NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 1809

MICHAEL BARDY

VERSUS

MR. AND MRS. RAYMOND FLICK AND THEIR INSURER, PRUDENTIAL PROPERTY & CASUALTY COMPANY

Judgment Rendered: September 20, 2006

* * * * * *

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2003-14150

Honorable Donald M. Fendlason, Judge

* * * * * *

F. Timothy Garlick
Folsom, LA
Lisa Montgomery Pittman
Mandeville, LA

Counsel for
Plaintiff-Appellant
Michael Bardy

Mark A. Myers
Mary B. Lord
Covington, LA

Counsel for
Defendants-Appellees
Mr. and Mrs. Raymond
Flick and Prudential
Property & Casualty
Company

* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

The driver of a four-wheel all terrain vehicle (ATV) appeals a summary judgment dismissing his claims relative to the injuries he sustained while operating the ATV. For the reasons that follow, we affirm the summary judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Michael Bardy, filed a petition for damages against Mr. and Mrs. Raymond Flick and their homeowner's insurer, Prudential Property and Casualty Company (Prudential), for injuries he sustained on September 2, 2002, while driving a four-wheel ATV owned by the Flicks on their property. Mr. Bardy alleged he was driving the ATV up an embankment on the Flicks' property when the ATV suddenly accelerated forward, causing the vehicle to flip over and to throw him to the ground, head first, with the ATV landing on top of him. He further alleged that the sudden acceleration and flipping of the ATV was "caused by the negligence of the Flicks in improperly maintaining the vehicle, and/or in improperly modifying the vehicle for its intended use." As a result of the accident, Mr. Bardy sustained serious head and neck injuries.

The Flicks and Prudential (collectively defendants) filed separate answers generally denying all liability for the claims asserted in the petition[1] and later filed a motion for summary judgment seeking the dismissal of Mr. Bardy's claims against them. In support of their motion, the defendants argued that Mr. Bardy would be unable to prove that the Flicks improperly maintained and/or improperly modified the ATV as alleged in his petition. Mr. Bardy filed a memorandum in opposition to the motion for summary judgment in which he asserted additional acts of negligence allegedly committed by the Flicks. Mr. Bardy later filed a supplemental and amending petition on the date of the trial on the motion for summary judgment, incorporating the additional allegations of negligence against

the Flicks. Following the presentation of arguments, the trial court granted summary judgment in favor of the defendants, "dismissing all of plaintiff's claims in the Original Petition for Damages as well as the Supplemental and Amending Petition for Damages against the defendants."

ASSIGNMENTS OF ERROR

In this appeal, Mr. Bardy generally asserts that the trial court erred in granting the motion for summary judgment based on the evidence in the record. Mr. Bardy contends that summary judgment was not properly granted because genuine issues of material fact and law exist. He further contends that the trial court improperly relied on the affidavit of Raymond Flick and that it failed to consider the additional claims of negligence raised in his memorandum in opposition to the motion for summary judgment that were incorporated into his supplemental and amending petition that was filed on the date of trial.

STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. Fagan v. LeBlanc, 04-2743, p. 5 (La. App. 1st Cir. 2/10/06), 928 So. 2d 571, 574. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The initial burden of proof is on the movant. However, if the movant will not bear the burden of proof at trial, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, but rather 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. La. C.C.P. art. 966(C)(2).

---

[1] Prudential also excepted to Mr. Bardy's petition based on the objections of no right of action, no cause of action, and prescription and filed a motion for partial summary judgment

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 motion should be granted. La. C.C.P. art. 966(C)(2).

On appeal, summary judgments are reviewed de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Sunrise Construction and Development Corporation v. Coast Waterworks, Inc., 00-0303, p. 4 (La. App. 1st Cir. 6/22/01), 806 So. 2d 1, 3, writ denied, 01-2577 (La. 1/11/02), 807 So. 2d 235.

DISCUSSION

As the movants on the motion for summary judgment, the defendants bore the initial burden of producing evidence at the hearing on the motion, which is ordinarily met by producing affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. See Racine v. Moon's Towing, 01-2837, pp. 4-5 (La. 5/14/02), 817 So. 2d 21, 24-25. In this instance, Mr. Bardy's claim is based on the following acts of negligence allegedly committed by the Flicks contained in the original and supplemental and amending petitions:

> VIII.
> [from the original petition]
> The sudden acceleration and flipping of the vehicle and resulting accident was caused by the negligence of the Flicks in improperly maintaining the vehicle, and/or in improperly modifying the vehicle for its intended use.
>
> XIV.
> [from the supplemental and amending petition]
> Alternatively and/or additionally, defendants breeched [sic] their duty to the petitioner by [allowing] the petitioner, who was not a competent ... ATV driver to drive their ATV, a 1999 Honda Fourtrax Recon, without establishing that the petitioner was competent to ride the ATV.
>
> XV.
> Alternatively and/or additionally, defendants breeched [sic] their duty to the petitioner by allowing him to drive their ATV without giving him any instruction in the operation of the ATV and/or

---

seeking dismissal of Mr. Bardy's claim of bad faith. These issues are not before us in this appeal.

providing him with the instruction manual that contained detailed instructions on how to operate the ATV.

XVI.

Alternatively and/or additionally, defendants breeched [sic] their duty to the petitioner by allowing him to ride their ATV without making protective apparel, including but not limited to, a safety helmet available to the petitioner.

XVII.

Alternatively and/or additionally, the defendant, Raymond Flick, was negligent in leaving the ATV available to the petitioner with the key in the ignition, thereby tacitly permitting the petitioner who had used the vehicle earlier in the day to use the ATV, the use of which resulted in the petitioner's injuries.

XVIII.

Alternatively and/or additionally, the trail on which the petitioner was injured was under the garde of the [defendants] and the defendant, Raymond Flick, knew or reasonably should have known that the trail was dangerous to ATV users and failed to warn the petitioner of the danger and/or modify or block the trail.

In support of their motion for summary judgment, the defendants submitted Mr. Bardy's deposition testimony, Mr. Flick's affidavit and deposition testimony, a copy of a service invoice from Garrett Honda dated September 17, 2003, and photographs of the ATV and trail on which Mr. Bardy was injured. Mr. Bardy admitted in his deposition that prior to the accident he had not had any problems using the thumb throttle on the ATV or in operating the ATV in general. When asked what evidence or information he could provide to substantiate his claim that the Flicks improperly maintained the ATV, Mr. Bardy's initial response was that "[Mr. Flick's] sons worked on it;" but when questioned further, he responded "[c]an't tell you. I don't know. I'm not a mechanic." Later, Mr. Bardy responded to the question by stating, "All I can say is that when I hooked up back with Raymond in '01, I've been going to his house quite a few times since then, and every time I talked to him he said, 'We'll ride down [to] the river,' so I know the four wheeler was there every time I went there. He never mentioned ever putting it in the shop or getting it fixed or anything like that."

In response to inquiries about what evidence he could produce to substantiate his claim that the ATV was improperly modified, Bardy testified, "Me, myself, I don't have nothing. But I always seen [sic] his son working on it and doing stuff. Any time something would go wrong with it, his son, Matthew, would work on it, and that's all I've got. I seen [sic] it with my own eyes." He admitted, however, that he did not have any evidence to indicate whether the work performed by Mr. Flick's son was proper or improper.

Finally, the Garrett Honda service invoice together with excerpts of Mr. Flick's deposition testimony submitted by the defendants established that the ATV was operating properly. Mr. Flick testified in his deposition that when he learned that Mr. Bardy had alleged in his petition that there was a problem with the throttle on the ATV, he took it to Garrett Honda to be inspected. According to the service invoice, the ATV's throttle cable was in perfect condition and the carburetor was like brand new. Mr. Flick also testified that the only work performed by his son on the ATV involved changing of the oil and adding a horn and a headlight.

Other than pointing out the same testimony highlighted by the defendants in support of their motion for summary judgment, Mr. Bardy did not present any evidence demonstrating that the Flicks had *improperly* maintained or modified the ATV. The deposition testimony of Mr. Bardy and Mr. Flick established that Mr. Flick's son had performed some maintenance and modification on the ATV, but this testimony did not establish that the work performed by Mr. Flick's son was improper. Hence, the only indications that the Flicks improperly maintained or modified the ATV are Mr. Bardy's allegations, which are insufficient to defeat the motion for summary judgment. See La. C.C.P. art. 967(B).

Similarly, Mr. Bardy failed to rebut the proof presented by the defendants regarding his allegation that Mr. Flick negligently allowed him to operate the ATV without first ascertaining that he was a competent ATV driver and without providing safety equipment and instructions on the proper operation of the ATV.

These claims against the defendants are basically that of negligent entrustment. Owners of motor vehicles ordinarily are not liable for damages that occur while another is operating the vehicle, unless the damage occurs when the driver is on a mission for the owner, the driver is the agent or employee of the owner, or when the owner is negligent in entrusting the vehicle to an incompetent driver. Brown v. Unknown Driver, 05-0421, p. 8 (La. App. 4th Cir. 1/18/06), 925 So. 2d 583, 588. Under the theory of negligent entrustment, the lender of the vehicle is not responsible for the negligence of the borrower unless he knew or should have known that the borrower was physically or mentally incompetent to drive. Brown, 05-0421 at 8, 925 So. 2d at 588-589.

To refute this allegation of negligent entrustment, the defendants referred to Mr. Bardy's deposition testimony wherein he acknowledged that he had previously driven and had experience operating a three-wheel ATV before using the Flicks' ATV. The defendants also submitted the affidavit of Mr. Flick in which he attested that prior to the accident Mr. Bardy had operated the ATV in question without incident or complaint and that Mr. Bardy had never requested to review the ATV's owner's manual or to be given protective gear. Mr. Flick attested that a helmet was available for Mr. Bardy's use. Mr. Flick also stated in his affidavit that certain warning stickers were present on the ATV at the times Mr. Bardy operated or rode on the vehicle that warned about, among other things, using a helmet and protective gear when operating the ATV; not using alcohol and drugs when operating the ATV; and using "proper riding techniques to avoid vehicle overturns on hills and rough terrain and in turns." Photographs of the warning decals displayed on the ATV were submitted in conjunction with the affidavit testimony.

In response to this evidence, Mr. Bardy submitted an affidavit wherein he attested that he was not offered or given the owner's manual for the ATV; that prior to driving the ATV, he was not instructed on the proper operating, riding, and safety procedures; and that he was not told that he should wear protective apparel

nor was he given any protective apparel to wear. Mr. Bardy also alleged in his memorandum in opposition to the motion for summary judgment that Mr. Flick knew he was intoxicated at the time he tacitly permitted him to drive the ATV. Mr. Bardy asserted that Mr. Flick gave him tacit or implied permission to drive the ATV at the time of the incident by leaving the vehicle parked in his yard with the keys in the ignition.

Despite this evidence and assertions, we find that the trial court properly granted summary judgment in favor of the defendants on these claims because we can find nothing in Louisiana law stating that the defendants had a legal duty to instruct a 44-year-old experienced ATV driver about how to properly operate the machine or about the risks associated with such operation. Further, although Mr. Bardy submitted some evidence showing that some of the warning decals normally found on ATVs like the one owned by the Flicks were missing,[2] he did not deny that the warning decals that advised about the proper operation of the ATV and the use of safety gear was displayed on the ATV. Rather, when asked if he had read the warning decals on the ATV, Mr. Bardy responded "not really." Further, according to the deposition testimony of Mr. Flick, which was submitted into evidence by Mr. Bardy, wherein Mr. Flick stated that when he attempted to instruct Mr. Bardy on how to operate the ATV, Mr. Bardy told him that he had driven ATVs all his life and he did not need any instructions.

Moreover, the mere act of leaving keys in a vehicle does not make the owner of the vehicle liable for injuries caused by someone who uses that vehicle without authorization. Racine, 01-2837 at 6, 817 So. 2d at 26. Although Mr. Bardy alleges that Mr. Flick tacitly permitted him to drive the ATV while intoxicated, by his own admission and Mr. Flick's deposition testimony, we find that no such permission was given. Generally, implied permission arises from a course of conduct

involving acquiescence in, or lack of objection to, the use of the vehicle. Lee v. Taylor, 00-1361, p. 5 (La. App. 1st Cir. 12/15/00), 808 So. 2d 407, 410. In his deposition, Mr. Flick testified that after he and a group of friends had finished fishing, he loaded the "stuff" onto a trailer attached to the ATV and drove the ATV back to his house. He stated that as soon as he arrived at his house, his daughter notified him that someone was waiting to speak with him on the telephone. Mr. Flick testified that he turned off the ATV, but left it parked with the keys in the ignition and the trailer attached while he went inside his home to answer the phone. When he went back outside after completing the call, Mr. Flick said the trailer was there, but the ATV was gone. He then asked two friends who were present about the missing ATV and was told that Mr. Bardy had taken a friend's son for a ride on the ATV. In his affidavit, Mr. Flick further testified that "[o]n the date of this accident, Mr. Flick was not aware that Michael Bardy was operating the Honda ATV in the area of the 'trail' where the incident occurred."

Thus, there was no evidence that the Flicks knew or had reason to know that Mr. Bardy would drive the ATV, while intoxicated, in the area of the trail where he was harmed. The evidence submitted by Mr. Bardy did not show that there was a course of conduct whereby Mr. Flick had left his keys in the ATV or other vehicles that Mr. Bardy then drove without the prior knowledge and permission of the Flicks. Mr. Bardy's failure to submit any evidence proving that Mr. Flick expressly or tacitly authorized him to drive the ATV at the time of the incident mandates that summary judgment be granted in favor of the defendants.

As for Mr. Bardy's contention that the trial court should have disregarded Mr. Flick's affidavit testimony because it conflicted with his prior deposition testimony, we find no merit in this argument as the objectionable statements do not

---

[2] According to the evidence submitted by Mr. Bardy, the missing decals advised that persons under the age of sixteen should not operate the ATV and that improper tire pressure and overloading or improperly loading the ATV with cargo could affect the ATV's performance.

concern the material facts at issue nor are they clearly inconsistent.

In his deposition, Mr. Flick testified that Mr. Bardy had never *driven* the ATV before the date of the incident, but he acknowledged that Mr. Bardy had ridden on the ATV. In his affidavit, Mr. Flick averred that Mr. Bardy "has operated the Honda ATV on many prior occasions" and that "Mr. Bardy had operated the Honda ATV earlier in the day on other trails on the [Flicks'] property." Material to the litigation, however, is Mr. Flick's acknowledgment that Mr. Bardy was operating the ATV on the date of the incident.

The other affidavit statement that Mr. Bardy objects to is Mr. Flick's statement that he was the owner of the ATV. At his deposition, Mr. Flick's wife acknowledged that she had purchased the ATV, and Mr. Flick testified "since we've been married, I've always put her name on everything we bought." Under our community property laws, Mr. Flick possesses a one-half ownership interest in the ATV purchased by his wife. So although Mr. Flick may not be the registered owner of the ATV, his claim of ownership is not false nor inconsistent with his deposition testimony.

Finally, as to Mr. Bardy's assertion that the presence of the twelve-foot incline on the trail used to travel to the river constituted a defect on the property for which the defendants were liable, we find that such a claim is barred by La. R.S. 9:2791,[3] which provides immunity to landowners for the recreational use of their land.

---

[3] Louisiana Revised Statute 9:2791(A), was amended in 2003, but at the time of the accident, the statute provided:

> An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, camping, hiking, sightseeing, or boating or to give warning of any hazardous conditions, use of, structure, or activities on such premises to persons entering for such purposes. If such an owner, lessee, or occupant give[s] permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to persons or property caused by any act of person to whom permission is granted.

CONCLUSION

For the foregoing reasons, we affirm the ruling of the trial court granting summary judgment and dismissing Mr. Bardy's claims against the defendants, Mr. and Mrs. Raymond Flick and Prudential Property and Casualty Company. All costs in this matter are assessed to the appellant, Michael Bardy.

AFFIRMED.