

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0005

LINDA ALESSI, JOSEPH ALESSI, JR. AND TOMMIE SINAGRA

VERSUS

BARRIERE CONSTRUCTION COMPANY, LLC

JMM
Judgment Rendered: JUL - 7 2010

* * * * *

RHP by JMM
JEK by JMM
APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TANGIPAHOA

STATE OF LOUISIANA

DOCKET NUMBER 2008-0003768, DIVISION "E"

THE HONORABLE BRENDA BEDSOLE RICKS, JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

McDONALD, J.

This is an appeal of a judgment rendered in the Twenty-First Judicial District Court granting a motion for summary judgment in favor of a defendant in a lawsuit arising as a result of an automobile accident. For the following reasons, we affirm the judgment.

The incident giving rise to this lawsuit was a one-vehicle accident that occurred at approximately 8:00 p.m. on the evening of January 8, 2008. The driver of the vehicle, Joseph Alessi, Jr., was traveling down Berry Bowl Road¹, in Independence, Louisiana, when he hit a “bump” in the road that caused severe damage to the vehicle. Suit was subsequently filed against Barriere Construction Company, LLC (“Barriere”) alleging that it had begun reconstructing the accident site pursuant to a contract with the Tangipahoa Parish Government, had been negligent, and were liable for damages to the three named plaintiffs, Linda Alessi, the owner of the vehicle, Joseph Alessi, Jr., and Tommie Sinagra, who was a passenger in the vehicle at the time of the accident. The negligence alleged included, but was not limited to:

Creating a defect in the roadway where vehicles were allowed to drive which caused the damage to the Alessi vehicle and physical injuries to the plaintiffs;

Failure to provide adequate signs, barricades, and warning devices in order to protect the public, including the Plaintiffs, from any defects or dangerous roadway conditions;

Failure to provide adequate lighting devices at night and during inclement weather to adequately warn the public of a work [site] that was left in a hazardous location or condition; and

Failure to provide any other reasonable measure to protect and warn the public of any hazardous condition or location in defendant’s worksite.

¹ The petition states that Mr. Alessi had turned onto “Alessi Road” when he encountered the “bump.” However, throughout the record it is referred to as “Berry Bowl Road,” and that is how we will designate the subject street.

In July 2009, an amended petition was filed naming as an additional defendant the Tangipahoa Parish Council-President Government, the governing body of the Parish of Tangipahoa, which entered into a contract with the defendant, Barriere for street overlay projects throughout the parish, including but not limited to, the Berry Bowl Road in Independence, Louisiana. Also named as a defendant was Zurich American Insurance, a foreign insurance corporation, licensed to do and doing business in Louisiana, which issued liability insurance coverage and other policies of insurance for both the defendants, Barriere and Tangipahoa Parish.

After extensive discovery, Barriere filed a motion for summary judgment, asserting that it had nothing to do with the bump in the roadway where the accident occurred. Barriere submitted several affidavits, along with documentary evidence, to establish that it had not worked on Berry Bowl Road for at least six days prior to the accident. Further, that when it had last worked on the roadway, January 3, 2008, the work had ended 689 feet from the bridge where the accident occurred. It was Barriere's contention that any "bump" in the road was caused by a Tangipahoa Parish bridge construction work crew.

Plaintiffs opposed the motion for summary judgment, and offered as evidence responses to interrogatories, deposition testimony, affidavits, and photographs.

The hearing on the motion was September 28, 2009. On September 29, 2009, the judge issued written reasons for judgment, finding in favor of Barriere and granting the motion for summary judgment. Judgment so ordering and dismissing plaintiffs demands against Barriere , with prejudice, at plaintiffs' cost, was signed on December 28, 2009. This appeal followed.

Plaintiffs assert that the district court erred in granting the motion for summary judgment, contending that Barriere did not present sufficient evidence to

prove that there are no genuine issues of material fact such that it is entitled to judgment as a matter of law.

We review a district court's grant of summary judgment *de novo*, viewing the record and all reasonable inferences that may be drawn from it in the light most favorable to the non-movant. Summary judgment is warranted only if there is no genuine issue as to material fact and the mover is entitled to judgment as a matter of law. *Hines v. Garrett*, 04-0806 (La. 6/25/04), 876 So.2d 764, 765; La. C.C.P. art. 966(C)(1). 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. *Hines*, 876 So.2d at 765. A genuine issue is one as to which reasonable persons could disagree; if a reasonable person could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Id.*

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). It is designed to allow courts to decide whether enough evidence exists to go to trial. *Scott v. McDaniel*, 96-1509 (La. App. 1 Cir. 5/9/97), 694 So.2d 1189, 1191, Writ denied, 97-1551 (La. 9/26/97), 701 So.2d 991. The burden of producing evidence at the hearing on the motion for summary judgment is on the mover (in this case the defendant), who can ordinarily meet this burden by submitting affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 09-1633, p.4 (La. 4/23/10), ---So3d---. At that point, the parties who bear the burden of persuasion at trial (in this case the plaintiffs) must come forth with evidence that demonstrates they will be able to meet the burden at trial. *Id.* Once the motion for summary judgment has been properly supported by the moving

party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. *Id.*

Barriere contends that it could not have caused this accident, because its crew did not do any work on the area of the road or bridge that contained the bump that allegedly caused the damage to the plaintiffs and their vehicle. In support of this, the invoices detailing where Barriere had worked, which had been submitted to Tangipahoa Parish in order to be paid, were offered into evidence. Additionally, the affidavit of Brian Kilgen was submitted. Mr. Kilgen is the project manager superintendent for the work being performed by Barriere for Tangipahoa Parish. He attested to the fact that no work was done by Barriere on or near the Berry Bowl Road Bridge prior to January 8, 2008. According to Mr. Kilgen, the closest the work got to the bridge was 698 feet away, and that work was performed on January 3, 2008.

Plaintiffs suggest that the statements are suspect and not necessarily true. They submit that there is deposition testimony that indicates Barriere was working on the roadway. It is true that Mr. Rumfola, the Tangipahoa Parish bridge crew foreman, testified that he had seen Barriere employees working on the road. Mr. Rumfola was testifying about the work done on Berry Bowl Road Bridge, apparently from Tangipahoa Parish work orders. Starting on December 3, 2007, when he "was cleaning the bridge off," Mr. Rumfola discussed work for which he was or was not responsible, including the placing of the "BUMP" signs near the bridge. Near the conclusion of the somewhat confusing questioning, Mr. Rumfola was asked: "At anytime that you were out there working, had you ever seen anybody from Barriere Construction Company out there?" He answered that "they were working on the road" at the same time that he was working on the bridge, but was interrupted while saying "But they weren't nowhere around... ." Mr. Rumfola had testified that he was working on the bridge on January 3, 2008, a

date on which Barriere was also working on Berry Bowl Road. When specifically questioned whether Barriere was there on January 8, 2008, he answered that he could not recall.

Barriere also points out that plaintiffs have failed to present evidence of the location of the bump that allegedly caused the damage was located. Plaintiffs contend that “[s]ince the beginning of this case, a question that has always remained and is, where on Berry Bowl Road was the hazardous condition that caused damage to the vehicle and injuries to the occupants?” It is their contention that this is an issue of material fact that should be left for the jury to decide. We disagree. Essential elements of the plaintiffs’ case are to prove that their damages were caused by a hazardous condition in the roadway, and to prove who created that hazardous condition.

The testamentary and documentary evidence established that Barriere did not work to within closer than 698 feet of the Berry Bowl Bridge prior to January 8, 2009. The affidavit of Andrew McPhate, the plaintiffs’ expert, opines that the damage to the vehicle supports the conclusion “that the roadway was left by the contractor in a severe and hazardous condition.” While it can be accepted that the damage to the vehicle supports the existence of a hazardous condition, there are absolutely no facts or any evidence to support a conclusion that the condition was created “by the contractor.” Affidavits that are devoid of specific underlying facts to support a conclusion of ultimate “fact” are not legally sufficient to defeat summary judgment. *Lewis v. Four Corners Volunteer Fire Dept.*, 08-0354 (La. App. 1 Cir. 9/26/08), 994 So.2d 696, 700.

After careful review of the entire record in this matter, we find that the evidentiary burden had shifted to the plaintiffs, and that they failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial. Therefore, we affirm the judgment of the

district court granting summary judgment to Barriere Construction Company, LLC, and this opinion is issued in compliance with Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.1.B. Costs of this appeal are assessed to plaintiffs, Linda Alessi, Joseph Alessi, Jr., and Tommie Sinagra.

AFFIRMED.