

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CA 0943

DEBRA BATTLE, INDIVIDUALLY AND ON BEHALF OF THE ESTATE
OF HER DECEASED HUSBAND, WILSON BATTLE JR. AND
WILSON BATTLE III., ERIC BATTLE AND CHAD BATTLE,
INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF,
WILSON BATTLE JR.

VERSUS

GREAT WEST CASUALTY INSURANCE COMPANY, DANA TRANSPORT INC.,
ALVESTER MOORE, MR. LUCKY'S, JOHN C. MANGANO, THE STATE OF
LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND
DEVELOPMENT, SUTTLES TRUCK LEASING, L.L.C., CITY OF BATON ROUGE/
PARISH OF EAST BATON ROUGE AND/OR EAST BATON ROUGE
CITY-PARISH, JOHN DOE, ABC INSURANCE COMPANY, AND
KANSAS CITY SOUTHERN RAILWAY COMPANY

Judgment rendered February 17, 2017.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 627919
Honorable Donald R. Johnson, Judge

* * * * *

JACLYN C. CHAPMAN
A.M. 'TONY' CLAYTON
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ATTORNEYS FOR
PLAINTIFFS-APPELLANTS
DEBRA BATTLE, ET AL

AMY E. NEWSOM
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ATTORNEYS FOR
DEFENDANTS-APPELLEES
KANSAS CITY SOUTHERN RAILWAY
COMPANY, BRENNAN P. HIDALGO
AND JAMES H. JOLLISAINT JR.

* * * * *

BEFORE: PETTIGREW AND McDONALD, JJ., AND CALLOWAY,¹ J. Pro Tem.

¹ Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Calloway, J. Dissents

PETTIGREW, J.

This is a wrongful death and survival action filed by the plaintiffs, the widow and children of the decedent, against numerous defendants, seeking damages for the tragic death of Wilson Battley Jr. (the decedent) that occurred on January 30, 2013, on Hwy. 190 West/Airline Highway, past Scenic Highway (near the Huey P. Long Bridge), in Baton Rouge. This appeal is of an April 19, 2016 judgment granting a motion for summary judgment, dismissing the plaintiffs' claims against Kansas City Southern Railway Company (KCS) and its two employees, engineer James H. Jollisaint Jr. (Jollisaint)² and conductor Brennan P. Hidalgo (Hidalgo) (collectively referred to as "KCS defendants"), who were operating the train on the day of the accident. After a thorough review of the record, we affirm.

FACTUAL BACKGROUND

The decedent was killed while driving his 2006 Cadillac Escalade when he suddenly encountered and struck a tractor-trailer (a 2007 Peterbilt eighteen-wheeler hauling a trailer containing hazardous cargo), which was travelling eastbound on Hwy. 190 and made a left turn into two oncoming lanes of travel in an attempt to enter the parking lot of a truck stop. At the time of the attempted left turn by the tractor-trailer, the decedent was proceeding westbound on Hwy. 190 in one of those oncoming lanes of traffic. Apparently, the driver of the tractor-trailer encountered significant pot holes in the parking lot entrance, and in an effort to navigate those holes, stopped or slowed down his rig, resulting in the trailer remaining on the roadway, in the westbound lanes of travel, blocking the decedent's lane of travel. Unable to avoid a collision, the decedent's vehicle struck the trailer in the roadway and became lodged under the carriage of the trailer. Tragically, by the time emergency responders were able to dislodge the Escalade from beneath the trailer and extricate decedent from the vehicle, he had died.

² We note that the engineer's last name is inconsistently spelled throughout the record, Jollisaint and Jolissaint are both used. We are unable to discern the correct spelling. In this opinion, we use the spelling provided in the original pleading naming him as a defendant, Jollisaint.

At the approximate time of the accident, a KCS train was travelling on the tracks located a short distance from the accident site, at a nearby intersection. The record established that this intersection was the only route for westbound vehicles, including responding emergency vehicles, to reach the accident site. According to plaintiffs' petition, the KCS employees had plain view of the accident scene (decedent's vehicle lodged under a trailer and emergency vehicles at the site) as the train approached the intersection. The record established KCS defendants were aware that the intersection through which the train was entering was the only intersection providing westbound ingress to the accident site. Also according to the plaintiffs' allegations, the KCS employees had ample notice and sufficient time to momentarily suspend the operation of the train through the intersection to allow emergency responders unobstructed passage to the accident site. They allege that the KCS defendants negligently failed to do so, and instead allowed the train to proceed through the intersection, blocking and delaying emergency responders from reaching the accident and administering vital medical assistance to the decedent. Plaintiffs maintain this delay was a contributing cause of the decedent's pain and suffering, and ultimately hastened his death.

The KCS defendants filed a motion for summary judgment asserting the plaintiffs would not be able to show evidentiary support for any of the allegations against them. KCS defendants deny that the train on the tracks blocked or delayed any of the emergency vehicles or personnel while in route to the accident scene, and they maintain there is no factual support for those allegations. Additionally, KCS defendants deny that the KCS crew received any notification or request to suspend the train or to provide a break in cars due to emergency vehicles needing to pass the intersection. The motion for summary judgment asserts the plaintiffs will be unable to prove those allegations or any of the other elements necessary to their cause of action against the KCS defendants, and that they are entitled to judgment as a matter of law.

APPLICABLE LAW
SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. **Dickerson v. Piccadilly Restaurants, Inc.**, 1999-2633 (La. App. 1 Cir. 12/22/00), 785 So.2d 842, 844. The mover has the burden of affirmatively showing the absence of a genuine issue of material fact and any doubt on this score should be resolved against granting the motion. La. C.C.P. art. 966D(1). A motion for summary judgment should be granted if the pleadings, deposition, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966A(3).³

However, when a motion for summary judgment is made and supported, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. 966D(1). In effect, after the mover files sufficient documentation to support the motion for summary judgment, the burden shifts to the opponent to prove material facts are at issue. *Id.* Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is “material” for summary judgment purposes can be seen only in light of the substantive law applicable to the case. **Grote v. Federal Insurance Company**, 2016-0474 2016 WL 7407385 (La. App. 1 Cir. 12/22/16)(unpublished). Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Vanner v. Lakewood Quarters Retirement Community**, 2012-1828 (La. App. 1 Cir. 6/7/13), 120 So.3d 752, 755.

³ The motion for summary judgment in this matter was filed February 19, 2016, and was not pending on January 1, 2016. Accordingly, we apply La. C.C.P. art. 966 as amended by 2015 La. Acts, No. 422, §1, effective January 1, 2017.

NEGLIGENCE/DUTY RISK ANALYSIS

Plaintiffs' claims against the KCS defendants are based on alleged negligence. Louisiana courts have adopted a duty-risk analysis in determining whether liability exists under the facts of a particular case. Under this analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages. **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 2001-2217, p. 6 (La. 4/3/02), 816 So.2d 270, 275-276; **Oracle Oil, LLC v. EPI Consultants**, 2016-0145, 2016 WL 6330421, p. 6 (La. App. 1 Cir. 10/28/16)(unpublished), writ denied, 2016-2049 (La. 1/9/17), ___ So.3d ___ 2017 WL 347579.

EVIDENCE PRESENTED

KCS defendants initially contend there are no genuine issues of material fact and that the plaintiffs will be unable, at a trial on the merits, to prove the essential element of breach of duty, and that they are entitled to summary judgment on this basis alone. They deny there was a train crossing the tracks at the intersection near the accident that caused any delay for emergency responders attempting to reach the accident site. In support, KCS defendants introduced the following evidence into the record: excerpts of the deposition testimonies of the KCS engineer, Jollisaint; the driver of the tractor-trailer Alvester Moore; State Trooper Joseph Nations; East Baton Rouge Parish Fire Department Captain Terrell Robillard; emergency responder Justin Arnone; EMS supervisor Stacy Denicola; and KCS conductor, Hidalgo, together with the affidavits of KCS Baton Rouge yardmaster Joey Stein and KCS claims agent Louis "Randy" Vanicor.

Alvester Moore, the driver of the tractor-trailer, testified that the impact of the decedent's vehicle with the tractor-trailer caused the air lines of the trailer to rupture and the truck came to an immediate stop. He saw the collision in his rear-view side mirror and immediately called 911. He also testified that the state police responded to the call

“seemed like instantly,” and that two “heavy” fire trucks arrived pretty quickly as well, “[r]ight after the state police got there.”

Captain Robillard testified that the EBRP Fire Department received notification at 7:34 p.m. and arrived on the scene five minutes later, at 7:39 p.m. Robillard also testified that there was no train crossing the tracks at the intersection he crossed to arrive at the accident site, and he experienced no delay in reaching the scene of the accident. According to Robillard, when he arrived on the scene and began assessing the accident, he could hear “the crossings, the binging” from the intersection consistent with notification that a train was approaching. As a preemptive measure, due to the location of the wreck, the condition of the vehicle, and the extra manpower that may be needed in extricating the vehicle and the person in it, and in the event that emergency responders *may* be caught on the other side of the tracks and unable to cross due to the train passing, Robillard contacted the Port Allen Fire Department for assistance from Port Allen’s rescue unit. Robillard explained that decision as follows:

A. ... You know, I could hear the crossings, the binging. I mean, we (sic) not far from it, so I felt as though it would be good, *if* our services got caught on that side of the train track, then I had already preempted, got those guys to coming our way. *It didn’t stop them*, but that was the reason why I did it. (Emphasis added.)

Robillard testified repeatedly that none of the emergency responders were actually stopped or delayed by a passing train:

Q. ... [S]o you called Port Allen. But did I understand correctly that the train never stopped your unit from getting to the scene?

A. No sir, the train did not stop us.

Q. So you had all the equipment on the scene that you needed?

A. Yeah.

Later in his testimony, Robillard clarified that he did not, personally, contact the Port Allen rescue unit, rather he relayed to dispatch that they *may* need assistance. Robillard also provided testimony regarding a report issued by the Port Allen rescue unit after receiving that notification. He acknowledged that the report stated that mutual aid was being requested “due to their [EBRP Fire Department] truck being stuck by a train,” but he

testified that particular statement on the report was inaccurate and did not represent what he had told dispatch. Robillard also persistently testified that there was no train on the tracks and that the EBRP rescue trucks were not delayed in reaching the accident site.

Justine Arnone, a member of the EMS crew dispatched to the scene, also testified that his unit arrived four minutes after receipt of a dispatch and was not faced with a train on the tracks, nor was it otherwise delayed, when it crossed the intersection to get to the accident site.

Jollisaint, the KCS engineer who was on the train on the date at issue, denied receiving notification of a request to break or move the train. He stated KCS employees on a train are not allowed (by federal law) to have cell phones, and the only way to contact trainmasters, yardmasters, and crewmembers is to communicate via radios. He further explained that a request from emergency responders to break or move the train would have had to been made to the KCS yard, which would then have been relayed to the crew by the yardmaster, via the radio. However, he testified no such contact or request was made that day. Jollisaint testified that, as the train was approaching the intersection, travelling eight to nine miles per hour, he noticed the accident near the track at the intersection that day because “[he] saw EMS and all of the lights and the other emergency vehicles” at the scene of the accident. Jollisaint testified that he did not see any vehicles crossing or attempting to cross the intersection. Jollisaint testified that he determined the most expedient course of action was for the train not to stop, and he testified it took approximately less than six minutes to complete the crossover through the intersection.⁴ According to Jollisaint, it would have taken him longer to stop the train, uncouple the cars, and clear the intersection than it did for the train to just continue through the crossing.

The train conductor, Hidalgo, corroborated the relevant testimony provided by Jollisaint concerning the speed of the train, and the approximate length of time it took the

⁴ Jollisaint additionally testified that federal law prohibited the train from exceeding a speed of ten miles per hour on that particular stretch of the tracks.

train to clear the intersection the day of the accident. (Hidalgo approximated it took the train six-to-eight minutes to clear the intersection.) Additionally, Hidalgo testified that if he had received word from the yardmaster that he needed to stop the train for whatever reason, he would have had to wait "several minutes" for the train to stop, then he would have had to walk back up the mile-and-a-half train to uncouple the cars, all of which would have taken longer than 6-8 minutes.

KCS yardmaster, Joey Stein, attested, by affidavit, that he was on duty on January 30, 2013, when the accident occurred and that no calls were received that date from any emergency services or otherwise requesting that KCS do anything in response to the accident. The evidence of telephone logs submitted in conjunction with Stein's affidavit confirmed that no such calls were received by the KCS Baton Rouge yard on the date of the accident, or made from the yardmaster to the crew on board the train that day.

State Trooper Joseph Nations testified regarding a report he issued about the accident. He stated he received notification of the accident at 7:30 p.m. and arrived on the scene at 8:07 p.m. He stated that the EBRP Sheriff's Office, WBRP Sheriff's Office, Acadian Ambulance, BR Fire Department, and the Port Allen Fire Department were all at the accident site. He could not recall if he had encountered a train crossing the tracks at the intersection when he attempted to reach the accident site; however, he acknowledged that he made no mention of there being a delay caused by a train and stated that if that had been the case, he likely would have noted that in the report.

Despite plaintiffs' contentions, the evidence submitted by them, in opposition to the motion for summary judgment, did not contradict or rebut the evidence presented by KCS defendants to negate plaintiffs' allegations that a train on the tracks blocked and delayed emergency responders from reaching the scene of the accident. Nor did the evidence presented require the district court to make credibility determinations that are improper on summary judgment.

The evidence detailed above presented in support of summary judgment established that none of the emergency responders were blocked, or otherwise delayed, from reaching the accident because there was no train on the tracks crossing the

intersection they had to traverse to get there. Thus, the burden shifted to the plaintiffs to contradict that evidence to establish the existence of a genuine issue of material fact concerning that essential element of their claims against KCS defendants. Plaintiffs introduced and relied on three affidavits they contend establish a genuine issue regarding whether emergency responders were blocked or delayed from reaching the accident site by a train on the tracks crossing the intersection. The affidavits submitted by the plaintiffs are from Gerald Mann, Captain of the Port Allen Fire Department; Mark Travazos, a firefighter/EMT with the Port Allen Fire Department; and, Richard P. Boudreaux, Chief of the Port Allen Fire Department. All three affiants attested that at 7:44 p.m. on the night of the accident, they were notified via West Baton Rouge 911 of an accident on Highway 190 in EBRP. All three also attested that they were also notified that the Baton Rouge Fire Department was requesting mutual aid "due to their heavy rescue truck being blocked by a train." They claim that this statement in all three affidavits establishes a genuine issue and a dispute as to whether or not there was a train blocking emergency responders from reaching the accident site. We do not agree.

Plaintiffs' argument misunderstands the probative value of Robillard's testimony *vis a vis* the written report, on which the three affiants relied. Robillard testified that he placed a call summoning mutual aid from the West Baton Rouge (Port Allen) rescue units after arriving at the accident scene because he had heard a train approaching the intersection and he decided to place a call for backup from the Port Allen unit in the event that such backup became necessary. He denied that he saw the train crossing at the intersection and testified that the report written by the WBRP dispatcher inaccurately conveyed the nature and content of his request. Robillard reiterated that the call was made as a precautionary measure in the event that the train ultimately ended up crossing the intersection and blocking emergency vehicles' attempt and only opportunity to reach the accident site. This testimony by Robillard was uncontroverted as to the content of his communication with the WBRP emergency dispatch.

Robillard's testimony that the report was inaccurate as to what he reported to WBRP emergency dispatch was also not contradicted. Although the report indicates that

EBRP Fire Department stated the train was crossing and blocking the intersection, Robillard's testimony established that he did not see the train crossing, but rather heard the train approaching, the intersection. While the report corroborates that Robillard placed a telephone call that morning, neither the report, nor the affidavits regarding the three WBRP rescue team members' understanding of the report, are relevant to the ultimate fact sought to be produced with the use of this evidence; *to wit*, whether or not the train was actually crossing the intersection and blocking approaching emergency vehicles and personnel from reaching the accident site.

In order to prove the essential element of breach of duty, the plaintiffs must be able to show that the train was crossing the intersection and blocking approaching emergency vehicles and personnel. In order to maintain summary judgment, KCS defendants must show that plaintiffs will be unable to bear their burden of proving every element essential to their cause of action. We find the evidence presented by the KCS defendants established there was no train on the tracks at the intersection blocking emergency responders from reaching the accident site. The burden then shifted to the plaintiffs, and the three affidavits relied on by the plaintiffs' failed to meet their burden. These affiants only attested regarding the information received from them by WBRP emergency dispatch. However, plaintiffs presented no evidence to rebut Robillard's uncontroverted testimony that the information provided by WBRP emergency dispatch to its rescue personnel was not accurate and did not relay the information that he provided. Specifically, he stated the report inaccurately stated that an emergency vehicle was blocking the intersection, and he also confirmed that he did not report that because it was not true. The affiants' understanding of what the report stated is not relevant to the material fact of the train either blocking, or not blocking, emergency vehicles trying to cross that intersection. The KCS defendants' evidence established, without contradiction, that there was not a train blocking the intersection, and the plaintiffs' evidence failed to contradict or rebut that showing.

KCS defendants proved the lack of factual support for the plaintiffs' claim that KCS defendants breached the duty owed. Plaintiffs' inability to rebut that showing entitled

KCS defendants to judgment as a matter of law, and that summary judgment in their favor was warranted. Thus, we need not reach the alternative basis set forth by KCS defendants in support of summary judgment, that the plaintiffs' would be unable to prove the third element of their claim, causation. Finding no genuine issue and that there was no breach of duty by KCS defendants, there can be no issue regarding causation, and we do not reach the alternative issue.

CONCLUSION

For the foregoing reasons, we find summary judgment in favor of KCS defendants is warranted by the record. Accordingly, the April 19, 2016 judgment of the district court rendering summary judgment in favor of Kansas City Southern Railway Company, Brennan P. Hidalgo, and James H. Jollisaint Jr., dismissing all of the claims by the plaintiffs against them, is hereby affirmed. Plaintiffs are assessed all costs of this appeal.

AFFIRMED.