

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CA 0830

ANTONIO WHITE

VERSUS


HUB INTERNATIONAL GULF SOUTH, J.I.T. DISTRIBUTING, LLC,
DAVID HORNAK, RUSH TRUCKING, INC., STATE OF LOUISIANA THROUGH
THE DEPARTMENT OF TRANSPORTATION & DEVELOPMENT AND
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA
(IN ITS CAPACITY AS UNINSURED/UNDER-INSURED MOTORIST CARRIER)

Judgment rendered February 17, 2017.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C636425
Honorable William Morvant, Judge

* * * * *

A.M. TONY CLAYTON
MICHAEL P. FRUGE'
PORT ALLEN, LA
AND
EDWARD J. WOMAC, JR.
DOUGLAS J. WOMAC, JR.
JASON F. GILES
NEW ORLEANS, LA

JAMES M. DILL
DAVID P. VIAL, II
LAFAYETTE, LA

WADE A. JOHNSON
METAIRIE, LA

ATTORNEYS FOR
PLAINTIFF-APPELLANT
ANTONIO WHITE

ATTORNEYS FOR
DEFENDANTS-APPELLEES
J.I.T. DISTRIBUTING LLC,
DAVID HORNAK AND GREAT WEST
CASUALTY CO.

ATTORNEY FOR
DEFENDANT-APPELLEE
STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF
TRANSPORTATION & DEVELOPMENT

* * * * *

BEFORE: PETTIGREW AND McDONALD, JJ., AND CALLOWAY,¹ J. Pro Tem.

¹ Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.



PETTIGREW, J.

In this case, plaintiff, Antonio White, challenges the trial court's granting of a motion for summary judgment in favor of the Louisiana Department of Transportation and Development (DOTD), dismissing with prejudice, all claims against it. For the reasons that follow, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

According to the record, on April 24, 2014, plaintiff was a member of a work crew performing road striping on the left westbound lane of Interstate 10 in Calcasieu Parish. The work was being done at night by a construction convoy, which consisted of several vehicles. Plaintiff was operating a crash attenuator truck at the end of the convoy.

As the construction convoy was located near mile marker 6.1 on Interstate 10, the crash attenuator truck driven by plaintiff was struck from behind by an 18-wheel tractor trailer driven by defendant David Hornak, who was within the course and scope of his employment with J.I.T. Distributing, LLC. Plaintiff was injured in the crash and subsequently filed suit against Hornak, J.I.T. Distributing, LLC, HUB International Gulf South, Rush Trucking, Inc., DOTD, and Great West Casualty Company.²

DOTD filed a motion for summary judgment on the basis that the sole cause of the accident was the fact that Hornak was asleep at the wheel, and nothing DOTD could have done under such a scenario would have prevented the accident.³ Hornak, J.I.T. Distributing, LLC, and Great West Casualty Company also filed a motion for summary judgment. Plaintiff opposed the motions for summary judgment and attached evidence indicating the State did not follow traffic control procedures at the time of the accident. Following a hearing on the matter, the trial court found that the cause of the accident fell squarely with Hornak and his employer and not with DOTD. A judgment

² American Casualty Company of Reading, Pennsylvania, was voluntarily dismissed as a defendant on August 20, 2015.

³ DOTD filed duplicate motions for summary judgment, the first motion filed on October 5, 2015, and the second filed on February 22, 2016.

was signed on April 28, 2016, granting DOTD's motion for summary judgment and dismissing DOTD with prejudice. Plaintiff appeals, citing the following assignments of error:

1. The Trial Court made factual determinations concerning the negligence of the State and whether the driver of the 18-wheeler would have been alerted of the construction convoy before falling asleep had the State complied with its control plan.

2. The Trial Court erred when it made improper assumptions regarding witness testimony and failed to make reasonable inferences so as to be viewed in the light most favorable to the party opposing the motion for summary judgment and made improper assumptions.

3. The Trial Court erred when it ignored an expert's opinion on a material fact that more likely than not is true.

SUMMARY JUDGMENT

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. 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 material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B) (prior to amendment by 2015 La. Acts, No. 422).⁴ Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. **Greater Lafourche Port Commission v. James Construction Group, LLC**, 2011-1548 (La. App. 1 Cir. 9/21/12), 104 So.3d 84, 88.

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 there is an absence of factual support for one or more elements essential to the adverse party's

⁴ Article 966 was amended by 2015 La. Acts, No. 422, §1, effective January 1, 2016. Section 2 provides, "The provisions of this Act shall not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act. As the motion for summary judgment at issue in this matter was filed in 2015, and was pending as of January 1, 2016, we apply the prior version of Article 966.

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); **Greater Lafourche Port Commission v. James Construction Group, LLC**, 104 So.3d at 88.

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. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether the mover is entitled to judgment as a matter of law. Issues that require a determination of reasonableness of acts and conduct of parties under all the facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. **Greater Lafourche Port Commission v. James Construction Group, LLC**, 104 So.3d at 88.

A plaintiff may recover damages from DOTD under a theory of negligence based on La. C.C. art. 2315 or a theory of strict liability based on La. C.C. art. 2317 and La. R.S. 9:2800. Under either theory, the elements of proof are the same. A plaintiff must show that: (1) DOTD had custody of the thing that caused the plaintiff's injuries or damages; (2) the thing was defective, because it had a condition that created an unreasonable risk of harm; (3) DOTD had actual or constructive knowledge of the defect and failed to take corrective measures within a reasonable time; and (4) the defect in the thing caused plaintiff's injuries. **Lee v. State, through Dep't of Transp. & Dev.**, 97-0350 (La. 10/21/97), 701 So.2d 676, 678; **Sevario v. State, through Dep't of Transp. & Dev.**, 98-1302 (La. App. 1 Cir. 11/10/99), 752 So.2d 221, 231, writs not considered, 99-3638, 00-0044 (La. 4/7/00), 759 So.2d 81 and 82, writ denied, 99-3457 (La. 4/7/00), 759 So.2d 760.

DOTD filed the instant motion for summary judgment seeking dismissal from this action on the basis that there was no breach of a duty on its part because the sole

cause of the accident was the fact that Hornak had fallen asleep at the wheel, thus nothing could have prevented the accident. In support of its motion for summary judgment, DOTD introduced excerpts of the deposition of Hornak wherein he admitted to setting the cruise control of the tractor-trailer at 74 mph, then sometime later falling asleep. Hornak testified that he could not recall when he fell asleep or for how long, prior to striking the crash attenuator truck. According to Hornak, his first recollection of the accident was waking up and seeing engine fluid blurring the windshield, and he "just rode it out until the tractor stopped.

Plaintiff opposed the motion for summary judgment on the basis that DOTD failed to follow its own policies and procedures regarding roadside work crews. Plaintiff contends that DOTD failed to take several measures that could have drawn a motorist's attention to the presence of the construction convoy, such as having a Portable Changeable Message Sign (PCMS) affixed to the rear of the crash attenuator truck driven by plaintiff and having a police vehicle with its blue lights operating positioned behind the crash attenuator truck. The exhibits introduced with plaintiff's opposition to the motion for summary judgment reflected that the position of the police vehicle in front of the crash attenuator truck and the absence of an affixed PCMS were both in violation of the Temporary Traffic Control (TTC) measures that accompanied the construction proposal for this striping project. There was evidence presented of the existence of a PCMS that could be moved in relation to the location of the construction convoy, at the beginning of the construction scene that displayed a flashing message regarding road construction occurring for the next two miles; however, it is unclear from the evidence exactly where this sign was with regard to the construction convoy at the time of the accident.

According to the deposition excerpts supporting plaintiff's opposition to the motion for summary judgment there were three DOTD employees (David Kohrs, William Smith, and Cornelius Marcusiu) accompanying the construction convoy, who each testified in depositions that they were present in the construction convoy on the night of the accident. The DOTD employees each testified that a police unit was not behind

the crash attenuator truck at the time of the accident.⁵ David Kohrs, a DOTD engineer, who was present with the construction convoy, testified that the TTC plan for this project reflected the police unit should have been behind the crash attenuator truck.

Plaintiff also included in his opposition to the motion for summary judgment the affidavit of Michael Gillen, an accident reconstruction expert. According to Gillen's affidavit, at the time of the accident, the TTC plan was not being followed. Gillen stated that if a police vehicle had been positioned at the very end of the construction convoy with its lights activated, it would have given more warning to oncoming motorists that they were approaching a work site.

If a party submits expert opinion evidence that would be admissible under **Daubert-Foret**⁶ and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion for summary judgment and let the issue be decided at trial. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 and 99-2257 (La. 2/29/00), 755 So.2d 226, 236

In ruling on a motion for summary judgment, the trial court'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. A trial court cannot make credibility decisions on a motion for summary judgment. In deciding a motion for summary judgment, the trial court must assume that all of the witnesses are credible. Despite the legislative mandate that summary judgments are favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubts must be resolved in the opponent's favor. **Janney v. Pearce**, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078.

⁵ This court understands plaintiff's argument, albeit a macabre position, that had the police unit been placed at the end of the construction convoy, the accident may have still occurred; however, this could have affected the severity of the impact with respect to plaintiff.

⁶ **Daubert v. Merrell Dow Pharms., Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); **State v. Foret**, 628 So.2d 1116 (La. 1993).

Based on our review of the record, it is apparent the trial court improperly weighed the evidence in finding the State bore no fault for the cause of this accident. Gillen's expert affidavit clearly raises an issue of material fact regarding the placement of a police unit at the back of the construction convoy with respect to proper warning to oncoming motorists and the severity of the impact involving this particular plaintiff. In the procedural posture that the trial court was presented with Gillen's affidavit, we find it was erroneous to ignore the substance of the affidavit and make a finding of which parties were at fault for the accident. Under the facts and circumstances of this matter, the issue of whether DOTD's actions are to be assigned even the slightest amount of fault is solely within the province of the fact finder's ultimate determination and not appropriate for disposition on a motion summary judgment.

CONCLUSION

For the above and foregoing reasons, we find the trial court's granting of the motion for summary judgment filed by DOTD to be erroneous and we reverse the judgment signed April 28, 2016, dismissing the State of Louisiana, through the Department of Transportation and Development, and remand this matter to the trial court for further proceedings. Costs associated with this appeal are assessed to the defendant-appellee, the State of Louisiana, through the Department of Transportation & Development, in the amount of \$3,057.50.

REVERSED AND REMANDED.