

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1786

JOHN THOMAS

VERSUS

AUSTIN BRIDGE & ROAD, INC. AND THE STATE OF LOUISIANA,  
THROUGH THE DEPARTMENT OF TRANSPORTATION AND  
DEVELOPMENT

**DATE OF JUDGMENT:** APR 26 2013

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
NUMBER 595,722, SEC. 26, PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

HONORABLE KAY BATES, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: AFFIRMED.

938 Pettigrew, J. Concurs

KUHN, J.

Plaintiff-appellant, John Thomas, appeals the trial court's dismissal by summary judgment of his claims for personal injuries against defendants-appellees, Austin Bridge & Road, Inc. (Austin Bridge) and the State of Louisiana, Department of Transportation and Development (DOTD), after his vehicle ran over debris in the roadway. We affirm.

Thomas filed this lawsuit alleging that around 5:19 a.m. on October 20, 2009, as he was driving his 2008 Malibu to his New Orleans worksite, he sustained damages when his car hit debris on the I-10 interstate, east of Siegen Lane, while the roadway was under construction. He contends that DOTD, as custodian of the roadway, and Austin Bridge, as the general contractor of the construction site, are liable for an unreasonable risk of harm that caused his damages.

In support of its entitlement to dismissal from the lawsuit, DOTD offered into evidence the affidavit of Earl Brown, an Engineering Technician 5, whose work duties included concrete paving inspection, watching traffic, and inspection of completed jobs. Brown stated that in keeping with his normal practice, on the morning of October 20, 2009, he inspected all lanes of travel on I-10, east- and westbound, at or near the Siegen Lane exit to ensure that the traffic lanes were free from obstructions and/or debris and that he did not observe any debris in the I-10 eastbound roadway near the Siegen Lane ramp. His last inspection of that roadway on October 20, 2009, was around 4 a.m. Brown also attested that he had reviewed the daily logs for October 20, 2009, and no one had called to inform DOTD of an obstruction on the I-10 eastbound roadway where Thomas advised his accident had occurred.

Austin Bridge submitted the affidavit of Office Manager Kelly Andrews. She attested that no complaints pertaining to concrete, debris, or other obstacles in the eastbound I-10 roadway near the Siegen Lane exit on October 19 and 20, 2009, had been reported by any motorists other than Thomas's subsequent advisement.

The record is devoid of any evidence to support a finding that DOTD had notice of the debris in the roadway so as to support the imposition of liability against it on that basis. See La. C.C. art. 2317; La. R.S. 9:2800; *Goza v. Parish of West Baton Rouge*, 2008-0086 (La. App. 1st Cir. 5/5/09), 21 So.3d 320, cert. denied, --- U.S. ---, 130 S.Ct. 3277, 176 L.Ed.2d 1184 (2010) (a plaintiff may recover damages from DOTD, a public entity, based on La. C.C. art. 2317, as limited by La. R.S. 9:2800, i.e., DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time). Similarly, there is no evidence that supports a finding that Austin Bridge knew or, in the exercise of reasonable care, should have known of the debris in the roadway such that in the exercise of reasonable care Austin Bridge could have prevented Thomas's damages. Thus, the presence of debris in the roadway cannot support the imposition of liability against Austin Bridge. See La. C.C. art. 2317.1.

Interestingly on appeal, Thomas avers that "[i]f [Austin Bridge] had appropriately cleaned up the concrete debris" or "[i]f [b]arriers had been installed as called for in the contract," the accident would not have happened. Thus, Thomas asserts "[Austin Bridge's] negligence gives rise to an unreasonably dangerous condition," and suggests that the trial court's dismissal of DOTD and Austin Bridge on the basis of a lack of notice was, therefore, error.

In addition to Office Manager Andrews' affidavit, Austin Bridge submitted those of two other representatives: Traffic Control Supervisor Emmett White and Foreman Guadalupe Deleon. Their collective attestations established that no construction work had been performed on October 19-20, 2009, on the eastbound lanes of I-10 near Siegen Lane.

In the affidavit submitted by DOTD, Brown attested that based on the photographs taken by Thomas later in the day on October 20, 2009, rebar was clearly visible. This indicated to him that it was impossible for a vehicle to cross over the exposed rebar to access I-10 eastbound without causing severe damage to the vehicle's tires.

All the parties relied on portions of Thomas's deposition to support their respective positions. According to Thomas, it was still dark outside when he struck the debris in the roadway. He described the weather as somewhat foggy and wet with morning dew, although he could not remember if he was running his windshield wipers. Thomas stated that as he was driving east in the left lane of the two-lane eastbound traffic, he was following behind a truck. He could not recall if it was a pick-up or a semi-truck. When Thomas saw the truck veer over "slightly to the right," he "scurried behind the truck wondering what was going on." He explained, "[I]mmediately after the truck passed, this obstruction – I visibly saw this cement boulder" in the middle of the roadway on the striped center line between the lanes of travel. Thomas said that he could not move his vehicle to the left to avoid the object because there was a gap in the retaining wall and it would have led him "into that quarry of cement blocks." And he could not move his vehicle into the right lane of travel to avoid the object because there was a vehicle next to his. He

hit the object "head-on on [the] passenger side." There was no one working in the construction area.

Thomas testified that as a result of the impact, both passenger tires deflated, causing his car to jerk into the right lane. With both hands on the wheel, he tried to retain control of his car. Thomas was unable to quickly maneuver into the right travel lane because of heavy traffic but eventually was able to pull off onto the right side shoulder where he called Onstar for assistance. He also called his wife and his supervisor to advise that he would not make it into work that day. Thomas did not call the police. He said that he did not look back to see what he had hit or to determine if it was still in the roadway.

In describing the debris he impacted, Thomas could not recall if "the boulder" was stationary or in motion or whether it moved when he impacted it; and he was "not approximately" able to tell its size or of what it was made. He stated that "[i]t appeared to be cement" based on the color, which was off-white. Thomas said that he did not know where the debris came from and admitted that it could have fallen off a vehicle immediately before he struck it.

Thomas returned to the approximate location of the accident several hours later. No one was working in the construction zone at that time. He took pictures of the area where the gap in the concrete barriers was located as well as a picture of a concrete rock next to one of the concrete barriers. Thomas could not say whether "the boulder" he struck was larger, smaller, or the same size as the one he photographed. He did not see any boulders in the roadway at the time he took the photographs.

In his opposition to the motions for summary judgment, Thomas also offered the affidavit of Dr. Jerry Householder, a civil engineer, who has testified as an expert in matters involving highway defects and construction management in Louisiana courts. Householder reviewed provisions of the construction proposal, executed contract, and addenda for the construction project that Austin Bridge had undertaken with DOTD (the contract). Householder testified that the contract required Austin Bridge to “[s]atisfactorily maintain the entire area within the right of way limits of the project, from the effective date of the notice to proceed until the date of final acceptance.” Therefore, Householder attested that under the terms of the contract, Austin Bridge was responsible for maintenance, including debris removal, “to provide safe and convenient conditions at all times.” Householder stated that under the contract’s provisions Austin Bridge was responsible for maintaining the roadway in a satisfactory condition to allow traffic to safely travel through its work zone. He suggested that under the contract terms, if Austin Bridge failed to perform its maintenance responsibilities, DOTD was authorized to initiate corrective measures.<sup>1</sup> According to Householder, the photographs taken by Thomas showed that “[i]n the area adjacent to the greatest concentration of broken concrete, a section of the shoulder was not removed and concrete was left which could serve as a ramp.”

Householder opined, “It was more probable than not that the concrete [Thomas] struck came from the construction performed by [Austin Bridge]” and based this opinion on photographs that “document the existence of several large

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<sup>1</sup> The contract was not placed in evidence and does not otherwise appear in the record. Moreover, we note that contractual interpretation is a legal question reserved for the courts. See *Johnson v. Illinois Nat’l Ins. Co.*, 2000-1775 (La. App. 1st Cir. 11/9/01), 818 So.2d 100, 103, writ denied, 2001-3190 (La. 2/8/02), 809 So.2d 139.

pieces of concrete on the road surface, which can be displaced and moved when a vehicle travels over or strikes them.” He also concluded that the accident could have been prevented if Austin Bridge had cleared the debris from the work area.

Based on our review of the evidence, defendants have shown through Thomas’s undisputed testimony and the Austin Bridge representatives’ affidavits that there was no one working in the construction zone on the morning of the accident or later in the day. Nothing in the record establishes that subsequent to Brown’s 4:00 a.m. inspection and prior to the 5:19 a.m. accident any vehicle traveled over or struck the “large pieces of concrete” depicted in the photographs that Householder relied upon to support his opinion that more probably than not the debris Thomas encountered in the roadway was concrete, which came from the construction site. Indeed, Brown’s attestations suggest that the construction site was not readily accessible to traffic and any vehicle that attempted to traverse the area would have had debilitating tire damage. And the record is devoid of any evidence that suggests the area “adjacent to the greatest concentration of broken concrete,” where Householder identified concrete was present that could serve as a ramp, had been used by any vehicle as a ramp in the time between the last 4 a.m. inspection and the 5:19 a.m. accident. Thus, we find Householder’s opinion insufficient to establish factual support that the debris Thomas encountered on the roadway came from the construction site.

Moreover, Thomas’s testimony of what he struck was highly equivocal. Thomas admitted he did not know what it was he struck. It appears that Thomas *assumed* it was a concrete boulder. He could not identify its content, its size -- not even relative to another object -- or whether it was stationery or moving before he

hit it. Thomas even admitted that the debris could have come from another vehicle in the roadway. He did not call the police to alert other drivers of the possible danger, although he had a phone from which he called Onstar, his wife, and his boss. And at no time while he waited for help did Thomas attempt to ascertain whether the item he struck remained on the roadway. Reading his entire deposition, we believe that Thomas's testimony is not the sort a reasonable trier of fact may rely on to establish what the debris he struck was so as to impose liability, particularly since there is no other evidence that would allow an inference that the debris he encountered was concrete that came from the construction site.

Thus, whether considered under a theory of either custodial liability, see La. C.C. art. 2317 and 2317.1 and La. R.S. 9:2800, or ordinary negligence, see La. C.C. art. 2315, Thomas has failed to produce factual support sufficient to establish that either Austin Bridge or DOTD's actions or omissions were the cause-in-fact of his damages. See La. C.C.P. art. 966C(2). Accordingly, the trial court correctly dismissed his claims against these defendants.

### **DECREE**

For these reasons, the trial court's judgment, dismissing Thomas's claims against defendants-appellees, Austin Bridge and DOTD, is affirmed. Appeal costs are assessed against plaintiff-appellant, John Thomas.

**AFFIRMED.**