

## Danes v. Rogers

Court of Appeals of Georgia

November 6, 2013, Decided

A13A1201.

### Reporter

324 Ga. App. 504; 751 S.E.2d 135; 2013 Ga. App. LEXIS 876; 2013 Fulton County D. Rep. 3426; 2013 WL 5931614

DANES v. ROGERS et al.

**Prior History:** Negligence, etc. Butts Superior Court. Before Judge Wilson.

**Disposition:** [\*\*\*1] Judgment affirmed.

### Core Terms

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workers' compensation, coverage, summary judgment, summary judgment motion, trial court, hearsay, insurance agent, negligence claim, legal duty, deposition, procure, granting summary judgment, essential element, legal consequence, moving party, certificate, estate administrator, genuine, shifts

### Case Summary

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#### Procedural Posture

Plaintiff estate administrator appealed the order of a Georgia trial court, which granted summary judgment to defendants, an insurance agent and her employer. The estate administrator brought suit alleging negligence in failing to procure worker's compensation insurance coverage for her husband, breach of contract, and promissory estoppel.

#### Overview

The estate administrator's husband was killed on a job site. The estate administrator claimed that her husband asked the insurance agent to procure worker's compensation insurance coverage for him, but failed to do so before his death. The trial court granted summary judgment to the insurance agent upon accepting her evidence that was undisputed that the husband had told her that he did not want the policy to cover him personally because he could not afford it. The court noted that once the insurance agent testified at her deposition that the husband told her that he could not afford personal coverage under the worker's compensation policy, the burden of production shifted to the estate administrator to come forward with evidence that created a genuine dispute of fact on that issue. The estate administrator's testimony

about what her husband said to the insurance agent constituted speculation and conjecture which was insufficient to defeat defendants' motion for summary judgment.

#### Outcome

The court affirmed the judgment.

### LexisNexis® Headnotes

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Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

**HN1** On appeal from a grant of a motion for summary judgment, the appellate court reviews the evidence de novo in the light most favorable to the nonmovant to determine whether a genuine issue of fact remains and whether the moving party is entitled to judgment as a matter of law. The moving party may do so by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the case.

Torts > ... > Elements > Duty > General Overview

Torts > Negligence > Elements

**HN2** The essential elements of a negligence claim are the existence of a legal duty; breach of that duty; a causal connection between the defendant's conduct and the plaintiff's injury; and damages. Thus, the threshold issue in a negligence action is whether and to what extent the defendant owes a legal duty to the plaintiff.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

**HN3** As held in *Lau's Corp. v. Haskins*, once a defendant points out that there is an absence of evidence to support the plaintiff's case, the burden then shifts to the plaintiff, who must point to specific evidence giving rise to a triable issue when considering a motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Evidence > Inferences & Presumptions > Inferences

**HN4** The evidence to defeat summary judgment must be more than mere possibility or speculation. A finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists.

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

**HN5** An alleged hearsay statement has a relevant nonhearsay use when it is offered, not to prove the truth of the matter asserted, but to explain conduct.

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

**HN6** A statement that has legal consequences independent of its truth or falsity is considered a verbal act and is not hearsay when those legal consequences are relevant or material to the case. The simplest example is an out-of-court statement establishing or defining the terms of a contract.

## Headnotes/Syllabus

### Headnotes

Georgia Advance Headnotes Advance Headnotes

#### GA(1) (1)

Civil Procedure. > Summary Judgment. > Standards of Review.

On appeal from a grant of a motion for summary judgment, the appellate court reviews the evidence de novo in the light most favorable to the nonmovant to determine whether a genuine issue of fact remains and whether the moving party is entitled to judgment as a matter of law.

#### GA(2) (2)

Civil Procedure. > Summary Judgment. > Burdens of Production & Proof.

Moving party for summary judgment may meet its burden by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the case.

#### GA(3) (3)

Torts. > Negligence. > Negligence Generally.

Essential elements of a negligence claim are the existence of a legal duty; breach of that duty; a causal connection between the defendant's conduct and the plaintiff's injury; and damages.

#### GA(4) (4)

Torts. > Negligence. > Duty. > Duty Generally.

Threshold issue in a negligence action is whether and to what extent the defendant owes a legal duty to the plaintiff.

#### GA(5) (5)

Civil Procedure. > Summary Judgment. > Burdens of Production & Proof.

Once a defendant points out that there is an absence of evidence to support the plaintiff's case, the burden then shifts to the plaintiff, who must point to specific evidence giving rise to a triable issue when considering a motion for summary judgment.

#### GA(6) (6)

Civil Procedure. > Summary Judgment. > Summary Judgment Standard.

Trial court properly granted summary judgment to an insurance agent on a negligence claim because the agent's testimony that the deceased had indicated that the deceased did not want to be personally covered under a workers' compensation policy because of cost was undisputed and entitled the agent to summary judgment on the issue.

#### GA(7) (7)

Evidence. > Hearsay Rule & Exceptions. > Hearsay Rule Components.

Statement that has legal consequences independent of its truth or falsity is considered a verbal act and is not hearsay when those legal consequences are relevant or material to the case.

**Counsel:** Eugene D. Butt, for appellant.

*Lokey, Mobley & Doyle*, Kevin A. Doyle, Owen, Gleaton, Egan, Jones & Sweeney, Charles J. Cole, for appellees.

**Judges:** ANDREWS, Presiding Judge. Dillard and McMillian, JJ., concur.

**Opinion by:** ANDREWS

## Opinion

[\*504] [\*\*136] Andrews, Presiding Judge.

Shawn Danes (“Danes”), as administrator of the estate of her husband William Danes (“William”), appeals from the trial court’s order granting Andee Rogers’s and Dan Rivers & Associates’ motion for summary judgment. Danes sued Rogers, an insurance agent, and her employer Dan Rivers & Associates (collectively “Rogers”) after [\*505] her husband William was killed while working as a subcontractor on a Georgia DOT project. Danes claimed that her husband asked Rogers to procure workers’ compensation insurance coverage for him, but Rogers failed to do so before his death. Danes alleged negligence, contending that Rogers promised to procure coverage, but did not do so; breach of contract, alleging that Rogers did not procure insurance as she had agreed to do; and promissory estoppel, claiming that Rogers was estopped from claiming there was no coverage because she promised to procure [\*\*137] workers’ compensation insurance for Danes that covered him personally.

Rogers responded that, although William requested workers’ compensation insurance for his business, he told her that he did not want to pay for coverage [\*\*\*2] for himself. Rogers filed a motion for summary judgment contending that the evidence was undisputed that William told her that he did not want the policy to cover him personally because he could not afford it. The trial court granted the motion. For the reasons that follow, we affirm.

**HNI GA(1)** (1) On appeal from a grant of a motion for summary judgment, we review the evidence de novo in the light most favorable to the nonmovant to determine whether a genuine issue of fact remains and whether the moving party is entitled to judgment as a matter of law. **GA(2)** (2) As the moving party, [Rogers] may do so by showing the court that the documents, affidavits, depositions, and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the ... case.

*Burnside v. GEICO Gen. Ins. Co.*, 309 Ga. App. 897, 898 (714 SE2d 606) (2011).

Viewed in the light most favorable to Danes, the record shows that William was killed while working as a subcontractor for Reeves Construction Company on a project for the Georgia DOT. William was the only employee of his company, B&S Grading. In June 2007, William first applied with Rogers for workers’ compensation [\*\*\*3] for the company. In that application, William rejected coverage for himself.<sup>1</sup> William cancelled that policy in June 2008.

Rogers testified at her deposition that William called her in June 2009 and again requested workers’ compensation insurance. He also [\*506] requested general liability and umbrella policies. Rogers procured the general liability and umbrella policies that William requested, but had not completed the application for the workers’ compensation policy at the time of his death. Rogers stated that William told her that he could not afford to be covered personally under the workers’ compensation policy, and that he “was struggling just to do any of it.” She stated that William said that he was concerned about the money and wanted to “keep it like it was, and let’s just do the minimum premium which would — which would be the exclusion.”

After William’s death, Reeves Construction called Rogers, requesting a certificate of insurance. Reeves did not tell Rogers [\*\*\*4] that William had died. Rogers sent a certificate which listed a workers’ compensation policy. Under the workers’ compensation listing on the certificate is a question: “Any proprietor/partner/executive officer/member excluded? If yes, describe under Special Provisions below.” There is nothing indicated on the certificate. Rogers later wrote on the certificate of insurance “only Reeves” and “does not bind.”

Danes testified that her husband told her that one of the requirements of the job was to have a “million dollars worker’s compensation insurance.” She said that he told her it would cost thousands of dollars and she felt “sick” because they did not have any money. She also stated that William told her that he had to be “included on the workers’ comp policy.” An employee of Reeves Construction testified that Reeves’s contract required that William have workers’ compensation insurance that covered him personally and that he could not “opt out” of coverage.

The trial court held that the certificate of insurance sent to Reeves was silent as to whether William was to be an

<sup>1</sup> Apparently it is not unusual for a business owner to exclude himself from coverage and save on premiums. If the company hires additional employees during the project, they would be covered by the workers’ compensation policy.

insured under the policy, and Rogers's un rebutted testimony was that William did not request that he be [\*\*\*5] personally insured on the policy. This appeal followed.

1. Danes claims that the trial court erred in granting Rogers's motion for summary judgment on her claim of negligence.

**GA(3)** (3) **HN2** The essential elements of a negligence claim are the existence of a legal duty; breach of that duty; a causal connection between the defendant's conduct and the [\*\*\*138] plaintiff's injury; and damages. Thus, the **GA(4)** (4) threshold issue in a negligence action is whether and to what extent the defendant owes a legal duty to the plaintiff.

*Boller v. Robert W. Woodruff Arts Center*, 311 Ga. App. 693, 695 (716 SE2d 713) (2011).

[\*507] Here, Rogers testified at her deposition that William told her that he wanted the same workers' compensation insurance coverage that he had before and that he could not afford personal coverage under the policy. The burden of production then shifted to Danes to come forward with evidence that creates a genuine dispute of fact on this issue. See OCGA § 9-11-56; *Pfeiffer v. Ga. Dept. of Transp.*, 275 Ga. 827, 828-829 (573 SE2d 389) (2002) **HN3** ("As we held in *Lau's Corp. v. Haskins*, **GA(5)** (5) once a defendant points out that there is an absence of evidence to support the plaintiff's case, the burden then shifts to [\*\*\*6] the plaintiff, who *must* point to specific evidence giving rise to a triable issue.").

**GA(6)** (6) Danes claimed that her husband told her that he had to be insured under the policy, but acknowledges that she was not involved in the business, stating "I didn't know anything about it." When asked if she had any personal knowledge of what her husband told anyone at Rivers & Associates about the type of policy he wanted, she replied, "No. I wasn't there." Accordingly, Danes's testimony about what her husband said to Rogers constitutes speculation and conjecture which is insufficient to defeat Rogers's motion for summary judgment. See *Mitchell v. Austin*, 261 Ga. App. 585, 587 (583 SE2d 249) (2003) **HN4** (evidence to defeat summary judgment must be more than mere possibility or speculation). And, "[a] finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted

evidence that no such fact exists." *Moore v. Camara*, 317 Ga. App. 651, 653 (732 SE2d 319) (2012). Therefore, because Danes cannot show a breach of a legal duty by Rogers, the trial court properly granted summary judgment on her claim of negligence. See *Boller*, *supra* at 696.

2. [\*\*\*7] Likewise, because Danes's claims for breach of contract and promissory estoppel are also based on the allegation that William told Rogers that he wanted her to issue a policy that covered him personally, and because Danes has come forward with no evidence to support this contention, Rogers was entitled to summary judgment on these claims.

3. Danes also argues that the trial court erred in granting summary judgment on the basis of Rogers's testimony, because that testimony was hearsay. The trial court held that the testimony was admissible as original evidence of the alleged contract and to explain conduct. See *Hart v. Groves*, 311 Ga. App. 587, 589 (716 SE2d 631) (2011) **HN5** (alleged hearsay statement had a relevant nonhearsay use in that it was offered, not to prove the truth of the matter asserted, but to explain conduct — that after Hart received the e-mail, he contacted Groves's uninsured motorist carrier to inquire about the additional coverage under her policy").

[\*508] Further,

**HN6 GA(7)** (7) [a] statement that has legal consequences independent of its truth or falsity is considered a "verbal act" and is not hearsay when those legal consequences are relevant or material to the case. The simplest [\*\*\*8] example is an out-of-court statement establishing or defining the terms of a contract.

*Stubbs v. Dubois*, 306 Ga. App. 171, 173, n. 5 (702 SE2d 32) (2010), quoting Milich, Georgia Rules of Evidence (2nd ed.), § 17.6, pp. 352-353. See also *State Farm Mut. Auto. Ins. Co. v. Drawdy*, 217 Ga. App. 236, 237 (456 SE2d 745) (1995) ("State Farm's argument that the ... employee's testimony as to out-of-court statements made by the State Farm agent constitutes inadmissible hearsay succumbs to the verbal act exception to the hearsay rule."). Accordingly, there was no abuse of discretion in the trial court's consideration of Rogers's deposition testimony.

*Judgment affirmed. Dillard and McMillian, JJ., concur.*