

MS. DOTTIE ADAMS, MR. HERBERT
ADAMS, ET AL

NO. 17-CA-250

VERSUS

FIFTH CIRCUIT

JOSEPH GREFER, CAMILLE GREFER,
ROSE MARIE GREFER HASSI, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 624-278, DIVISION "K"
HONORABLE BRADY M. FITZSIMMONS, JUDGE PRESIDING

December 13, 2017

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Robert A. Chaisson

AFFIRMED.

SMC

JGG

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CHEHARDY, C.J.

Numerous plaintiffs¹ appeal the trial court's grant of summary judgments in favor of defendants, Exxon Mobil Corporation, Mobil Exploration and Producing North America, Inc. (hereinafter "Exxon"); Shell Oil Company, Shell Offshore, Inc., and SWEPI LP, ConocoPhillips Company; and Alpha Technical Services, Inc (hereinafter "Shell").² For the following reasons, we affirm the trial court's judgments.

Facts and Procedural History

On October 11, 2005, over 1100 plaintiffs, colloquially known as "the Dottie Adams plaintiffs," filed a petition for damages alleging that they were directly or indirectly exposed to naturally occurring radioactive material ("NORM") by defendants'³ contamination of the "Grefer tract," a 33-acre industrial tract situated in Harvey, Louisiana.⁴ The "Dottie Adams" plaintiffs are "present or former residents of ... Harvey, Louisiana, or at some point worked near the 'Grefer Tract,' near Peters Road, Sixteenth Street, Paillet Avenue and Breaux Avenue."

¹ Fifty-six appellants challenging the grant of summary judgment in favor of Exxon, *et al* are Aaron Boyd; Dana Michelle Boyd; Robert Boyd, Jr.; Mark Anthony Johnson; Melvina W. Lafayette; Timothy A. Lafayette; Bert Lancaster Parker; Sean Deangelo Parker; Trenice Sharper; Trenice Sharper o/b/o Shaquille O'Neal Sharper; Anthony Jenkins; Lisa Henderson; Montrice R Johnson; Shirley Gray; Kim Elana Henderson (named in the Petition as "Kim Elana Houston;" Grace Ann Jenkins; Dewitt Jenkins; Demetrius Ann Parker; Robert H. Boyd, Sr.; Stephen Reuben Boyd; Mary Ann Boyd-Smothers; Edward A. Burras; Dennis Butcher; Rita Mae Cason; Willard Clover. III; Coy Sabree Cola; Sherlena McClure Davis; Sierra Denae Davis; Tierra Janae Davis; Charles Green, Jr.; Sharon Ingrid Guyton; Mattie Harrell; Elenor Harris; Toshiba L. Jenkins; Caroline Davis Johnson; Marcel Anthony Johnson; Maya Ashley Johnson; Montinique Angell Johnson; Harrison Dwight Lomax; Ada Tonzio Mack; Charlie Mack, Jr.; Cheryl Jeanette Mack; Delores Mack; Sidney Allen Martin; Robert Charles Osgood; Harriet Polk; Shavone-Sharper; Ada Sandra Triggs; Anitra Marie Triggs; Jacquet Triggs; Prentiss Sylvester Washington, III; Sylvia Smith Weatherspoon; Andrew Webster, Jr.; I C. Wilson; Rita Wilson; and Susan Yotte.

² Eighteen appellants challenging the grant of summary judgment in favor of Shell, *et al* are Aaron Boyd; Dana Michelle Boyd; Robert Boyd, Jr.; Mark Anthony Johnson; Melvina W. Lafayette; Timothy A. Lafayette; Bert Lancaster Parker; Sean Deangelo Parker; Trenice Sharper; Trenice Sharper o/b/o Shaquille O'Neal Sharper; Anthony Jenkins; Lisa Henderson; Montrice R Johnson; Shirley Gray; Kim Elana Henderson (named in the Petition as "Kim Elana Houston;" Grace Ann Jenkins; Dewitt Jenkins; and Demetrius Ann Parker.

³ Defendants named in the original petition were Exxon-Mobil Corporation; the Grefer Family; Charles Holmes; Intracoastal Tubular Services, Inc.; Alpha Technical Services, Inc.; Chevron U.S.A., Inc.; Conoco, Inc.; Homeco, Inc.; Mobil Exploration & Producing Southeast, Inc.; Phillips Oil Company; Sexton Oil & Mineral Corporation; Shell Offshore, Inc.; Shell Oil Company; Shell Western E&P; Systems Fuels, Inc.; Texaco, Inc.; and Tubular Corporation.

⁴ There has been substantial litigation surrounding the personal injuries suffered as a result of the environmental damage at this site. *See generally*, *Bailey v. Exxon*, 15-225 (La. App. 5 Cir. 12/23/15), 184 So.3d 191; *Oleszkowicz v. Exxon Mobil Corp.*, 14-0256 (La. 12/09/14), 156 So.3d 645, 646; *Lester v. Exxon Mobil Corp.*, 12-1709 (La. App. 4 Cir. 6/26/13), 120 So.3d 767, 771; *Lester v. Exxon Mobil Corp.*, 10-743 (La. App. 5 Cir. 5/31/12), 102 So.3d 148, *writ denied*, 12-2202 (La. 4/19/13), 111 So.3d 1028; *Grefer v. Travelers Ins. Co.*, 04-1428 (La. App. 5 Cir. 12/16/05), 919 So.2d 758, 761; *Grefer v. Alpha Technical*, 02-1237 (La. App. 4 Cir. 3/31/05), 901 So.2d 1117, *writ denied*, 05-1259, 925 So.2d 1248 and 05-1590 (La. 3/31/06), 925 So.2d 1248, *cert. granted, vacated and remanded on other grounds*, 549 U.S. 1249, 127 S.Ct. 1371, 167 L.Ed.2d 156 (2007), *on remand*, 02-1237 (La. App. 4 Cir. 8/8/07), 965 So.2d 511.

After eleven years of litigation, Exxon filed its motions for summary judgment with respect to fifty-seven⁵ specific “Dottie Adams” plaintiffs on the basis that the plaintiffs were not able to substantiate that either they or their property were exposed to NORM above naturally-occurring background levels.⁶ To its motions for summary judgment, Exxon attached an affidavit from its expert health physicist, John R. Frazier, Ph.D., with attached exhibits, including a deposition from Andrew Gross of Radiation Technical Services; two reports from the Louisiana Department of Environmental Quality; and a list of plaintiffs’ addresses. In his affidavit, Dr. Frazier attests that “no evidence of physical testing of Plaintiffs’ properties ... shows any NORM impacted dust or soil from operations on the [Grefer Tract].” In conclusion, Dr. Frazier surmises that “it is more likely than not that the properties owned by the subject Plaintiffs in Harvey, Louisiana, ... would have not been impacted by NORM from oil pipe scale from operations in the [Grefer Tract] in Harvey, Louisiana.”

Within days, Shell filed its own motion for summary judgment, incorporating and adopting Exxon’s motion for summary judgment and supporting exhibits, with respect to forty “Dottie Adams” plaintiffs on the basis that the plaintiffs were not able to substantiate that either they or their property were exposed to NORM above naturally-occurring background levels. To its motion for summary judgment, Shell attached a “Master Set of Requests for Admission, Interrogatories, and Requests for Production of Documents” propounded by Exxon and Shell to all remaining “Dottie Adams” plaintiffs on November 17, 2016. In support of its motion, Shell alleged that the plaintiffs named in its motion failed to respond within 30 days to the propounded interrogatories and, thus, Shell’s

⁵ On December 29, 2016, Exxon filed its motion for summary judgment regarding claims made by fifty-six plaintiffs. On January 6, 2017, Exxon filed its motion for summary judgment with respect to claims made by plaintiff, Demetrius Ann Parker.

⁶ Exxon reported to the trial judge that these fifty-seven plaintiffs were the only remaining “Dottie Adams” plaintiffs who had declined Exxon’s settlement offers.

requests for admission were deemed admitted by operation of law under La. C.C.P. art. 1467(A). Specifically, Shell argued that the named plaintiffs “have admitted they have no evidence of their alleged exposure to NORM, including exposure to their persons and/or their properties.” Based on these supporting documents, Exxon and Shell contended that the plaintiffs at issue could not bear their burden of proof at trial and, thus, Exxon and Shell were entitled to summary judgment.

In their opposition, plaintiffs argued that summary judgment was not appropriate as the parties had already reached an agreement to settle. Plaintiffs attached documents, which were sealed, to their opposition, including a copy of the offer to settle from 2008 and other privileged communications. Plaintiffs argued that they have “suffered as a minimum ‘fear and fright’ as a result of the warnings posted by the DEQ, . . . , the high incidence of cancers related to radiation, and the settlement confected between the parties.”

After a hearing on January 30, 2017, the trial court took the matter under advisement. On February 1, 2017, the trial judge granted Shell’s motion for summary judgment with respect to eighteen plaintiffs.⁷ On February 3, 2017, the trial judge granted Exxon’s motions for summary judgment with respect to fifty-three⁸ represented plaintiffs. On February 24, 2017, the trial judge granted Exxon’s motion for summary judgment with respect to four *pro se* plaintiffs.⁹ All

⁷ Those represented plaintiffs are Aaron Boyd; Dana Michelle Boyd; Robert Boyd, Jr.; Mark Anthony Johnson; Melvina W. Lafayette; Timothy A. Lafayette; Bert Lancaster Parker; Sean Deangelo Parker; Trenice Sharper; Trenice Sharper o/b/o Shaquille O’Neal Sharper; Anthony Jenkins; Lisa Henderson; Montrice R Johnson; Shirley Gray; Kim Elana Henderson (named in the Petition as “Kim Elana Houston;” Grace Ann Jenkins; Dewitt Jenkins; and Demetrius Ann Parker. That same day, the trial judge granted voluntary dismissals with respect to the twenty-two other plaintiffs that had been named in Shell’s motion for summary judgment. Those rulings are not at issue in this appeal.

⁸ The represented plaintiffs were Aaron Boyd; Dana Michelle Boyd; Robert Boyd, Jr.; Mark Anthony Johnson; Melvina W. Lafayette; Timothy A. Lafayette; Bert Lancaster Parker; Sean Deangelo Parker; Trenice Sharper; Trenice Sharper o/b/o Shaquille O’Neal Sharper; Anthony Jenkins; Montrice R Johnson; Kim Elana Henderson (named in the Petition as “Kim Elana Houston;” Dewitt Jenkins; Demetrius Ann Parker; Robert H. Boyd, Sr.; Stephen Reuben Boyd; Mary Ann Boyd-Smothers; Edward A. Burras; Dennis Butcher; Rita Mae Cason; Willard Clover. III; Coy Sabree Cola; Sherlena McClure Davis; Sierra Denaë Davis; Tierra Janae Davis; Charles Green, Jr.; Sharon Ingrid Guyton; Mattie Harrell; Elenor Harris; Toshiba L. Jenkins; Caroline Davis Johnson; Marcel Anthony Johnson; Maya Ashley Johnson; Montinique Angell Johnson; Harrison Dwight Lomax; Ada Tonzo Mack; Charlie Mack, Jr.; Cheryl Jeanette Mack; Delores Mack; Sidney Allen Martin; Robert Charles Osgood; Harriet Polk; Shavone Sharper; Ada Sandra Triggs; Anitra Marie Triggs; Jacquet Triggs; Prentiss Sylvester Washington, III; Sylvia Smith Weatherspoon; Andrew Webster, Jr.; I C. Wilson; Rita Wilson; and Susan Yotte.

⁹ The *pro se* plaintiffs were Shirley Gray, Lisa Henderson, Blanche Jenkins, and Grace Ann Jenkins.

of those rulings were designated as final judgments under La. C.C.P. art. 1915. On February 24, 2017, fifty-six plaintiffs¹⁰ filed a motion to appeal the trial court's grant of summary judgment in favor of Exxon and Shell, which was granted.

Standard of Review

Appellate courts review the granting of summary judgment *de novo* using the same criteria governing the trial court's consideration of whether summary judgment is appropriate. *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/06/10), 45 So.3d 991, 996.

Law and Discussion

In their assignment of error, plaintiffs argue that the trial court erred by granting defendants' motions for summary judgment as there had been a settlement between the parties.

A motion for summary judgment "shall be granted if the motion, memorandum, and supporting documents 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(A)(2).¹¹ "The court may only consider those documents filed in support of or in opposition to the motion for summary judgment." La. C.C.P. art. 966(D)(2). "The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions." La. C.C.P. art. 966(A)(4).

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

¹⁰ Only one of the plaintiffs, Blanche Jenkins, is not appealing the grant of Exxon's and Shell's motions for summary judgment.

¹¹ La. C.C.P. art. 966 was amended by 2015 Acts 422, §2, effective January 1, 2016.

La. C.C.P. art. 967(A). The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits. *Id.*

The party moving for summary judgment bears the burden of proof. La. C.C.P. art. 966(D)(1). However, if the movant will not bear the burden of proof at trial, the movant's burden on a motion for summary judgment does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. *Id.*; *Patrick v. Iberia Bank*, 05-783 (La. App. 5 Cir. 3/14/06), 926 So.2d 632, 634. If the adverse party fails to produce factual support sufficient to establish a genuine issue of material fact, summary judgment should be granted. La. C.C.P. art. 966(D)(1).

It is well-settled a plaintiff opposing summary judgment cannot rest on the mere allegations of his pleadings, but must set forth specific facts showing a genuine issue for trial exists. If the plaintiff does not set forth specific facts, summary judgment, if appropriate, shall be rendered against him. La. C.C.P. art. 967(B); *Darr v. Marine Elecs. Solutions, Inc.*, 11-908 (La. App. 5 Cir. 5/22/12), 96 So.3d 527, 533, *writ denied*, 12-1442 (La. 10/8/12), 98 So.3d 860. Conclusory allegations and unsupported speculation will not support the finding of a genuine issue of material fact. *Trench v. Winn-Dixie Montgomery LLC*, 14-152 (La. App. 5 Cir. 9/24/14), 150 So.3d 472, 476.

In order to determine whether a plaintiff should prevail on a tort action, Louisiana courts employ a duty-risk analysis. *Long v. State ex rel. Dept. of Transp. & Dev.*, 04-0485 (La. 6/29/05), 916 So.2d 87, 101. One element of the duty-risk analysis requires a plaintiff to provide proof that the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries. *Id.*; *Pitre v. Louisiana Tech Univ.*, 95-1466 (La. 5/10/96), 673 So.2d 585, 590, *cert. denied*, 519 U.S. 1007, 117 S.Ct. 509, 136 L.Ed.2d 399 (1996).

On appeal, appellants contend that the trial court erred in granting judgment in defendants' favor as the parties had agreed to settle this matter. Both Exxon and Shell agree that they had settled with many other plaintiffs, but disagree that a settlement had been reached with these specific plaintiffs, who had refused to fulfill the necessary requirements of settling.

In our review, we find that Exxon and Shell supported their motions with an affidavit from their expert health physicist, Dr. John Frazier, who attested that "no evidence of physical testing of Plaintiffs' properties ... shows any NORM impacted dust or soil from operations on the [Grefer Tract]." We find that defendants satisfied their burden to establish that plaintiffs lacked evidence to prove their exposure to NORM attributable to defendants. The burden shifted to plaintiffs to set forth specific facts showing a genuine issue for trial exists, but plaintiffs failed to provide any support in their opposition. Accordingly, based upon our *de novo* review of the record, we find no error in the trial court's grant of summary judgment in favor of defendants.

Decree

Based on the foregoing, we affirm the trial court's grant of summary judgment in favor of defendants and dismissal of these plaintiffs' claims.

AFFIRMED.

SUSAN M. CHEHARDY
CHIEF JUDGE

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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 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
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17-CA-250

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