

Judgment rendered February 13, 2008
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 42,980-CA
No. 42,981-CA
(Consolidated Cases)

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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No. 42,980-CA

No. 42,981-CA

WILLIE DANIELS AND
PAMELA DANIELS

ALBERTINE DAVIS, ET AL.

versus

RANDY COLLINS, AND GEICO
GENERAL INSURANCE COMPANY

RANDY COLLINS, ET AL.

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court Nos. 493,312 and 495,124

Honorable Jeanette G. Garrett, Judge

* * * * *

HUDSON, POTTS, & BERNSTEIN
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USAgencies Casualty Insurance
Company, Inc.

STEVEN D. CARBY

Counsel for Appellees,
Albertine Davis and
Dorothy Davis

* * * * *

Before BROWN, GASKINS and CARAWAY, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

Following certain confusion in the handling of this consolidated matter before two district judges, we allowed this appeal to consider the procedure employed by the court below. Finding no error in the rulings of the court, we now affirm and remand the case for further proceedings.

Facts and Procedural History

These consolidated cases arise from a traffic accident involving the vehicles driven by Willie Daniels, Albertine Davis and Randy Collins. The collision occurred when Collins allegedly failed to stop at a traffic signal, causing Daniels to swerve into Davis's vehicle. The first suit against Collins and his insurer, GEICO General Insurance Company (hereinafter "GEICO"), was instituted by Daniels (hereinafter the "Daniels Suit") and filed in Division B of the First Judicial District Court on April 6, 2005.

In the second action filed on June 20, 2005 (hereinafter the "Davis Suit"), Albertine Davis and her passenger, Dorothy Davis (collectively "Davis"), sued Collins and Daniels and their common liability insurer, GEICO. The Davis Suit was filed in Division "A" of the First Judicial District Court. Also included in the action was Albertine Davis's uninsured/underinsured ("UM") carrier, USAgencies Insurance Company (hereinafter "USAgencies").

Collins and GEICO promptly answered both actions and propounded discovery. In mid-October 2005, Davis, Daniels, Collins and GEICO filed a joint motion to consolidate the Davis Suit with the Daniels Suit. The order consolidating both proceedings was signed by Division "B" district judge,

Judge Jeanette Garrett, on October 15, 2005, and filed in both suit records. The order provided that both actions “are hereby consolidated under Suit No. 493,312 Division “B” [the Daniels Suit] for purposes of discovery, trial and appeal.”

After all the above proceedings had occurred, USAgencies finally made an appearance by answering the Davis Suit on January 11, 2006. USAgencies answered Davis’s petition (with the Davis Suit caption) as a Division “A” matter, notwithstanding the consolidation of both lawsuits in the other division. Similarly, Daniels and her insurer also answered the claims of Davis on August 23, 2006, listing only the Davis Suit caption for their answer.

Despite the consolidation of the actions into Division “B,” the district judge in Division “A,” Judge Roy Brun, prompted by the parties’ misfiled pleadings, continued signing administrative, interlocutory orders under the Davis Suit caption, which revealed no consolidation. Likewise, despite the prior consolidation order for future action in the Daniels Suit, Division “B” proceedings, certain pleadings and orders continued to be filed by the clerk of court solely in the Davis Suit.

With this confusion abounding, the problem became more significant upon USAgencies’ filing of a motion for summary judgment on October 20, 2006. The motion showed only the Davis Suit caption, and Judge Brun, instead of Judge Garrett, signed the order setting the hearing on the motion for December 4, 2006.

The substantive basis for USAgencies' motion for summary judgment was certain "Receipt and Release" agreements signed on December 29, 2005, by both plaintiffs in the Davis Suit, releasing Collins and GEICO. USAgencies claims that these releases, executed without a reservation of rights for Davis's UM claims, acted as a complete release or settlement of Davis's claims against USAgencies. The evidence placed before Judge Brun in support of USAgencies' motion was the two "Receipt and Release" documents executed under the consolidated caption of these proceedings. Nevertheless, neither USAgencies nor Davis questioned the authority of the Division "A" judge's actions over the consolidated proceedings. In fact, Davis's counsel filed opposition evidence and a brief on November 22, 2006, utilizing the misleading single caption for the Davis Suit, never insisting that the filing be made under the suit number for the Daniels Suit in Division "B," and never arguing to Judge Brun that Judge Garrett had been assigned the matter by virtue of the consolidation.

On November 29, 2006, Davis's counsel instituted another attack on USAgencies' motion for summary judgment with a "Joint Motion for Partial Dismissal with Reservation of Rights," listed under the consolidated caption and filed in the Daniels Suit record in Division "B." The motion, which was also signed by counsel for Collins and GEICO, was based upon revised "Receipt and Release" agreements executed by the Davis plaintiffs on November 21, 2006, wherein they reserved their rights to the UM claim against USAgencies. Judge Garrett was presented with the joint motion and signed an order dismissing Davis's claim against Collins and GEICO with

an express reservation of rights on November 29, 2006. This occurred five days before the hearing on USAgencies' motion for summary judgment scheduled before Judge Brun on December 4.

USAgencies' motion for summary judgment came on for hearing on December 4, 2006. Although the revised release agreements between Davis and Collins/GEICO were before Judge Brun, the record of the hearing does not reflect that Judge Garrett's November 29, 2006 order of dismissal was brought to Judge Brun's attention. At the conclusion of the hearing, the trial court ruled from the bench, and granted USAgencies' motion for summary judgment. The judgment dismissing Davis's claims against USAgencies was signed on January 25, 2007.

On February 9, 2007, Davis moved for a new trial, or to annul the January 25, 2007, summary judgment rendered in Division "A" by Judge Brun in favor of US Agencies dismissing Davis's claims against it. The motion for new trial was filed in the Daniels Suit, Division "B" before Judge Garrett. The motion included allegedly new evidence consisting of the affidavit of GEICO's defense counsel describing the intent of the parties who negotiated the prior "Receipt and Release" agreements between Collins/GEICO and Davis. USAgencies opposed the motion for new trial.

At the hearing, Judge Garrett acknowledged the confusion that often occurs with consolidated actions. Yet, citing La. C.C.P. art. 1561 requiring consolidation into the oldest of the consolidated actions, she confirmed that all matters should have come before her in Division "B," and not Judge Brun. In response to USAgencies' argument that only Judge Brun should

have entertained the motion for new trial under the unusual circumstances, Judge Garrett indicated that both judges had discussed the matter and agreed she should proceed pursuant to the initial consolidation order.

After hearing argument, the trial court rendered judgment annulling the January 25, 2007 summary judgment and denying USAgencies' motion for summary judgment. The judgment was signed on May 7, 2007.

USAgencies sought a supervisory writ of review of the judgment, and by order of this court on June 21, 2007, the writ was converted to an appeal.

Discussion

From our examination of the filings made by the parties in both suit records, we find that both sides bear responsibility for the improper presentation of the summary judgment matter to Judge Brun in disregard of the initial consolidation order. Whether or not his summary judgment ruling on the UM claim can be questioned as an authoritative ruling of the district court, the reconsideration and reversal of the prior ruling was within the discretion of the trial court, and Judge Garrett, the judge authorized for the consideration of the consolidated cases, properly entertained the motion for new trial. Accordingly, we find no error or abuse of discretion in Judge Garrett's ruling for reconsideration of the motion for summary judgment.

Regarding USAgencies' second assignment of error concerning the denial of its motion for summary judgment, we need not consider this interlocutory ruling at this time. *Herlitz Construction Co. v. Hotel Investors of New Iberia, Inc.*, 396 So.2d 878 (La. 1981). The extinguishment of the UM claim by remission of the debt is an affirmative defense which remains

for trial in this matter. La. C.C.P. art. 1005 and La. C.C. art. 1888.

Following a trial on the merits, USAgencies will retain its rights to appeal this matter in the event of an adverse ruling.

Conclusion

Finding no error in the proceedings of the district court, we affirm the ruling of Judge Garrett setting aside the prior judgment on USAgencies' motion for summary judgment. Costs of appeal are assessed to USAgencies.

AFFIRMED AND REMANDED.