

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2015 CA 0041

TARESA GRAVES

VERSUS

ANDRE FREEMAN AND SAFEWAY INSURANCE CO.

Judgment Rendered: SEP 21 2015

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of St. Helena
State of Louisiana
No. 19,806

The Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

HOLDRIDGE, J.

Plaintiff, Taresa Graves, appeals a trial court judgment dismissing her claim against defendant, Safeway Insurance Company (of Louisiana), based on a finding that Safeway's automobile liability insurance policy did not provide coverage for her accident. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On October 6, 2006, at approximately 3:30 a.m., Ms. Graves was riding a horse on or beside Hano Road in Tangipahoa Parish when her horse was struck by a vehicle driven by Andre Freeman. As a result of the injuries she sustained in the accident, Ms. Graves filed suit against Mr. Freeman. She also named Safeway as a defendant, alleging that "the vehicle operated by [Mr.] Freeman was insured by Safeway."

Through discovery, it was established that the vehicle driven by Mr. Freeman at the time of the accident was registered to his then paramour and mother of his three children, Latandria "Tangy" Harness. Although Ms. Harness had previously insured the vehicle with Safeway, the policy was cancelled in April 2006. Thus, Ms. Harness had no coverage on the vehicle at the time of the accident.

Ms. Graves asserted that Safeway was nonetheless liable under a separate liability policy it issued to Mr. Freeman's mother, Elaine Jackson. With respect to non-owned vehicles, the Safeway policy issued to Ms. Jackson provided coverage to Ms. Jackson's relatives but defined the term "relative" as "a person related to you ... by blood, marriage or adoption who lives with you." Ms. Graves argued that Mr. Freeman lived with Ms. Jackson, and thus, under the terms of the policy, Safeway was bound to provide coverage. During discovery, the depositions of both Ms. Jackson and Mr. Freeman were taken at the office of the plaintiff's

attorney. The parties stipulated that the depositions were being “taken for all purposes” under the provisions of the Louisiana Code of Civil Procedure.

On the day of the trial, neither Ms. Jackson nor Mr. Freeman appeared, despite having been subpoenaed by Safeway. In lieu of their testimony, Safeway sought to offer their depositions into evidence; Ms. Graves objected. Consequently, the trial court instructed the sheriff’s office to dispatch deputies to attempt to locate Ms. Jackson and Mr. Freeman and bring them to court to testify. Despite their efforts, the deputies were unable to locate either individual. Concluding that Ms. Jackson and Mr. Freeman were “unavailable,” the trial court overruled Ms. Graves’ objection and allowed the depositions to be admitted into evidence.

Following trial, the trial court issued written reasons for judgment. Therein, the court noted that both Mr. Freeman and Ms. Jackson testified in their depositions that at the time of the accident, Mr. Graves was living with Ms. Harness and had been for a considerable amount of time. Moreover, Mr. Freeman, who at the time of his deposition was 27 years old, testified that he had not lived with his mother since he was twelve years old. The trial court further noted that the only evidence that Ms. Graves offered in support of her contention that Mr. Freeman lived with his mother was the testimony of Oscar Smith, who stated that he lived near Ms. Jackson’s home and that he saw Mr. Freeman there on a frequent basis. Given the evidence, the trial court ruled that it could not conclude that Mr. Freeman lived with Ms. Jackson. Therefore, it found that the Safeway policy issued to Ms. Jackson did not provide coverage for the accident.

After finding Mr. Freeman to be fifty percent at fault for the accident, the trial court rendered judgment in favor of Ms. Graves and against Mr. Freeman; however, it dismissed Ms. Graves’ claim against Safeway with prejudice.

Following the denial of her motion for new trial, Ms. Graves lodged the instant appeal asserting two assignments of error.

DISCUSSION

In her first assignment of error, Ms. Graves contends the trial erred in admitting into evidence the depositions of Ms. Jackson and Mr. Freeman based on “unavailability.” Louisiana Code of Civil Procedure article 1450 governs the admissibility of depositions when a witness is unavailable. Under Louisiana Code of Evidence article 804A(5), a declarant is “unavailable as a witness” when he “cannot or will not appear in court and testify,” including when the declarant is absent from the hearing and the proponent has been unable to procure his attendance “by process or other reasonable means.” A declarant is not unavailable as a witness, however, if his absence has been procured by the proponent of his statement. La. Code of Evid. art. 804A(5). Any conflicts between La. C.C.P. art. 1450 and La. Code of Evid. art. 804, regarding the use of depositions, are to be resolved by the trial court in its discretion. La. C.C.P. art 1450C. Moreover, the trial court enjoys much discretion under Article 1450 in determining whether to allow the use of depositions at trial, and its decision will not be disturbed on review in the absence of an abuse of that discretion. *Sullivan v. City of Baton Rouge*, 14-0964 (La.App. 1 Cir. 1/27/15), 170 So.3d 186, 193; *Walley v. Vargas*, 12-0022 (La.App. 1 Cir. 9/21/12), 104 So.3d 93, 99-100.

In the instant matter, it is apparent that Safeway sought to procure Mr. Freeman’s and Ms. Jackson’s appearance at trial by process. The record indicates that both Mr. Freeman and Ms. Jackson were served, via domiciliary service, with subpoenas commanding their appearance at trial. Neither Mr. Freeman nor Ms. Jackson appeared on the trial date despite having been served with subpoenas. There is absolutely no indication that their absence was due to any machinations on

the part of Safeway. Under these circumstances, we find no abuse of discretion by the trial court in determining that Ms. Jackson and Mr. Freeman were “unavailable” and allowing the use of their depositions at trial. Clearly, the provisions of La. C.C.P. 1450 art. and La Code of Evid. art. 804 were satisfied.

Nevertheless, Ms. Graves cites several criminal cases to argue that, in addition to subpoenaing Mr. Jackson and Mr. Freeman, Safeway was obligated to take additional measures to procure their appearance at trial before they could be deemed “unavailable.” We respectfully disagree. Initially, we note that this is a civil case and that the criminal cases cited by Ms. Graves clearly do not involve the application of La. C.C.P. art. 1450.¹ Furthermore, we observe that La. Code of Evid. art. 804A(5) expressly provides that a declarant is unavailable as a witness when the proponent has been unable to procure his appearance by “process or other reasonable means[.]” (Emphasis added.) Even so, we note that additional means were employed in this case to obtain Mr. Freeman’s and Ms. Jackson’s appearance; the trial court, with the agreement of counsel, ordered the sheriff’s office to try to locate them and bring them to court. *See* La. C.C.P. art. 1357. Lastly, we note that criminal cases, such as those cited by Ms. Graves, implicate the confrontation clauses of our federal and state constitutions. The Sixth Amendment of the United States Constitution and Article I, § 16, of the Louisiana Constitution guarantee the right of an accused in a criminal prosecution to confront

¹ Ms. Graves’ subsequent reply brief does cite two civil cases addressing La. C.C.P. art. 1450: *Snell v. United Parcel Services, Inc.*, 543 So.2d 52 (La.App. 1 Cir. 1989) and *Cawthorne v. Fogelman*, 12-870 (La.App. 3 Cir. 2/6/13), 107 So.3d 906, *writ denied*, 13-0501 (La. 4/12/13), 111 So.3d 1011. However, neither case offers support for her position. In *Snell*, this court ruled that, although the record lacked a return, the trial court did not err in concluding that the proponent had made a reasonable effort to have the witness subpoenaed. Therefore, the court found that the witness’ deposition was admissible. *Snell*, 543 So.2d at 54. Hence, *Snell* appears to undermine Ms. Graves’ argument. Although the *Snell* court went on to note the existence of an additional basis for the admission of the deposition, i.e. other diligent efforts made to procure the witness’ presence at trial, it did not hold that an additional basis was necessary or that one was insufficient. *Snell*, 543 So.2d at 54-55. We find that Ms. Graves’ reliance on *Cawthorne* is likewise misplaced. *Cawthorne* dealt with a party who sought to offer his own deposition in lieu of testifying live at trial. However, because he had chosen to be out of state at the time of trial, he had voluntarily procured his own absence and therefore could not be deemed “unavailable.” *Cawthorne*, 107 So.3d at 912. Thus, *Cawthorne* is distinguishable from the case at hand.

and cross-examine witnesses against him. Nevertheless, the importance of cross-examination cannot be minimized in civil cases, such as Ms. Graves'. *Trascher v. Territo*, 11-2093 (La. 5/8/12), 89 So.3d 357, 362. Therefore, the Louisiana Supreme Court has held that, in order for a deposition to be admissible under La. C.C.P. art. 1450, the opposing party must have been given an opportunity to cross-examine the deponent. *See Trascher*, 89 So.3d at 364. In the instant matter, Ms. Graves' attorney was not only afforded the opportunity but actually cross-examined both Ms. Jackson and Mr. Freeman during their depositions.

Notwithstanding this fact, Ms. Graves argues that she was denied due process by the admission of the depositions because she was not afforded an opportunity to cross-examine the witnesses at trial. However, she cites no supporting authority for this particular assertion, nor does she explain how the use of a deposition in compliance with La. C.C.P. art. 1450 (which is presumed constitutional) violates her due process rights. Accordingly, we find her argument to be unpersuasive.

Finally, Ms. Graves suggests that the depositions were erroneously admitted because Safeway failed to show that the subpoenas were properly served on Ms. Jackson and Mr. Freeman. Specifically, Ms. Graves argues that neither Ms. Jackson nor Mr. Freeman were personally served and that Safeway failed to establish that the domiciliary service of the subpoenas was perfected at the proper addresses and upon individuals suitable to receive such service. However, Ms. Graves' argument runs counter to well-established law.

The record before us contains service returns indicating domiciliary service of both subpoenas. Pursuant to La. C.C.P. art. 1355, subpoenas are served and the returns made in the same manner as the service and return on a citation. Service is made by the sheriff. La. C.C.P. arts. 321 and 1291. Louisiana Code of Civil

Procedure article 1292 provides that, “The return, when received by the clerk, shall form part of the record, and shall be considered prima facie correct.” *Seaward v. City of Hammond*, 01-0770 (La.App. 1 Cir. 6/21/02), 822 So.2d 38, 40-41. Therefore, any party attacking the recitation on the return bears the burden of proving its incorrectness by a preponderance of the evidence. *See Tunnard v. Simply Southern Homes, L.L.C.*, 07-0945 (La.App. 1 Cir. 3/26/08), 985 So.2d 166, 169. Hence, it was not Safeway’s burden to establish the propriety of service; rather it was incumbent upon Ms. Graves to prove its incorrectness. This she failed to do. Perceiving no abuse of the trial court’s discretion in admitting the depositions, we deem Ms. Graves’ first assignment of error to be without merit.

In her second assignment of error, Ms. Graves contends that, despite the deposition testimony, the trial court nonetheless erred in concluding that Mr. Freeman did not live with his mother, Ms. Jackson. Specifically, she points to the fact that Mr. Freeman admitted in his answer that he was domiciled in St. Helena Parish. Ms. Graves contends that his mother resides in St. Helena Parish, and thus, Mr. Freeman’s admission constituted a judicial confession that he lived with his mother. We find this argument to be specious, at best. Although Mr. Freeman admitted in his answer that he was domiciled in St. Helena Parish, it does not necessarily follow that it was at his mother’s residence. Moreover, Mr. Freeman’s domicile at the time he filed his answer is not determinative of the issue regarding where he lived at the time of the accident. Accordingly, Ms. Graves’ second assignment of error also lacks merit.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court is affirmed. Taresa Graves is cast with all costs of this appeal.

AFFIRMED.