NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0655

LEANDRO CARIAS

VERSUS

VERNON A. LOREN, RICKIE WILLIAMS, JR., CR ENGLAND, INC., BRADY W. WALTON, SOCTTSDALE INDEMNITY COMPANY, STATE FARM INSURANCE COMPANY, AND USAA CASUALTY INSURANCE COMPANY (IN ITS CAPACITY AS AN UN-INSURED/UNDER-INSURED MOTORIST CARRIER)

Judgment Rendered: MAR 09 2015

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. C592,684

The Honorable William A. Morvant, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

DRAKE, J.

Plaintiff, Leandro Carias, appeals the trial court's granting of summary judgment dismissing plaintiffs' claims against defendants, Loren Vernon Arey,[1] Rickie Williams, Jr., and CR England, Inc. For the reasons stated herein, the judgment of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

On August 3, 2009, Mr. Carias was traveling eastbound on Interstate 10 on the Mississippi River Bridge in East Baton Rouge Parish, when a multi-vehicle accident occurred. Mr. Arey was driving an eighteen wheeler in the middle lane of the interstate when traffic in the left lane and middle lane slowed down. A white car with an unknown driver, that had been in the left lane, moved into the middle lane in front of Mr. Arey. To avoid hitting that car, Mr. Arey swerved to his right, hitting a pickup truck pulling a trailer which was operated by Brady W. Walton,[2] causing Mr. Walton to hit the rear of the vehicle owned and operated by Mr. Carias. The phantom vehicle that moved into Mr. Arey's lane of travel moved back into the left lane and kept going after the accident.

Mr. Arey, Mr. Williams, who was Mr. Arey's trainer and guest passenger, and CR England, Inc., the owner of the eighteen wheeler driven by Mr. Arey, filed a motion for summary judgment claiming that the accident was caused by the sudden emergency of the phantom vehicle moving into Mr. Arey's lane of travel, meaning that there was no evidence of liability as to any of these defendants. The trial court granted the motion for summary judgment and dismissed all claims against Mr. Arey, Mr. Williams, and CR England, Inc. Mr. Carias now appeals.

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[1] Loren Vernon Arey was erroneously sued and named as Vernon A. Loren.

[2] Mr. Walton was also named as a defendant in this matter but was dismissed pursuant to a judgment granting a motion for summary judgment in favor of him and his insurer, State Farm Mutual Automobile Insurance Company, on March 10, 2014. Although an appeal was filed from the judgment dismissing Mr. Walton and State Farm, that matter was never briefed, and this court dismissed the appeal as abandoned. *Carias v. Loren, et al.*, 14-0656 (La. App. 1 Cir. 8/22/14)(unpublished).

ERRORS

Mr. Carias claims that the trial court erred in making factual determinations regarding the actions of Mr. Arey; failing to shift the burden of proof to defendants for the application of the sudden emergency doctrine; making credibility determinations; and failing to make reasonable inferences so as to be viewed in the light most favorable to the party opposing the motion for summary judgment.

DISCUSSION

Summary Judgment

A motion for summary judgment is a procedural device used when there is no genuine issue as to material fact for all or part of the relief prayed for by a litigant. *Duncan v. U.S.A.A. Ins. Co.*, 06-363 (La. 11/29/06), 950 So. 2d 544, 546; *see* LSA-C.C.P. art. 966. An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So. 2d 730, 750. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, 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); *George S. May Int'l Co. v. Arrowpoint Capital Corp.*, 11-1865 (La. App. 1 Cir. 8/10/12), 97 So. 3d 1167, 1171.

However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing 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, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial; failure to do so shows that

there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); *Manno v. Gutierrez,* 05-0476 (La. App. 1 Cir. 3/29/06), 934 So. 2d 112, 116. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Id.*

The party opposing summary judgment cannot rest on the mere allegations of his pleadings but must show that he has evidence that could satisfy his evidentiary burden at trial. If he does not produce such evidence, then there is no genuine issue of material fact and the mover is entitled to summary judgment. *Mbarika v. Bd. of Sup'rs of Louisiana State Univ.*, 07-1136 (La. App. 1 Cir. 6/6/08), 992 So. 2d 551, 561, *writ denied,* 08-1490 (La. 10/3/08), 992 So. 2d 1019; *See* La. C.C.P. art. 966(C)(2).

Normally, the burden of proof in a personal injury case is upon the plaintiff. However, in exceptional cases, a presumption of negligence arises. *Ferrell v. Fireman's Fund Ins. Co.,* 94-1252 (La. 2/20/95), 650 So. 2d 742, 746. When a driver leaves his own lane of travel and strikes another vehicle, a presumption of negligence arises. In such a case, the burden of proof on such a defendant motorist is to show that he was not guilty of any dereliction, however slight. A motorist has a duty to maintain control of his vehicle. *Shephard, on behalf of Shephard v. Scheeler,* 96-1690 (La. 10/21/97), 701 So. 2d 1308, 1318. The person who leaves his lane of travel is required to exculpate himself from any fault, however slight, that may have contributed to the accident. *See Reichert v. State, Dept. of Transportation and Development*, 96-1419 (La. 5/20/97), 694 So. 2d 193, 201.

The initial burden of proof in the present case was on Mr. Arey, who left his lane of travel. To overcome the presumption of negligence, from which Mr. Arey bears the burden of exculpating himself, he relies on the sudden emergency

doctrine. *Whiddon v. Hutchinson,* 94-2000 (La. App. 1 Cir. 2/23/96), 668 So. 2d 1368, 1374-76, *writs denied,* 96-0731, 96-0775 (La. 5/10/96), 672 So. 2d 923.

The Louisiana Supreme Court explained the sudden emergency doctrine in *Hickman v. Southern Pacific Transport Company,* 262 La. 102, 262 So. 2d 385, 389 (1972), as follows:

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

The doctrine of unavoidable or inevitable accident relieves a person of liability so long as the person invoking the doctrine shows that he was in no way to blame for the happening. *Richardson v. Aldridge,* 37,192 (La. App. 2 Cir. 5/16/03), 854 So. 2d 923, 931, *writ denied,* 03-3034 (La. 2/6/04), 865 So. 2d 743. If a motorist has exercised ordinary care as required by law (or the highest degree of care as may be required), and has nevertheless inflicted injury on another, the accident is said to be inevitable, for which no liability attaches. *Id.*

Analysis

In connection with the motion for summary judgment, Mr. Arey attached the petition, the first supplemental and amending petition, the affidavit of Mr. Williams, excerpts from the deposition of Mr. Arey, and excerpts from the deposition of Mr. Carias.

Mr. Williams testified that he was a passenger in the vehicle driven by Mr. Arey on the date of the accident. Mr. Williams stated that while crossing the Mississippi River Bridge and travelling east into Baton Rouge, Mr. Arey was traveling below the speed limit and was fully in his lane of travel. He also testified that Mr. Arey was a safe distance from the vehicles in front of him when a white car moved into Mr. Arey's lane of travel. Mr. Williams stated that the white car

moved so abruptly, Mr. Arey had to make a quick decision and moved his vehicle one lane to the right.

Mr. Arey testified that he was "like three miles from the car in front of [him] coming up the hill." When he got closer to the cars in front of him, the traffic in both the left and middle lanes slowed. However, when the traffic in the left lane came to a stop, a light-colored car in the left lane moved into his lane of travel. Mr. Arey stated that there was no way he would have been able to stop and avoid hitting the car that had pulled in front of him, so he glanced to his right, did not see anyone, and swerved to the right. However, he hit a pickup truck with a trailer. The pickup truck was driven by Mr. Walton.

Defendants attached an excerpt from the deposition of Mr. Carias, who was driving in the right lane in front of Mr. Walton. Mr. Carias heard a bang and was almost immediately hit in the rear following the bang. Mr. Carias admitted he did not know what happened behind him; he only knew that he was rear-ended by the pickup truck.

From our review of the record, there is sufficient evidence to rebut the presumption of Mr. Arey's fault. Both his deposition testimony and the affidavit of his passenger, Mr. Williams, establish that a vehicle came into Mr. Arey's lane of travel without warning. Mr. Arey took evasive action to avoid that vehicle, which eventually moved back into the left lane and continued going. However, in an effort to avoid hitting the phantom vehicle, Mr. Arey collided with the pickup truck driven by Mr. Walton which was travelling in the right lane. Therefore, we find that the trial court did not err in finding that Mr. Arey overcame his presumption of negligence relying upon the sudden emergency doctrine. The burden then shifted to Mr. Carias to prove some negligence on the part of Mr. Arey.

Mr. Carias opposed the motion for summary judgment and attached excerpts from the deposition of Mr. Arey and a copy of the police report. However, a police report which is not accompanied by an affidavit or a deposition of the officer is not considered as competent evidence in a summary judgment proceeding. La. C.C.P. art. 967. *See Lewis v. Jabbar,* 08-1051 (La. App. 1 Cir. 1/12/09), 5 So. 3d 250, 255. Accordingly, because the police report was not authenticated or sworn to by affidavit or deposition of the officer, the only competent evidence in opposition to the motion for summary judgment is the deposition testimony of Mr. Arey, one of the defendants. Mr. Carias introduced mostly the same portions of testimony as those introduced by the defendants, except for an additional portion wherein Mr. Arey stated that he was two car lengths from the car in front of him when he noticed that the traffic had stopped.

Mr. Carias asserts that because of this inconsistent testimony and based upon *Manno v. Gutierrez,* 05-0476 (La. App. 1 Cir. 3/29/06), 934 So. 2d 112, and *Saylor v. Viguet,* 09-1686 (La. App. 1 Cir. 3/26/10), 2010WL1170381 (unpublished), that the trial court erred in making a factual determination as to whether the sudden emergency doctrine applied to the facts of this matter. This court stated in *Manno,*

> We note first that the application of the sudden emergency doctrine requires factual determinations concerning whether the driver was confronted with imminent peril and whether there was sufficient time to consider and weigh the circumstances in order to take action to avoid an impending danger. **While we cannot say that it would never be possible to apply the doctrine on a motion for summary judgment**, our research has disclosed no cases from this court that has so applied it, and by the nature of the sudden emergency doctrine, it would seem rarely appropriate on a motion for summary judgment.

934 So. 2d at 117-118 (emphasis added). Relying on the language above, this court in *Saylor* also reversed a motion for summary judgment that had been granted based on the sudden emergency doctrine. *Saylor,* 09-1686, at p. 3, 2010WL1170381.

Manno and *Saylor,* however, are distinguishable from the present situation. In *Manno,* there was **conflicting deposition testimony** regarding the defendant's opportunity and time to assess the situation and take other evasive action. The four depositions in the *Manno* record contained many factual discrepancies. *Manno,* 934 at 118. In *Saylor,* there was **conflicting deposition and affidavit testimony** as to when a deer was first seen, where the deer came from, and how long the deer had been there. *Saylor,* 09-1686, at p. 2, 2010WL1170381.

As the trial court determined, there is **no conflicting testimony** in the present case. Mr. Carias did not see anything regarding the accident, which occurred behind him. Further, he did not offer the deposition or affidavit testimony of Mr. Walton. Therefore, this court has nothing in the record evidencing a genuine issue as to a material fact. The evidence in this record, namely the deposition excerpts of Mr. Arey and the affidavit of his passenger, Mr. Williams, is in agreement as to the fact that a light-colored car came into Mr. Arey's lane of travel, causing Mr. Arey to take evasive action and hit the truck driven by Mr. Walton.

The present situation is more similar to the cases relied upon by defendants, *Loyd v. Lancer Ins. Co.,* 43-859 (La. App. 2 Cir. 1/14/09), 999 So. 2d 1232, *Lee v. Davis*, 03-997 (La. App. 5 Cir. 12/30/03), 864 So. 2d 780, and *Marigny v. Allstate Ins. Co.,* 95-0952 (La. App. 4 Cir. 1/31/96), 667 So. 2d 1229, *writ denied,* 96-0693 (La. 4/26/96), 672 So. 2d 910. In *Loyd*, the court affirmed the granting of a summary judgment in favor of a truck driver based upon the sudden emergency doctrine. The truck driver was confronted with a group of motorcycles that quickly moved into his lane of travel. The second circuit stated, "[w]here no facts are in dispute, summary judgment may be appropriate where a sudden emergency renders an accident unavoidable." 999 So. 2d at 1234. The plaintiff attempted to

speculate that the defendant could have responded differently but presented no evidence to support the speculation.

Lee also affirmed a summary judgment in favor of a defendant based upon the sudden emergency doctrine. The defendant driver was faced with a bicyclist coming at him at night with no headlights or reflectors and swerved to avoid the bicyclist. His car ended up in the ditch and the bicyclist did not stop. The plaintiff, who was a passenger in Lee's vehicle, was injured. The fifth circuit agreed that there were no genuine issues of material fact as to the liability of the defendant driver.

Marigny affirmed the granting of summary judgment based upon the sudden emergency doctrine. The defendant lost control of her vehicle after a vehicle swerved into her lane of travel due to another vehicle going the wrong way. Even though there was no formal estimate of the defendant driver's reaction time, the court found that other evidence showed that she had taken evasive action as soon as she could. The court determined that the defendant had only seconds to react to the situation of imminent peril. *Id.* at 1232.

In the cases relied upon by the plaintiff, there were facts in dispute. In the present case, the facts are not in dispute. Similar to the arguments in *Loyd,* in the present case, Mr. Carias claims that factual issues remain as to whether Mr. Arey had time to consider and weigh the circumstances or whether Mr. Arey even faced an imminent danger. However, Mr. Carias offers no evidence to contradict the testimony of Mr. Arey and Mr. Williams. Therefore, the assertions of Mr. Carias are mere speculation. We must agree with the second circuit, "[w]here no facts are in dispute, summary judgment may be appropriate where a sudden emergency renders an accident unavoidable." *Loyd,* 999 So. 2d at 1234. Mr. Carias has not submitted any possible interpretation of the undisputed facts that would support the liability of Mr. Arey.

Mr. Carias asserts that the trial court made an impermissible credibility determination in granting summary judgment in favor of the defendants because the defendant driver, Mr. Arey, presented inconsistent and conflicting testimony in his deposition.

In his deposition, Mr. Arey sets forth a series of events leading up the accident at issue, beginning with his approach up the hill. At this point, he states that the car in front of him was about three miles away. However, Mr. Arey then states that as he got closer to these cars, the cars in the left lane and the middle lane slammed on their brakes. Mr. Arey clarifies further in his testimony that he was approximately two car lengths from these cars when he noticed that the traffic had stopped. Mr. Arey states that it was at this point that a vehicle from the left lane pulled into his lane of travel. According to Mr. Arey, he did not have time to stop to avoid hitting the vehicle that had just pulled in front of him, so he checked his rear-view mirror, did not see any vehicles in the right lane, and moved into the right lane.

After reviewing the excerpts of Mr. Arey's deposition testimony contained in the record, his testimony is neither in conflict nor inconsistent. Therefore, given the absence of any internal conflict in Mr. Arey's testimony or any countervailing evidence offered by the plaintiff, the trial court was not required to make a credibility determination in rendering summary judgment in favor of the defendants, and the plaintiff's assignment of error in this regard is without merit.

We do not find that the trial court made factual or credibility determinations. Even making reasonable inferences in the light most favorable to Mr. Carias, there is no genuine issue of material fact. Therefore, this case is appropriate for application of the sudden emergency doctrine on summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to plaintiff, Leandro Carias.

AFFIRMED.