NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1246

ERVIN MARSHALL, INDIVIDUALLY AND ON BEHALF OF HIS ACKNOWLEDGED MINOR CHILD ERVIN MARSHALL, III

VERSUS

JARED SANDIFER (INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A TROOPER WITH THE LOUISIANA STATE POLICE), MICHAEL D. EDMONSON (INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COLONEL WITH THE LOUISIANA STATE POLICE) AND LOUISIANA STATE POLICE, THROUGH LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

Judgment Rendered: SEP 21 2018

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C597,408

Honorable Todd Hernandez, Judge Presiding

* * * * * * *

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Guidry, J., Dissents and assigns reasons.

PENZATO, J.

Plaintiff, Ervin Marshall, individually and on behalf of his minor child, Ervin Marshall, III, appeals a summary judgment in favor of defendants, the State of Louisiana, through the Department of Public Safety & Corrections, Office of State Police, Trooper Jared Sandifer and Colonel Michael Edmonson, individually and in their official capacities as officers with the State Police, dismissing his claims against defendants with prejudice. For the reasons that follow, we affirm. We also deny the answer to the appeal filed by defendants.

FACTS AND PROCEDURAL HISTORY

On January 8, 2010, Louisiana State Trooper Jared Sandifer, along with Trooper Lance Kennedy and Investigator Hampton Guillory, were attempting to locate Ervin Marshall in order to execute an arrest warrant stemming from a November 7, 2009 incident where Mr. Marshall fled from the police. The warrant included charges for aggravated flight from an officer and possession of a firearm by a convicted felon, as well as a number of traffic violations. The troopers reviewed Mr. Marshall's criminal history, which stated that he was to be considered armed and dangerous.

The troopers observed Mr. Marshall at the apartment complex of his girlfriend, Brittany Sheif. Wearing ballistic vests with "State Police" on them, Trooper Sandifer and Investigator Guillory knocked on the door of Ms. Sheif's apartment, while Trooper Kennedy went to the rear of the residence. Ms. Shief answered the door, stated that she did not know where Mr. Marshall was, and gave permission for Trooper Sandifer and Investigator Guillory to enter the apartment and look for him. Trooper Sandifer and Investigator Guillory searched the apartment, giving loud verbal commands to Mr. Marshall to come out with his hands up.

While searching one of the bedrooms, Trooper Sandifer noticed that the open closet door did not open all the way against the wall. Suspecting that Mr. Marshall might be behind the door, Trooper Sandifer pulled the door and saw Mr. Marshall standing behind the door with his hands down near the waistband of his pants. When Trooper Sandifer saw Mr. Marshall raise his hands from his waistband in a quick, upward motion, he shot Mr. Marshall in the lower abdomen. As a result of the January 8, 2010 incident, Mr. Marshall was charged with and pled guilty to resisting an officer.

On December 13, 2010, Mr. Marshall filed a petition for damages alleging that the January 8, 2010 incident was caused by the "gross and flagrant recklessness, carelessness, negligence and fault of [Trooper] Sandifer." The petition further alleged that Colonel Michael Edmonson was responsible for the training of officers under his employ, and he failed to properly train Trooper Sandifer as to the proper procedures and protocols as they related to the arrest and apprehension of Mr. Marshall. According to the petition, the incident occurred in the presence of Ervin Marshall, III, who was therefore entitled to damages pursuant to La. C.C. art. 2315.6.[1]

On February 21, 2017, the defendants filed a motion for summary judgment, asserting that they were entitled to discretionary immunity pursuant to La. R.S. 9:2798.1. They also asserted that they were entitled to immunity from liability for injuries sustained while committing a felony offense, pursuant to La. R.S. 9:2800.10, and that plaintiff was estopped from bringing his claim asserting excessive force based on any facts that contradict, collaterally attack, challenge, or even call into question any of the facts that led to his two convictions under the

[1]Louisiana Civil Code article 2315.6 allows certain classes of people "who view an event causing injury to another person" to "recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury."

rule of *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), as adopted in Louisiana by *Williams v. Harding*, 2012-1595 (La. App. 1 Cir. 4/26/13), 117 So. 3d 187. Following a hearing on April 17, 2017, the matter was taken under advisement.

The trial court issued reasons for judgment on May 25, 2017, finding that the defendants were immune from liability under La. R.S. 9:2798.1 and 2800.10, and that plaintiff was not estopped from filing his claim for personal injuries pursuant to the rules established in the cases of *Heck* and *Williams*. On June 16, 2017, a judgment was signed in accordance with the reasons for judgment. The June 16, 2017 judgment granted the defendants' motion for summary judgment on all issues of liability and dismissed the plaintiff's petition and all of his claims, with prejudice. The judgment further overruled the plaintiff's objections to certain of the defendants' exhibits; denied the plaintiff's motion to continue; denied the defendants' claim that the plaintiff was estopped from filing a claim for personal injuries under the rules established in the cases of *Heck* and *Williams*; and designated the judgment to be a final judgment pursuant to La. C.C.P. art. 1915(B). On June 26, 2017, the plaintiff filed a motion for reconsideration of the trial court's ruling on the defendants' motion for summary judgment. On July 18, 2017, the defendants filed a motion to strike the plaintiff's motion for reconsideration, based on the plaintiff's failure to file an order setting the motion for hearing. Prior to the trial court ruling on the plaintiff's motion for reconsideration, the plaintiff filed a notice of appeal. On July 21, 2017, the clerk of court issued notice that on July 19, 2017, an order of appeal was entered granting a devolutive appeal from the judgment of June 16, 2017.

RULE TO SHOW CAUSE

On September 11, 2017, this court, *ex proprio motu,* issued a rule to show cause order noting that the appeal appeared to be premature because the plaintiff's

motion for new trial regarding the June 16, 2017 judgment (entitled "Plaintiff's Motion for Reconsideration of Ruling on Defendants' Motion for Summary Judgment (with Incorporated Memorandum)") remained pending. The parties were directed to show cause as to whether the appeal should be dismissed for that reason. By interim order dated February 5, 2018, the case was remanded to the trial court for the limited purpose of allowing the trial court to rule on the plaintiff's motion for reconsideration and/or the defendants' motion to strike the motion for reconsideration. The interim order further provided that the record was to be supplemented with such ruling on or before February 21, 2018. On March 22, 2018, the rule to show cause was referred to the panel to which the appeal was assigned.

On February 21, 2018, the trial court signed an order denying the plaintiff's motion for reconsideration and holding that the defendants' motion to strike the motion for reconsideration was moot. The record on appeal was supplemented with the February 21, 2018 order on February 26, 2018.

Louisiana Code of Civil Procedure article 2087(D) provides:

> An order of appeal is premature if granted before the court disposes of all timely filed motions for new trial or judgment notwithstanding the verdict. The order becomes effective upon the denial of such motions.

A trial court's denial of a motion for new trial during the pendency of an appeal cures the defect of prematurity. *Britton v. Hustmyre*, 2009-0847, p.3 (La. App. 1 Cir. 3/26/10), 2010 WL 1170222 (unpublished). Once a previously existing defect has been cured, there is no useful purpose in dismissing an otherwise valid appeal. See *Overmier v. Traylor*, 475 So. 2d 1094, 1095 (La. 1985) (per curiam).

In the instant case, we find that the appeal order was granted prematurely because the trial court had not yet ruled on the plaintiff's motion for reconsideration. However, the trial court's subsequent order denying the motion for reconsideration cured the defect of prematurity. Thus, the appeal has since

been perfected and should be maintained. We, therefore, recall the rule to show cause order and maintain the appeal.

ASSIGNMENTS OF ERROR; ANSWER TO APPEAL

The plaintiff assigns the following as error on appeal:

1. The trial court erred in ruling that there was no genuine issue of material fact as to the reasonableness of Trooper Sandifer's actions;

2. The trial court erred in failing to draw all inferences that were most favorable to the plaintiff; and

3. The trial court erred in granting summary judgment in the absence of adequate discovery.

The defendants answered the appeal, assigning as error the portion of the June 16, 2017 judgment that denied the defendants' claim that the plaintiff was estopped from filing a claim for personal injuries under the rules established in *Heck* and *Williams*.

LAW AND DISCUSSION

We first address the plaintiff's third assignment of error asserting that the trial court erred by granting summary judgment in the absence of adequate discovery. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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. 966A(3). The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966A(2).

The burden of proof is on the mover. La. C.C.P. art. 966D(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be

negated. Rather, the mover must 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, action, or defense. Thereafter, the adverse party must produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1). If, however, the mover 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 mover is not entitled to summary judgment. *Succession of Hickman v. State Through Bd. of Supervisors of Louisiana State Univ. Agric. & Mech. Coll.*, 2016-1069 (La. App. 1 Cir. 4/12/17), 217 So. 3d 1240, 1244.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Reynolds v. Bordelon*, 2014-2371 (La. 6/30/15), 172 So. 3d 607, 610. 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 the case. *Succession of Hickman*, 217 So. 3d at 1244.

Suit was filed in this matter on December 13, 2010. The defendants filed their motion for summary judgment on February 21, 2017. On April 4, 2017, the plaintiff filed a response to the defendants' motion for summary judgment wherein he argued that discovery was incomplete and that the defendants were aware that the plaintiff sought to depose several key defense witnesses, whose testimony was essential to his case. According to the plaintiff, counsel for the defendants assured plaintiff's counsel that they would be able to schedule the requested depositions, but in an attempt to frustrate the plaintiff's discovery efforts, the defendants "surreptitiously" filed their motion for summary judgment. However, the plaintiff did not request a court order requiring the defendants to comply with his request

for depositions. Moreover, he failed to file an affidavit showing facts essential to justify his opposition or why he could not justify his opposition as required by La. C.C.P. art. 967C[2]. See *Vanderbrook v. Coachmen Indus., Inc.*, 2001-0809 (La. App. 1 Cir. 5/10/02), 818 So. 2d 906, 911.

There is no absolute right to delay action on a motion for summary judgment until discovery is completed. *Id.* Under La. C.C.P. art. 967, a trial judge has the discretion to issue a summary judgment after the filing of affidavits, or the judge *may* allow further affidavits or discovery to take place. *Simoneaux v. E.I. du Pont de Nemours & Co., Inc.*, 483 So. 2d 908, 912 (La. 1986). The only requirement is that the parties be given a fair opportunity to present their claim. Unless plaintiff shows a probable injustice, a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact. *Id.* at 913. The mere claim by an opponent to a motion for summary judgment that he does not have in his possession the facts and information necessary to counter such a motion will not defeat a summary judgment motion. *Vanderbrook,* 818 So. 2d at 911.

Under the facts of this case, the plaintiff had the opportunity for "adequate discovery." See La. C.C.P. art. 966A(3). His suit had been pending for more than six years at the time that the defendants filed the motion for summary judgment at issue. The plaintiff failed to comply with the provisions of La. C.C.P. art. 967C, which requires that he file an affidavit stating the reasons why he could not present by affidavit facts essential to justify his opposition to the motion for summary judgment, thus allowing the court to order a continuance or to allow discovery. Therefore, this assignment of error is without merit.

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[2] Louisiana Code of Civil Procedure article 967C provides that "[i]f it appears from the affidavits of a party opposing the motion [for summary judgment] that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

We now address the merits of the summary judgment in favor of the defendants, which was granted on the basis of immunity.

Louisiana Revised Statutes 9:2798.1 grants immunity to public entities and provides, in pertinent part, as follows:

> A. As used in this Section, "public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.
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> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
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> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

The Louisiana Supreme Court has held that La. R.S. 9:2798.1 is "clear and unambiguous" and applies to "policymaking or discretionary acts when such acts are within the course and scope of ... lawful powers and duties." *Gregor v. Argenot Great Central Insurance Company,* 2002-1138 (La. 5/20/03), 851 So. 2d 959, 967; *Herrera v. First National Insurance Company of America*, 2015-1097 (La. App. 1 Cir. 6/3/16), 194 So. 3d 807, 814, writ denied, 2016-1278 (La. 10/28/16), 208 So. 3d 885. The defendant, the State of Louisiana, through the Department of Public Safety & Corrections, Office of State Police, is clearly a "public entity" as defined by the statute, and defendants Trooper Sandifer and Colonel Edmonson are "officers or employees" of a public entity as contemplated by the statute. However, the immunity provided by La. R.S. 9:2798.1 is not

applicable to the defendants if their actions constituted "criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct." La. R.S. 9:2798.1(C)(2); *Miller v. Village of Hornbeck*, 2010-1539 (La. App. 3 Cir. 5/11/11), 65 So. 3d 784, 788.

Whether a given set of conduct rises to the level of "criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct" is a standard created by law to determine whether liability will result from that conduct; as such, the question of whether a given set of conduct rises to the level of "criminal, willful, outrageous, reckless, or flagrant misconduct" is purely a question of law, and is within the province of the trial court to determine at the summary judgment stage. *Haab v. East Bank Consolidated Special Service Fire Protection District of Jefferson Parish*, 2013-954 (La. App. 5 Cir. 5/28/14), 139 So. 3d 1174, 1181, writ denied, 2014-1581 (La. 10/24/14), 151 So. 3d 609.

Once a public official raises the defense of qualified immunity, the burden rests on the plaintiff to rebut it. *Trantham v. City of Baker*, 2010-1695, p. 4 (La. App. 1 Cir. 3/25/11), 2011 WL 1103628 (unpublished); writ denied, 2011-1049 (La. 6/24/11), 64 So. 3d 221. Thus, the question before the trial court on the defendants' motion for summary judgment, and now before us, is whether the defendants' actions constituted "criminal, willful, outrageous, reckless, or flagrant misconduct." In order for the plaintiff to defeat the defendants' claims of discretionary immunity, it was incumbent upon him to put forth evidence showing that the conduct of the defendants rose to the level of misconduct required by La. R.S. 9:2798.1(C)(2). See *Haab*, 139 So. 3d at 1179-80.

In support of their motion for summary judgment, the defendants presented the deposition testimony of Trooper Sandifer and Mr. Marshall. According to Trooper Sandifer, he and Investigator Guillory knocked on the door of the apartment that they had seen Mr. Marshall enter. They explained to Ms. Shief,

who answered the door, that they were with the state police and had a warrant for Mr. Marshall's arrest. Ms. Shief gave them permission to enter the apartment and look for him. Trooper Sandifer testified that he and Investigator Guillory began searching the apartment for Mr. Miller, "clearing" the rooms.[3] According to Trooper Sandifer, during the entire time that they were in the apartment, they gave Mr. Marshall loud verbal commands telling him to come out with his hands up. Trooper Sandifer testified that he cleared one of the bedrooms, including the closet. When he backed out of the closet, he noticed that the closet door was "open against the wall." According to Trooper Sandifer, he kicked the closet door and it "didn't go up against the wall." He believed that Mr. Marshall might be behind the door, and as he reached to pull the door, he repositioned his weapon. Trooper Sandifer testified that he pulled the door and saw Mr. Marshall standing behind it. He recalled seeing Mr. Marshall's hands down near the waistband of his pants, but did not see anything in his hands. Trooper Sandifer said that Mr. Marshall moved his hands in a quick upward motion from his waistband, and he felt threatened by the sudden jerking motion of Mr. Marshall's hands, at which time he shot Mr. Marshall. According to Trooper Sandifer, there was not much time between when he first encountered Mr. Marshall face-to-face and when the shot went off; it was only enough time for Mr. Marshall to jerk his hands from his waistband area. Trooper Sandifer testified that he and Inspector Guillory searched Mr. Marshall after he was shot and found that he was unarmed.

Mr. Marshall testified in his deposition that he was aware that the police had been looking for him following the November 7, 2009 incident, during which he ran from them. He testified that on January 8, 2010, he and Ms. Shief had returned to the apartment from the grocery store, and he was in the kitchen when he heard a

[3] Trooper Sandifer explained that when "[y]ou clear a room, you basically go in and make sure nobody is in there."

knock on the door. According to Mr. Marshall, when he heard the police inside the apartment, he ran to the back of the room and was planning to climb through the window, but he saw a police officer outside of the window and decided to stand behind the closet door. He testified that twice he heard the officers say, "Marshall, we know you're in here. Come out." Mr. Marshall said that he heard the officers enter the room where he was hiding, and he tried to be quiet and stop himself from breathing. He felt one of the officers push on the door, and he did not do or say anything, but hoped they would just leave. He stated that one of the officers pushed on the door, then pulled the door away from Mr. Marshall and shot him. According to Mr. Marshall, his hands were clear of his pants, around his chest, "to where you know I didn't have anything." Mr. Marshall further testified that from the time the officer saw him behind the door until the shot happened was "quick as you could blink your eyes."

An Internal Affairs investigation was conducted into the January 8, 2010 shooting incident, and a Shooting Review Report that included the findings of the investigation was accepted into evidence.[4] The Shooting Review Board concluded that Trooper Sandifer's actions were "justified, proper and consistent with Departmental Policy."

In opposition to the motion for summary judgment, Mr. Marshall relied solely upon Trooper Sandifer's deposition testimony that at the time Trooper Sandifer saw Mr. Marshall's hands down near the waistband of his pants, he did not see anything in Mr. Marshall's hands. However, after a thorough review of the evidence admitted in connection with the motion for summary judgment, we do not find that a genuine issue of material fact was created regarding whether Trooper Sandifer's conduct was "criminal, fraudulent, malicious, intentional, willful,

[4] Mr. Marshall did not object to the introduction of this exhibit. Louisiana Code of Civil Procedure article 966(D)(2) provides that "[t]he court ... shall consider any documents to which no objection is made."

outrageous, reckless, or flagrant misconduct." Trooper Sandifer encountered Mr. Marshall face-to-face, hiding behind a closet door after being repeatedly instructed to "come out." Trooper Sandifer testified that he shot Mr. Marshall in response to the sudden movement of Mr. Marshall's hands from his waistband area. Mr. Marshall failed to produce any evidence that, under these circumstances, the sole fact that Trooper Sandifer did not see a weapon in Mr. Marshall's hands when they were down near the waistband of his pants elevated Trooper Sandifer's actions to the level of misconduct required by La. R.S. 9:2798.1(C)(2). Therefore, the defendants are entitled to statutory immunity pursuant to La. R.S. 9:2798.1.

Having determined that the defendants are immune from liability pursuant to La. R.S. 9:2798.1, they are entitled to summary judgment dismissing the plaintiff's petition and all of his claims. As we affirm the dismissal of the plaintiff's petition in its entirety, the defendants' answer to the appeal is denied as moot.

CONCLUSION

For the above and foregoing reasons, the June 16, 2017 judgment granting summary judgment on behalf of the State of Louisiana, through the Department of Public Safety & Corrections, Office of State Police, Trooper Jared Sandifer and Colonel Michael Edmonson, individually, and in their official capacities as Officers with the State Police, and dismissing with prejudice the claims of Ervin Marshall, individually and on behalf of his minor child, Ervin Marshall, III, is affirmed. The defendants' answer to the appeal is denied as moot. Costs of this appeal are assessed to plaintiff Ervin Marshall, individually and on behalf of his minor child, Ervin Marshall, III.

RULE TO SHOW CAUSE ORDER RECALLED; APPEAL MAINTAINED; JUDGMENT AFFIRMED; ANSWER TO APPEAL DENIED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

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ERVIN MARSHALL, INDIVIDUALLY AND ON BEHALF OF HIS ACKNOWLEDGED MINOR CHILD ERVIN MARSHALL, III

VERSUS

JARED SANDIFER (INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A TROOPER WITH THE LOUISIANA STATE POLICE) MICHAEL D. EDMONSON (INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COLONEL WITH THE LOUISIANA STATE POLICE), AND LOUISIANA STATE POLICE, THROUGH LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

This case was dismissed on a summary judgment wherein the trial court found that the police officer, Sandifer, who shot the plaintiff, Marshall, was immune from liability. I find, however, that the evidence submitted in conjunction with the motion for summary judgment establishes a genuine issue of material fact as to whether Sandifer's conduct could be viewed as "criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct," such that under La. R.S. 9:2798.1(C), the defendants would not be entitled to immunity.

Notably, I find that the evidence submitted in conjunction with the motion for summary judgment is conflicting in several material respects. In his deposition, Marshall testified that his hands were chest level, not near his waist, and that his dress was such that it was evident he did not have a gun on his person. He testified that he did not move his hands at all when Sandifer pulled the door away from him. He further stated that he was not searched for weapons after he was shot by Sandifer. Sandifer, on the other hand, testified that Marshall's hands

were near or in the waistband of his pants. And he admitted not seeing a gun in Marshall's hands. Sandifer further testified that they searched Marshall for a weapon after he shot Marshall, but found none.

Hence, you have conflicting accounts of what occurred, which would require a credibility determination. Further, should a reasonable juror believe Marshall's account over Sandifer's, this brings to question whether Sandifer's action of shooting a clearly unarmed man could be viewed as "criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct."

Therefore, I believe summary judgment was improperly rendered by the trial court, and for this reason, I respectfully dissent.