

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1924

**JAMES THOMAS, SR., LUCILLE MARIE LANDRY, JACOB ALLEN
THOMAS, CHELSEA MARIE LANDRY, LEXIE LYNN LANDRY AND
JADE ELAINE THOMAS**

VERSUS

**STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT AND BARRIERE
CONSTRUCTION COMPANY, L.L.C.**

Judgment Rendered: May 8, 2009

Appealed from the

Seventeenth Judicial District Court

In and for the Parish of Lafourche, State of Louisiana

Docket Number 100723

The Honorable F. Hugh Larose, Judge Presiding



**James Thomas, Sr.
Angie, LA**

**Plaintiff/Appellant in Proper Person,
James Thomas, Sr.**

**Lucille Marie Landry
Gulfport, MS**

**Plaintiff/Appellee in Proper Person,
Lucille Marie Landry**

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BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.

WHIPPLE, J.

This matter is before us on appeal by plaintiff, James Thomas, Sr., from a judgment of the trial court granting summary judgment and dismissing his claims against defendant, Barriere Construction Company, L.L.C.¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This litigation arises from a single-car accident that occurred on February 14, 2004, near Port Fourchon in Lafourche Parish. At approximately 8:30 p.m., James Thomas, Sr. was driving his vehicle on Louisiana Hwy. 1 in a southerly direction with his daughter, Jade, and son, Jacob, in the vehicle with him. After passing through a construction area, Thomas drove his vehicle off the roadway, struck a utility pole, and rolled over landing upside down in a body of water. As a result of the accident, Jade died and Jacob received injuries.

At the time of the accident, Thomas was driving with a suspended license, due to his multiple DWI arrests. Notably, the blood alcohol content analysis taken at Terrebonne General Medical Center after the accident revealed that his blood alcohol content was .24g%. Thomas was subsequently convicted of vehicular homicide and sentenced to twenty years imprisonment at hard labor. See State v. Thomas, 2005-2210 (La. App. 1st Cir. 6/9/06), 938 So. 2d 168, writ denied, 2006-2403 (La. 4/27/07), 955 So. 2d 683.

While confined to the Lafourche Parish Detention Center, on February 14, 2005, one year after the accident, Thomas filed this lawsuit against the State of Louisiana, through the Department of Transportation and Development (DOTD) and Barriere Construction, seeking damages in excess of one million

¹Although a motion and order of appeal was entered by James Thomas, Sr. on behalf of “James Thomas, Sr., et. al.,” the only party appearing in this appeal is James Thomas, Sr. *pro se*. No other plaintiff or attorney on behalf of any other plaintiff filed an appeal or made an appearance in the appeal. Thus, to the extent that the underlying judgment dismissed the plaintiffs’ claims, the judgment of dismissal is final as to any claims of the other plaintiffs herein.

dollars. Therein, Thomas alleged that a “red eighteen wheeler type truck” was coming toward him traveling north and appeared to be on the double yellow lines in the center of the highway causing him to “take the shoulder” to his right. Thomas further alleged that after passing the truck, he attempted to re-enter the highway on the milled section. Once he did so, his vehicle began to “fishtail to the right” and when he tried to regain control, he hit a “bump” at the end of the milled section of the roadway where the milled or graded section of the highway transitioned to the original highway, causing him to lose control of his vehicle.

At the time of the accident, Barriere Construction was performing construction work on a portion of Louisiana Hwy. 1 north of where the accident occurred pursuant to a contract with the DOTD identified as State Project No. 064-02-0026. Pursuant to its contract with the DOTD, Barriere was to provide materials, equipment, and labor, and perform all work for State Project No. 064-02-0026.

On October 9, 2007, Barriere filed a motion for summary judgment, contending there were no genuine issues of material fact and that it was entitled to judgment as a matter of law pursuant to LSA-R.S. 9:2771, the “contractor’s immunity statute.” Barriere argued that it was not at fault in any way in causing the accident because: (1) it did not design the roadway in question; (2) its work was performed according to the plans and specifications of its contract; and (3) it had no justifiable reason to believe that its adherence to the plans and specifications created a hazardous condition. Instead, Barriere contended the sole cause of the accident was Thomas’ intoxication.

On November 13, 2007, Thomas filed an opposition to Barriere’s motion for summary judgment and alternative cross-motion for summary judgment, contending that he was entitled to judgment as a matter of law pursuant to LSA-

C.C. art. 2769.² Therein, Thomas contended that Barriere's failure to reduce the speed limit "near" where the construction repairs were being performed contributed to the accident herein. In support, Thomas cited Section 713.04(c) of Louisiana Standard Specifications for Roads and Bridges, which, according to Thomas, recommends that the pre-existing speed limit be reduced by 10 m.p.h. where maintenance work has degraded the condition of the original roadway in a construction zone.

On November 30, 2007, the trial court heard argument on both motions. By judgment dated December 18, 2007, the trial court denied Barriere's motion for summary judgment and Thomas' cross-motion for summary judgment, finding that a factual issue remained as to whether the posted speed limit should have been reduced.

On February 19, 2008, Barriere re-urged its motion for summary judgment and presented additional evidence in support of the motion. The re-urged motion was argued before trial court on June 17, 2008. At the conclusion of the hearing, the trial court granted Barriere's motion for summary judgment and ruled as follows:

[Barriere] met their threshold burden ... through the use of affidavits, the exhibits, the deposition testimony and the other proof, it is clearly shown from both the accident report and the testing that was performed on the roadway following the accident ... that your intoxication at the time of the accident was a precipitating factor in the cause of the accident that ultimately resulted in the death of your daughter. And of course, that was borne in the criminal trial.

²Louisiana Civil Code article 2769 provides as follows:

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

The affidavits, the evidence presented to the Court today clearly shows that Barriere met the standards as required under the contractual obligations with the State of Louisiana. That they posted those signs that were necessary and according to the affidavit of the trooper[,] there was nothing in the construction area that affected your driving. There were no skid marks, there were no yaw marks showing, as you indicated, that you were going sideways down the road. There was no physical evidence that supports your theory of what occurred on that date.

The affidavit of Ms. D'Angelo indicates that she was frequently at the construction site, I believe two or three times per week, and that the road site itself did not result in the degradation of the roadway to such an extent as would require, under the highway standards, the placement of any additional warning signs.

Based upon the evidentiary presentation today, the arguments of both parties, and the very voluminous record, which at this point consists of several thousand pages, and the history the Court has had with this matter, I'm at this time going to grant the motion for summary judgment finding that Barriere has proven that there are no material issues of fact and they are entitled to summary judgment pursuant to Article 966 of the Code of Civil Procedure.

On June 27, 2008, the trial court signed a written judgment granting summary judgment in favor of Barriere Construction. Thomas appealed from this judgment. Upon examining the record, however, this Court noted an apparent defect in the appeal, in that the judgment signed on June 27, 2008, did not contain appropriate decretal language disposing of or dismissing the claims of plaintiffs. Accordingly, this Court issued a show-cause order allowing the parties to show cause as to why the appeal should or should not be dismissed for these reasons. In response to the show cause-order by this Court, on January 5, 2009, the trial court signed an "Amended Judgment" containing appropriate decretal language dismissing plaintiffs' claims against Barriere Construction and further designating the judgment as a final appealable judgment in accordance with LSA-C.C.P. art. 1915. Accordingly, on January 15, 2009, the show-cause order was recalled and this appeal was maintained.

On appeal, Thomas contends that the trial court erred in granting Barriere's motion for summary judgment and in finding that Thomas' intoxication, not the alleged "bump" in the highway caused by Barriere's failure to meet the applicable standards during construction, was a precipitating factor in causing the accident herein.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. It should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, the movant's burden does not require him to negate all essential elements of the adverse party's claim. Rather, the movant need only show that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2); Asberry v. The American Citadel Guard, Inc., 2004-0929 (La. App. 1st Cir. 5/6/05), 915 So. 2d 892, 894.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Granda v. State Farm Mutual Insurance Company, 2004-2012 (La. App. 1st Cir. 2/10/06), 935 So. 2d 698, 701. Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in

dispute is material can be seen only in light of the substantive law applicable to the case. Gomon v. Melancon, 2006-2444 (La. App. 1st Cir. 3/28/07), 960 So. 2d 982, 984, writ denied, 2007-1567 (La. 9/14/07), 963 So. 2d 1005.

Louisiana Revised Statute 9:2771, entitled, “Non-liability of contractor for destruction or deterioration of work,” provides immunity for contractors as follows:

No contractor, including but not limited to a residential building contractor as defined in R.S. 37:2150.1(9), shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications. This provision shall apply regardless of whether the destruction, deterioration, or defect occurs or becomes evident prior to or after delivery of the work to the owner or prior to or after acceptance of the work by the owner. The provisions of this Section shall not be subject to waiver by the contractor.

The duty of a contractor is to build the thing in accordance with the plans and specifications of the owner. City of Covington v. Heard, 428 So. 2d 1132, 1134 (La. App. 1st Cir. 1983). Generally, however, a contractor owes third parties a duty to exercise ordinary care and refrain from creating hazardous conditions in the fulfillment of its contractual obligations. Morgan v. Lafourche Recreation District No. 5, 2001-1191 (La. App. 1st Cir. 6/21/02), 822 So. 2d 716, 721, writ denied, 2002-1980 (La. 10/25/02), 827 So. 2d 1156.

A contractor is not the guarantor of the sufficiency of plans and specifications drawn by another, and if it complies with those plans and specifications, it is entitled to immunity under LSA-R.S. 9:2771. Morgan v. Lafourche Recreation District No. 5, 822 So. 2d at 721. Where the plans and specifications are deficient and injury results, the fault for any resulting injuries rests with the persons preparing such plans and specifications. Ortego v. State Bank and Trust Company of Golden Meadow, 316 So. 2d 826, 828 (La. App. 1st

Cir.), writ denied, 320 So. 2d 914 (La. 1975). Nonetheless, in order to avoid liability, the contractor must prove either that the condition created was not hazardous or that it had no justifiable reason to believe that its adherence to the plans and specifications created a hazardous condition. Morgan v. Lafourche Recreation District No. 5, 822 So. 2d at 721. Since the contractor has the burden of proving the elements of the contractor's immunity defense under LSA-R.S. 9:2771, summary judgment herein was only proper if Barriere introduced sufficient undisputed evidence to satisfy its burden of proving these essential elements. Morgan v. Lafourche Recreation District No. 5, 822 So. 2d at 722.

Thomas contends that the basis of Barriere's liability herein is its failure to adequately warn of an alleged bump in the roadway where the graded or milled portion of the highway transitions to the original highway surface and to reduce the speed limit near the stretch of highway where construction repairs were being performed. Thus, to be afforded immunity herein under LSA-R.S. 9:2771, Barriere was required to prove that it complied with the plans and specifications designed by the DOTD, that the alleged "bump" transitioning the graded area of the highway to the original highway was not hazardous or that it had no justifiable reason to believe that its adherence to the plans and specifications created such a hazardous condition.

In support of its motion for summary judgment, Barriere presented: (1) the affidavit of Dawn Lewis D'Angelo, Barriere Construction's Project Manager; (2) the State Police Accident Report prepared by investigating officer, Trooper Donald R. Callais, Jr.; (3) an Accident Reconstruction Report; (4) a certified copy of Thomas' conviction for vehicular homicide; (5) the certificate of Final Acceptance of State Project No. 064-02-0026; (6) a copy of plaintiffs' amended petition; and (7) a statement of seven uncontested issues of fact. In support of its re-urged motion for summary judgment, Barriere additionally presented the

affidavit of Trooper Blanchard, a supplemental affidavit of Dawn Lewis D'Angelo, and a statement setting forth twenty-three uncontested issues of fact.³

Ms. D'Angelo testified that Barriere entered into a contract with the DOTD to provide all materials, equipment, and labor, and to perform all work including laying of asphalt for Project No. 064-02-0026, entitled "La. 1 Embankment Stabilization." She further attested that she was at the job site two to three times a week and was personally aware that the plans and specifications for the work done under the contract were prepared by the DOTD and that Barriere worked from the DOTD's plans without deviation. Ms. D'Angelo attested that she had personal knowledge of the road construction in the area of the accident at the time of the accident, and that the construction did not cause any obstruction in the traffic nor had it "degraded the condition of the original highway" so as to require a reduction in the posted speed limit pursuant to Section 713 of the Louisiana Standard Specifications for Roads and Bridges. Ms. D'Angelo further attested that at no time did the DOTD, the engineer, or the plans and specifications call for a reduction in the posted speed limit due to construction in the area of the accident herein.

In order to further establish compliance with the contract plans and specifications, Barriere introduced the DOTD's Final Acceptance of Project No. 064-02-0026, which certified that the final inspection of all work performed by Barriere Construction was made on May 24, 2004, and that all phases of work under the contract were "satisfactorily completed."

Thomas failed to produce any evidence to controvert these statements or to show that Barriere designed or created the plans and specifications for the

³With regard to the statements of uncontested facts filed by Barriere in support of its original and re-urged motions for summary judgment, we pretermitt discussion of their evidentiary value, if any, and whether these statements comply with Rule 9.10 of the Rules for Louisiana District Courts as there is nothing in the record before us to indicate that the trial court considered or relied upon them in making its ruling.

construction of the roadway near the scene of the accident herein. Further, Thomas failed to make the required showing in opposition to Barriere's showing or that any factual questions remain as to Barriere's proof of compliance with the DOTD's plans and specifications. Accordingly, we find no genuine issues of material fact remain, as the record establishes that Barriere did not prepare the plans and specifications for the design of the roadway and that Barriere complied with the plans and specifications provided by the DOTD.

With reference to Thomas' claim that Barriere's compliance with the plans and specifications created a hazardous condition, we note that the accident report prepared by Trooper Callais shows that the posted speed limit in the stretch of highway where the accident occurred was 55 m.p.h. and that there was a "Bump" sign posted on the southbound shoulder of the highway in the milled section. The report also reflects that despite this posted limit, immediately following the accident, Thomas reported to Trooper Callais that he was traveling at a rate of 65 m.p.h. when the accident occurred. Trooper Callais further documented the roadway conditions therein, stating that "the milled section just north of the crash site has no great changes on each approach and does not seem to be a factor in the crash." Notably, Trooper Callais documented that "alcohol involvement is suspected" in the accident, and that there was a "strong smell of an alcoholic beverage emitting from [Thomas'] breath." In connection with his investigation of the accident, Trooper Callais performed a "test run" traveling over the portion of the roadway where the milled section transitioned to the non-milled roadway at 65 m.p.h. In doing so, Trooper Callais noted "no adverse controllability ... the milled section is not believed to be a factor in this crash."

The affidavit testimony of Lt. Richard Blanchard of the Louisiana State Police was also offered by Barriere. Trooper Blanchard testified that he was called to investigate the accident at issue herein. He was tendered and accepted

by the trial court as an expert in the field of accident reconstruction in Thomas' criminal proceedings on the charges resulting from this accident and was called to testify therein on behalf of the state. Trooper Blanchard physically walked the 93-foot milled or graded section of the highway in the vicinity of the accident and found a tapered area at the end of the milled section. He attested that the taper was made to provide, and did provide, a smooth transition from the milled area to the existing roadway. Trooper Blanchard specifically testified that there were no abrupt "bumps" at the point of re-entry when leaving the milled area of the roadway and that there was no evidence whatsoever that Thomas' vehicle abruptly left the roadway. Moreover, Trooper Blanchard's investigation revealed that Thomas' vehicle left the roadway 115 feet past the tapered area and traveled another 103 feet prior to hitting a utility pole. Trooper Blanchard found no signs of braking by Thomas' vehicle, or any evidence whatsoever that Thomas was trying to avoid or evade something in the roadway.

In the course of his investigation, Trooper Blanchard also drove over the roadway in the area of the milled section and before the milled section conducting seven tests at various speeds of 55 m.p.h., 65 m.p.h., and 75 m.p.h. Trooper Blanchard testified that in the multiple tests he conducted, he encountered no problems negotiating the turn over this section of the roadway. After completing his investigation of the accident, Trooper Blanchard determined that the travel of Thomas' vehicle was consistent with someone who had "straightened out the road" or fallen asleep at the wheel. Importantly, through the course of his investigation, Trooper Blanchard was able to rule out the following factors as contributing factors to the crash: (1) the speed at which Thomas was traveling; (2) the condition of the roadway; (3) placement of road signs; and (4) road construction. Instead, the results of his investigation revealed that the accident was caused by Thomas' grossly intoxicated condition at the time of the accident.

On review, we note that Trooper Blanchard's findings were consistent with the details and facts set forth in the accident report prepared by Trooper Callais.

Barriere also presented an accident reconstruction report prepared by Trooper Kevin Marcel and Sgt. Darrin Naquin with the Reconstruction Office at State Police Troop C. Attributing the accident to Mr. Thomas' intoxication on the night of the accident, the reconstruction report noted:

As he entered the left-banking curve on LA., he was unable to negotiate the curve. Once off the roadway on the grassy shoulder, he attempted to regain control but to no avail. The vehicle struck a large utility pole and rotated counter-clockwise before rolling into the canal. The front-seat passenger drowned as a result of the crash. The cause of the crash was driver condition (intoxication).

The report further noted that construction and "Bump" signs were posted accordingly and were of the right size.

In response to the evidence and showing made by Barriere, Thomas relies upon photographs of the roadway in question, affidavits of family members, and the trial testimony of Sgt. Richard Blanchard from Thomas' criminal proceedings. Although Thomas presented photographs, which allegedly show the roadway area containing a "bump," Thomas failed to produce any expert testimony or evidence to otherwise establish that the bump was or created a hazardous condition. Moreover, the testimony of Trooper Blanchard from Thomas' criminal proceedings where Trooper Blanchard was accepted by the court as an expert in accident reconstruction was consistent with Trooper's Blanchard's affidavit and the findings submitted by Barriere. On review, we note that none of the evidence set forth by Thomas countered the showing in Ms. D'Angelo's testimony that the roadway work had not "degraded" the condition of the original roadway such that it warranted a reduction in the posted speed limit pursuant to Section 713 of the Louisiana Standard Specifications for Roads and Bridges or Sgt. Blanchard's testimony regarding his investigation and testing, which established that speed

was not a contributing factor to the accident. In sum, Thomas has failed to set forth any evidence whatsoever to establish or show that the failure to post a reduced speed limit had any causal connection with the accident herein.

When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond or fails to make the required showing, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B).

Considering the record before us, we find Barriere sufficiently proved that the “bump” was not a hazardous condition, and further, that Barriere had no justifiable reason to believe (nor does the record show) that its adherence to and compliance with the plans and specifications designed by the DOTD created a hazardous condition. Thus, the record establishes that Barriere is entitled to the immunity provided in LSA-R.S. 9:2771. Inasmuch as Thomas failed to offer evidence to rebut this showing, summary judgment was appropriate herein.

CONCLUSION

Overall, in response to Barriere’s showing, Thomas has failed to produce any evidence to show that Barriere designed the plans and specifications or that Barriere did not fully comply with the plans and specifications designed by the DOTD. Considering the testimony of Ms. D’Angelo and the certificate of Final Acceptance issued to Barriere by the DOTD, we find there is no genuine issue of material fact remaining as Barriere did not design any portion of the roadway at issue herein and Barriere completed the project in full compliance with the plans provided by the DOTD. Moreover, Thomas has failed to present evidence to rebut Barriere’s showing that the “bump” was not a hazardous condition

warranting a reduction in the posted speed limit, or that speed was even a factor contributing to the crash herein. Thus, we find no genuine issue of fact remains on this issue as well. Absent a showing that the bump in the roadway created a hazardous condition or that Barriere had a justifiable reason to believe that its adherence to the DOTD's plans and specifications created a hazardous condition, Barriere was entitled to judgment in its favor as a matter of law.

Accordingly, for the above and foregoing reasons, the January 5, 2009 judgment of the trial court is affirmed. Costs of this appeal are assessed against the plaintiff/appellant, James Thomas, Sr.

AFFIRMED.