C.C. art. 2323(A). Id.

Based on Grimes, while the judgment granting the motion for summary judgment is final between the Rogers plaintiffs and the Cotton defendants because the Rogers plaintiffs did not oppose the motion or thereafter appeal, this Court can consider the issue of whether the Bread Bizz defendants may reduce or defeat their

liability to the Rogers plaintiffs by establishing the fault or negligence of Mr. Cotton. Similarly, in State Farm Mutual Automobile Insurance Co. v. McCabe, 2014-501 (La.App. 3 Cir. 11/5/14), 150 So.3d 595, 596, the remaining co-defendants in a tort suit appealed the grant of a motion for summary judgment dismissing a defendant driver and his employer where the plaintiffs did not appeal. Based on Nunez and Grimes, the Third Circuit held that it could not determine whether summary judgment was proper as to plaintiffs because the judgment was final; therefore, the trial court's grant of the partial summary judgment was affirmed. McCabe, 150 So.3d at 598. The court then found that the remaining defendants might be entitled to a reduction in judgment by the percentage of fault allocated to the dismissed codefendants according to the comparative fault principles of La. C.C. art. 2323(A). Id. The court found that the determination of the defendant driver's fault was appropriate for jury determination and stated that any judgment for the plaintiffs should be determined and reduced based on the principles of comparative fault after considering the potential liability of all parties involved. McCabe, 150 So.3d at 598-99.

Moreover, the Bread Bizz defendants are parties aggrieved; they have an actual interest in the appeal and the correctness of this judgment. The trial court's ruling dismissing Mr. Cotton from the Rogers suit is effectively a ruling that an accident occurred and that Mr. Cotton is free from fault. The judgment is therefore effectively a judgment that the other driver, Mr. Kennedy, was solely at fault. If the Bread Bizz defendants assert at trial that Mr. Cotton caused or contributed to the accident, they would likely be met with Mr. Cotton's rebuttal that the court already decided the issue in the motion for summary judgment and would have no defense to the suit.[4] Because the Bread Bizz defendants are entitled to have Mr. Cotton's

[4] It should be noted that the court did not specifically state in the judgment that Mr. Cotton was not

alleged fault considered under the principle of comparative negligence, we deny the motion to dismiss the appeal.

The Bread Bizz defendants contend that the trial court erred in granting the motion for summary judgment filed by the Cotton defendants. They assert that factual issues remain as to whether an accident occurred and to what extent each driver was at fault. They contend that two equally plausible theories of fault exist in this case and due to the lack of non-biased, objective evidentiary support for Mr. Cotton's allegations, the trial court made an improper credibility determination in granting the motion for summary judgment.

After adequate discovery, a motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2) & (C)(1) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[5] The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy and inexpensive determination of non-domestic civil

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negligent. If that were the case, he would not be able to be considered in the allocation of fault and subsequent evidence could not be introduced to establish his fault. Duzon v. Stallworth, 2001-1187 (La.App. 1 Cir. 12/11/02), 866 So.2d 837, 854, writs denied, 2003-0589, 2003-0605 (La. 5/2/03), 842 So.2d 1101, 1110. Moreover, La. C.C.P. art. 966(G)(1) as it read prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016, stated, in pertinent part:

> When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or nonparty is not negligent, not at fault, or did not cause, whether in whole or in part, the injury or harm alleged, that party or nonparty shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or nonparty nor shall the issue be submitted to the jury nor included on the jury verdict form.

The provisions of La. C.C.P. art. 966(G) are not applicable to the summary judgment in this matter because the court did not specify in the judgment that they were applicable. La. C.C.P. art. 966(G)(2). See Barrilleaux v. Bd. of Supervisors of La. State Univ., 2014-1173 (La.App. 1 Cir. 4/24/15), 170 So.3d 1015, 1021, writ denied, 2015-1019 (La. 9/11/15), 176 So.3d 1048.

[5] Now, see La. C.C.P. art. 966(A)(3).

actions. La. C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[6] If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). If the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). If, however, the movant fails in his burden to show an absence of factual support for one or more of the elements of the adverse party's claim, the burden never shifts to the adverse party, and the movant is not entitled to summary judgment.

In ruling on a motion for summary judgment, the trial court'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 fact. Fonseca v. City Air of La., LLC, 2015-1848 (La.App. 1 Cir. 6/3/16), ___ So.3d ___, ___. Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Id. In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's

[6] Now, see La. C.C.P. art. 966(D)(1).

determination of whether summary judgment is appropriate. Id. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. Id.

In support of the motion for summary judgment, the Cotton defendants cited excerpts from Mr. Cotton's deposition testimony. He answered affirmatively when asked if his vehicle was entirely within the right lane. Mr. Cotton then testified that he realized Mr. Kennedy's van was in his lane at the moment of impact. Mr. Cotton later answered affirmatively when asked if he was "certain" that Kennedy's van came from the left turn lane into his turn lane. In their motion, the Cotton defendants also relied on the following excerpt from Mr. Kennedy's deposition testimony.

> Q. Did the tires of your vehicle ever enter into the right turn lane that goes onto Corporate?
>
> A. Not to my knowledge, I don't believe.
>
> Q. Do you know for sure it didn't or is that an assumption that you're making that it didn't?
>
> A. It's more of an assumption. I'm not a hundred percent sure, but pretty much I believe I stayed in my lane though.

The Cotton defendants contend that Mr. Cotton's testimony created a prima facie case that the accident was caused by Mr. Kennedy and Mr. Kennedy's testimony failed to create a genuine issue of material fact as to whether Mr. Cotton was at fault.

The Bread Bizz defendants opposed the motion for summary judgment, contending that a genuine issue of material fact existed as to whether an accident actually occurred, citing the investigating officer's testimony that there was no physical evidence showing that either car left its travel lane and pointing out there were no independent witnesses to the accident. They also referred to Mr. Kennedy's deposition excerpts submitted by the Cotton defendants wherein he

testified that he did not feel any type of impact. The Bread Bizz defendants asserted that there was a genuine issue of material fact as to whether Mr. Cotton was negligent, assuming an accident occurred, because Mr. Cotton could only cite his own self-serving testimony to support his version of events.

Corporal Kenneth Bourque, the investigating officer, in his deposition stated that there was no physical evidence to substantiate Mr. Cotton's claim that Mr. Kennedy went into his lane; however, he did state that Mr. Kennedy's right rear tire had a scuff mark on it which was consistent with the Cotton vehicle's damage. Corporal Bourque concluded he was unable to determine which vehicle went into which lane. The Bread Bizz defendants submitted additional excerpts from Mr. Cotton's deposition wherein he testified that he was looking "straight ahead" in his lane and did not see Mr. Kennedy's van until the moment of impact.

The Bread Bizz defendants submitted additional deposition excerpts from Mr. Kennedy. He testified that he turned wide so as not to hit the curb because the van he was driving was large, explaining as follows.

> Q. So at some points in time when you're trying to turn a vehicle of that size, you do actually leave your lane of travel, don't you?
>
> A. No, sir, I don't.
>
> . . .
>
> Q. You would agree in this case it's possible that you turned wide into the correct, the other right-side lane?
>
> A. No, sir.
>
> Q. You don't think so?
>
> A. No.
>
> Q. But you didn't feel any impact at all?
>
> A. No, sir, I didn't.

While both parties refer to deposition testimony from Ms. Rogers, the very limited excerpts from her deposition were submitted as attachments to Mr. Cotton's memorandum adopting the motion for summary judgment filed in the Rogers suit in the consolidated suit in which he is a plaintiff. The consolidation of cases is a procedural convenience designed to avoid multiplicity of actions and does not

cause a case to lose its status as a procedural entity; the filing of a pleading or motion in one consolidated case does not procedurally affect the other consolidated case. See Dendy v. City Nat. Bank, 2006-2346 (La.App. 1 Cir. 10/17/07), 977 So.2d 8, 11. Therefore, Ms. Rogers' deposition excerpts should not be considered on this motion for summary judgment. Lastly, the Rogers plaintiffs did not file any opposition to the motion for summary judgment.

The trial judge issued written findings of fact and reasons for judgment wherein he stated that there were no genuine issues of material fact as to whether there was an accident and that the Bread Bizz defendants failed to come forward with any evidence showing a genuine issue of material fact. The court also found that the Bread Bizz defendants failed to produce any evidence showing that the Cotton defendants would not be able to carry their burden of proof at trial.

The law is well settled that the trial court cannot make credibility determinations, evaluate testimony or weigh conflicting evidence in making its decision whether to grant or deny a motion for summary judgment. Fonseca, ___ So.3d at ___. Our review of this matter shows that the trial court improperly weighed the credibility of the witnesses. Mr. Kennedy and Mr. Cotton provided conflicting accounts about an impact and whether their vehicles were in their proper lane. The investigating police officer found no physical evidence to substantiate Mr. Cotton's claim that he was in the proper lane and that Mr. Kennedy was not. Genuine issues of material fact remain in this matter regarding whether an accident occurred, and, if so, the fault of Mr. Cotton and the fault of Mr. Kennedy.

CONCLUSION

For these reasons, we maintain the appeal and conclude that genuine issues of material fact remain regarding the issues raised in the motion for summary

judgment, which may ultimately have bearing on the Rogers plaintiffs' claims against Justin Cotton, Imperial Fire & Casualty Insurance Company, Patrick Kennedy, Bread Bizz, Inc., and State Farm Mutual Automobile Insurance Company as the underinsured motorist and liability insurer, and the allocation of fault, if any, as to these respective parties. Therefore, the judgment of May 26, 2015 granting the motion for summary judgment in favor of Justin Cotton and Imperial Fire and Casualty Insurance Company, dismissing with prejudice the plaintiffs' claims against them, is not final as to Justin Cotton, Imperial Fire & Casualty Insurance Company, Patrick Kennedy, Bread Bizz, Inc., and State Farm Mutual Automobile Insurance Company as the underinsured motorist and liability insurer.[7] That part of the judgment is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion. All costs of this appeal to be paid by appellees.

APPEAL MAINTAINED; REVERSED IN PART, AND REMANDED.

[7] Because plaintiffs Nedra N. Rogers, individually and on behalf of her minor son, Jayden Cotton, and Terry Cotton did not appeal that part of the trial court's judgment granting the motion for summary judgment in favor of Justin Cotton and Imperial Fire and Casualty Insurance Company, dismissing with prejudice the claims against those defendants, that part of the judgment is final as between those plaintiffs and those defendants, and this Court need not affirm that part of the judgment. See Grimes, 36 So.3d at 217; Bethley v. Sheybani, 2010-0713 (La.App. 1 Cir. 10/29/10), 2010 WL 4273105, *7 (unpublished).