NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

07-25

HIEN T. NGUYEN

VERSUS

ANDREWS TRUCKING, INC., ET AL.

****

APPEAL FROM THE
SEVENTH JUDICIAL DISTRICT COURT,
PARISH OF CATAHOULA, NO. 23,754,
HONORABLE KATHY A. JOHNSON, DISTRICT JUDGE

****

MICHAEL G. SULLIVAN
JUDGE

****

Court composed of Ulysses Gene Thibodeaux, Chief Judge, Marc T. Amy, and Michael G. Sullivan, Judges.

AFFIRMED.

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SULLIVAN, Judge.

Hien T. Nguyen appeals the dismissal on summary judgment of her suit for personal injuries against Christian D. Sikes, Anderson Trucking, Inc. ("Anderson"), and Interstate Fire and Casualty Company ("Interstate"). For the following reasons, we affirm.

Discussion of the Record

Ms. Nguyen filed suit alleging that, while she was traveling eastbound on I-10, her Toyota Previa van was struck from behind by a Mack Truck driven by Mr. Sikes, owned by Anderson, and insured by Interstate. After answering the suit, Defendants filed a motion for summary judgment, attaching in support thereof the notarized statement and the accident report of Mississippi State Trooper Alex J. Lizana, the investigating officer who also witnessed the accident.

In his statement, Trooper Lizana described how he was traveling in the left lane of I-10 behind a commercial vehicle, when he saw a Toyota van in the right lane collide with the vehicle in front of him as the van attempted to change lanes. Trooper Lizana observed that the left rear side of the van collided with the right front side of the truck. Because Ms. Nguyen could only say "He hit me" in English, Trooper Lizana allowed an individual that Ms. Nguyen had called on her cell phone to translate between them. Trooper Lizana stated that he informed the person on the phone that he had witnessed the accident and that Ms. Nguyen had struck the other vehicle. In his accident report, Trooper Lizana wrote: "V-1 [the truck] and V-2 [the van] were E/B on I10. V-2 attempted to change lanes and left rear collided with right front of V-1. V-1 and V-2 pulled onto South shoulder of I10 and came to final rest facing East." In the report, Trooper Lizana checked that Mr. Sikes exhibited "No Apparent Improper Driving," but that Ms. Nguyen "Failed to Yield Right of Way"

and made an "Improper Lane Change." His hand-drawn diagram in the report depicts the left rear corner of the van colliding with the right front side of the truck in the truck's lane of travel.

In opposition, Ms. Nguyen submitted her own affidavit, as well as one from Lam Huu Huynh, the owner of an automobile repair shop. In her affidavit, Ms. Nguyen stated that she was "traveling in the right lane and was going straight" and that she was "then struck in the rear by a vehicle owned and operated by Andrews Trucking, Inc." Mr. Huynh stated that he has seven years experience in repairing cars damaged in accidents and that, based upon his damage assessment of Ms. Nguyen's vehicle, it was struck from the rear by another vehicle.

After reviewing all documents submitted, the trial court granted Defendants' motion. On appeal, Ms. Nguyen argues that the trial court erred in granting summary judgment where there exists a genuine issue of material fact as to comparative fault.

Opinion

In *Aday v. State, through DOTD*, 06-1181, p. 3 (La.App. 3 Cir. 2/7/07), __ So.2d __, __ (emphasis added), this court recently summarized the burden of proof and standard of review in summary judgment cases:

> 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 mover is entitled to judgment as a matter of law." La.Code Civ.P. art. 966(B). Summary judgment is favored and shall be construed "to secure the just, speedy, and inexpensive determination of every action." La.Code Civ.P. art. 966(A)(2).
>
> The mover bears the initial burden of proof to show that no genuine issue of material fact exists. *However, if the mover will not bear the burden of proof at trial, he need not negate all essential elements of the adverse party's claim, but he must point out that there is an absence of factual support for one or more elements essential to the claim*. La.Code Civ.P. art. 966(C)(2). Once the mover has met his

> initial burden of proof, the burden shifts to the nonmoving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. *Id.*
>
> Appellate courts review motions for summary judgments *de novo*, asking the same questions the trial court asks to determine whether summary judgment is appropriate. *Champagne v. Ward*, 03-3211 (La.1/19/05), 893 So.2d 773. This inquiry seeks to determine whether any genuine issue of material fact exists and whether the mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966(B). "A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of a legal dispute." *Hines v. Garrett*, 04-806, p. 1 (La.6/25/04), 876 So.2d 764, 765.

Ms. Nguyen argues that Trooper Lizana's affidavit is insufficient because it fails to absolve Mr. Sikes of all negligence, as it does not state that Mr. Sikes was not driving at an excessive speed, that he kept a proper lookout, that he kept a safe distance from the other vehicle, and that he used due care to avoid an emergency situation. She also claims that the affidavit is insufficient to rebut the presumption that Mr. Sikes was at fault as the following motorist. For the following reasons, we disagree.

In *Bah v. Continental Casualty Insurance Co.*, 05-499 (La.App. 4 Cir. 2/8/06), 925 So.2d 630, *writ denied*, 06-1103 (La. 6/23/06), 930 So.2d 989, the court decided on summary judgment that there was no negligence on the part of a favored driver who collided with a vehicle that turned in front of her from an unfavored street. Similar to Ms. Nguyen's argument here, the unfavored driver in that case argued that the favored driver should have at least been found comparatively at fault and that the trial court erred in granting summary judgment without apportioning fault between the parties. The appellate court rejected these arguments, noting that the evidence established there was nothing obstructing the view of the unfavored driver and that the unfavored driver was ticketed for failure to yield. In *Lee v. Davis*, 03-997

(La.App. 5 Cir. 12/30/03), 864 So.2d 780, the court determined on summary judgment that a driver confronted with the sudden emergency of a bicyclist approaching him in his lane of travel was not negligent in losing control of his car, despite arguments from his passenger that the driver was guilty of comparative negligence because he did not use his high beam lights on a dark road. The court reached its decision after examining the duties of all involved, emphasizing that a motorist is entitled to assume that another vehicle would not be traveling in the wrong direction. *See also Smeby v. Williams,* 37,845 (La.App. 2 Cir. 12/10/03), 862 So.2d 381, in which summary judgment was affirmed in favor of a motorist faced with the sudden emergency of a jack-knifed truck blocking both lanes of travel, notwithstanding conflicting testimony as to whether or not he was accelerating immediately before the crash, where the witnesses agreed there was nothing the driver could have done to have prevented the crash.

Ms. Nguyen alleges in her petition and states in her affidavit that she was struck from behind; however, the affidavit and the accident report of Trooper Lizana establish that the vehicles were not traveling in the same lane. Both Louisiana and Mississippi have statutes requiring that a driver not change lanes until he or she ascertains that such movement can be done safely. La.R.S. 32:79; Miss.Code.Ann § 63-3-603. After witnessing the accident from behind Mr. Sikes' truck, Trooper Lizana noted in his accident report that Mr. Sikes did nothing inappropriate, whereas Ms. Nguyen failed to yield and made an improper lane change. Accordingly, although Ms. Nguyen may have been struck from behind, we do not agree that she is entitled to the presumption of the following motorist's fault, when Mr. Sikes was faced with a sudden emergency of her creation. *See Baptiste v. Granada*, 387 So.2d

1235 (La.App. 1 Cir. 1980). Further, "[w]hen a motion is made and supported, as required by La. C.C.P. art. 966, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response must set forth specific facts showing a genuine issue for trial." *Brooks v. City of Jennings*, 06-680, p. 2 (La.App. 3 Cir. 11/22/06), 944 So.2d 768, 771 (quoting *Semien v. EADS Aeroframe Servs., LLC*, 04-760, pp. 1-2 (La.App. 3 Cir. 2/2/05), 893 So.2d 215, 216-17). Once the Defendants produced the eye-witness account of a trained investigator that Mr. Sikes did nothing wrong and that Ms. Nguyen failed to yield and made an improper lane change, the burden shifted to Ms. Nguyen to come forward with specific allegations of Mr. Sikes' comparative fault. Her offerings, however, only repeat her initial allegations that she was struck from the rear. On the record before us, we find that the trial court properly granted summary judgment.

Decree

For the above reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to Plaintiff/Appellant, Hien T. Nguyen.

AFFIRMED.

This opinion is NOT DESIGNATED FOR PUBLICATION. Uniform Rules—Courts of Appeal. Rule 2-16.3.