Judgment rendered May 5, 2016.

No. 50,395-CA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

EVELYN GOERS — Plaintiff-Appellant

Versus

LORENE MAYFIELD AND
STATE FARM FIRE AND CASUALTY
INSURANCE COMPANY — Defendant-Appellees

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On Rehearing
Appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 55,791

Honorable Jay B. McCallum, Judge

* * * * *

GREENWALD LAW FIRM, LLC
By: Joseph W. Greenwald, Jr.
— Counsel for Appellant Cheryl Goers

HUDSON POTTS & BERNSTEIN, LLP
By: Margaret H. Blackwell
Gordon L. James
— Counsel for Appellees Laureen Mayfield (Lorene Mayfield) and State Farm Fire and Casualty Insurance Co.

* * * * *

Before BROWN, CARAWAY, DREW, MOORE and LOLLEY, JJ.

MOORE, J., dissents for the reasons assigned in his majority opinion rendered January 13, 2016, and assigns additional reasons.

LOLLEY, J., dissents for reasons assigned by J. Moore.

BROWN, CHIEF JUDGE, On Rehearing.

This court granted a rehearing in this case. The case was reargued. The facts are set forth in the original opinion. In May 2011, 89-year-old Evelyn Goers ("Evelyn") was visiting her daughter, Laureen Mayfield, in Simsboro.[1] Ms. Mayfield owned four large Tibetan Mastiffs. Evelyn opened the back door of the house and was viciously attacked by the dogs. In May 2012, she filed this suit against Ms. Mayfield and her homeowners' insurer, State Farm, alleging negligence and strict liability.

In February 2015, Evelyn passed away. Her other daughter, Cheryl Goers, filed an amended petition substituting herself as plaintiff in lieu of her deceased mother. A month later, Ms. Mayfield also filed a motion to have herself substituted as plaintiff. The court allowed both substitutions.

State Farm filed an exception of no right of action, alleging that because Ms. Mayfield was now both a plaintiff and a defendant, confusion occurred and extinguished the obligation. La. C.C. art. 1903.
The trial court sustained the exception and dismissed Ms. Mayfield as a plaintiff and also as a defendant. Plaintiff, Cheryl Goers, appealed. This court, with one dissent, affirmed. As stated, a rehearing with oral argument was granted. We now reverse the dismissal of Ms. Mayfield as a defendant in Ms. Goers' action.

Ms. Mayfield was the sole tortfeasor and debtor, but she was not the sole creditor. The Louisiana Supreme Court case of *Doughty v. Insured Lloyds Ins. Co.*, 576 So. 2d 461 (La. 1991), is on point.

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[1]Her name is misspelled "Lorene" in the original petition.

In *Doughty*, the supreme court reversed the First Circuit, which had held, in *Doughty v. Insured Lloyds Ins. Co.*, 563 So. 2d 1233 (La. App. 1st Cir. 1990), that both parents' wrongful death and survivor claims arising out of the death of their son were extinguished by confusion. Specifically, the appellate court in *Doughty*, 563 So. 2d at 1233, phrased the issue before it as whether both parents could recover damages arising out of their son's death against their own liability insurer, where the parents were legally at fault in causing the death. The First Circuit found that, as insureds under the policy, Mr. and Mrs. Doughty were in effect "suing themselves" in the wrongful death and survival actions. In those claims, they sought their own personal damages, for which they were both legally responsible, against their own liability insurer. According to the appellate court, the claims became extinguished by confusion because both parents would be both debtors and creditors on the amounts recoverable. *Doughty*, 563 So. 2d at 1236.

The First Circuit's decision was reversed by the Louisiana Supreme Court as to Mrs. Doughty only, based upon the court's finding that she was not a tortfeasor and thus was not precluded from recovering from defendant for her wrongful death and survivor claims. *Doughty*, 576 So. 2d at 465.

In *Lewis v. Till*, 395 So. 2d 737 (La. 1981), the supreme court held that the negligence of the wife in causing the death of the couple's son was not imputed to the husband and would not bar recovery by him in an action brought against their homeowners' insurer for general damages or in a survival action brought on behalf of the child.

The trial court kept State Farm as a defendant in Ms. Goers' action. We note State Farm's concession that under the Direct Action Statute, Ms. Goers' claim against the homeowners' insurer is valid. We affirm that ruling. We find, however, that it is disingenuous to state that Ms. Goers can maintain her action against the insurer, State Farm, but not against the tortfeasor. Further, the order dismissing Ms. Mayfield as plaintiff and defendant dealt exclusively with Ms. Mayfield bringing suit against herself. It was not understood as a dismissal of Ms. Goers' claims against State Farm and its at-fault insured, Ms. Mayfield.

We reverse and reinstate Ms. Goers' action against the tortfeasor, Ms. Mayfield, and remand the matter for trial.

MOORE, J., dissents.

I dissent. The majority conveniently skates over the fact that Ms. Goers judicially confessed by expressly consenting to the grant of the peremptory exception and acquiescing in the decree dismissing Ms. Mayfield both as a plaintiff and a defendant. La. C.C. art. 1853. I would affirm the district court on this basis. *Trahan v. Coca Cola Bottling Co. United Ltd.*, 2004-0100 (La. 3/25/05), 894 So. 2d 1096.

On the merits, I would affirm for the reason expressed in the original opinion: under La C.C. art. 1903, the obligation is extinguished. The effect of the majority's ruling, in these unique circumstances, is to confer on Ms. Goers a cause of action against Ms. Mayfield for the negligence of allowing her dogs to bite their mother, Evelyn. While the moral pull of this outcome is surely appealing, the fact is that Ms. Goers did not allege any such cause of action. She claimed only her share of an obligation which was extinguished by operation of law.

Finally, I do not accept the majority's view that it is "disingenuous" (a modern synonym for "dishonest") to maintain Ms. Goers's action against the insurer, State Farm, but not against the insured, Ms. Mayfield. Such an action is precisely the function of Louisiana's Direct Action Statute, La. R.S. 22:1269 B(1), as applied to this situation in *Soileau v. Smith True Value & Rental*, 2012-1711 (La. 6/28/13), 144 So. 3d 771. In fact, the instant case illustrates the purpose of liability insurance.

The judgment of the district court is entirely correct, and I would affirm it.