

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0540

JERAD REYNOLDS, MINOR SON OF SARAH M. REYNOLDS;
HARRIETT REYNOLDS, IN HER OWN RIGHT AND AS GUARDIAN
AND UNDERTUTRIX FOR THE MINOR CHILD, JERAD
REYNOLDS; AND TOMMY REARDON, AS FATHER AND
NATURAL TUTOR FOR THE MINOR CHILD AND THE ESTATE OF
SARAH REYNOLDS

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION

Judgment Rendered: DEC 10 2014

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2010-16412

Honorable August J. Hand, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

Whipple, J. concurs & assigns reasons.

McCleendon, J. concurs.

HIGGINBOTHAM, J.

The plaintiffs appeal the dismissal of their wrongful death and survival claims on summary judgment. For the following reasons, we affirm the trial court's grant of summary judgment in favor of the defendant.

FACTS AND PROCEDURAL HISTORY

On October 18, 2009, Sarah Reynolds was critically injured in a head-on collision between her car and a passenger bus on a one-way, two-lane westbound overpass on Interstate 10 near the interchange between Interstates 10, 12, and 59 (hereafter referred to as "I-10," "I-12," and "I-59" or "the interchange") in Slidell, Louisiana. The accident occurred at approximately 3:30 a.m. and Sarah died a few hours later as a result of the multiple traumatic injuries she sustained in the accident.

At the time of the accident, Sarah's car was moving east – in the wrong direction – on the westbound I-10 overpass, while the bus was progressing west on the overpass in the left lane. It is estimated that both vehicles were traveling at the posted speed limit of 70 miles per hour. When the driver of the bus, Ricardo Barrera, saw Sarah's vehicle, he attempted to avoid the collision by applying the bus's brakes and swerving to the right, but the car and bus collided head-on. After the impact, the vehicles skidded westward on the overpass for approximately 135 feet before the bus came to a stop against the left guardrail of the overpass, with Sarah's car facing south against the bus's front bumper.

There were no witnesses who actually saw how Sarah's car came to be traveling the wrong way on the overpass. However, one witness, Jarrod Dennis, was approaching the interchange on I-10 at the same time that Sarah's car was driving up the overpass. Mr. Dennis observed the tail lights of Sarah's car as it moved up the overpass in the wrong direction at the same time as a "large vehicle [was] coming the other way." Mr. Dennis stated that he saw the car's tail lights suddenly "fly up into the air," which he believed to be the time of the impact between Sarah's car and the

bus. Mr. Dennis hurried to the scene and offered assistance until authorities arrived a few minutes later.

The investigating officer, Louisiana State Trooper Charles J. Robertson, found Sarah unconscious and unrestrained on the driver's side floorboard of her car. During his investigation, Trooper Robertson questioned Mr. Dennis, Mr. Barrera, and the forty-one passengers riding in the bus involved in the accident. No one could provide any information as to how Sarah's car ended up traveling the wrong way on the I-10 overpass. Trooper Robertson investigated each area of possible access to the I-10 overpass; however, he did not find any evidence of a road abnormality, nor a disruption or damage to the crossover/contraflow barriers or grassy medians. Thus, Trooper Robertson could not determine how Sarah was able to drive onto the overpass in the wrong direction. Furthermore, Trooper Robertson did not find any area where traffic was diverted from its normal route near the interstate interchange.

Trooper Robertson suspected that Sarah was impaired at the time of the accident, because he found a bag of marijuana in her car and he smelled a slight odor of alcohol coming from her body. An analysis of Sarah's blood taken at two different times after the accident, revealed a blood alcohol content ("BAC") level of .082 gm% at 4:25 a.m. along with the presence of two drugs, Xanax and marijuana, and then at 5:40 a.m., after a large number of liters of fluids were administered intravenously, Sarah's BAC level was .06 gm% with no measurable presence of drugs. In contrast, the bus driver's BAC level was .000 gm%.

The plaintiffs, consisting of Sarah's minor son, Jerad Reardon (also known as Jerad Reynolds), her mother, Harriett Reynolds, and her son's father, Tommy Reardon, on behalf of Jerad, and Sarah's estate, filed suit against the State of Louisiana, through the Department of Transportation and Development ("the

DOTD”).¹ The plaintiffs’ petition alleged that the accident was caused by Sarah somehow being misdirected onto the wrong side of the I-10 overpass due to an ill-lit and/or negligently designed or misplaced crossover/contraflow barrier. The DOTD subsequently filed a motion for summary judgment, pointing out that the plaintiffs could not establish negligence or causation on the part of the DOTD and therefore, no genuine issues of material fact remain as to the DOTD’s liability for the accident. In its motion, the DOTD relied on Trooper Robertson’s deposition testimony and highway design/safety expert, David W. Hall, to show that there was no evidence of any sort of hazardous/defective road condition or that Sarah was somehow misdirected onto the wrong side of the I-10 overpass. The DOTD also relied on an affidavit submitted by pharmacology and toxicology expert, William J. George, Ph.D., opining that the collision was due to Sarah’s significantly impaired condition due to the combination of alcohol, Xanax, and marijuana in her body at the time of the accident. The trial court granted the DOTD’s motion for summary judgment, and by judgment rendered on September 24, 2013, dismissed the plaintiffs’ claims against the DOTD with prejudice. The plaintiffs now appeal, arguing that apparent fact and credibility issues preclude summary judgment.

LAW AND DISCUSSION

First, we discuss several important underlying principles concerning summary judgment. Because summary judgment deprives litigants of the opportunity to present their evidence to a fact finder, it should be granted only when it is shown that there are no genuine issues of material fact. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 (La. 2/29/00), 755 So.2d 226, 236. The trial court must not make credibility determinations on motions for summary judgment, including an evaluation of the persuasiveness of competing scientific studies, but must assume that all of the

¹ The petition named other defendants that were later dismissed after several pretrial motions and exceptions. The only remaining defendant relevant to this appeal is the DOTD.

affiants are credible. **Id.** Also, the trial court must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion. **Id.**

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Schroeder v. Board of Sup'rs of Louisiana State University**, 591 So.2d 342, 345 (La. 1991). We must determine whether the evidence admitted for purposes of the motion for summary judgment demonstrates that there are no disputed issues of material fact and that the defendants are entitled to summary judgment as a matter of law. See La. Code Civ. P. art. 966. The burden of proof to show that no material factual issue exists is on the mover. However, if the party moving for summary judgment will not bear the burden of proof at trial, the mover is not required to negate all essential elements of the adverse party's claim. Rather, the mover must point out to the trial court that there is an absence of factual support for one or more elements essential to the adverse party's claim. 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 and the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(C)(2).

The elements necessary to impose liability upon the DOTD based on a defective condition of a roadway are the same whether based on negligence or strict liability. **Faulkner v. State, Dept. of Transp. & Development**, 25,857 (La. App. 2d Cir. 10/26/94), 645 So.2d 268, 273, writs denied, 94-2901, 94-2908 (La. 1/27/95), 649 So.2d 390. Under either theory, the plaintiffs must prove: (1) that the DOTD owned or had custody of the thing which caused the damage; (2) that the thing was defective in that it created an unreasonable risk of harm to others; (3) that the DOTD had actual or constructive knowledge of the defect or risk of harm and failed to take

corrective measures within a reasonable time; and (4) causation. See Cormier v. Comeaux, 98-2378 (La. 7/7/99), 748 So.2d 1123, 1127; **Faulkner**, 645 So.2d at 273.

In its motion for summary judgment, the DOTD admits to having custody over the interchange area near the I-10 overpass where the accident occurred; however, the DOTD points out the plaintiffs' lack of factual support or evidence regarding the remaining elements of a defective condition, knowledge, and causation. In support of its motion, the DOTD submitted the deposition testimony of Trooper Robertson regarding the lack of a defective roadway condition or any indication that Sarah was misdirected onto the I-10 overpass in the wrong direction. Additionally, the DOTD submitted an affidavit by Mr. Hall, who is an expert in traffic/highway engineering, design, and safety, as well as accident reconstruction. Mr. Hall opined that the crossover/contraflow barricades² in the interchange area were all properly marked, in place, and visible at the time of the accident, and there was no physical evidence that Sarah had driven through or around the barricades or struck them in any way before entering the I-10 overpass in the wrong direction. The DOTD also submitted an affidavit by toxicology expert, Dr. George, regarding the significant impairment of Sarah at the time of the accident that affected her ability to safely operate a motor vehicle.³

It is settled in Louisiana that expert opinion testimony is allowed in support of or in opposition to a motion for summary judgment if it qualifies under **Daubert-Foret**⁴ standards. **Independent Fire Ins. Co.**, 755 So.2d at 235-236. Further, any asserted inadequacy of an expert's affidavit is a formal defect, which is waived unless

² According to Mr. Hall, the crossover/contraflow barricade design had been approved by the Federal Highway Administration and was designed to prohibit movement across the medians of I-10, I-12, and I-59 through the use of barricades in a closed position until opened for use during hurricane evacuation.

³ A litigant in a civil action may prove driver impairment by introducing evidence of a person's BAC level and expert testimony interpreting the effects of such a level on the person's ability to operate a motor vehicle. **Wells v. State Farm Mut. Auto. Ins. Co.**, 573 So.2d 223, 230 (La. App. 1st Cir. 1990).

⁴ See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); **State v. Foret**, 628 So.2d 1116 (La. 1993).

the opposing party files a motion to strike or otherwise objects. **Id.**, 755 So.2d at 235 n.4. The plaintiffs did not object or assert any inadequacies in the affidavits of the experts that the DOTD relied on in support of its motion for summary judgment. Instead, the plaintiffs adopted and incorporated by reference “each and every exhibit” filed by the DOTD, maintaining that the deposition testimony of Trooper Robertson demonstrates that genuine issues of material fact remain.

In order to defeat the motion for summary judgment, the plaintiffs’ burden was simply to produce evidence sufficient to create a material issue of fact with respect to a defective condition and causation. That is, the plaintiffs were required to produce evidence from which a reasonable person could conclude that it is more likely than not that the circumstances that misdirected and/or allowed Sarah to drive the wrong way upon the I-10 overpass just before the collision was the DOTD’s placement or positioning of the crossover/contraflow barriers or the lack of sufficient lighting and/or inadequate shoulder-width at the interchange area near the scene of the accident. The plaintiffs argue in their opposition to summary judgment that although Sarah was admittedly impaired at the time of the accident, the degree of her impairment and how it affected Sarah’s driving ability are genuine issues of material fact. However, once a party has moved for summary judgment and pointed out the lack of factual support for essential elements in the opponent’s case, the party opposing the motion cannot rely on the bare allegations or denials of her pleadings to defeat the properly supported motion. See Scott v. McDaniel, 96-1509 (La. App. 1st Cir. 5/9/97), 694 So.2d 1189, 1191-92, writ denied, 97-1551 (La. 9/26/97), 701 So.2d 991; **City of Baton Rouge v. Cannon**, 376 So.2d 994, 996 (La. App. 1st Cir. 1979). In response to the DOTD’s motion for summary judgment, the plaintiffs must come forth with evidence that demonstrates that they will be able to meet their burden of proof at trial.

Our review of the record reveals that the plaintiffs failed to produce any competent or admissible evidence to counter the experts' affidavits or fact witness's deposition testimony offered by the DOTD. Under these circumstances, we find that the plaintiffs have failed to meet their burden to defeat the summary judgment filed by the DOTD. The undisputed facts presented in the record before us fail to support the plaintiffs' allegations that the condition of the interchange area and/or the I-10 overpass somehow misdirected Sarah onto the wrong side of the I-10 overpass just before the collision occurred. There is absolutely no evidence in the record as to where Sarah was driving or why she drove in the wrong direction onto the I-10 overpass. Further, the plaintiffs did not produce any evidence that something other than the acknowledged driver impairment caused the accident. Accordingly, pursuant to La. Code Civ. P. art. 966, there is no genuine issue of material fact as to the lack of the DOTD's liability for the subject accident. We therefore find that the trial court properly granted summary judgment in favor of the DOTD.

CONCLUSION

For the assigned reasons, we affirm the trial court's grant of summary judgment in favor of defendant-appellee, the State of Louisiana, through the Department of Transportation and Development, and the dismissal of the plaintiffs' claims. All costs of this appeal are assessed to the plaintiffs-appellants, Jerad Reynolds (also known as Jerad Reardon), minor son of Sarah Reynolds; Harriett Reynolds, in her own right and as guardian and undertutrix for the minor child, Jerad Reynolds; and Tommy Reardon, as father and natural tutor for the minor child; and the estate of Sarah Reynolds.

AFFIRMED.

**JERAD REYNOLDS, MINOR SON
OF SARAH M. REYNOLDS; HARRIETT
REYNOLDS, IN HER OWN RIGHT AND
AS GUARDIAN AND UNDERTUTRIX
FOR THE MINOR CHILD, JERAD
REYNOLDS; AND TOMMY REARDON,
AS FATHER AND NATURAL TUTOR
FOR THE MINOR CHILD AND THE
ESTATE OF SARAH REYNOLDS**

STATE OF LOUISIANA


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**LOUISIANA DEPARTMENT OF
TRANSPORTATION**

NUMBER 2014 CA 0540

 **Whipple, C.J. concurring.**

Considering the applicable burden of proof in this case, the plaintiffs have failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial on an element essential to their claim. Specifically, the plaintiffs have not shown that any genuine issue of material fact remains regarding the DOTD's lack of knowledge of any alleged defect. The DOTD specifically denied any knowledge as to any alleged roadway defects. Moreover, the DOTD submitted the deposition of the investigating officer, wherein he states that the barricades were still in place and blocking the asphalt portion of the cross-over when he investigated the accident scene. The affidavit of the DOTD's expert engineer states that the Federal Highway Administration approved the contraflow lane/median crossover design that was in place on the day of the accident. In response, plaintiffs did not present, by affidavit or other competent evidence, any factual or evidentiary support showing that there is a genuine issue regarding the DOTD's lack of actual or constructive knowledge of the alleged defective roadway conditions. Thus, the record before us fails to establish the necessary existence of a genuine issue of material fact pertaining to this element of the plaintiffs' claim. Therefore, the DOTD was entitled to summary judgment in its favor as a matter of law.

For these reasons, I concur in the result reached by the majority herein.