

MONICA HAAB, WIFE OF/AND
GARRET HAAB, INDIVIDUALLY AND ON
BEHALF OF HIS MINOR CHILDREN,
AIDEN HAAB, AMELIA HAAB, AND
SOPHIE HAAB

VERSUS

EAST BANK CONSOLIDATED SPECIAL
SERVICE FIRE PROTECTION DISTRICT OF
JEFFERSON PARISH, LOUISIANA, PARISH
OF JEFFERSON, JEFFERSON PARISH
DEPARTMENT OF HOMELAND SECURITY,
JEFFERSON PARISH DEPARTMENT OF
EMERGENCY MANAGEMENT, DAVID
SAUNDERS, DEANO BONANO, KENNETH
L. PADGETT, SR., M. JOSEPH, AND ABC
INSURANCE COMPANY

NO. 13-CA-954

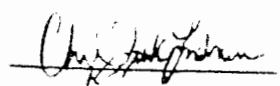
FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

COURT OF APPEAL
FIFTH CIRCUIT

FILED MAY 28 2014


CLERK
Cheryl Quirk Landrieu

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 677-006, DIVISION "M"
HONORABLE HENRY G. SULLIVAN, JR., JUDGE PRESIDING

MAY 28, 2014

ROBERT A. CHAISSON
JUDGE

Panel composed of Judges Susan M. Chehardy, Marc E. Johnson,
and Robert A. Chaisson

JOHNSON, J., DISSENTS WITH REASONS

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AFFIRMED

RAC
SAC

Monica and Garret Haab (the “Haabs”) appeal from a summary judgment dismissing with prejudice their suit against Jefferson Parish and several of its departments and employees. The Haabs allege in their suit that they suffered the loss of their personal property when, during Hurricane Gustav, the defendants did not promptly respond to a fire at the house where the Haabs were residing. For the following reasons, we affirm that judgment.

FACTS AND PROCEDURAL HISTORY

The underlying facts are not disputed. At the time that Hurricane Gustav struck southeast Louisiana on September 1, 2008, the Haabs were renting a house in Jefferson Parish. On August 27, 2008, in response to the approach of Hurricane Gustav, the State of Louisiana declared a state of emergency. Jefferson Parish likewise declared a state of emergency on August 30, 2008. The following day, a mandatory evacuation order was issued for residents of the east bank of Jefferson

Parish, and a 24-hour curfew was announced. Residents who failed to evacuate were informed not to expect government, law enforcement, fire or emergency medical services during that time.

During the morning hours of September 1, 2008, a falling tree branch struck the electrical service entering the Haabs' residence and started a fire. The Haabs had evacuated as ordered, and thus were not at home at the time of the fire. Neighbors, including Sheriff Newell Normand and Constable Dan Civello, attempted to fight the fire with garden hoses. The fire was reported at about 8:50 a.m., but because the Parish's Fire Service Disaster Response Plan (the "Plan") was in effect, no fire units responded. The provision in the Plan pertinent here is that fire units would not respond when sustained wind speeds reached 50 mph, which they reportedly had done earlier that morning. Both Sheriff Normand and Constable Civello made additional calls to fire personnel urging them to respond.

At about 9:25 a.m., Deano Bonano, the Director of Jefferson Parish Homeland Security, and David Saunders, Director of the Jefferson Parish East Bank Consolidated Fire Department, arrived at the scene to assess the situation. Mr. Bonano believed that the winds had subsided to a point where they would not be a great threat, and ordered a fire unit to respond. The unit arrived at 9:43 a.m. and began fighting the fire, but the firefighters were ordered not to enter the house because high winds created a danger of structural collapse. The fire was extinguished by noon, but the house was nonetheless a total loss.

The Haabs sued the Parish of Jefferson and several of its departments, as well as a number of individual Jefferson Parish employees responsible for public safety, alleging that their personal property in the rental house was lost due to the

actions of the defendants.¹ The Haabs seek to hold the various defendants liable for their conduct during two distinct time periods: first, for the conduct of the Parish officials from 2006 to 2008, in their actual formulation, adoption and review of the Plan, and second, for the conduct of the Parish employees in their activation of the Plan, and response to the fire during the actual emergency event of Hurricane Gustav. All of the defendants urged a motion for summary judgment, contending that, pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act (the “HSA”),² the Parish and its departments are entitled to absolute immunity and the individual employee defendants are entitled to qualified immunity, for acts taken during “emergency preparedness activities.” Additionally, the defendants claim that they are entitled to discretionary immunity, for events that took place before and during the actual event, pursuant to La. R.S. 9:2798.1, the discretionary immunity statute (the “DIS”). The trial court granted the defendants’ motion for summary judgment, and the Haabs now appeal that judgment.

LAW AND DISCUSSION

Summary judgments are reviewed *de novo* on appeal, that is, the appellate courts use the same criteria as the district courts in considering such motions. *Supreme Services and Specialty Co., Inc. v. Sonny Greer, Inc.*, 06-1827 (La. 5/22/07), 958 So.2d 634. Our inquiry is whether there is any dispute as to material facts, and, if not, is the moving party entitled to judgment as a matter of law. *Id.*; La. C.C.P. art. 966(B)(2).

The HSA requires that all parishes prepare and maintain an all hazards emergency operations plan and keep it current. La. R.S. 29:729(B). The Act further provides that:

¹ The owners of the house are not parties here.

² La. R.S. 29:721, *et seq.*

Neither the state nor any political subdivision thereof, nor other agencies, nor, except in case of willful misconduct, the agents' employees or representatives of any of them engaged in any homeland security and emergency preparedness activities, while complying with or attempting to comply with this Chapter or any rule or regulation promulgated pursuant to the provisions of this Chapter shall be liable for the death of or any injury to persons or damage to property as a result of such activity.

La. R.S. 29:735(A)(1).

“Emergency preparedness” is defined as “the mitigation of, preparation for, response to, and the recovery from emergencies or disasters.” La. R.S. 29:723(4). Inasmuch as the HSA provides absolute immunity to the political subdivision and its agencies during emergency preparedness activities, we find that the trial court was correct to grant summary judgment in favor of the Parish and its various departments regarding their conduct in activating the Plan, and in their response to the fire during the actual emergency event. The Parish, however, contends that the HSA also provides the Parish, and its various departments, absolute immunity in connection with the formulation, adoption and review of the Plan itself. We disagree.

In *Banks v. Parish of Jefferson*, 08-27 (La. App. 5 Cir. 6/19/08), 990 So.2d 26, *writ denied*, 08-1625 (La. 10/24/08), 992 So.2d 1043, this Court, interpreting the HSA, found that absolute immunity in emergency preparedness applies only when the activities complained of are undertaken to address a discreet or specific condition or event. *Banks*, at 34. In *Banks*, this Court declined to extend absolute immunity as defined in the HSA to general levee construction activities not performed in preparation for a specific emergency event. We agree that there is a temporal element implicit to the grant of absolute immunity in the HSA, and that it therefore applies only to the complained of conduct *during the actual occurrence* of the emergency event, not to the formulation, adoption and review of a Plan

enacted some two years prior to the emergency event.³ Therefore, the Parish and its departments' entitlement to immunity regarding the formulation, adoption and review of the Plan must be analyzed pursuant to the DIS.

Unlike the absolute immunity provided to the Parish and its departments by the HSA, the HSA provides only qualified immunity to individual Parish employees during a specific emergency event, as no immunity is afforded for acts that may constitute "willful misconduct." Similarly, the DIS, La. R.S. 9:2798.1(C)(2) which is applicable at all times, provides only qualified immunity to public entities and their officials and employees for policymaking and discretionary acts.⁴ No immunity is afforded under the DIS for "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct."

Therefore, the question before the trial court on defendants' motion for summary judgment, and now before us, is whether the acts or omissions of the Parish officials or employees, either in the formulation, adoption, review or execution of the Plan itself, constituted "willful misconduct" under the HSA or "criminal, fraudulent, malicious, intentional, willful, outrageous, reckless or flagrant misconduct" under the DIS. In order for the Haabs to defeat the defendants' claims of discretionary immunity, it was incumbent upon them to put forth evidence showing that the conduct of the defendants rose to the level of misconduct required by the HSA or the DIS. For the following reasons, we find that none of the conduct of the Parish officials or employees constituted either

³ This Court, in a writ disposition, reached the same conclusion regarding the applicability of "emergency preparedness immunity" to the formulation of the Jefferson Parish "doomsday plan" adopted seven years prior to the flooding that occurred in Hurricane Katrina. See *Chicago Property Interests, L.L.C. v. Broussard*, 08-1210 (La. App. 5 Cir. 3/6/09), writ denied, 09-758 (La. 5/22/09)(unpublished writ).

⁴ La. R.S. 9:2798.1(B) provides: "Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties."

“willful misconduct” or “criminal, fraudulent, malicious, intentional, willful, outrageous, reckless or flagrant misconduct.”

In this case, the evidence of record indicates that Mr. Bonano was appointed Homeland Security Chief of Jefferson Parish in 2006. In that capacity, and as authorized by the HSA, he helped to develop, with input from the various Parish firefighting services, a Plan for how those services were to respond in the event of an emergency. Under the Plan, once sustained wind speeds in a hurricane reached 50 mph, firefighters were to remain in place and not respond because it had been determined that the dangers to firefighters in such conditions were greater than the good they could do in fighting fires. The evidence further showed that the Parish had in operation a Supervisory Control and Data Acquisition System (SCADA), consisting of a number of sensors located all over the Parish. Several of these sensors measured wind speeds, and their measurements were transmitted to the Emergency Operation Center (EOC), which in turn was to notify all appropriate units, including firefighters, when the 50 mph threshold had been met. At the time of Hurricane Gustav, Kenneth Padgett was the Emergency Management Director for the Parish, and as such oversaw the EOC. On September 1, 2008, Jason Phillips was collecting the wind speed information from the SCADA, and, at about 5:30 a.m., he detected wind speeds of over 50 mph. Mr. Padgett therefore notified all agencies to implement their emergency plans for this contingency. For firefighters, the Plan called for them to shelter in place and not respond to fires, and this is what Mr. Saunders ordered.

The evidence also indicated that Mr. Bonano had the authority to override the plan, and that he eventually did so. Upon receiving information about the fire, he drove to the scene, and after conferring with Mr. Saunders about the safety issues, he decided that a fire unit should be dispatched to the scene. However,

because of the strong winds, firefighters were restricted to fighting the fire from the outside of the house due to the threat of collapse.

One of the documents introduced by the Haabs in an attempt to establish that a genuine issue of material fact exists as to whether the defendants engaged in “willful misconduct” or “criminal, fraudulent, malicious, intentional, willful, outrageous, reckless or flagrant misconduct” is the affidavit of Constable Civello. Constable Civello’s affidavit is based not only upon his personal observations on the day of the fire, but also upon his expertise in fire safety, having formerly been a fire department chief himself. Constable Civello, in addition to finding a number of deficiencies in the Plan itself, and in the activation of the Plan and actual response to the fire, opined that 1) the “decision to use this plan was criminal, willful, outrageous, reckless, and flagrant misconduct,” and 2) the failure of Mr. Saunders and Mr. Bonano to order a fire unit to respond to the fire when they knew it was safe to do so was “willful misconduct.”

The Haabs argue that the question of whether this Plan rose to the level of “willful misconduct” or “criminal, willful, outrageous, reckless, and flagrant misconduct” is a question of fact. They complain that the only way that the trial court could have granted summary judgment in consideration of Constable Civello’s affidavit was for the trial court to disregard his conclusions entirely. They cite *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, for the proposition that automatically excluding expert opinion evidence at the summary judgment stage is not allowed.

In *Independent Fire*, the court was faced with competing expert affidavits regarding which of two propane tanks was the source of a grill fire. The Supreme Court found that although the evidence submitted on behalf of one of the parties by way of expert opinion was circumstantial and conflicted with the eyewitness

testimony, the Court could not conclude that “. . . ‘the scintilla of evidence presented supporting [this expert’s] position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true,’ such that a trial court should grant summary judgment.” *Id.* at 236-37. (Citation omitted). The Court therefore held that “[i]f a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert-Foret* 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 and let the issue be decided at trial.” *Id.* at 236. (Emphasis added). Clearly, the issue in dispute in *Independent Fire*, (i.e., the source of the fire), was a *factual* question. Because we disagree with the Haabs’ assertion that the question of “[w]hether the foolishness of this Plan rose to the level of criminal, willful, outrageous, reckless, and flagrant misconduct” is a question of fact, we do not find the decision in *Independent Fire* pertinent to our analysis in the case before us.

Whether a given set of conduct rises to the level of “willful misconduct” or “criminal, willful, outrageous, reckless, or flagrant misconduct” is a standard created by law to determine whether liability will result from that conduct; as such, the question of whether a given set of conduct rises to the level of “willful misconduct” or “criminal, willful, outrageous, reckless, or flagrant misconduct” is purely a question of law, and is within the province of the trial court to determine at the summary judgment stage. The fact that Constable Civello, in addition to expressing his opinion regarding the underlying facts and conduct in this matter, also expresses his opinion on the purely legal question of whether that conduct rises to the level of “willful misconduct” or “criminal, willful, outrageous, reckless, or flagrant misconduct” does not create a question of material fact that precludes

the grant of summary judgment in this matter. Therefore, while Constable Civello's opinion regarding the underlying facts and conduct is relevant to determine whether a genuine issue of material fact exists, his opinion regarding the legal question of the characterization of that conduct is not.

In *Cates v. Beauregard Electric Cooperative, Inc.*, 316 So.2d 907, 916 (La. App. 3rd Cir.1975), *aff'd*, 328 So.2d 367 (La. 1976), the Third Circuit stated:

The terms 'willful', 'wanton', and 'reckless' have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended. The usual meaning assigned to do (sic) the terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow. (Citations omitted).

We conclude that only the most egregious conduct by parish agents, employees or representatives that exhibits an active desire to cause harm, or a callous indifference to the risk of potential harm from flagrantly bad conduct, will rise to the level of "willful misconduct" or "criminal, willful, outrageous, reckless, or flagrant misconduct" resulting in a forfeiture of all the immunity protections afforded by the HSA and the DIS.

After a thorough review of the evidence of record on the summary judgment motion, and accepting as true, deficiencies in the Plan itself and in the response to the actual fire as opined by Constable Civello, we do not find any facts that are even remotely suggestive of the extreme conduct required by the statutes on the part of any of the Parish officials or employees in the formulation, adoption or review of the Plan, or in the activation of the Plan and response to the fire during Hurricane Gustav. The evidence shows that the Parish was complying with the

HSA in adopting the Plan. It also shows that the Parish had a rational basis for including provisions in the Plan that balanced the needs of the public for fire protection during an emergency event with the need for the safety of its employees during that event. Furthermore, the evidence shows that the employee defendants, who were required to make instantaneous decisions during a crisis situation, were doing their best to comply with the mandates of the Plan, and still be responsive to the needs of the public. Although in hindsight there may have been deficiencies in the Plan itself, and in the response to the fire, as opined by Constable Civello, we conclude that these deficiencies, at most, might constitute ordinary negligence for which the Parish and its employees are immune under both the HSA and the DIS on the facts as presented in this case. As such, we find that the Parish and its departments, officials and employees are entitled to absolute and qualified immunity pursuant to the HAS, and qualified immunity pursuant to the DIS. Finding there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law, we conclude that the summary judgment as to all defendants was properly granted. La. C.C.P. art. 966(C).

DECREE

For the foregoing reasons, the summary judgment granted in favor of the defendants and dismissing the Haabs' lawsuit with prejudice is hereby affirmed.

AFFIRMED

MONICA HAAB, WIFE OF/AND
GARRET HAAB, INDIVIDUALLY AND
ON BEHALF OF HIS MINOR
CHILDREN, AIDEN HAAB, AMELIA
HAAB, AND SOPHIE HAAB

NO. 13-CA-954

FIFTH CIRCUIT

COURT OF APPEAL

VERSUS

STATE OF LOUISIANA

EAST BANK CONSOLIDATED
SPECIAL SERVICE FIRE PROTECTION
DISTRICT OF JEFFERSON PARISH,
LOUISIANA, PARISH OF JEFFERSON,
JEFFERSON PARISH DEPARTMENT OF
HOMELAND SECURITY, JEFFERSON
PARISH DEPARTMENT OF
EMERGENCY MANAGEMENT, DAVID
SAUNDERS, DEANO BONANO,
KENNETH L. PADGETT, SR., M.
JOSEPH, AND ABC INSURANCE
COMPANY



JOHNSON, J., DISSENTS WITH REASONS

I, respectfully, dissent from the majority opinion on the analysis of the discretionary immunity statute, La. R.S. 9:2798.1. The opinion rejects the Haabs' assertion that the question of "[w]hether the foolishness of this Plan rose to the level of criminal, willful, outrageous, reckless, and flagrant misconduct is a question of fact" and finds "the question of whether a given set of conduct rises to the level of 'criminal, willful, outrageous, reckless, or flagrant misconduct' is purely a question of law, and is within the province of the trial court to determine at the summary judgment stage." However, the opinion provides no jurisprudential support for the assertion that the question is purely a question of law. When considering the issue of whether the misconduct of a political subdivision is criminal, willful, outrageous, reckless, or flagrant, there is jurisprudence that squarely opposes the point of law set forth in the opinion.

In *Farve v. Boh Bros. Const., L.L.C.*, 11-451 (La. App. 5 Cir. 3/13/12); 90 So.3d 481, 489, *writ denied*, 12-1024 (La. 6/22/12); 91 So.3d 976, this Court held that the application of La. R.S. 9:2798.1 is a question of fact to be determined through a trial. The Louisiana Third Circuit, in *Murphy Cormier General Contractor, Inc. v. State*, 12-1000 (La. App. 3 Cir. 5/22/13); 114 So.3d 567, 599, *writ denied*, 13-1491 (La. 11/1/13); 125 So.3d 430, has stated, “The trier of fact determines whether, under the facts of the particular case, the officials are entitled to immunity.” (*See also, Chaney v. National Railroad Passenger Corp.*, 583 So.2d 926 (La. App. 1st Cir. 1991), where the court found:

Whether or not the exercise of discretion by a governmental entity is a policy-making decision as contemplated by La. R.S. 9:2798.1, or an operational decision, is a question of fact. Likewise, whether the exercise of the discretion is protected by the discretionary immunity statute, or whether it is “willful, outrageous, reckless, or flagrant misconduct” is also a factual question. (Citations omitted)).

Thus, from the jurisprudence mentioned, the question of whether a given set of conduct rises to the level of “criminal, willful, outrageous, reckless, or flagrant misconduct,” is a factual question, not a purely legal question.

By considering the Haabs’ issue solely as a question of law, the majority opinion determines through summary judgment that the defendants are entitled to the affirmative defenses of discretionary immunity and Louisiana Homeland Security Act immunity, which is contrary to the controlling jurisprudence held in *Farve, supra*, and other jurisprudence reviewing willful misconduct. Additionally, the opinion does not consider all of the evidence presented. The majority opinion totally dismisses Constable Dan Civello’s affidavit from consideration; yet, it wholly adopts the defendants’ position by holding, “the evidence shows that the employee defendants, who were required to make instantaneous decisions during a

crisis situation, were doing their best to comply with the mandates of the Plan, and still be responsive to the needs of the public.” In essence, the majority opinion makes factual determinations on affirmative defenses through summary judgment by using the facade that it is determining a question of law. Those factual determinations are to be made by the trier of fact at trial, not on summary judgment.

I am of the opinion that the affidavit of Constable Dan Civello presents a genuine issue of material fact as to whether the conduct of the defendants in response to the house fire rises to the level of “criminal, willful, outrageous, reckless, or flagrant misconduct” sufficient to preclude summary judgment. Therefore, I would reverse the summary judgment and remand the matter to the trial court for further proceedings.

SUSAN M. CHEARDY
CHIEF JUDGE

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JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
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JUDGES



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**NOTICE OF JUDGMENT AND
CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **MAY 28, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

13-CA-954

E-NOTIFIED

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