

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2023 CA 0314

WEL
by
WEL
SASHA RICKETSON, TINA RAMUS, ON BEHALF OF MADISON
RICKETSON AND XANDER RAMUS, AND DANIELL BERRY ON BEHALF
OF DYLAN BERRY, INDIVIDUALLY AND ON BEHALF OF STEPHEN
RICKETSON

VERSUS

ANITA MCKENZIE, ROBERT D. FRANK, ILLINOIS CENTRAL RAILROAD
COMPANY, STATE OF LOUISIANA THROUGH DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT, PARISH OF TANGIPAHOA,
TOWN OF AMITE CITY

Judgment Rendered: OCT 04 2023

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Suit Number 2016-0001308

Honorable Brian K. Abels, Presiding

* * * * *

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Chutz, concurs and assigns reasons.
by
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* * * * *

BEFORE: GUIDRY, C.J., CHUTZ, AND LANIER, JJ.

GUIDRY, C.J.

In this wrongful death and survival action, plaintiffs, Sasha Ricketson, individually and on behalf of Stephen Ricketson, Tina Ramus, tutor of the minor children, Madison Ricketson and Xander Ramus, individually and on behalf of Stephen Ricketson, and Daniell Berry, tutor of the minor child Dylan Berry, individually and on behalf of Stephen Ricketson, appeal from a trial court judgment granting summary judgment in favor of defendant, the Town of Amite City (the Town) and dismissing their claims with prejudice.¹ For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On May 10, 2015, Ricketson was operating a Ford F-750 truck westbound on Pope Lane in the Town. While attempting to traverse a railroad crossing at Pope Lane, which was owned by Illinois Central Railroad Company (Illinois Central), Ricketson was struck by a southbound Amtrak passenger train and died as a result of injuries sustained in the collision.

Thereafter, on May 9, 2016, plaintiffs, Ricketson's surviving spouse and minor children, filed a wrongful death and survival action, naming as defendants: the train engineers, Anita McKenzie and Robert Frank; Illinois Central Railroad Company; the State of Louisiana through the Department of Transportation and Development (DOTD); the Parish of Tangipahoa; and the Town.² Plaintiffs alleged there was a sight obstruction at the crossing, which deprived Ricketson of an adequate "crossing sight distance," and therefore Illinois Central was negligent in

¹ Intervenor, Louisiana Construction & Industry Self Insurers Fund, has also appealed, claiming as the party who provided the workers' compensation benefits of Ricketson's employer, KCJS, Trucking, LLC, it is entitled to reimbursement for payments made to plaintiffs and a credit against any future workers' compensation obligation owed to plaintiffs."

² Tangipahoa Parish was dismissed by judgment dated January 17, 2017, McKenzie and Frank were dismissed by judgment dated July 29, 2019, and DOTD was dismissed by judgment dated August 5, 2019.

failing to maintain and/or provide an adequate “crossing sight distance” at the Pope Lane crossing and in failing to maintain its right of way to prevent diminished crossing sight distance. Plaintiffs further alleged that Ricketson’s truck got stuck on the railroad track due to a defect in the road surface for which DOTD and/or Tangipahoa Parish and/or the Town were liable. Furthermore, plaintiffs asserted that the accident was caused by the negligence of DOTD and/or Tangipahoa Parish and/or the Town in failing to post proper and sufficient warning signs indicating the danger of the railroad crossing, failing to adequately mark the road and surrounding area indicating the existence and presence of a railroad crossing to approaching motorists, failing to maintain the elevated crossing so that vehicles would not be impeded or “bottom out” on the track while crossing, and failing to maintain the condition of the road surface at the railroad intersection.

Illinois Central, McKenzie, and Frank subsequently filed a motion for summary judgment, asserting that the plaintiffs had no evidence to support any of their allegations of negligence against them, and the only available evidence in the case, the locomotive video from the Amtrak train, demonstrates that the sole cause of the accident was Ricketson’s failure to yield the right of way to the approaching Amtrak train as he was required to do by law. The Town also filed a motion for summary judgment simply “join[ing] in with and adopt[ing] the motion for summary judgment of co-defendants ... and plead[ing] same herein by reference, as if copied *in extenso*” and attaching no additional argument or evidence. Plaintiffs opposed the motions, offering the affidavit and expert report of James Loumiet, an expert in transportation accident reconstruction.

Following a hearing on the motions for summary judgment, the trial court denied the motions, finding there were issues of fact concerning the cause of the accident, particularly regarding the hazards at the crossing, which made summary judgment inappropriate.

Thereafter, plaintiffs filed an amended petition, adding allegations that the Town was negligent in failing to close the crossing and provide alternative access as agreed with Illinois Central, failing to install necessary active warning devices (lights and gates) at the crossing, and failing to work with Illinois Central and DOTD in installing active warning devices or closing this crossing. With regard to Illinois Central, plaintiffs added allegations that Illinois Central was negligent in failing to inspect and maintain the signage at this crossing, leading to a severely faded and non-functioning stop sign at the time of the collision; failing to install necessary active warning devices (lights and gates) at this crossing; improperly maintaining this crossing, resulting in an extremely humped crossing that necessarily diverts a driver's attention; failing to properly maintain a safe crossing under Louisiana Revised Statutes Chapter 32; failing to maintain a smooth and even crossing surface and failing to close this crossing and provide alternative access as agreed to with the Town; and failing to work with the Town and DOTD in installing active warning devices or closing this crossing.

On December 30, 2021, Illinois Central filed its second motion for summary judgment, again asserting that plaintiffs had no evidence to support any of their allegations of negligence against it and the only available evidence in this case *demonstrates that the sole cause of the accident was Ricketson's failure to yield the right of way to the approaching Amtrak train.* Illinois Central submitted with its motion the locomotive video; the affidavit of the investigating officer, Sergeant Toni Cuti; photographs; the affidavit of McKenzie; and excerpts of the deposition of Teresa Brown, an eyewitness to the accident. The Town filed a motion for summary judgment on January 4, 2022, again joining in with and adopting the motion for summary judgment filed by Illinois Central and pleading same therein by reference as if copied in extenso.

Illinois Central thereafter filed a supplemental memorandum in support of the motion for summary judgment on March 21, 2022, reasserting that despite the new allegations, all claims against it should be dismissed because Ricketson's failure to stop and yield at the Pope Lane crossing was the sole cause of the accident and plaintiffs have provided no factual evidence of negligence by Illinois Central related to the accident.

Plaintiffs opposed Illinois Central's motion for summary judgment, asserting that genuine issues of material fact remain regarding the cause of the collision and Illinois Central's own comparative fault. In particular, plaintiffs asserted that there are genuine issues regarding the sight distance and quality of the track at the crossing. Plaintiffs alleged that the new evidence offered by the defendants, Sgt. Cuti's affidavit and Brown's deposition, should not change the prior court's ruling denying summary judgment and finding genuine issues of material fact exist in this case. Furthermore, plaintiffs attached the expert report of Loumiet; an excerpt from Brown's deposition; and the affidavit of William Hughes, an expert in rail safety, grade crossings, rail needs assessments, grade crossing inventory, and other railroad related areas. However, plaintiffs did not file an opposition to the motion for summary judgment filed by the Town.

The trial court held a hearing on the motions on July 5, 2022. Following argument, in ruling in favor of defendants, the trial court stated that it "[didn't] see anything—considering everything, everything both parties submitted, ... showing any breach of duty on the part of either Illinois Central or the Town." Accordingly, the trial court signed a judgment on November 14, 2022, granting summary judgment in favor of the Town and dismissing plaintiffs' claims against it with prejudice. Plaintiffs now appeal from the trial court's judgment.

DISCUSSION

Louisiana Code of Civil Procedure article 966 was recently amended by 2023 La. Acts. No. 317, § 1, effective August 1, 2023. Significantly, this amendment expanded the exclusive list of supporting documents that are considered competent evidence in support of or in opposition to a motion for summary judgment. See La. C.C.P. art. 966(A)(4)(a). Additionally, this amendment changed the duties of parties in supporting and opposing motions for summary judgment. Particularly, prior to the amendment, parties were required to file their supporting documents with the motion and memorandum in order for such supporting documents to be considered; references to documents elsewhere in the record were not permissible. See La. C.C.P. art. 966, Comments—2015 Comment (k) (noting that the 2015 revision made it clear that the court can only consider documents filed in support of or in opposition to the motion, which differs from the Federal Rules of Civil Procedure Rule 56(c)(3), which allows the court to consider other materials in the record); see also Troncoso v. Point Carr Homeowners Association, 22-0530, pp. 17-19 (La. App. 1st Cir. 1/10/23), 360 So. 3d 901, 914-915 (discussing former La. C.C.P. art. 966(A)4 and (D)(2)). However, La. C.C.P. art. 966, as amended, now permits such supporting documents to be “filed *or referenced*” and mandates that a trial court shall consider only those documents “filed *or referenced*” in support of or in opposition to a motion for summary judgment. See La. C.C.P. art. 966(A)(4)(a) and (D)(2).

Furthermore, as amended, La. C.C.P. art. 966(A)(4)(b), now provides that any documents listed in subparagraph (a) that have been previously filed into the record of the cause may be specifically referenced and considered in support of or in opposition to a motion for summary judgment by listing with the motion or opposition the document by title and date of filing. Additionally, the party shall concurrently with the filing of the motion or opposition furnish to the court and the

opposing party a copy of the entire document with the pertinent part designated and the filing information. La. C.C.P. art. 966(A)(4)(b).

Although La. C.C.P. art. 966 is a procedural article contained in the Louisiana Code of Civil Procedure, amendments to the articles therein may be substantive or procedural. See e.g., Woodlands Development, L.L.C. v. Regions Bank, 13-226, pp. 7-8 (La. App. 5th Cir. 10/29/14), 164 So. 3d 226, 230 (finding 2012 amendment to La. C.C.P. art. 966 was substantive in nature); Mason v. T & M Boat Rentals, LLC, 13-1048, p. 6 (La. App. 4th Cir. 3/19/14), 137 So. 3d 741, 744 (finding the 2013 amendment to La. C.C.P. art. 966 to be substantive in nature); Trahan v. Prudential Property & Casualty Insurance Company, 97-2470, p. 4 (La. App. 1st Cir. 5/14/99), 739 So. 2d 811, 813 (finding the 1997 amendment to La. C.C.P. art. 966 was procedural in nature). Louisiana Civil Code article 6 provides that “[i]n the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.” As such, in order to determine which version of La. C.C.P. art. 966 applies to the instant case, this court must engage in a two-fold inquiry. First, the court must determine whether the amendment to the statute expresses legislative intent regarding retroactive or prospective application. Second, if no such intent is expressed, the court must determine whether the amendment is substantive, procedural, or interpretative. Strattman v. LeBlanc, 19-0105, p. 5 (La. App. 1st Cir. 9/27/19), 289 So. 3d 135, 139, writ denied, 19-01904 (La. 6/12/20), 307 So. 3d 1033.

Unlike the 2015 revision to Article 966, the legislature did not express its intent regarding retrospective or prospective application of the 2023 amendment. Compare 2015 La. Acts, No. 422, § 2 (providing that the provisions of this Act shall not apply to any motion for summary judgment pending adjudication or appeal on the effective date of this Act). Furthermore, while the 2023 revision comments,

comment (f), provide that “[s]ubparagraph (D)(2) was amended to include only slight changes in phraseology. The amendment is not intended to make substantive changes to the law,” we note revision comments, while useful in determining legislative intent, are not law. See Succession of Bourg, 16-1347, p. 7 (La. App. 1st Cir. 9/21/17), 231 So. 3d 673, 678. However, even considering comment (f), we find that this comment is directly at odds with the plain language of former and current La. C.C.P. art. 966(D)(2). As previously noted, former Article 966(D)(2) mandated that supporting documents be filed in support of or in opposition to the motion for summary judgment. Current Article 966(D)(2), however, now provides for an alternative and less burdensome means by which parties may have supporting documents considered by a trial court in connection with their motion for summary judgment, i.e., referring to documents previously filed into the record. As such, this amendment is more than a “slight change in phraseology” and rather, effects a change in the law.

Accordingly, because the 2023 amendment to La. C.C.P. art. 966(A)(4) and (D)(2) changed the law by creating an alternative means by which a party may have their supporting documents considered in support of and in opposition to a motion for summary judgment and as such, created additional duties for a party seeking to reference supporting documents, we find that this amendment is substantive. See Strattman, 19-0105 at p. 5, 289 So. 3d at 140 (noting that substantive laws either establish new rules, rights, and duties or change existing ones). As such, we find that the 2023 amendments to La. C.C.P. art. 966 cannot be applied retroactively, because to do so would remove the Town’s responsibility to file evidence as mandated by former Article 966(D)(2) and would deprive plaintiffs of the opportunity to object to the Town’s failure to comply with the requirements of new Article 966(A)(4)(b).³

³ Louisiana Code of Civil Procedure article 966, comments—2023, comment (b) provides that “[f]ailure to comply with Subparagraph (A)(4)(b) may be grounds for an objection requesting that the court not consider the referenced document.

Therefore, we will apply the version of La. C.C.P. art. 966 in effect at the time of the hearing of the Town's motion for summary judgment to the matter before us. See Horrell v. Barrios, 16-1547, 16-1548, p. 19 n.8 (La. App. 1st Cir. 3/15/18), 2018WL1373653 *10 n.8 (unpublished opinion) (applying the version of La. C.C.P. art. 966 in effect at the time of the hearings on the motions for summary judgments despite three amendments to Article 966 following the hearings).

After an opportunity for adequate discovery, 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)(3). An issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. Methvien v. Our Lady of the Lake Hospital, 22-0398, p. 4 (La. App. 1st Cir. 11/4/22), 354 So. 3d 720, 723.

The Code of Civil Procedure places the burden of proof on the party filing a motion for summary judgment. La. C.C.P. art. 966(D)(1). At the time of the hearing on the Town's motion for summary judgment, La. C.C.P. art. 966(A)(4) provided that the mover can meet its burden by filing supporting documentary evidence consisting of pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions with its motion for summary judgment. The mover's supporting documents must prove the essential facts necessary to carry the mover's burden. See La. C.C.P. art. 966(A)(3).

Once the mover properly establishes the material facts by its supporting documents, the mover does not have to negate all of the essential elements of the adverse party's claims, actions, or defenses if he will not bear the burden of proof at trial. La. C.C.P. art. 966(D)(1). Methvien, 22-0398 at p. 5, 354 So. 3d at 723.

Rather, the mover must 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. La. C.C.P. art. 966(D)(1). The burden then shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its motion, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1); see also La. C.C.P. art. 966, comments-2015, comment (j). If the non-moving party fails to produce sufficient factual support in its opposition which proves the existence of a genuine issue of material fact, Article 966(D)(2) mandates the granting of the motion for summary judgment. White v. Herbert, 22-1333, p. 5 (La. App. 1st Cir. 6/2/23), __ So. 3d __, __. However, even in the absence of formal opposition, the moving party must show that he is entitled to summary judgment. James as Co-Trustees of Addison Family Trust v. Strobel, 19-0787, p. 7 (La. App. 1st Cir. 6/24/20), 2020WL3446635 *4 (unpublished opinion).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Succession of Hickman v. State through Board of Supervisors of Louisiana State University Agricultural and Mechanical College, 16-1069, p. 5 (La. App. 1st Cir. 4/12/17), 217 So. 3d 1240, 1244.

In the instant case, the Town filed a motion for summary judgment "join[ing] in with and adopt[ing] the motion for summary judgment of co-defendant Illinois Central ... and plead[ing] same herein by reference, as if copied *in extenso*; and for the same bases as are set forth in that motion filed by ... Illinois Central... mover... respectfully request[ing] that this Honorable Court grant this motion for summary judgment." In the Town's accompanying memorandum in support of its motion, it submitted that the arguments made by Illinois Central in its memorandum in support

of its motion for summary judgment also apply to the Town, and as such, the Town re-asserted, re-alleged, and re-averred each and every argument set forth in Illinois Central's memorandum in support of its motion for summary judgment. The Town, however, did not set forth any arguments in its motion or memorandum nor did it file any evidence in support of its motion.

This court has previously found that these "me too" motions, wherein a party attempts to adopt and incorporate the evidence, authorities, and arguments set forth in another motion simply by reference thereto, do not meet the requirements of La. C.C.P. art. 966, because materials elsewhere in the record cannot be considered on summary judgment. See Troncoso, 22-0530 at pp. 17-18, 360 So. 3d at 915. Accordingly, because the Town failed to raise any argument or file any evidence in support of its motion for summary judgment that would satisfy its initial burden, we find, pursuant to our *de novo* review, that the trial court erred in granting summary judgment in favor of the Town.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court and remand this matter for further proceedings. All costs of this appeal, in the amount of \$8,598.00, are assessed to the Town of Amite City.

REVERSED AND REMANDED.

SASHA RICKETSON ET AL.

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

FIRST CIRCUIT

ANITA McKENZIE ET AL.

NUMBER 2023 CA 0314

WRC
b
JH
CHUTZ, J., concurring.

I concur with the majority's conclusion. I believe it is unnecessary to hold that 2023 La. Acts, No. 317, §1, to La. C.C.P. art. 966 (the 2023 Amendment) is prospective because a retroactive application also results in a reversal of the trial court's grant of summary judgment in favor of the Town of Amite City (the Town).

The majority relies on *Woodlands Dev., L.L.C. v. Regions Bank*, 2013-226 (La. App. 5th Cir. 10/29/14), 164 So. 3d 226, 230, and *Mason v. T & M Boat Rentals, LLC*, 2013-1048 (La. App. 4th Cir. 3/19/14), 137 So. 3d 741, 744, to hold that the 2023 Amendment makes a substantive change in the law and, therefore, is applied prospectively. Accord *Horrell v. Barrios*, 2016-1547 (La. App. 1st Cir. 3/15/18), 2018WL1373653, at *10 n.8.

Unlike the 2012 and 2013 amendments under scrutiny in *Woodlands Dev., L.L.C.*, 164 So. 3d at 230, and *Mason*, 137 So. 3d at 744, the 2023 amendment does not narrow any duties placed on the parties. As noted in 2023 Official Comment (f), subparagraph (D)(2) was amended to include only slight changes in phraseology; the 2023 Amendment was not intended to make substantive changes to the law. Therefore, on its face, I tend to believe that the amendment is procedural and should be applied retroactively.

Even if 2023 Amendment to Article 966 were applied, the Town did not comply with its requirements. As amended, Article 966(A)(4)(b) presently reads:

Any document listed in Subsubparagraph (a) of this Subparagraph previously filed into the record of the cause may be specifically referenced and considered in support of or in opposition to a motion for

summary judgment by listing with the motion or opposition the document by title and date of filing. The party shall concurrently with the filing of the motion or opposition furnish to the court and the opposing party a copy of the entire document with the pertinent part designated and the filing information. [Emphasis added.]

Since the Town adopted the motion for summary judgment filed by Illinois Central Railroad Company (Illinois Central), cross referenced it “in extenso,” and the two motions for summary judgment were heard at the same time, arguably the Town complied with the requirement to furnish the court and the plaintiff an entire document ostensibly with the pertinent part designated inasmuch as Illinois Central pointed out the pertinent portions of the documents upon which it relied. The record reveals, however, that the Town did not list by date of filing the documents upon which it was relying. It also did not state the date of the Illinois Central’s motion for summary judgment, which was a second motion filed by Illinois Central. Therefore, under a retroactive application of the 2023 Amendment, the Town did not comply with the amended version of La. C.C.P. art. 966(A)(4)(b).

Because the Town failed to properly submit its motion for summary judgment, the trial court’s grant of summary judgment is correctly reversed irrespective of whether the 2023 Amendment is determined to have prospective or retroactive application. The majority’s holding that the 2023 Amendment to La. C.C.P. art. 966 is substantive and required to be applied prospectively is, therefore, unnecessary for resolution of the issues raised in this appeal. Accordingly, I concur.