

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1274



CHARLES FALCON, INDIVIDUALLY AND ON BEHALF OF  
INTERDICT ANYA MARIE FALCON

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION, GLENN PATRICK,  
EDWARD J. GAY PLANTING & MANUFACTURING CO. AND ABC  
INSURANCE COMPANY AND XYZ INSURANCE COMPANY

**Judgment rendered March 25, 2011.**

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Appealed from the  
18th Judicial District Court  
in and for the Parish of Iberville, Louisiana  
Trial Court No. 65747  
Honorable Alvin Batiste, Jr., Judge

\* \* \* \* \*

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BRENT P. FREDERICK  
MICHAEL A. COLOMB  
BATON ROUGE, LA  
AND  
ANTONIO M. "TONY" CLAYTON  
MICHAEL P. FRUGÉ  
PORT ALLEN, LA  
AND  
PAUL H. DUE  
B. SCOTT ANDREWS  
BATON ROUGE, LA

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COMPANY

\* \* \* \* \*

**BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.**

**PETTIGREW, J.**

In the instant personal injury litigation, plaintiff, appearing herein individually, and in his capacity as curator of his interdicted daughter, and further in his capacity as tutor of his minor grandchildren, challenges the trial court's dismissal, via a partial grant of summary judgment, of claims put forth by him against three of six defendants named herein. For the reasons that follow, we reverse in part, and remand for further proceedings.

**STATEMENT OF THE CASE**

At approximately 5:40 a.m. on the morning of September 13, 2007, 26-year-old Anya Marie Falcon ("Ms. Falcon"), was driving with her three minor children, Abigail M. Falcon, aged 6 years; Nikki L. Hanchett, aged 3 years; and Landon P. Hanchett, aged 1 year; in an easterly direction on St. Louis Road (a/k/a Tenant Road or La. Hwy. 992-3) just south of the town of Plaquemine, in Iberville Parish, Louisiana. After Ms. Falcon entered the "T-shaped" intersection of St. Louis Road and La. Hwy. 1, her 1998 Honda Accord sedan was struck broadside by a 2002 Ford F-150 pick-up operated by Moses Williams, who was traveling southbound in the right lane of La. Hwy. 1.

The accident that gave rise to this litigation occurred prior to daylight. It was raining, the roads were wet, and the headlights on both vehicles were turned on. The intersection where this accident occurred is in the middle of a "straight-away" on La. Hwy. 1. At this point, La. Hwy. 1 consists of five lanes of traffic – two southbound lanes, a center turn lane, and two northbound lanes. The intersection of St. Louis Road and La. Hwy. 1 is controlled by a stop sign for motorists traveling on St. Louis Road toward La. Hwy. 1. There are no controls for motorists traveling on the favored roadway, La. Hwy. 1, which has a posted speed limit of 45 mph.

Following this accident, Mr. Williams along with Ms. Falcon's children were treated and released from River West Medical Center while Ms. Falcon was hospitalized at Our Lady of the Lake Regional Medical Center in Baton Rouge due to the extensive nature of her injuries. As a result of this accident, Ms. Falcon sustained multiple broken bones, contusions, and lacerations to her left thigh and spleen. Ms. Falcon also sustained a

severe closed head injury for which she requires supervision twenty-four hours a day and exhibits difficulty performing even the simplest of tasks. As Ms. Falcon remains unable to bathe, clothe, or feed herself without assistance, and suffers from significant short-term memory loss, she has been legally interdicted and remains under the curatorship of her father, Charles E. Falcon, the plaintiff in this matter.

At issue in this case is, whether the placement by defendants prior to this accident of an immense political billboard promoting the candidacy of Glenn Patrick for the office of tax assessor posed an unreasonably dangerous condition to motorists. The billboard in question measured sixteen (16) feet in width by approximately eight (8) feet in height, was erected along the shoulder of La. Hwy. 1 just north of its intersection with St. Louis Road. Said billboard was placed on the property of E.J. Gay and is alleged to have extended two feet into the State's right-of-way along La. Hwy. 1 in violation of La. R.S. 48:461.2.

#### **ACTION OF THE TRIAL COURT**

Charles E. Falcon, individually, and in his capacity as the natural curator of his interdicted daughter, Ms. Falcon, instituted this litigation in the 18<sup>th</sup> Judicial District on October 17, 2007. Named as defendants herein were, the State of Louisiana, through the Department of Transportation and Development ("DOTD"), Glenn Patrick, Edward J. Gay Planting & Manufacturing Co. ("Gay"), ABC Insurance Company, and XYZ Insurance Company. Mr. Falcon filed a First Amended Petition for Damages on August 12, 2008, naming as additional defendants, Louisiana Farm Bureau Casualty Insurance Company ("Farm Bureau"), State Farm Fire and Casualty Insurance Company ("State Farm"), Bayou Fabricators and Machine Works, Inc. ("Bayou Fabricators") and First Financial Insurance Company ("First Financial"). Mr. Falcon, in his capacity as the tutor of his interdicted daughter's minor children, Abigail M. Falcon, Nikki L. Hanchett, and Landon P. Hanchett,

also set forth a loss of consortium claim on their behalf.<sup>1</sup> Since this time, much discovery has been conducted by all parties.

On August 19, 2009, all of the named defendants joined in filing a Joint Motion for Summary Judgment based on the assertions that the placement of the political billboard at issue did not present an unreasonably dangerous condition to motorists attempting to turn onto La. Hwy. 1 from St. Louis Road. Additionally, defendants urged that any motorist on St. Louis Road approaching the La. Hwy. 1 intersection had an unobstructed view of approximately 23 feet of approaching southbound traffic on La. Hwy. 1. Lastly, defendants argued that regardless of the billboard's placement, Ms. Falcon had a duty to act as a reasonable motorist and yield to oncoming traffic on the favored highway, which she failed to do.

At a hearing held on January 6, 2010, the trial court determined that Mr. Patrick and Bayou Fabricators had custody, control, and garde of the political billboard that was placed within the State's right-of-way. The court also determined that said defendants had a duty not to place the billboard in an unlawful manner in an unlawful place. The court further determined that genuine issues of material fact remained as to whether Mr. Patrick and Bayou Fabricators' placement of the billboard at that location contributed to the accident. For that reason, the trial court declined to grant summary judgment in favor of Mr. Patrick, Bayou Fabricators and their respective insurers, State Farm and First Financial. Noting that there had been no evidence to demonstrate the existence of an issue of material fact with respect to Gay, Farm Bureau, or DOTD, the trial court granted summary judgment as to these defendants.

At the close of arguments, the trial court granted Mr. Falcon leave to amend his petition to more specifically plead a civil conspiracy amongst the defendants with respect to the placement of the billboard. On January 26, 2010, Mr. Falcon filed a motion seeking

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<sup>1</sup> Defendants Bayou Fabricators and its insurer, First Financial, responded by filing, together with its answer, a dilatory exception raising the objection as to Mr. Falcon's lack of procedural capacity to assert a claim on behalf of his interdicted daughter or minor grandchildren. Bayou Fabricators and First Financial later moved for an order to withdraw said exception after being provided with orders recognizing the proper procedural capacity of Mr. Falcon. The trial court issued an order on November 18, 2008, allowing defendants to withdraw their exception.

a new trial with respect to defendants' Joint Motion for Summary Judgment, which was later denied by the trial court. Mr. Falcon filed his second amended petition for damages on March 3, 2010, in which he alleged defendants engaged "in a civil conspiracy pursuant to [La. Civ. Code art.] 2324."<sup>2</sup>

On April 12, 2010, a panel of this court denied a supervisory writ application filed by defendants Mr. Patrick and State Farm with respect to the trial court's denial of their motion for summary judgment.<sup>3</sup>

On April 22, 2010, Mr. Falcon, individually, and in his capacity as curator of his interdicted daughter, and further in his capacity as tutor of his minor grandchildren, filed for a devolutive appeal of the trial court's partial grant of summary judgment.

### **ASSIGNMENTS OF ERROR**

In connection with his appeal in this matter, Mr. Falcon presents the following assignments of error for review and consideration by this court:

1. The trial court erred in granting summary judgment in favor of E.J. Gay, Farm Bureau and the Louisiana Department of Transportation on grounds not submitted via written motion or at oral argument in open court; and
2. The trial court erred in ruling, as a matter of law, that an uncontested sight obstruction did not constitute an unreasonably dangerous condition.

### **STANDARD OF REVIEW**

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **Johnson v. Evan Hall Sugar Co-op, Inc.**, 2001-2956, p. 3 (La. App. 1 Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of

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<sup>2</sup> Newly-released defendants Gay and Farm Bureau filed a peremptory exception raising objections of no cause and no right of action with respect to Mr. Falcon's civil conspiracy allegation. Although not contained in the record before this court, the trial court, in a hearing scheduled for August 24, 2010, is alleged to have granted defendants' exception and dismissed Mr. Falcon's civil conspiracy claim with respect to all defendants.

<sup>3</sup> **Falcon v. Louisiana Department of Transportation, et al.**, 2010-CW-0232 (La. App. 1 Cir. 4/12/2011).

material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. art. 966(A)(2); **Thomas v. Fina Oil and Chemical Co.**, 2002-0338, pp. 4-5 (La. App. 1 Cir. 2/14/03), 845 So.2d 498, 501-502.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Robles v. Exxonmobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038, p. 7 (La. App. 1 Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

#### **DISCUSSION**

As part of his appeal in this matter, Mr. Falcon asserts that defendants failed to raise issues regarding notice or duty on the part of DOTD, Gay, and Farm Bureau in either their joint motion for summary judgment or in open court at the hearing in this matter.

Mr. Falcon further asserts that the only issue before the court was whether his daughter failed to act as a reasonably prudent motorist under the circumstances present on the morning of the accident. Accordingly, Mr. Falcon argues the trial court's ruling with respect to the dismissal of DOTD, Gay, and Farm Bureau must be reversed.

In connection with their joint motion for summary judgment, defendants argued that the claims asserted by Mr. Falcon in his capacity as curator of his interdicted daughter, and further in his capacity as tutor of his minor grandchildren, arose out of the presence of the political billboard and are based on theories of negligence and premises liability. Defendants pointed out that in order to recover under either theory, a plaintiff had the burden of proving that (1) the property that caused the damage was owned by, and in the custody of, the defendants; (2) an unreasonably dangerous and hidden condition in the property presented an unreasonable risk of harm to plaintiff as "***a reasonably prudent person exercising ordinary care under the circumstances,***" i.e., a defective condition; (3) the defective condition was a cause in fact of the damages; and (4) the defendant had actual or constructive knowledge of the risk.<sup>4</sup>

Defendants further claimed that it was undisputed that at the time of the accident, Ms. Falcon "ran" the stop sign at the intersection of St. Louis Road and La. Hwy. 1, attempted to cross the southbound lanes of La. Hwy. 1 directly in front of the vehicle operated by Mr. Williams, and make a left-turn into the northbound lane of La. Hwy. 1. Defendants cited **Price v. City of Slidell**, 97-2066, pp. 6-7 (La. App. 1 Cir. 9/25/98), 723 So.2d 455, 459, for the proposition that a left-turning motorist involved in a collision that occurs across the center line at the time of impact is burdened with the presumption of fault, and said motorist must offer evidence to show that the motorist is free from negligence to avoid the imposition of liability. See also, **Miller v. Leonard**, 588 So.2d 79, 81-82 (La. 1991).

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<sup>4</sup> As support for this proposition, defendants cite **Vincinelli v. Musso**, 01-0557, p. 4 (La. App. 1 Cir. 2/27/02), 818 So.2d 163, 165; writ denied, 02-0961 (La. 6/7/02), 818 So.2d 767; and **Williams v. Leonard Chabert Med. Cir.**, 98-1029, p. 5 (La. App. 1 Cir. 9/26/99), 744 So.2d 206, 209; writ denied, 00-0011 (La. 2/18/00), 754 So.2d 974.



Defendants argued that in order for Mr. Falcon to defeat summary judgment, he was required to successfully overcome two (2) separate presumptions that his daughter was at fault in causing the accident. The first presumption was that a left-turning motorist who is involved in a collision that occurs across the center line at time of impact is presumed to have been at fault in causing the accident. The second presumption was that a motorist who runs a stop sign resulting in a collision is similarly presumed to have been at fault in causing the accident.

Defendants cited and argued for application of **Stewart v. State ex rel. DOTD**, 08-0772 (La. App. 1 Cir. 3/20/09), 9 So.3d 957, writ denied, 09-1228 (La. 9/18/09), 17 So.3d 968, a case involving a reversal of a jury's assessment of liability on the part of DOTD based upon the jury's finding that an intersection was unreasonably dangerous due to the absence of a semaphore traffic light. Claiming that all of the factual evidence as to how the accident occurred which may be submitted at trial had been completed and submitted, defendants argued Mr. Falcon could not produce evidence sufficient to overcome the presumptions that his daughter was at fault in causing the accident. Defendants urged that they were entitled to summary judgment dismissing with prejudice Mr. Falcon's claims against each defendant.

In response, Mr. Falcon argued that in order to prevail on their motion for summary judgment, defendants were required to prove the absence of any material issue of fact. Mr. Falcon asserted that it was obvious genuine issues of material fact remained with respect to each contention put forth by defendants.

Defendants' contention that Ms. Falcon was attempting to make a left turn at the time of the accident is not supported by the deposition testimony of the other driver, Moses Williams, one of the only eye witnesses to the accident. In his sworn deposition, Mr. Williams testified that he did not know which direction Ms. Falcon intended to travel because Ms. Falcon's vehicle did not have its turn signal activated prior to the crash. Mr. Falcon argued that as the investigating officer's testimony and photographs of the accident scene clearly indicated that the accident occurred in the right-hand lane of La. Hwy. 1, it could not be said with certainty that Ms. Falcon was attempting to execute a

left-hand turn at the time of the accident. Accordingly, it was the position of Mr. Falcon that absent proof his daughter intended to execute a left turn, defendants were not entitled to avail themselves of the presumption of negligence that is imputed to a left-turning motorist.

In contending that his daughter ran the stop sign at the intersection of St. Louis Road with La. Hwy. 1, and must therefore be presumed to have been at fault in causing the resulting collision, Mr. Falcon argued that defendants conveniently elected to overlook testimony that directly contradicted their assumptions. Mr. Falcon averred that although the deposition testimony of the other driver, Mr. Williams, indicated Ms. Falcon failed to stop at the stop sign, a view later recounted by State Police troopers on the scene, this version of the accident was directly contradicted by the deposition testimony of Ms. Falcon's daughter Abigail, who was a passenger in her mother's car on the morning of the accident. In her deposition testimony, Abigail unequivocally recalled that just prior to the accident her mother stopped at the stop sign. Mr. Falcon further averred that such conflicting testimony established the existence of a genuine issue of material fact as to whether his daughter stopped at the stop sign. Mr. Falcon further cited **Hayes v. Western United Insurance Company**, 96-556, p. 4 (La. App. 5 Cir. 11/14/96), 685 So.2d 228, 230; **Osborne v. Vulcan Foundry, Inc.**, 95-2766, p. 9 (La. App. 4 Cir. 5/29/96), 675 So.2d 837, 842; and **Sanders v. City of Blanchard**, 438 So.2d 714, 717 (La. App. 2 Cir. 1991); for the proposition that courts in Louisiana have consistently recognized that "summary judgment is not appropriate where the trier of fact must weigh conflicting evidence in order to reach a conclusion upon which reasonable men could differ." Mr. Falcon argued that it is inappropriate for purposes of summary judgment to ignore evidence that directly contradicts an assumption in order to conclude that a fact is undisputed.

Finally, in response to the defendants' contention that the accident was caused by his daughter's failure to act as a reasonably prudent motorist, Mr. Falcon asserted that it was the placement of Mr. Patrick's political billboard on the property of Gay and within DOTD's right-of-way that created a sight obstruction that obscured the view of oncoming

traffic by motorists such as his daughter. In support of this position, Mr. Falcon relied upon La. R.S. 48:461.2(A)<sup>5</sup>, and cited **Poland v. Glenn**, 623 So.2d 227, 231-232 (La. App. 2 Cir. 1993), writ denied, 629 So.2d 1171 (La. 1993), for the proposition that the violation of a statute or ordinance constitutes negligence *per se*. Mr. Falcon also put forth a video taken by his daughter's mother, Brenda Bueche, documenting the sight obstruction posed by this billboard to motorists traveling at night, as well as the deposition testimony of Ms. Bueche and State Police Sergeant Kirk D. Martin. In her deposition testimony, Ms. Bueche confirmed the observations depicted in her video, namely that the lights of vehicles on La. Hwy. 1 approaching the St. Louis Road intersection at night were completely obscured for 15.3 seconds due to the presence of the billboard. Sergeant Martin conceded in his deposition testimony that the presence of the sign obstructed the vision of motorists at a certain point.

Mr. Falcon argued that whether his daughter stopped at the stop sign remained an unresolved issue of material fact. The testimony of his expert, Michael S. Gillen, accompanied by Mr. Gillen's affidavit established that the political billboard obscured Ms. Falcon's view when she was stopped. In addition, the sworn deposition testimony of Ms. Bueche and Sergeant Martin established that the political billboard constituted an obstruction to the vision of motorists traveling along St. Louis Road and La. Hwy. 1.

Mr. Falcon further asserted that DOTD and Gay, the landowner, were on notice that said billboard was located within the State's right-of-way, yet they knowingly maintained this defective or unreasonably dangerous condition by failing to alter the location of, or removing, the political billboard. In contrast to the **Stewart** case cited by defendants, Mr. Falcon cited and argued that **Irion v. State ex rel. Dept. of Transp. and Development**, 98-2616, p. 9 (La. App. 1 Cir. 5/12/00), 760 So.2d 1220, 1229 writ denied, 2000-2365 (La. 11/13/00), 773 So.2d 727, was more applicable to the facts presented in this case. In **Irion**, DOTD was found to be 50% at fault for its failure to

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<sup>5</sup> Louisiana Revised Statute 48:461.2(A) provides, in pertinent part, that "No outdoor advertising shall be erected or maintained within six hundred sixty feet of the nearest edge of the right of way and visible from the main traveled way of the interstate or primary highways in this state . . . ."

take affirmative action with respect to trees situated outside of its right-of-way that obscured motorists' view of oncoming traffic. **Id.**, 98-2616 at p. 15, 760 So.2d at 1232. Due to the existence of genuine issues of material fact, Mr. Falcon urged that summary judgment should be denied.

Following a hearing, the trial court released DOTD, Gay, the owner of the property, and Gay's insurer, Farm Bureau. At the hearing on the motion, the trial court opined:

Based upon what has been submitted, I think that it is clear [to] the Court that the custody and control and [garde] of that sign, that being a political sign, which was placed in the State's right-of-way was owned by Glen Patrick and through whatever association that has with Bayou Fabricators. And, I think that Glen Patrick, Bayou Fabricators, whoever the owner or whoever had the [garde] of that sign had a duty also under the law not to place it in an unlawful manner in an unlawful place. And even though it may be clear that it did not cause an obstruction, I still think there is a genuine issue of material fact as to whether or not it contributed to the cause of this accident based upon its placement.

....

However, I feel that with regard to, there has been nothing demonstrating that there is a material issue of genuine fact as regards the Gay Planning [sic] Company and its insurer or the Department of Transportation and Development.

So, I will grant the motion for summary judgment as to those two entities as well as the insurer of E.J. Gay, and I will deny the motion for summary judgment as to Glen Patrick, his insurer, and Bayou Fabricators and its insurer.

We note from a review of defendants' motion for summary judgment together with a review of the transcript of the summary judgment hearing that the custody, control, and garde of the political billboard was not the issue before the trial court. The real issues were whether the billboard obscured the view of Ms. Falcon thereby creating an unreasonable risk of harm, and whether Ms. Falcon operated her vehicle as a reasonably prudent motorist under the circumstances present on the morning of the accident. Finding Ms. Falcon at fault with respect to the operation of her vehicle does not necessarily relieve defendants of all liability because Louisiana is a comparative fault state. See, La. Civ. Code art. 2323.

Based upon our review of the record together with the evidence adduced at the hearing in this matter, we find that the trial court legally erred in concluding that there had been no evidence to demonstrate the existence of an issue of material fact with respect to Gay, Farm Bureau, or DOTD, and in granting summary judgment as to these

defendants. In the opinion of this court, serious unresolved issues of fact remain with respect to the obstruction posed by the placement of the political billboard on the property owned by Gay and within the State's right-of-way. Consequently, such issues are not properly decided by way of summary judgment.

It is undisputed that at a certain point, the placement of this billboard obstructed the view of motorists traveling on St. Louis Road. Defendants submit that a sight obstruction is only actionable if it causes an unreasonably dangerous condition and that for at least 23.3 feet prior to entering the intersection motorists on St. Louis Road had an unobstructed view of approaching traffic on La. Hwy. 1. In daylight, under ideal conditions, this may be true; however, this accident occurred in the early morning darkness during a heavy rainstorm. Under these conditions, Ms. Falcon may not have been able to discern the presence of the sign, or realize even that her sightline was being obscured. For these reasons, the trial court's grant of summary judgment as to Gay, Farm Bureau, and DOTD was unwarranted.

### **CONCLUSION**

For the above and foregoing reasons, we hereby reverse the trial court's grant of summary judgment as to Gay, Farm Bureau, and DOTD as outstanding issues of fact remain. This matter is remanded for further proceedings consistent with this opinion. All costs associated with this appeal shall be assessed against Gay, Farm Bureau, and DOTD.

**REVERSED IN PART, AND REMANDED.**