

**NOT DESIGNATED FOR PUBLICATION**

**COURTNEY THOMAS,** \* **NO. 2005-CA-0034**  
**FATHER OF AND ON BEHALF** \* **COURT OF APPEAL**  
**OF LOVELL THOMAS** \* **FOURTH CIRCUIT**

**VERSUS** \* **STATE OF LOUISIANA**

**GEE CEE GROUP, INC.,** \* **STATE OF LOUISIANA**  
**BRAND SCAFFOLD** \*  
**COMPANY, GOOTEE** \*  
**CONSTRUCTION AND JOHN** \*  
**DOE** \*

\* \* \* \* \*

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 99-4601, DIVISION "F-10"  
Honorable Yada Magee, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,  
and Judge Leon A. Cannizzaro, Jr.)

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**AFFIRMED**

The plaintiffs, Courtney Thomas, individually, and on behalf of his minor son, Lovell Thomas, and defendant Gee Cee Group, Inc., appeal the summary judgment granted in favor of defendant Brand Scaffold Builders, Inc., dismissing plaintiffs' claims against it with prejudice. After reviewing the record before us, as well as the applicable jurisprudence, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

In 1997, Gootee Construction, Inc., ("Gootee") contracted with Xavier University to build a four story building on the university's campus. Gootee contracted with several subcontractors including Gee Cee Group, Inc. ("Gee Cee") and Brand Scaffold Company ("Brand Scaffold"). Gee Cee was hired to perform brickwork on the building while Brand Scaffold was retained to erect a scaffold frame around the entire perimeter of the building.

The plaintiffs' petition alleges that on March 20, 1998, plaintiff

Courtney Thomas (“Mr. Thomas”) was working as an employee of Gee Cee, approximately four stories high on a scaffold erected and maintained by Brand Scaffold. Plaintiff alleges that a co-employee, “John Doe”, intentionally shoved him during a work related argument, causing him to lose his balance and fall approximately four stories to the ground below.

On March 22, 1999, Mr. Thomas filed suit individually, and on behalf of his minor son, against Gootee, Gee Cee, John Doe (a/k/a Sebasitan Chigbu), and Brand Scaffold for personal injuries he sustained as a result of the fall. In their original petition, the plaintiffs allege, among other things, that Brand Scaffold is liable to plaintiffs because it “failed to meet it’s [sic] responsibility to properly erect safe scaffolding for workers...to use while working as a laborer for defendant Gee Cee Group, as well as being responsible for properly training any potential users of the subject scaffolding as to the proper and safe manner in which to use this scaffolding.” Alternatively, the plaintiffs argue that Brand Scaffold was “negligent in its failure to properly instruct Gootee Construction and any other companies utilizing same scaffolding in the proper erection and maintenance of the subject scaffolding in the event Brand Scaffold chose or

was required to let any other company personnel conduct same.”

On March 20, 2003, plaintiffs amended their petition to assert that Brand Scaffold was negligent for the following acts and omissions:

- erecting its scaffolding at the Xavier University job site without complying with OSHA [Occupational Safety and Health Administration] requirements mandating the installation of proper safety canopy structures, debris nets, catch platforms, and guardrails.
- 1 allowing non-qualified personnel from other sub-contractors to use and install decking on levels above the second floor, despite Brand’s knowledge that proper safety canopy structures, debris nets, catch platforms, and guardrails were not installed and that the risk of harm to untrained and non-qualified workers would be greater due to the absence of OSHA required safety canopy structures, debris nets, catch platforms, and guardrails.
- 1 failing to supervise the erection of its scaffolding, of which Brand still had garde, and to stop unsafe work by non-qualified sub-contractors on its scaffold despite knowledge of same.

Plaintiffs further allege that Brand Scaffold is liable under La. C.C. art. 2317 because it had custody, control and garde of its scaffold.

On June 20, 2002, defendant, Brand Scaffold, filed a motion for summary judgment contending that there is no evidence of liability on the part of Brand Scaffold. Specifically, Brand Scaffold argues in its motion for summary judgment that: (1) the scaffolding frame it constructed was safe

and built according to all scaffolding safety regulations and in compliance with the Occupational Safety and Health Administration (“OSHA”) standards; (2) after it built the thirteen level scaffolding frame and installed floor decks on the lower two levels, the safe use of the scaffold was the responsibility of Gee Cee and it did not have any responsibility to install floor decks, or monitor the use of the scaffold on the upper level from which plaintiff fell; (3) the duty to train Gee Cee’s employees in scaffold safety erection and maintenance and to oversee their safe use of the scaffold was the responsibility of Gee Cee; and (4) Plaintiff was intentionally pushed off the scaffold by his co-employee, an employee of Gee Cee. In support of its motion for summary judgment, Brand Scaffold attached an affidavit of Bobby Milligan, the Superintendent of Gootee in 1998, the affidavit of Breland “Jay” Clement, Brand Scaffold’s Supervisor at the Xavier job site; and excerpts from Mr. Thomas’s deposition.

The plaintiffs filed an opposition to Brand Scaffold’s motion for summary judgment, arguing that material issues of fact remain as to: (1) whether OSHA standards were complied with in this case; (2) whether Brand Scaffold had contractual responsibility for the safe erection of its own scaffold; and (3) whether Brand Scaffold had a duty to train competent workers. In support of their opposition, the plaintiffs attached: Brand

Scaffold's proposal for the Xavier job; various OSHA regulations governing employers whose employees work on scaffolds; two printouts from OSHA's web site interpreting OSHA regulations; and a report written by Gina Noto, an investigator for the worker's compensation carrier, with attachments.

Gee Cee also opposed Brand Scaffold's motion for summary judgment, arguing that it did not enter into an agreement with Brand Scaffold to provide the safety, maintenance and modification of the scaffolding. In support of its opposition, Gee Cee filed the affidavit of Gibson Chigbu, the owner of Gee Cee.

In response to plaintiffs' and Gee Cee's oppositions to Brand Scaffold's motion for summary judgment, Brand Scaffold filed a post-trial memorandum and two rebuttals, with additional exhibits attached. Brand Scaffold's additional exhibits included the following: Brand Scaffold's proposal for the Xavier job; copies of OSHA regulations; additional excerpts from Mr. Thomas's deposition; a letter written by Gibson Chigbu shortly after Mr. Thomas's accident; Gee Cee's response to a request for admissions authenticating Chigbu's letter; an affidavit of Jerry Adams, the manager of safety and training for Brand Scaffold; and an affidavit of Gene Gatlin, Brand Scaffold's service representative who negotiated the contract with Gootee for the Xavier job.

The trial court heard the summary judgment motions on March 28, 2003, and the court rendered summary judgment in favor of Brand Scaffold by judgment rendered on March 31, 2003. On October 15, 2004, after finding that there is no just reason to delay the appeal, the trial court signed a Consent Order designating the trial court's judgment of March 31, 2003 as final. The trial court did not state any reasons why there is no just reason for delay.

The Louisiana Supreme Court recently held that the trial court's failure to state the reasons why there is no just reason for delay does not require dismissal of an appeal of a judgment that has been certified as final under La. C.C.P. art.1915. *R.J. Messinger, Inc. v. Rosenblum*, 2004-1664 (La. 3/2/05) 894 So.2d 1113. Rather, the Supreme Court held that when there are no reasons stated as to why the trial court determined there is no just reason for delay, the appellate court should make a *de novo* determination of whether certification was proper. *Id.*

Under Louisiana caselaw, this Court should consider five factors in determining whether no just reason for delay exists under Article 1915:

- 1) The relationship between the adjudicated and unadjudicated claims;
- 2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
- 3) The possibility that the reviewing court might be obliged to

consider the same issue a second time;

- 4) The presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and
- 5) Miscellaneous factors such as delay, economic and insolvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

*Banks v. State Farm Ins. Co.*, 30,868 p.4 (La. App 2 Cir. 3/5/98), 708 So.2d 523, 525; *Johns v. Jaramillo*, 1998-2507 pp.3-4 (La. App. 4 Cir. 11/25/98), 724 So.2d 255, 275. Following our *de novo* review, we conclude certification of this judgment was proper.

## **STANDARD OF REVIEW**

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/2000), 755 So.2d 226, 230. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A (2). A summary judgment shall be rendered forthwith 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 the mover is entitled to



judgment as a matter of law. La. C.C.P. art. 966 B. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2). The jurisprudential presumption against granting the summary judgment was legislatively overruled by La.C.C.P. art. 966 as amended. The amendment levels the playing field between the parties, with the supporting documentation submitted by the parties to be scrutinized equally and the removal of the overriding presumption in favor of trial. Under the amended statute, the initial burden of proof remains with the mover to show that no genuine issue of material fact exists. However, under La.C.C.P. art. 966(C), once mover has made a prima facie showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that material factual issues remain. Once

mover has properly supported the motion for summary judgment, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion.

A fact is material if it is essential to a plaintiff's cause of action under the applicable theory of recovery and without which plaintiff could not prevail. Generally, material facts are those that potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute. *Prado v. Sloman Neptun Schiffahrts, A.G.*, 611 So.2d 691, 699 (La.App. 4 Cir. 12/15/92). Although summary judgments are now encouraged, they are inappropriate where there is a genuine issue of material fact to be resolved by the trier of fact.

## **DISCUSSION**

On appeal, appellants briefed the following assignments of error: (1) the trial court erred in granting Brand Scaffold's motion for summary judgment; (2) the trial court erred in concluding that there existed no genuine material issues of fact concerning Brand Scaffold's adherence or non-adherence to OSHA standards; (3) the trial court erred in concluding that there existed no genuine material issues of fact concerning the breach of Brand Scaffold's duty to plaintiff, Mr. Thomas, arising from Brand Scaffold's contractual duty to provide supervision and materials to erect

scaffold at the Xavier job site; and (4) the trial court erred in concluding that there existed no genuine material issues of fact, despite conflicting affidavits averring that neither Gee Cee nor Brand Scaffold were responsible for safety, maintenance or modification of the job site scaffold.

The issue for review before this Court is whether Brand Scaffold met its burden of proof on summary judgment. The Appellants complain that the trial court erred in granting Brand Scaffold's motion for summary judgment concluding that no genuine issues of material fact existed. Appellants argue that there are genuine issues of material fact surrounding Brand Scaffold's liability to the Appellants and its responsibility for supervising, maintaining, or modifying the scaffold. Further, the Appellants argue that there are genuine issues of material fact concerning how Mr. Thomas fell from the scaffold.

In support of its motion for summary judgment, Brand Scaffold submitted Mr. Thomas's deposition together with the affidavits of Bobby Milligan, the Gootee Superintendent on the Xavier project, and Breland Clement, the supervisor for Brand Scaffold. According to Mr. Milligan and Mr. Clement, Brand Scaffold's original contract with Gootee called for Brand Scaffold to erect a thirteen level scaffold frame around the perimeter of the Xavier building and to install floor decks on the first two levels of the

scaffolding frame. Mr. Milligan and Mr. Clement testified that the scaffolding frame and two lower floor decks built by Brand Scaffold were safe and built according to scaffolding safety regulations and in compliance with OSHA standards. Mr. Milligan and Mr. Clement stated in their affidavits that after Brand Scaffold completed the thirteen level scaffolding frame and the floor decks on the first two levels, Gee Cee had the responsibility to install floor decks on the remaining eleven levels as work progressed, and that Gee Cee also had the responsibility to maintain and modify the scaffold and to ensure scaffold safety. Mr. Milligan and Mr. Clement further stated in their affidavits that Brand Scaffold had no responsibilities to train any employees other than their own in the proper use, erection or maintenance of the scaffold.

According to Mr. Thomas, Gee Cee's employees were instructed to build and move scaffolding as they worked. Specifically, Mr. Thomas stated in his deposition as follows:

Q. When you were doing your job--when I say your job, the overall job of putting brick on that building-is that something that your company did; in other words, moved the scaffolding, the boards around so you could do your job properly?

A. Yeah. Yeah. My company did it.

\* \* \*

Q. Who was the scaffold builder employed by?

A. Gee Cee Group.

Q. Do you know his name or was there more than one?

A. His name is Benny Thompson.

Q. And that was his job, to build the scaffolds?

A. Yeah.

Mr. Thomas also stated in his deposition that his co-worker, Sebastian, pushed him from the scaffold. Specifically, Mr. Thomas stated the following:

A. I'm on the scaffold and we were having a few words. We were arguing on the scaffold, and then when I went to go get a piece of tape, I turned this way towards the outside of the scaffold and the guy pushed me, pushed me from behind.

Although plaintiffs offered several documents in opposition for summary judgment, plaintiffs failed to produce factual support to establish that they would be able to satisfy their evidentiary burden of proof at trial. Specifically, plaintiffs do not dispute the fact that Mr. Thomas was intentionally thrown off of the third level of the scaffold by Gee Cee's own employee. Further, plaintiffs failed to provide evidence: (1) that Brand Scaffold had a duty to supervise Gee Cee's employees; (2) that Brand Scaffold was in anyway responsible for the supervision of the scaffold above the first two decks; and/or (3) that the scaffold did not meet OSHA

standards.

Gee Cee also opposed Brand Scaffold's motion for summary judgment and attached the affidavit of its owner, Gibson Chigbu. Although Mr. Chigbu states that Gee Cee "did not enter into an agreement with Brand Scaffolding to provide safety, maintenance or modification of the scaffold erected by Brand Scaffold at the Xavier job site...", he did not contradict the testimony of Mr. Milligan, Mr. Clement, and Mr. Thomas that it was Gee Cee's own employees who actually moved the first and second level floor boards to higher levels on the scaffold as the bricklaying work progressed. Accordingly, Gee Cee failed to provide evidence that Brand Scaffold was responsible for the scaffold in the area where Mr. Thomas was working.

From our *de novo* review of the evidence submitted on the motion for summary judgment, we find that summary judgment was proper.

Accordingly, we affirm the summary judgment granted in favor of defendant, Brand Scaffold, dismissing all of the plaintiffs' claims against it.

**AFFIRME**

**D**

