

NOT DESIGNATED FOR PUBLICATION

MICHELLE MARSHALL, * NO. 2009-CA-1304
**INDIVIDUALLY AND ON *
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**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-8706, DIVISION "J-13"
Honorable Nadine M. Ramsey, Judge**

*** * * * ***

Judge Dennis R. Bagneris, Sr.

*** * * * ***

**(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)
ARMSTRONG, C.J., CONCURS IN THE RESULT
MURRAY J. CONCURS WITH REASONS**

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AMERICA CORP., AND AIR LIQUIDE AMERICA, L.P.**

REVERSED AND REMANDED

MARCH 3, 2010

Plaintiffs filed this class action suit to recover damages allegedly caused by exposure to carbide lime released from an Air Liquide America facility located in New Orleans, Louisiana. Plaintiffs filed suit against various defendants, including Air-Liquide – Big Three, Inc. f/k/a/ Lincoln Big Three, Inc.; Air Liquide America Corp.; Air Liquide America, L.P.; and Three C’s Properties, Inc. In response to Plaintiffs’ suit, Three C’s Properties, Inc. filed a third party demand against Clarendon American Insurance Company (“Clarendon”) demanding Clarendon to provide it a defense and indemnity pursuant to a commercial general insurance policy. Thereafter, Clarendon filed a motion for summary judgment, which was denied. Clarendon then filed a motion for new trial and/or reconsideration of judgment, which the trial court granted. At that time, the trial court granted the motion for summary judgment, which dismissed Clarendon from the case.

Defendants now appeal this final judgment, contending that (1) the trial court erred in granting the motion for new trial, and (2) genuine issues of material fact remain for a trier of fact to decide. For the following reasons, we reverse and remand the matter to the trial court.

After a review of the record, we find that the trial court committed procedural error in considering the motion for a new trial and rendering a summary judgment as a result of its consideration of the motion for new trial. As this Court recently stated in *Magallanes v. Norfolk Southern Railway Company*, 2009-0605, p. 2 (La. App. 4 Cir. 10/14/09) 2009 WL 3287613:

We have previously held that the motion for new trial pursuant to La. C.C.P. art.1974 applies only to *final* judgments. *Carter v. Rhea*, 01-0234, p. 4 (La. App. 4 Cir. 4/25/01), 785 So.2d 1022, 1025. Article 1974 reads:

The delay for applying for a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.

La. C.C.P. art.1913 pertains only to final judgments. (Footnote omitted) A denial of a motion for summary judgment is an *interlocutory* judgment. *Carter, Id.* (other citations omitted)

* * *

The proper procedure for obtaining a reconsideration of the motion for summary judgment which has been denied is to re-urge the motion itself by re-filing it prior to trial. *Young v. Dupre Transport Co.*, 97- 0591 (La. App. 4 Cir. 10/1/97), 700 So.2d 1156, 1157. In his concurrence in *Carter, supra*, Judge Tobias noted:

[A] literal reading of La. C.C.P. art.1974, authorizing motions for new trial, makes it applicable to final judgments only.... The majority makes our practice conform to the literal language of La. C.C.P. art. 1974 and the jurisprudence from two other appellate circuits.... Now, 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. *Carter*,

01-0234 at p. 6, 785 So.2d at 1026. (Footnote omitted)

This court permitted a motion for summary judgment to be re-urged by the defendants after it had been denied twice previously, noting that previous denials had no res judicata effect. *Francioni v. Rault*, 570 So.2d 36, 37 (La. App. 4 Cir.1990). See also *Hargett v. Progressive Ins. Co.*, 08-0293, pp. 6-7 (La.App. 4 Cir. 10/29/08), 996 So.2d 1199, 1202.

Similarly to the *Magallanes* case, we conclude that the trial court erred as a matter of law when it reconsidered its previous denial of summary judgment through the procedural vehicle of a motion for new trial and then rendered a final summary judgment dismissing Clarendon from the suit.

Accordingly, we hereby reverse the granting of summary judgment and we remand the matter to the trial court.

REVERSED AND REMANDED