

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1024

TYRONE GOODMOND

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF  
TRANSPORTATION AND DEVELOPMENT (DOTD), DUANE P. ALLEMAN,  
AND UNION PACIFIC RAILROAD COMPANY

Judgment Rendered: APR 18 2017

\*\*\*\*\*

Appealed from the  
Eighteenth Judicial District Court  
In and for the Parish of Iberville  
State of Louisiana  
Suit Number 69,510

Honorable Alvin Batiste, Jr., Judge

\*\*\*\*\*

Blake R. David  
J. Derek Aswell  
Lafayette, LA

Counsel for  
Plaintiffs/Appellees  
Tyrenette Goodmond,  
individually and on behalf of  
Tyrone Goodmond

Jeff Landry  
*Attorney General*  
Stacey Moak  
Jonathan D. Mayeux  
Christopher W. Stidham  
Breann Crane  
*Special Assistant Attorneys General*  
Baton Rouge, LA

Counsel for  
Defendant/Appellant  
Louisiana Department of  
Transportation and  
Development

\*\*\*\*\*

BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

PMF McCleendon, J. concurs in reasons assigned.

*Handwritten:* PMF  
VGW by PMF

## **GUIDRY, J.**

The State of Louisiana, through the Department of Transportation and Development (DOTD), appeals a summary judgment wherein the trial court found it solely liable based on the actions of its employee. For the reasons that follow, we reverse the summary judgment, vacate the judgment on the merits, and remand this matter for a new trial.

### **FACTS AND PROCEDURAL HISTORY**

On April 6, 2010, a Union Pacific Railroad train struck a DOTD road grader that was stopped on the railroad tracks in the path of the oncoming train. A DOTD employee, Duane P. Alleman, was driving the road grader traveling west on Cedar Street in Grosse Tete, Louisiana, when he attempted to cross the train tracks. At the same time, Tyrone Goodmond was working as an engineer aboard the Union Pacific train that was traveling north in a path that would cross Cedar Street. Despite the approaching train, Mr. Alleman was unable to drive the road grader off the train tracks, and the road grader was struck by the train. Mr. Alleman died as a result of the accident, and Mr. Goodmond was allegedly injured.

Mr. Goodmond filed an original and a first supplemental and amending petition for damages against the DOTD, Mr. Alleman, and the Union Pacific Railroad Company, alleging the defendants to be at fault for the injury and damages he sustained in the April 6, 2010 accident. Mr. Goodmond later settled all claims against the Union Pacific Railroad Company, and by an order of partial dismissal signed on March 30, 2012, the Union Pacific Railroad Company was dismissed from the action with prejudice.

The DOTD initially answered Mr. Goodmond's original and amended

petitions to deny all liability and later filed an amended answer<sup>1</sup> in which it alleged the following:

FURTHER ANSWERING, DOTD shows, alleges and avers that plaintiff's damages were caused in whole or in part by the independent, intervening and superseding negligence, comparative negligence, breach of duty, and/or fault of the Village of Gross[e] Tete, over whom DOTD had no control and for whom DOTD had no responsibility, which totally precludes, or, alternatively, reduces any recoverable damages.

...

The Village of Grosse Tete's negligence includes, but is not limited to, the following:

- A) Failure to properly design, install and/or maintain the roadway surface on the approach to the railroad grade crossing where the subject accident occurred;
- B) Failure to install and/or maintain a stop sign and other warning devices at the intersection of Cedar Street and the railroad grade crossing where the subject accident occurred; and
- C) All other acts and omissions proved at the trial of this matter.

In light of the DOTD's amended answer, Mr. Goodmond filed a second supplemental and amending petition for damages in which he added the Village of Grosse Tete as a defendant, alleging that the Village bore fault for the accident in failing to install or otherwise construct active signals and signage crossing, in failing to suggest to the railroad defendants that alternative active signals/signage were necessary at the crossing, and in failing to conduct an engineering study at the crossing before a highway stop sign was installed. The Village of Grosse Tete answered Mr. Goodmond's petition to generally deny any liability.

Following the death of Mr. Goodmond on July 23, 2013, Karen Goodmond and Tyrenette Goodmond, Mr. Goodmond's wife and child respectively (collectively "plaintiffs"), filed a third supplemental and amending petition to

---

<sup>1</sup> The DOTD also filed a second amended answer in which it alleged the defense of set off.

name themselves as plaintiffs on behalf of the deceased Mr. Goodmond and to assert claims of wrongful death. In response to the plaintiffs' third supplemental and amending petition, the DOTD and the Village of Grosse Tete filed motions for partial summary judgment, seeking dismissal of the plaintiffs' wrongful death claims. Following a hearing on the motions, the trial court granted partial summary judgment in favor of the DOTD and the Village of Grosse Tete, dismissing the plaintiffs' wrongful death claims with prejudice.

Thereafter, on June 8, 2015, the Village of Grosse Tete filed another motion for summary judgment, alleging that the plaintiffs lacked sufficient evidentiary support to establish any of the elements required under La. R.S. 9:2800 for finding it liable, and hence, the Village of Grosse Tete sought dismissal of all the plaintiffs' claims against it. In response, the plaintiffs filed a motion for summary judgment in which they joined in the Village of Grosse Tete's motion for summary judgment, conceding: (1) that the Village of Grosse Tete did not have custody of the property in question; (2) that the property did not contain a defect that posed an unreasonable risk of harm to persons exercising ordinary care; and (3) that the Village of Grosse Tete did not have notice of any defect. Thus, the plaintiffs stated that the Village of Grosse Tete's motion for summary judgment should be granted.

Additionally, the plaintiffs filed a separate motion for summary judgment, seeking a finding by the trial court that Mr. Alleman was the sole legal cause of the April 6, 2010 accident. Also in this motion for summary judgment, the plaintiffs joined and adopted "any and all arguments made in support of the Motion for Summary Judgment" filed by the Village of Grosse Tete that was pending before the trial court. Citing sections 171 and 174 of Title 32 of the Louisiana Revised Statutes, plaintiffs argued that Mr. Alleman failed to comply with the statutory requirement that he stop, listen, look both ways, and only proceed to cross the tracks when it was safe to do so.

The DOTD opposed the plaintiffs' motion for summary judgment seeking to cast it with sole fault for the accident. In its opposition, the DOTD argued that "[even] should DOTD admit that Mr. Alleman was a cause-in-fact of the accident and was partially at fault in the cause of the accident, the mere fact that Mr. Alleman had *some* fault in the accident at issue does not preclude comparative fault on the part of the Village of Grosse Tete." In support of its argument in opposition to the plaintiffs' motion for summary judgment, the DOTD submitted the affidavit of V.O. "Dean" Tekell, a registered, professional civil engineer specializing in traffic and transportation engineering and accident reconstruction. In his affidavit, Mr. Tekell opined that "[t]he Village of Grosse Tete controlled the approach to the railway crossing" on Cedar Street, that "[t]he Village of Grosse Tete was responsible for any signs and markings for the approach to the railroad crossing as required by the Manual on Uniform Traffic Control Devices (MUTCD) 2009 edition, as published by the Federal Highway Administration (FHWA)," that "Part 8 of the MUTCD requires the installation of stop signs, advanced railroad crossing signs and advanced railroad crossing pavement markings" on the approach to the Cedar Street crossing, and that there was "no evidence the required signs and markings were present" at the time of the accident.

Further arguing that there is a presumption in the law that had a traffic control device been installed, a motorist would have obeyed, the DOTD prayed that the plaintiffs' motion for summary judgment would be denied because "[r]easonable persons could easily disagree on the issue of comparative fault on behalf [of] the Village for its failure to install and maintain the minimum required traffic control devices."

Additionally, the DOTD filed an opposition to the Village of Grosse Tete's motion for summary judgment and the plaintiffs' motion for summary judgment joining in the Village of Grosse Tete's motion. In that opposition, the DOTD

argued that disputed material facts existed as to whether the Village of Grosse Tete maintained custody and control of the signage at the crossing, whether a defect existed that created an unreasonable risk of harm, whether the Village of Grosse Tete had notice of such defect, and whether the defect was a cause-in-fact of the accident at issue. In support of its opposition, the DOTD averred that custody and control had been established, pointing out that the Village of Grosse Tete had admitted in its memorandum in support of its motion for summary judgment that it owned the roadway approaching the railroad crossing.

As for defect, the DOTD again relied on Mr. Tekell's affidavit to establish that the lack of appropriate signage constituted a defect. As for notice, the DOTD pointed out that photographs of the accident scene, which displayed a sign post with no sign attached, and the deposition testimony of Phillip Faveroth, maintenance superintendent for the Village of Grosse Tete, wherein he testified that he had never been aware of a sign being installed on the post during his ten years of serving as superintendent. Finally, as to causation, the DOTD reiterated the presumption in the law that if a traffic control device had been installed, a motorist would have obeyed it.

In response to the opposition of the DOTD, the plaintiffs filed a motion to strike the testimony of Mr. Tekell (as being untimely under the trial court's scheduling order) and reply memoranda re-urging arguments presented in their original motions for summary judgment.

At a hearing held on September 3, 2015, the trial court considered the plaintiffs' motion for summary judgment to find the DOTD the sole cause of the April 6, 2010 accident and their motion for summary judgment joining in the Village of Grosse Tete's motion for summary judgment. During the hearing, counsel for the plaintiffs advised the court that the Village of Grosse Tete had been

dismissed from the lawsuit,<sup>2</sup> and the parties acknowledged that the plaintiffs had reached a settlement with the Village of Grosse Tete. Hence, the trial court only considered the two motions for summary judgment filed by the plaintiffs, as the court believed that because the Village of Grosse Tete had settled with the plaintiffs, the Village of Grosse Tete's motion for summary judgment was moot.

The trial court also considered the plaintiffs' motion to strike the testimony of Mr. Tekell. Observing that Mr. Tekell's testimony was presented in the form of an affidavit in opposition to the plaintiffs' motions for summary judgment, the trial court denied the motion to strike, citing the Code of Civil Procedure articles on motions for summary judgment.<sup>3</sup> Then, citing La. R.S. 32:235, the trial court found that local municipalities are not mandated to follow the MUTCD, and therefore found, under the undisputed facts, that there was no liability on the part of the Village of Grosse Tete. A summary judgment decreeing that the April 6, 2010 accident was solely caused by the DOTD through its employee, Mr. Alleman, was signed on September 17, 2015.

The matter thus proceeded to a jury trial solely on the issue of damages. Trial began on September 22, 2015, and on September 24, 2015, the jury rendered a verdict awarding Tyrenette Goodmond<sup>4</sup> \$401,885.50 damages. The trial court signed a judgment incorporating the jury's verdict on October 8, 2015. On November 25, 2015, the DOTD filed a motion to devolutively appeal the September 17, 2015 summary judgment and filed a separate motion to

---

<sup>2</sup> According to the record before us, a motion to dismiss the Village of Grosse Tete from the lawsuit was not filed until October 9, 2015, and a judgment dismissing the Village of Grosse Tete from the suit was not signed until October 15, 2015 – after the trial on the merits and after a judgment on the merits had been signed by the trial court. The record before us does not contain the provisions of the settlement agreement between the plaintiffs and the Village of Grosse Tete.

<sup>3</sup> See La. C.C.P. arts. 966-967.

<sup>4</sup> Although in the third supplemental and amending petition, Karen Goodmond identified herself as being Mr. Goodmond's wife, the record indicates that at the time of his death, Mr. Goodmond and Karen were divorced.

suspensively appeal the October 8, 2015 damages judgment.

## DISCUSSION

The DOTD solely assigns as error its claim that the trial court legally erred in granting the plaintiffs' motion for summary judgment regarding the fault of the Village of Grosse Tete. We find merit in this lone assignment of error.

The plaintiffs' motions for summary judgment were both filed in July 2015. At the time the motions were filed, La. C.C.P. art. 966(F)(1) provided that "[a] summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time." In their motions for summary judgment and memoranda in support, the plaintiffs do not mention the statute relied on by the trial court in making its ruling, La. R.S. 32:235. Paragraph B of La. R.S. 32:235 provides:

Local municipal and parish authorities in their respective jurisdictions shall place and maintain such traffic control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this Chapter, regulations of the department and commissioner adopted pursuant hereto, and local traffic ordinances adopted pursuant to the authority granted by R.S. 32:41 and R.S. 32:42. All such traffic control devices hereafter erected shall conform to the department's manual or specifications. If any such device hereafter erected by a political subdivision of this state fails to conform to the manual or specifications, payment of any funds allocated to that political subdivision shall be withheld by the department until the standards established by the department are complied with.

At the hearing, when the DOTD argued that the MUTCD required the Village of Grosse Tete to install either a stop sign or a yield sign along the road or on the approach to the railroad crossing at issue in this case, the trial court asked: "What statutory requirement is there for the Village of Grosse Tete to follow the MUTCD?" The initial counsel arguing on behalf of the DOTD responded, "Judge, I'm not sure, as I stand here. I know the State is required to do that." Additional counsel for the DOTD then responded "I don't know the statute off the top of my head, but I believe that the statute [applies to] the State and all subdivisions,

political subdivisions, that would include the Village and MUTCD.” But relying on the above-quoted provision from La. R.S. 32:235 and an attorney general’s opinion, the trial court held:

[I]t’s not negligence, per se, if this signage doesn’t appear at these crossings. It’s a question of whether or not an ordinary – ordinarily prudent driver would it pose some unreasonable risk to that person. And I just believe, just based upon what the Court has found in relation to your memos that you filed, looking at this Revised Statute 32:235 as well as some of the other articles mentioned and some of [the] cases that I’ve seen, that it’s not mandatory that a municipality or a parish-governing authority has to abide by the MUTCD....

As the record clearly reveals that the issue of whether the Village of Grosse Tete was mandated to adhere to the MUTCD according to La. R.S. 32:235 was not an issue raised by the parties, we find that the trial court erred in relying on the statute to render summary judgment in favor of the plaintiffs. Moreover, we find that the affidavit of Mr. Tekell, in conjunction with the deposition testimony of Mr. Faveroth, was sufficient to create genuine issues for a jury’s determination of whether some fault for the April 6, 2010 accident could be attributed to the Village of Grosse Tete. Accordingly, on *de novo* review, we find the trial court erred in granting the plaintiffs’ motion for summary judgment holding the DOTD solely at fault for the April 6, 2010 accident. We therefore we will reverse the September 17, 2015 summary judgment.

Further, as a consequence of the trial court’s error, no evidence was presented in the proceedings below for the jury to consider whether fault could be attributed to the Village of Grosse Tete. As such, we must likewise vacate the October 8, 2015 judgment in part and remand this matter to the trial court for the limited purpose of determining the respective fault, if any, of the DOTD and the

Village of Grosse Tete relative to the April 6, 2010 accident.<sup>5</sup> See Shaw v. Hingle, 94-1579, p. 5 (La. 1/17/95), 648 So. 2d 903, 905. Following such a trial, the trial court is directed to sign a new judgment in conformity with the jury's September 24, 2015 damage award and the findings of fault determined on remand.

### CONCLUSION

For the reasons discussed herein, we reverse the trial court's September 17, 2015 summary judgment in favor of the plaintiffs and vacate the October 8, 2015 damage judgment. We remand this matter for further proceedings consistent with this opinion. All costs of this appeal, in the amount of \$7,840.81, are cast to the appellees, Karen and Tyrenette Goodmond, individually and on behalf of the deceased Tyrone Goodmond.

**SEPTEMBER 17, 2015 SUMMARY JUDGMENT REVERSED;  
OCTOBER 8, 2015 JUDGMENT VACATED IN PART; AND REMANDED.**

---

<sup>5</sup> This limited remand is ordered because the jury's damage award was not challenged on appeal, and thus, that portion of the judgment is now final. See Radcliffe 10, L.L.C. v. Zip Tube Systems of Louisiana, Inc., 07-1801, p. 19 (La. App. 1st Cir. 8/29/08), 998 So. 2d 107, 120, amended on reh'g, 07-1801 (La. App. 1st Cir. 12/3/08), 22 So. 3d 178, writS denied, 09-0011, 09-0024 (La. 3/13/09), 5 So. 3d 119, 120; Martin v. Unopened Succession of Martin, 49,573, p. 17 (La. App. 2d Cir. 1/14/15), 161 So. 3d 1010, 1020. Moreover, we observe that the error committed by the trial court did not discernably impact the jury's assessment of damages or the parties' ability to litigate that issue.

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2016 CA 1024**

**TYRONE GOODMOND**

**VERSUS**

**STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF  
TRANSPORTATION AND DEVELOPMENT (DOTD), DUANE P. ALLEMAN,  
AND UNION PACIFIC RAILROAD COMPANY**

\*\*\*\*\*

**McClendon, J., concurring.**

Because genuine issues of material fact remain regarding the comparative fault of the Village of Grosse Tete, I concur with the result reached by the majority.