**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 2185**

**JESSICA R. BIEBER, KEVIN C. BIEBER, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, CAROLINE J. BIEBER**

**VERSUS**

**GENESIS INDEMNITY INSURANCE CORPORATION, PARISH OF ASCENSION, AND JERRY G. BABIN, JR.**

Judgment Rendered: NOV - 3 2006

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On Appeal from the 23rd Judicial District Court
In and For the Parish of Ascension, State of Louisiana
Trial Court No. 74,374, Division "B"

Honorable Thomas Kliebert, Jr., Judge Presiding

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| Lexlee Overton<br>Baton Rouge, LA | Counsel for Plaintiffs/Appellants<br>Jessica R. Bieber, Kevin C. Bieber,<br>Individually and on Behalf of Their<br>Minor Child, Caroline J. Bieber |
| G. Bruce Parkerson<br>H. Edward Barousse<br>New Orleans, LA | Counsel for Defendant/Appellee<br>Genesis Insurance Company |
| Ricky L. Babin<br>Gonzales, LA | Counsel for Defendants/Appellees<br>Parish of Ascension and<br>Jerry G. Babin, Jr. |

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

Pettigrew, J. Concurs with Results

**HUGHES, J.**

This is an appeal from a summary judgment granted in a lawsuit arising out of an automobile accident, finding no liability on the part of the defendants. For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

On February 25, 2002, the plaintiff, Jessica R. Bieber, was en route from her home in Prairieville, Louisiana, to the school where she worked as a teacher in Gonzales, Louisiana. At approximately 7:42 a.m., Ms. Bieber's vehicle impacted the rear end of a slow moving Fiatallis tractor (a road grader) while traveling south on Highway 61. Ms. Bieber, who was seven months pregnant immediately went into labor and subsequently, gave birth to her daughter, Caroline, prematurely.

On January 30, 2003, Mr. and Ms. Bieber filed suit against the driver of the tractor, Jerry G. Babin, Jr., and his employer, the Parish of Ascension, along with its insurer, Genesis Insurance Company ("Genesis"), alleging that both Ms. Bieber and her child were personally injured in the accident, and that as a result, Mr. Bieber sustained the loss of consortium, love, service, and society of his wife. Ms. Bieber further alleged that the driver of the tractor, Jerry G. Babin, Jr., while in the course and scope of his employment with Ascension Parish, was negligent and/or at fault in: driving in a reckless and careless manner, "time and place considered;" driving at a dangerously slow speed on a major highway during morning rush hour traffic; in failing to keep a proper lookout and move to the shoulder of the road; in failing to have proper safety lights and signs on the vehicle; and in failing to warn traffic of slow moving machinery on the highway.

Defendants answered the suit denying fault and asserting that the accident was caused solely by the negligence of Ms. Bieber, in the following

particulars: in failing to keep a proper lookout; in failing to keep her vehicle under proper control; in following too closely to the traffic in front of her; in operating her vehicle at an excessive rate of speed under the traffic conditions; and in colliding into the rear of defendants' vehicle. Genesis further answered asserting the fault of unnamed third parties.

The defendants thereafter filed a motion for summary judgment. Evidence submitted in connection with the motion included the depositions of Mr. Babin and Ms. Bieber, photographs of the accident scene, and the affidavit of Craig Wascom. Following a hearing on February 14, 2005, the trial court granted the summary judgment in defendants' favor and dismissed plaintiffs' suit.

Plaintiffs have appealed and assert that the trial court erred in granting summary judgment, contending that a genuine issue of material fact remains as to whether the operation of a slow moving vehicle on a high-speed multi-lane highway without displaying the proper warning signs was in violation of state highway safety laws, and therefore a cause-in-fact of the collision. Plaintiffs/appellants also contend there was a genuine issue of material fact as to whether the plaintiff had an unobstructed view of the road grader prior to impact.

## LAW AND ANALYSIS

Motion for Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration 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; **Schroeder v. Board of Supervisors of Louisiana State University**, 591 So.2d 342, 345 (La. 1991). In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.** at 765-6.

Pursuant to LSA-C.C.P. art. 966(C)(2), the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted.

Moreover, as consistently noted in LSA-C.C.P. art. 967, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence that will establish that material facts are still at issue. **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

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 the case. See **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-9.

Highway Safety Law

In the instant case, plaintiffs/appellants contend that the defendants violated LSA-R.S. 32:64, 32:71, and 32:77, and that these violations were a cause-in-fact of the accident in question. These statutes provide as follows:

> **§ 64. General speed law**
>
> A. No person shall drive a vehicle on the highway within this state at a speed greater than is reasonable and prudent under the conditions and potential hazards then existing, having due regard for the traffic on, and the surface and width of, the highway, and the condition of the weather, and in no event at a speed in excess of the maximum speeds established by this Chapter or regulation of the department made pursuant thereto.
>
> B. Except when a special hazard exists that requires lower speed for compliance with paragraph A of this section, no person shall operate or drive a motor vehicle upon the highways of this state at such a slow speed as to impede the normal and reasonable movement of traffic.
>
> C. Rolling roadblocks shall be prohibited from operating on all Interstate highways in the state.

## § 71. Driving on right side of road; exceptions

A. Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement, including passing lanes;

(2) When the right half of a roadway is closed to traffic while under construction or repair;

(3) Upon a roadway designated and signposted for one-way traffic.

B. (1) Upon all multilane highways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the circumstances then existing, shall be driven in the right-hand lane then available for traffic except when preparing for a left turn at an intersection or into a private road or driveway, or passing or overtaking a vehicle proceeding in the same direction, if passing on the left side of it. Nothing herein contained shall be construed to authorize driving any vehicle in the left lane so as to prohibit, impede or block passage of an overtaking vehicle in such lane and in such event the vehicle in the left lane prohibiting, impeding or blocking passage of an overtaking vehicle shall expeditiously merge into the right lane of traffic.

(2) In addition to the requirement of Paragraph 1 hereof, any vehicle proceeding on a multilane highway at a speed slower than ten miles per hour less than the posted maximum speed limit shall be driven in the right hand lane then available for traffic, or as close as practicable to the right hand curb or edge of the roadway, except when overtaking and passing a vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway. Persons in violation of this Paragraph shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both. [Footnote omitted.]

## § 77. No passing zones

A. The Department is hereby authorized to determine those portions of any highway where overtaking and passing or driving to the left of the roadway would be especially hazardous, and shall by appropriate signs or markings on the roadway indicate the beginning and end of such zones, and when such signs and markings are in place and are clearly visible to an ordinary observant person, every driver shall obey the directions thereof.

B. Where signs or markings are in place to define a no-passing zone as set forth in paragraph A, no driver shall at any time drive on the left side of the roadway within such zone, or on the left side of any pavement striping, designated to mark such no-passing zone, throughout its length.

In brief to this court, plaintiffs/appellants assert that driving the road grader on Highway 61 violated the cited statutes for the following reasons: the grader could have been moved by "loading the same upon a trailer;" and because "there is no reason that the grader could not have been driven safely on the shoulder."

Further, plaintiffs/appellants contend that the road grader failed to display the appropriate slow moving vehicle emblem in violation of LSA-R.S. 32:377, which states:

> **§ 377. Slow moving vehicle, identification**
>
> Every motor vehicle, combination of motor vehicle and towed equipment, every self-propelled unit of equipment, self-propelled implement of husbandry, or towed implement of husbandry normally operating at speeds not in excess of twenty-five miles per hour on public streets and roads at all times shall be equipped with a slow moving vehicle emblem as follows:
>
> (1) Where the towed unit or any load thereon obscures the slow moving vehicle emblem on the towing unit, the towed unit shall be equipped with a slow moving vehicle emblem.
>
> (2) Where the slow moving vehicle emblem on the towing unit is not obscured by the towed unit or its load, then either or both may be equipped with the required emblem, but it shall be sufficient if either has it.
>
> (3) The emblem required shall comply with current standards and specifications as established by the American Society of Automotive Engineers and approved by the commissioner.

In support of the judgment rendered in its favor, defendants/appellees contend that plaintiffs failed to present any competent evidence to overcome the presumption of Ms. Bieber's negligence created by LSA-R.S. 32:81, which provides:

> **§ 81. Following vehicles**
>
> A. The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.
>
> B. The driver of a motor truck, when traveling upon a highway outside a business or residential district, shall not

> follow another motor truck within four hundred feet, but this shall not be so construed as to prevent one motor truck from overtaking and passing another.
>
> C. Motor vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade, whether or not towing other vehicles, shall be so operated as to allow sufficient space between each such vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger. This provision shall not apply to a funeral procession.

Although the issues before the court initially appear to involve a question of fact, our examination of the record reveals that there is no genuine issue of material fact in this case. All evidence submitted in support of the motion for summary judgment established that the road grader was clearly visible to following traffic.

In his deposition, Mr. Babin testified that the grader was bright orange, roughly ten and one-half feet in height, eight and one-half feet in width, and equipped with a flashing beacon, which was mounted on top of the engine compartment and was six feet from the ground. Mr. Babin also testified that in addition to the flashing beacon, the grader was equipped with "flashers" and "blinkers;" and that all of the lights were working on the day of the accident. During the hearing before the trial court, plaintiffs' counsel agreed that the road grader had operating flashing lights at the time of the accident. Defendants concede there was no slow moving warning sign on the grader.

Mr. Babin further testified that he had just turned onto Highway 61 (Airline Highway) at Roddy Road, and shifted through all the grader's gears to reach the maximum operating speed of nineteen miles per hour, when Ms. Bieber's car struck the rear of the grader. He stated that the accident occurred approximately one-half mile past the intersection. On that section of the highway, Mr. Babin stated that the speed limit was between 45 and 55

miles per hour. After the accident, Mr. Babin did not see any skid marks at the scene; nor do the photographs of the accident scene reflect any.

In her deposition, Ms. Bieber testified that she was on her way to work, traveling southbound on Airline Highway, which is a four-lane highway with two northbound and two southbound lanes. The traffic was steady but not stop and go. Ms. Bieber stopped at a traffic light behind two or three other cars. After the light turned green, Ms. Bieber began to accelerate her vehicle and remembers "just seeing orange;" she slammed on her brakes and hit the back of the grader. Ms. Bieber testified that she saw the size of the vehicle ahead of her and knew it was a utility vehicle, but she did not recall seeing any flashing lights or warning signs. Ms. Bieber could not recall at what speed she was traveling at the time of the accident, thought she admits she was "picking up speed" after coming through the traffic light.

After a careful review of the record in this case, we conclude that no evidence was presented to show that Mr. Babin's operation of the road grader ran afoul of LSA-R.S. 32:64, 32:71, or 32:77. Although he was traveling at a speed less than the posted speed limit, he was traveling to the right of the roadway as required by LSA-R.S. 32:71(B)(2).[1] And even though the grader did not have a slow moving vehicle emblem as required by LSA-R.S. 32:377, the evidence is clear that such failure was not a cause-in-fact of the accident.

The only evidence presented on motion for summary judgment supports the conclusion that the accident was caused solely by the fault of Ms. Bieber in failing to observe the clearly-visible grader in time to either change lanes or safely reduce the speed of her vehicle. Ms. Bieber argues

[1] We are unpersuaded by plaintiffs' unsupported argument that these statutes required Mr. Babin to either transport the road grader on a trailer or to drive it exclusively on the shoulder.

the evidence raises a question of fact as to whether another vehicle was traveling in front of her immediately prior to the accident and changed lanes suddenly, suggesting thereby that the court should infer that the other vehicle obstructed her view of the grader. However, it was clear from the testimony of Mr. Babin regarding the size of the road grader, and from the photographs of the vehicles, that the grader would have been visible to an attentive following driver even if another automobile had been between them.

A legal presumption exists that a following motorist who collides into the rear end of a leading automobile is at fault; he is presumed to have breached the standard of conduct prescribed in LSA-R.S. 32:81, and hence is presumed negligent. **Matherne v. Lorraine**, 2003-2369, p. 2 (La. App. 1 Cir. 9/17/04), 888 So.2d 244, 246. Under LSA-R.S. 32:81, a following motorist owes a high degree of care to maintain a reasonable and prudent distance behind a lead vehicle; the duty imposed by this statute is significant, so much so that a breach of this duty is presumed when a rear-end collision occurs. The burden of rebutting this presumption may be borne by a showing that the following motorist maintained control, closely observed the lead vehicle, followed at a safe distance under the circumstances, or that the lead vehicle negligently created an unavoidable hazard. **Bellas v. Dresser Industries, Inc.**, 564 So.2d 1305, 1307 (La. App. 1 Cir.), writs denied, 569 So.2d 988 (La. 1990). See **Chambers v. Graybiel**, 25,840, p. 8 (La. App. 2 Cir. 6/22/94), 639 So.2d 361, 367, writ denied, 94-1948 (La. 10/28/94), 644 So.2d 377. See also **Matherne v. Lorraine**, 2003-2369 at p. 3, 888 So.2d at 246 (lead driver failed to activate her turn signal and came to a sudden stop); **McCullin v. U.S. Agencies Casualty Insurance** Company, 34,661, p. 10 (La. App. 2 Cir. 5/9/01), 786 So.2d 269, 276 (lead driver accidentally

activated her left blinker and briefly moved to the left, misleading the following driver into believing the forward vehicle was turning left); **Boggs v. Voss**, 31,965, pp. 3-4 (La. App. 2 Cir. 6/16/99), 741 So.2d 139, 141-2 (lead vehicle's sudden, substantial, and last minute decrease in speed and/or stopping, after accelerating on an interstate entrance ramp, was found to present a hazard that could not reasonably be avoided by the following driver under the circumstances).

In the instant case, Ms. Bieber offered no competent evidence to rebut the presumption of negligence against her; she failed to show that she was closely observing traffic ahead of her; she failed to show that she was following at a safe distance under the circumstances; and she failed to demonstrate that any hazard presented by the slow-moving grader was unavoidable. Consequently, we must conclude that plaintiffs failed to bear their burden under LSA-C.C.P. art. 966 to establish their ability to bear their evidentiary burden of proof, and find there is no genuine issue of material fact in this case.

A similar factual scenario was before the Third Circuit in a case involving a following motorist who failed to discern at a distance of 800 to 1000 feet a tractor being pulled by a pick-up truck. In that case, the motorist contended that he would have seen an eleven-inch wide triangular warning sign, positioned on the rear of the tractor, had it been present. The Third Circuit found that such an inference could not reasonably be drawn, stating, "It is extremely improbable that an eleven-inch wide sign could be seen at a distance of 800-1000 feet where a large yellow tractor with red and silver discs, being pulled by a bright red and white truck, with a [fluorescent] orange insert across the entire rear glass could not even be distinguished or identified by [the following motorist] as he approached them. Reasonable

and fair-minded persons could reach no other conclusion but that failure to display the sign was not a factor at all in bringing about the accident, much less a 'substantial factor'." **Rougeau v. Commercial Union Insurance Company**, 432 So.2d 1162, 1168-9 (La. App. 3 Cir.), writ denied, 437 So.2d 1149 (La. 1983).

Thus, we conclude that the trial court did not err in granting summary judgment in favor of defendants in this case. Plaintiffs failed to present any evidence of any action or inaction on the part of the defendants herein that was a cause-in-fact of the traffic accident at issue. See **LeBlanc v. St. Landry Parish Police Jury**, 94-501, pp. 6-7 (La. App. 3 Cir. 12/7/94), 647 So.2d 614, 617.

## CONCLUSION

For the reasons stated, we affirm the judgment of the trial court granting summary judgment in favor of defendants, and dismissing plaintiffs' suit. All costs of this appeal are to be borne by plaintiffs/appellants, Jessica R. Bieber and Kevin C. Bieber, individually and on behalf of their minor child, Caroline J. Bieber.

**AFFIRMED.**