MICHELLE MARSHALL, INDIVIDUALLY AND ON	*	**NO. 2009-CA-1304**
BEHALF OF HER MINOR CHILDREN AALIYAH,	*	**COURT OF APPEAL**
JAMISON, BRANDI MARSHALL, AND JEREMY	*	**FOURTH CIRCUIT**
ROBERTS, DOROTHY JONES, JIM ADAMS, AND TINA	*	**STATE OF LOUISIANA**
ANDREWS INDIVIDUALLY AND ON BEHALF OF HER	*	
MINOR CHILDREN JEFFREY DARNADO, ET AL.	*	
	* * * * * * *	

VERSUS

AIR LIQUIDE-BIG THREE, INC., AIR LIQUIDE CORPORATION, AIR LIQUIDE AMERICA, L.P., GLOBAL LINE CALCINER OF LOUISIANA, INC., GLOBAL LIME, LLC, DAVID BERGERON AND E. ROY BAGGETT

MURRAY, J., CONCURS WITH REASONS

Because of this court's previous ruling in *Magallanes v. Norfolk Sourthern Ry. Co.*, 09-0605 (La. App. 4 Cir. 10/14/09), ___ So.3d ___, 2009 WL 3287613, I am forced to concur in the result in this case. I disagree with the jurisprudence from this court holding that a trial court's reconsideration of a previously denied motion for summary judgment on a motion for new trial is improper. *Magallanes, supra.* Technically, the reasoning in *Magallanes* is correct: a denial of a motion for summary judgment is an interlocutory ruling, a motion for new trial may only be taken from a final judgment, and thus a motion for new trial may not be taken from the denial of a motion for summary judgment. Although technically correct, the conclusion that a motion for new trial may not be taken from the denial of a motion for summary judgment should not end the inquiry.

The reasoning in *Magallanes* fails to consider that a party's request for a new trial seeking reconsideration of a previously denied of a motion for summary judgment may, in substance, be a re-urged motion for summary judgment, which is permissible. *Magallanes, supra* (citing *Francioni v. Rault,* 570 So. 2d 36, 37 (La. App. 4 Cir. 1990); s*ee also Hargett v. Progressive Ins. Co*., 08-0293, pp. 6-7 (La. App. 4 Cir. 10/29/08), 996 So. 2d 1199, 1202, for the proposition that a trial court may consider a re-urged motion for summary judgment.)

In his concurrence in *Carter v. Rhea,* 01-0234 (La. App. 4 Cir. 4/25/01), 785 So.2d 1022, Judge Tobias suggests that in order to seek reconsideration of a ruling denying summary judgment a party must file a new motion for summary judgment; he states that "in order to accomplish the same result as a motion for new trial, one must file a brand new motion (with appropriate attachments) addressing the identical issue as a previous motion that resulted in an allegedly erroneous interlocutory decree." The court in *Magallanes* quotes Judge Tobias' suggestion and also suggests that the filing of a new motion is necessary to satisfy the requirements of La. C.C.P. art. 966 regarding notice and applicable delays. *Magallanes,* 09-0605 at p. 4 n. 6. I respectfully disagree for four reasons.

First, like a motion for summary judgment, a motion for new trial must be served on the opposing party. La. C.C.P. art. 1976 (providing that "[n]otice of the motion for new trial and of the time and place assigned for hearing thereon must be served upon the opposing party as provided by Article 1314"); La. C.C.P. art. 966 B ("[t]he motion for summary judgment and supporting affidavits shall be served at least fifteen days before the time specified for the hearing.") Thus, regardless the label on the motion—new trial or summary judgment—the opponent is required to be served with notice of the hearing.

Second, the fact the mover labeled its motion as one for a new trial is not dispositive. Considering the label the parties place on their pleading as dispositive

is inconsistent with the jurisprudence of this state holding that a substance over form rule applies in construing pleadings. *Smith v. Cajun Insulation, Inc*., 392 So.2d 398 (La. 1980)(courts are obligated to look beyond the caption and to determine the substance of the pleading); *In re Matranga,* 06-0604, p. 12 (La. App. 4 Cir. 12/20/06), 948 So.2d 261, 269)(noting that "it is not always the caption on a pleading that determines its substance"); *Brown v. Harrel*, 98-2931, p. 4 (La. App. 4 Cir. 8/23/00), 774 So.2d 225, 228 (noting that "it is the substance rather than the caption of a pleading that determines its effect").

Third, the Code of Civil Procedure provides that "[e]very pleading shall be so construed as to do substantial justice." La. C.C.P. art. 865. The Code further provides that "[t]he articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves." La. C.C.P. art. 5051.

Finally, nothing prohibits a party from asking a trial court to reconsider any interlocutory ruling.

For these reasons, I would find under the circumstances presented in both this case and the *Magallanes* case that the trial court correctly considered the motion for new trial as a re-urged motion for summary judgment. The trial court's ruling granting that re-urged motion for summary judgment was a final judgment from which an appeal to this court properly was taken. For this court to reverse and remand under these circumstances is procedurally incorrect and judicially inefficient. I acknowledge that a different result would be dictated if the party against whom the motion for summary judgment was granted could show some prejudice resulted from the styling of the motion as a motion for new trial, as opposed to a re-urged motion for summary judgment. In neither the present case nor the *Magallanes* case was any prejudice shown. Accordingly, I suggest that this court should reconsider its holding in *Magallanes* and this case.