TOBIAS DIXON	NO. 17-CA-29
VERSUS	FIFTH CIRCUIT
THE GRAY INSURANCE COMPANY, COMMAND CONSTRUCTION INDUSTRIES, LLC, PROGRESSIVE SECURITY INSURANCE COMPANY, PATRICK JACKSON, AND DEVYN ALLEN	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 79,10, DIVISION "C"
HONORABLE EMILE R. ST. PIERRE, JUDGE PRESIDING

June 15, 2017

STEPHEN J. WINDHORST
JUDGE

Panel composed of Jude G. Gravois,
Marc E. Johnson, and Stephen J. Windhorst

AFFIRMED

SJW
MEJ

DISSENTS WITH REASONS

JGG

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WINDHORST, J.

Appellant, Louisiana Pizza Group, LLC, d/b/a Papa John's Pizza ("LPG"), appeals the trial court's July 27, 2016 summary judgment in favor of appellees, The Gray Insurance Company, Command Construction Industries, LLC, and Patrick Jackson (hereinafter "appellees" or "Jackson"), dismissing plaintiff, Tobias Dixon's, claims against appellees with prejudice. For the reasons that follow, we affirm the trial court's July 27, 2016 judgment.

Facts and Procedural History

This accident occurred on October 6, 2013, in the center turn lane and left westbound lane of U.S. Highway 90 near its intersection with Breaux Court in St. Charles Parish. Defendant, Devyn Allen, was driving his vehicle westbound on U.S. Highway 90, when he moved from the left westbound lane into the center turn lane. Plaintiff, Dixon, operating his motorcycle, collided with the rear of Allen's vehicle and he was ejected from the motorcycle where he landed on the pavement. Thereafter, a pickup truck driven by co-defendant, Jackson, allegedly struck Dixon while he was lying on the pavement. Dixon filed a petition naming Allen, Progressive Security Insurance Company (insurer of Allen's vehicle), Jackson, Command Construction Industries, LLC (Jackson's employer), and The Gray Insurance Company (Command's insurer). Dixon subsequently added LPG (Allen's employer) and Tudor Insurance Company (LPG's insurer).

On April 22, 2016, appellees filed a motion for summary judgment arguing that there was no evidence that Jackson ran over Dixon while he was lying on the pavement. The motion was opposed by Dixon and LPG. The trial court granted the motion on July 27, 2016. Dixon filed a motion for appeal, but dismissed his appeal in the trial court before the record was lodged in this Court. LPG filed the instant timely appeal.

Discussion

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria which govern the trial court's consideration of whether summary judgment is appropriate. Bank of New York Mellon v. Smith, 15-0530 (La. 10/14/15), 180 So.3d 1238, 1243; Smith v. Our Lady of the Lake Hospital, Inc., 93-2512 (La. 07/05/94), 639 So.2d 730, 750. 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. 966 A(3).

In its sole assignment of error, LPG contends that the trial court erred in granting appellees' motion for summary judgment. LPG contends that there remains a genuine issue of material fact as to the liability of appellees, and whether Jackson struck Dixon while he was lying on the pavement. Thus, LPG contends that the comparative fault of Jackson, who was found without fault at summary judgment, is a determination that should be made by the trier of fact.

When a judgment dismisses one of several cumulated claims by the plaintiff, the *plaintiff* must appeal the adverse judgment to obtain affirmative relief. Nunez v. Commercial Union Ins. Co., 00-3062 (La. 02/16/01), 780 So.2d 348, 349. The judgment of dismissal acquires the authority of the thing adjudged when the plaintiff does not appeal the dismissal of his action. Grimes v. La. Med. Mut. Ins. Co., 10-0039 (La. 05/28/10), 36 So.3d 215, 217; Nunez, 780 So.2d at 349. An appeal from the judgment of the trial court by another party only brings "up on appeal the portions of the judgment that were adverse to [that party]," but not "the portions of the judgment that were adverse to plaintiff." Grimes, 36 So.3d at 217, citing Nunez, 780 So.2d at 349.

When Dixon did not appeal or answer the appeal, the summary judgment dismissing appellees became final as to the parties thereto, Dixon and Jackson. In

the absence of an appeal, this Court has no authority to determine whether the grant of summary judgment against Dixon was correct on its merits.

With regard to appellant's contention that the trier of fact should determine and allocate fault between Jackson and LPG, La. C.C.P. art. 966 G provides:

> G. When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or non-party is not negligent, is not at fault, or did not cause in whole or in part the injury or harm alleged, **that party or non-party shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or non-party.**
>
> During the course of the trial, **no party or person shall refer directly or indirectly to any such fault, nor shall that party or non-party's fault be submitted to the jury or included on the jury verdict form.** (Emphasis and line break added.)

These provisions were not law when Grimes,[1] supra, was decided. They are clear and unambiguous, and do not lead to absurd results. La. C.C.P. art. 966 G is an emphatic expression by the legislature that there *shall* be no evidence admitted, nor any consideration of the fault or comparative fault of a party or non-party who has been adjudicated to be without negligence or fault at summary judgment.

The summary judgment which found Jackson free of fault is now final. A finding to the effect that La. C.C.P. art. 966 G does not preclude all parties from attempting to show fault on the part of a party dismissed in summary judgment could lead to the absurd result that during trial, LPG would be permitted to argue and present evidence of Jackson's percentage of fault, while the plaintiff, Dixon, against whom summary judgment was adverse, could not. That result would

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[1] In **Grimes**, supra, the Supreme Court affirmed a summary judgment dismissing a defendant when the plaintiff neither appealed nor answered the appeal. The Court noted that an appeal from the judgment of the trial court by another party only brings "up on appeal the portions of the judgment that were adverse to [that party]," but not "the portions of the judgment that were adverse to plaintiff." The Court found that while the dismissed defendant could not be cast for judgment, the co-defendant was still entitled to a reduction in judgment by the percentage of fault allocated to the dismissed defendant in accordance with the general principles of comparative fault set forth in La. C.C. art. 2323. At the time Grimes was decided, La. C.C.P. art. 966 did not contain the mandatory language of subsection G which now prohibits the appellee's fault and percentage of fault from being submitted to the trier of fact.

disregard the current law and would allow LPG to circumvent the intent of the legislature.

To the contrary, La. C.C.P. 966 G is clear: "no party shall refer directly or indirectly" to fault of a party or non-party who was found not at fault at summary judgment, and the trial court shall not consider the dismissed party in any allocation of fault.

Therefore, although LPG appeals the summary judgment insofar as it is adverse to LPG, under the provisions of La. C.C.P. art. 966 G, LPG may not introduce, and the trial court may not admit or allow evidence, argument, or reference to, or any consideration of, fault on the part of Jackson at trial. Accordingly, LPG's appeal is without merit.

Conclusion

For the reasons stated above, we affirm the trial court's July 27, 2016 summary judgment finding Jackson free from fault, and dismissing Dixon's case against appellees.

AFFIRMED

TOBIAS DIXON	NO. 17-CA-29
VERSUS	FIFTH CIRCUIT
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GRAVOIS, J., DISSENTS WITH REASONS

For the following reasons, I respectfully dissent from the majority's opinion to "affirm the trial court's July 27, 2016 summary judgment finding Jackson free from fault, dismissing Dixon's case against appellees."[2]

PERTINENT PROCEDURAL BACKGROUND

On April 22, 2016, defendants The Gray Insurance Company, Command Construction Industries, LLC, and Patrick Jackson (collectively "Jackson") filed a motion for summary judgment, asserting that there were no genuine issues of material fact in this matter regarding their liability for the damages alleged by plaintiff, Tobias Dixon ("Dixon"), against them, and that the law is in their favor, and requesting an order of dismissal, with prejudice, of all of the allegations made against them in this litigation.

Both plaintiff Dixon and co-defendant Louisiana Pizza Group, Inc., d/b/a Papa John's Pizza ("LPG"), opposed the motion for summary judgment. After considering the motion for summary judgment and the oppositions thereto, the

[2] The record reflects that the trial court conducted a hearing on the motion for summary judgment on July 27, 2016. After taking the matter under advisement, the trial court granted the motion by judgment read, rendered, and signed on August 16, 2016.

trial court rendered judgment on August 16, 2016, granting the motion for summary judgment. Plaintiff Dixon timely filed a motion for an appeal of the judgment, but later dismissed his appeal. LPG also timely appealed the judgment (the instant appeal), asserting on appeal that the trial court erred in granting the motion for summary judgment, as material issues of fact remain as to whether Jackson caused or contributed to the injuries complained of by plaintiff Dixon.

ANALYSIS

First, I agree with the majority's finding that the summary judgment dismissing Jackson became final as between Dixon and Jackson when Dixon dismissed his appeal of the judgment.[3] I disagree, however, with the majority's finding that under La. C.C.P. art. 966(G), Dixon's dismissal of his appeal automatically precludes LPG from appealing the trial court's grant of Jackson's motion for summary judgment.[4]

As correctly noted by the majority, the Supreme Court in *Grimes v. La. Med. Mut. Ins. Co.*, 10-0039 (La. 5/28/10), 36 So.3d 215, 217, in a case procedurally similar to the instant matter, found that an appeal from a judgment by another party only brings "up on appeal the portions of the judgment that were adverse to [that party]," but not "the portions of the judgment that were adverse to plaintiff," citing *Nunez v. Commercial Union Ins. Co.*, 00-3062 (La. 2/16/01), 780 So.2d 348, 349. The majority goes on to find, however, that LPG's appeal "is without merit," asserting that although LPG appeals the summary judgment insofar as it is adverse to LPG, "La. C.C.P. [art.] 966 G is

[3] The record further reflects that Dixon did not answer the appeal.

[4] Interestingly, on appeal, appellees (Jackson) apparently do not disagree with this assessment of the matter, asserting in their appellate brief as follows: "The only remedy the LPG defendants have in this appeal is in the event that this Court finds that the trial judge erred in finding no liability of Jackson for the plaintiff's accident, as expressed in his reasons for judgment, *and allows consideration of Jackson's fault following trial*. … *This could serve to reduce the LPG defendants' liability to plaintiff*, but in no way impacts the dismissal of Appellees [the Jackson defendants], which is a final judgment." (Emphasis added.)

clear: 'no party shall refer directly or indirectly' to fault of a party or non-party who was found not at fault at summary judgment, and the trial court shall not consider the dismissed party in any allocation of fault." On this basis, the majority declines to address the merits of LPG's appeal of the trial court's grant of Jackson's motion for summary judgment, but rather essentially dismisses LPG's appeal on procedural grounds.[5]

At issue herein is La. C.C.P. art. 966(G), which provides:

> When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or non-party is not negligent, is not at fault, or did not cause in whole or in part the injury or harm alleged, that party or non-party shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or non-party. During the course of the trial, no party or person shall refer directly or indirectly to any such fault, nor shall that party or non-party' fault be submitted to the jury or included on the jury verdict form.[6]

On appeal, LPG asserts that "*Nunez* and its progeny stand for the contention that where a plaintiff [such as Dixon] fails to appeal a grant of summary judgment, but a co-defendant [such as LPG] appeals, and the court of appeal finds that genuine issues of material fact remain, the trial court's grant of summary judgment must be vacated as between the co-defendant appellant [LPG] and [the] appellee [Jackson]." LPG further asserts that "[t]his is because a defendant/appellant is 'entitled to a reduction in judgment by the percentage of fault allocated to the [defendant/appellee] in accordance with the general principles of comparative fault set forth in La. [C.C.] art. 2323(A),'" citing *Grimes*, 36 So.3d at 217.[7]

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[5] Although the majority opinion "affirms" the judgment in question, it is clear that the majority did not address the merits of the appeal (*i.e.*, whether the trial court properly granted Jackson's motion for summary judgment). Rather, the majority simply found that LPG's appeal is "without merit" because Dixon dismissed his appeal and failed to answer the appeal, specifically finding that "[i]n the absence of an appeal [by Dixon], this Court has no authority to determine whether the grant of summary judgment against Dixon was correct on its merits."

[6] This is the current version of La. C.C.P. art. 966(G) which became effective on January 1, 2016.

[7] La. C.C. art. 2323(A) provides:

Although enacted after *Grimes*, Article 966(G) does not address the appealability of summary judgments; rather, it is completely silent regarding appeal rights. I thus find nothing in Article 966(G) that prohibits a party such as LPG under the procedural posture of this case from appealing an adverse ruling on a motion for summary judgment. This is because the judgment granting Jackson's motion for summary judgment is not final as to LPG, as LPG has timely appealed that judgment. In my opinion, the prohibition contained in Article 966(G) against admitting evidence at trial "to establish the fault of that party or non-party" only comes into play once summary judgment is final as to "that party or non-party." The point that the majority apparently fails to consider in its interpretation of Article 966(G) is that the subject summary judgment is not final as to LPG, as LPG has timely appealed that judgment. Thus, in accordance with *Grimes* and *Nunez*, it is my opinion that we are required to address the merits of LPG's appeal.[8]

Further, under La. C.C.P. art. 1915(A),[9] a summary judgment that dismisses a party is a final judgment, immediately appealable. Also, pertinent to this matter,

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> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

[8] If we were to address the merits of LPG's appeal and *affirm* the trial court's grant of Jackson's motion for summary judgment and the judgment then becomes final as to LPG, then the trial court's grant of Jackson's motion for summary judgment would be final as to all parties and the provisions of Article 966(G) would kick in and indeed prohibit evidence of Jackson's fault in the cause (in whole or in part) of the subject accident and/or of Dixon's injuries, nor would any party or person be allowed during the course of trial to refer directly or indirectly to any such fault, nor would LPG's fault be submitted to the jury or included on the jury verdict form. If, however, we were to address the merits of LPG's appeal and *reverse* the trial court's grant of Jackson's motion for summary judgment, then the provisions of Article 966(G) would not kick in and LPG could present evidence of Jackson's fault in the cause (in whole or in part) of the subject accident and/or of Dixon's injuries. In such case, should the trier of fact find fault or causation (in whole or in part) on Jackson's part, then Dixon's recovery against LPG would be reduced in accordance with the general principles of comparative fault set forth in La. C.C. art. 2323(A). Dixon would not, however, enjoy any recovery from Jackson, even if found to be at fault or having caused Dixon's injuries, since Dixon dismissed his appeal of the trial court's grant of Jackson's motion for summary judgment.

[9] La. C.C.P. art. 1915(A) provides, in pertinent part:

> 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:
>
> * * *

La. C.C.P. art. 2083(A) provides: "A final judgment is appealable in all causes in which appeals are given by law, whether rendered after hearing, by default, or by reformation under Article 1814." Again, nothing in Article 966(G) addresses the appealability of a judgment granting a motion for summary judgment, or overrides Article 2083(A)'s basic principle that *final judgments are appealable*. Article 966(G) therefore does not, in my opinion, take away any appeal rights that any party may have.

Nor do I find that Article 966(G) legislatively overrules *Grimes*. Again, in my opinion, Article 966(G) only applies as to final summary judgments. As noted above, because LPG timely appealed the summary judgment in question, it is not final as to LPG. Because the summary judgment in question is not final as to LPG, *Grimes* is, in my opinion, controlling herein.

A review of jurisprudence arising subsequent to the enactment of Article 966(G) also persuades me that based on the current procedural posture of this case, we are required to review the merits of LPG's appeal.

In *Cotton v. Kennedy*, 2015 CA 1391 c/w 2015 CA 1392 (La. App. 1 Cir. 9/19/2016), 2016 La. App. Unpub. LEXIS 343*, the First Circuit, under very similar factual and procedural circumstances, maintained the appeal of a co-defendant (citing *Grimes* and *State Farm Mutual Automobile Insurance Co. v. McCabe*, 14-501 (La. App. 3 Cir. 11/5/14), 150 So.3d 595, 596), and also limitedly reversed the summary judgment at issue, thus allowing the successfully appealing co-defendants to introduce evidence of the dismissed co-defendant's fault as per La. C.C. art. 2323(A).

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(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).

* * *

Noteworthy, the case of *Robert v. Turner Specialty Servs., L.L.C.*, 50,245 c/w 50,246 (La. App. 2 Cir. 11/18/15), 182 So.3d 1069, implicitly considered the interplay of La. C.C. art. 2323 and La. C.C.P. art. 966(G), and allowed co-defendant RockTen CP, L.L.C.'s ("RockTen") appeal of a summary judgment granting co-defendant Turner Specialty Services, L.L.C.'s ("Turner") motion against plaintiffs, dismissing it from the case. The procedural posture of the case is very similar to the instant matter: a co-defendant (Turner) was dismissed from the case via summary judgment, the plaintiffs did not appeal, and a remaining co-defendant, RockTen, sought reversal of the summary judgment so as to be able to invoke La. C.C. art. 2323(A) to have fault apportioned to Turner.[10] Notably, the court did not discuss *Grimes* or whether RockTen could appeal the grant of summary judgment between Turner and the plaintiffs, but went straight to the merits of the summary judgment. The court declined to overturn the summary judgment on the procedural grounds that RockTen had never pleaded the affirmative defense of comparative fault as to the dismissed co-defendant Turner.[11] The pertinent point to be taken from *Robert* is, however, that the Second Circuit found that Article 966(G) was no impediment to a co-defendant maintaining an appeal of a summary judgment dismissing another co-defendant, and presumably would be no impediment to a successful appellant's application of La. C.C. art. 2323(A) at a trial on the merits, provided the appellant had pleaded the affirmative defense of comparative fault.

Finally, in the recent case of *Stafford v. Exxon Mobile Corp.*, 16-1067 (La. App. 1 Cir. 2/17/17), 2017 La. App. LEXIS 267*, the First Circuit followed *Grimes* and allowed the appeal of co-defendants regarding a summary judgment that dismissed another co-defendant, Hotard's Coaches, Inc. ("Hotard's").

[10] Like *Cotton*, this case was decided when Article 966(G) contained a paragraph requiring the trial court to explicitly state that the summary judgment was rendered pursuant thereto, which has been removed by a more recent amendment to the Article. The trial court's summary judgment did explicitly so state.

[11] In the instant matter, both defendants pleaded comparative fault.

Hotard's filed its motion for summary judgment on December 13, 2015, alleging no legal duty to the plaintiff under the facts pleaded. The motion was heard on January 25, 2016 and was granted on February 19, 2016, dismissing the plaintiff's claims against Hotard's with prejudice. The plaintiff did not appeal the judgment granting Hotard's motion for summary judgment. The court of appeal noted that ***vis-à-vis*** the plaintiff and Hotard's, the summary judgment was final and not subject to reversal. However, the court recognized that if the co-defendants were successful in their appeal, they could invoke the principles of comparative fault set forth in La. C.C. art. 2323(A), citing *Grimes* and *Cotton*. The court proceeded to consider the merits of the motion for summary judgment, found that it was properly granted as to Hotard's, and affirmed, thus denying relief to the appealing co-defendants. Interestingly, in *Stafford*, Article 966(G) was not mentioned at all, even though it was in effect at all pertinent times during the suit.

CONCLUSION

For the foregoing reasons, I respectfully dissent. Rather than finding that LPG's appeal "is without merit," ostensibly on procedural grounds, I would review and address the merits of LPG's appeal.

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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 2-16.4 AND 2-16.5** THIS DAY **JUNE 15, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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CLERK OF COURT

17-CA-29

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