

BENJAMIN J. MATHERNE AND HIS WIFE
ANDREA MATHERNE

NO. 14-CA-572 C/W
14-CA-573

VERSUS

FIFTH CIRCUIT

LEMOINE INDUSTRIAL GROUP, LLC AND
LABORN WELLS

COURT OF APPEAL

C/W

STATE OF LOUISIANA

SHANTELL RUDOLF AND DEBRA BILLIOT

VERSUS

LEMOINE INDUSTRIAL GROUP, LLC AND
LABORN WELLS

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 705-726 C/W 705-785, DIVISION "L"
HONORABLE DONALD A. ROWAN, JR., JUDGE PRESIDING

COURT OF APPEAL
FIFTH CIRCUIT

October 15, 2014

FILED OCT 15 2014


FREDERICKA HOMBERG WICKER CLERK
JUDGE Cheryl Quirk Landrieu

Panel composed of Judges Fredericka Homberg Wicker, Marc E. Johnson, and
Robert A. Chaisson

ALAN J. YACOUBIAN
NEAL J. FAVRET
CYRIL G. LOWE, JR.
ATTORNEYS AT LAW
701 Poydras Street
Suite 4700
New Orleans, Louisiana 70139
COUNSEL FOR DEFENDANT/APPELLANT

APPEAL DISMISSED

JAW
MSJ
RAC

Appellants appeal the trial court’s granting of summary judgment in favor of a co-defendant on the issue of defense and indemnity. For the following reasons, we find this Court lacks appellate jurisdiction as the judgment appealed is not a final, appealable judgment. Accordingly, we dismiss this appeal and remand this matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation arises out of a September 23, 2010 rear-end accident involving three “UTV” or golf cart buggies. On August 31, 2011, plaintiffs, Benjamin and Andrea Matherne, instituted an action against Lemoine Industrial Group, LLC (“Lemoine Group”) and defendant-driver, Mr. Laborn Wells, for damages arising out of the accident, claiming that Mr. Wells was at fault and in the

course and scope of his employment with Lemoine Group at the time of the accident.¹ On January 4, 2012, plaintiffs amended their petition to name Advantage Human Resourcing, Inc. d/b/a Advantage Staffing. Plaintiffs claimed that, at the time of the accident, Mr. Wells was employed by both Lemoine Group and Advantage Staffing and, thus, that both are vicariously liable for plaintiffs' injuries.

Advantage Staffing answered plaintiffs' petition and also filed a cross-claim against Lemoine Group, asserting that Lemoine Group had a duty to defend and indemnify Advantage Staffing and Mr. Wells against plaintiffs' claims pursuant to contractual agreements (the "Temporary Staffing Agreement" and "Vehicle or Machinery Operator Release") executed between the parties and in effect at the time of the accident at issue.

On July 1, 2013, Lemoine Group filed a motion for summary judgment with respect to the issue of defense and indemnity raised in Advantage Staffing's and Mr. Wells' cross-claim. Thereafter, Advantage Staffing and Mr. Wells also filed a motion for summary judgment, seeking a ruling that Lemoine Group in fact owed a duty to defend and indemnify them against plaintiffs' claims.

On May 15, 2014, the trial court denied Advantage Staffing's motion for summary judgment and granted summary judgment in favor of Lemoine Group, finding that Lemoine Group does not owe Advantage Staffing a duty to defend and indemnify against the claims at issue in this matter.

Defendants, Advantage Staffing and Mr. Wells, filed a notice of intent to apply for supervisory writs to this Court, seeking review of the trial court's May 15, 2014 judgment. On June 3, 2014, Advantage Staffing and Mr. Wells also filed

¹ In September of 2011, the trial court consolidated this matter with another matter in the Twenty-Fourth Judicial District Court arising out of the same accident, *Shantell Rudolph and Debra Billiot v. Lemoine Industrial Group, LLC and Laborn Wells*, case no. 705-785.

a Motion for Devolutive Appeal, seeking to appeal the trial court's May 15, 2014 judgment. On June 11, 2014 the trial judge granted defendants' motion for devolutive appeal. In their brief to this Court, defendants, Advantage Staffing and Mr. Wells, assert that the trial court designated the May 15, 2014 judgment as final pursuant to La. C.C.P. art. 1915(B) on August 5, 2014, and, thus, claim that appellate jurisdiction is proper.

DISCUSSION

The judgment at issue in this case is a partial judgment because it disposes only of the issue of defense and indemnity but does not address the issue of plaintiffs' damages.

A partial judgment may be a final judgment even if it does not grant the successful party all of the relief prayed for or adjudicate all of the issues in the case. La. C.C.P. art. 1915(A). La. C.C.P. art. 1915(A) lists partial judgments that are final. That list includes a trial court grant of "a motion for summary judgment, as provided by [Louisiana Code of Civil Procedure] Articles 966 through 969, but not including a summary judgment granted pursuant to [Louisiana Code of Civil Procedure] Article 966(E)." La. C.C.P. art. 1915(A)(3).

La. C.C.P. art. 966(E) provides for the grant of summary judgments in favor of any one or more of the parties to the litigation that are "dispositive of a particular issue, theory of recovery, cause of action, or defense" even if the grant of "the summary judgment does not dispose of the entire case."

Nevertheless, even if a partial summary judgment does not qualify as a final judgment under La. C.C.P. art. 1915(A)(3), it may still constitute a final judgment for the purpose of an immediate appeal if it is designated as a final judgment by the trial court after an express determination that there is no just reason for delay. La. C.C.P. art. 1915(B)(1). However, in the absence of such a designation, such a

judgment “shall not constitute a final judgment for the purpose of an immediate appeal.” La. C.C.P. art. 1915(B)(2); *see also Pontchartrain Tavern, Inc. v. Johnson*, 07-115 (La. App. 5 Cir. 8/28/07), 966 So.2d 1062, 1063-64.

The partial summary judgment at issue in this case does not dispose of the entire litigation, but only resolves the issue of defense and indemnity between co-defendants. Therefore, it is not a partial final judgment as contemplated by La. C.C.P. art. 1915(A).² However, even if a judgment does not dispose of all matters at issue in a litigation, the trial court may designate a partial judgment final pursuant to La. C.C.P. art. 1915(B).³

In their appellate brief, defendants, Advantage Staffing and Mr. Wells, assert that on August 5, 2014, the trial court did in fact designate the May 15, 2014 judgment at issue a final, appealable judgment pursuant to La. C.C.P. art. 1915(B). However, the appellate record does not contain the August 5, 2014 judgment designating the May 15, 2014 judgment as final pursuant to La. C.C.P. art. 1915(B). Because defendants-appellants herein failed to supplement the appellate

² La. C.C.P. art. 1915(A) provides:

A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

- (1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.
- (2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.
- (3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).
- (4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.
- (5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.
- (6) Imposes sanctions or disciplinary action pursuant to Article 191, 863, or 864 or Code of Evidence Article 510(G).

³ La. C.C.P. art. 1915(B) provides:

(1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

(2) In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

record to include the August 5, 2014 judgment, it cannot be considered by this Court.⁴

Accordingly, the record before us reflects that the judgment appealed is not a final, appealable judgment and, thus, this Court lacks appellate jurisdiction to consider the merits of defendants' appeal. Furthermore, we additionally point out that this Court has previously considered, on a *de novo* review, the May 15, 2014 judgment at issue in this appeal. On July 16, 2014, this Court considered defendant's writ application and, in denying defendants' writ, stated: "[a]fter a *de novo* review of the writ application and attachments, we find the trial court did not err in its rulings on the cross-motions for summary judgment."

We, therefore, dismiss this appeal and remand this matter to the trial court for further proceedings.

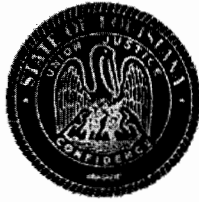
APPEAL DISMISSED

⁴ Defendant's appellate brief further lists the August 5, 2014 judgment as an exhibit attached to their brief; however, the exhibit was not actually attached to their brief. Nonetheless, an appellate court cannot consider documents attached to briefs that have not been formally introduced into evidence or made part of the appellate record. *Boes Iron Works, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 05-782 (La. App. 5 Cir. 3/28/06), 927 So.2d 553, 556.

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
HANS J. LILJEBERG

JUDGES



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

CHERYL Q. LANDRIEU
CLERK OF COURT

MARY E. LEGNON
CHIEF DEPUTY CLERK


SUSAN BUCHHOLZ
FIRST DEPUTY CLERK

MELISSA C. LEDET
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

**NOTICE OF JUDGMENT AND
CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **OCTOBER 15, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


CHERYL Q. LANDRIEU
CLERK OF COURT

14-CA-572
C/W 14-CA-573

E-NOTIFIED

NO ATTORNEYS WERE ENOTIFIED

MAILED

CHRISTOPHER M. SMITH
ATTORNEY AT LAW
POST OFFICE BOX 1004
KENNER, LA 70063

DONALD F. DEBOISBLANC, JR.
DONALD F. DEBOISBLANC
ATTORNEY AT LAW
410 SOUTH RAMPART STREET
NEW ORLEANS, LA 70112

JENNIFER L. SIMMONS
RICHARD E. KING
ATTORNEY AT LAW
701 POYDRAS STREET
ONE SHELL SQUARE, SUITE 4040
NEW ORLEANS, LA 70139

TERRENCE J. LESTELLE
ANDREA S. LESTELLE
RICHARD M. MORGAIN
ATTORNEY AT LAW
3421 NORTH CAUSEWAY BOULEVARD
SUITE 602
METAIRIE, LA 70002

LISA M. AFRICK
ALEX P. ROTHENBERG
ATTORNEY AT LAW
650 POYDRAS STREET
SUITE 2200
NEW ORLEANS, LA 70130

ALAN J. YACoubIAN
NEAL J. FAVRET
CYRIL G. LOWE, JR.
ATTORNEY AT LAW
701 POYDRAS STREET
SUITE 4700
NEW ORLEANS, LA 70139