

NOT DESIGNATED FOR PUBLICATION

MICHAEL PERRY * **NO. 2000-CA-2231**
VERSUS * **COURT OF APPEAL**
STATE OF LOUISIANA * **FOURTH CIRCUIT**
THROUGH THE * **STATE OF LOUISIANA**
DEPARTMENT OF *
TRANSPORTATION AND *
DEVELOPMENT *
*

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 78-414, DIVISION "B"
Honorable David S. Gorbaty, Judge

Judge Max N. Tobias, Jr.

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray,
Judge Max N. Tobias, Jr.)

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REVERSED AND REMANDED

The State of Louisiana, through the Department of Transportation and Development (the “DOTD”), appeals the trial court’s granting of summary judgment in favor of St. Bernard Parish (the “Parish”), dismissing, with prejudice, the claims asserted against the Parish by the plaintiff and by the DOTD.

We review this summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an automobile accident that occurred on 16 November 1995, in which the plaintiff, Michael Perry (“Perry”), was operating his vehicle on Tusa Drive, in St. Bernard Parish, near its intersection with St. Bernard Highway/Louisiana State Highway 46 (“La. 46”). Perry had stopped at the stop sign on Tusa Drive and, as he attempted to merge into the traffic on La. 46, was struck by a truck headed eastbound

on La. 46. He originally filed suit against the DOTD alone, but later named the Parish as an additional defendant. The allegations against both defendants were identical. Specifically, Perry alleged that:

“[T]he accident was caused solely by the fault, neglect and/or strict liability of the defendant(s), to-wit:

1. Maintaining within their control a defective and/or unreasonably dangerous roadway;
2. Failing to post and/or maintain an appropriate signal;
3. Failing to post and/or maintain an appropriate warning(s);
4. Failing to promptly and properly remove visual obscurements, including, but not limited to several large trees located alongside Highway 46 near its intersection with Tusa Street;
5. Strict liability for the defective and/or unreasonably dangerous roadway;
6. All such other acts of fault, neglect or strict liability as may be shown at the trial of this matter.” [See paragraph 5 of plaintiff’s original Petition for Damages and paragraph IV of plaintiff’s First Supplemental and Amending Petition.]

In addition, Perry alleged that at the time of the accident, La. 46, at its intersection with Tusa Street, was under the exclusive control of the DOTD which had the responsibility of maintaining the roadway and the intersection in a safe and proper manner. Alternatively, Perry alleged that at the time of the accident, Tusa Street, at its intersection with La. 46, was under the exclusive control of the Parish, which had the responsibility to maintain the roadway and intersection in a safe and proper manner. Further, Perry alleged that both defendants had actual and/or constructive notice of the dangerous and/or defective condition to the roadway and the intersection

prior to the accident.

On 28 March 2000, the Parish filed a motion for summary judgment seeking to have plaintiff's claims against it dismissed because it owed no duty to him with respect to any of the allegations contained in his petition. The motion was originally set for hearing on 14 April 2000, but was later rescheduled for 5 May 2000. In its motion, the Parish submitted that allegations 1, 2, 3, 5 and 6 (see above) dealt with alleged problems of La. 46, which under Louisiana law and jurisprudence is the sole responsibility of the DOTD. The Parish further submitted that, with respect to allegation 4, the trees in question were located within the State's right-of-way. In support of this argument, the Parish submitted the affidavit of Stephen V. Estopinal, a registered land surveyor, along with a survey that he conducted in May of 1998, wherein he stated that the trees were located within the State's right-of-way for La. 46. Accordingly, the Parish argued, that if those trees were a cause in fact of plaintiff's accident, responsibility would lie with the DOTD, rather than with it, because the DOTD has the duty to maintain its rights-of-ways in such condition that they do not present an unreasonable risk of harm to motorists.

The plaintiff joined in the Parish's motion, arguing that the issue of who was responsible for the trees that obscured his view was purely a

question of law that needed to be resolved prior to trial on the merits.

On 17 April 2000, the Parish filed a supplemental memorandum in support of its motion and attached a second affidavit of Mr. Estopinal, wherein he stated that his May 1998 survey was based on the State of Louisiana's own plans for La. 46, particularly sheet 13 of the plans, which show the State's right-of-way to be fifty feet from the centerline of the highway in each direction.

On 3 May 2000, the Parish filed a second supplemental memorandum in support of its motion, to which it attached a State of Louisiana, Department of Highways Driveway Permit, and related documents, concerning a Mr. Russell Tusa's application for a driveway permit for Tusa Drive on the right-of-way of La. 46. The Parish asserted that the map attached to the permit application shows the fifty-foot right-of-way between the centerline of La. 46 and the first property on Tusa Drive. The Parish further noted that a Mr. J. A. Barbay, "Right of Way Permit Engineer" for the State of Louisiana, granted the permit. Thus, the Parish argued that Mr. Tusa would not have had to obtain permission from the State if the State did not own the right-of-way that his proposed driveway was to cross.

The DOTD filed an opposition to the Parish's motion on 3 May 2000. Therein, the DOTD did not dispute its statutory duty to maintain its roads in

a reasonably safe condition. It submitted, however, that the Parish likewise has a duty to maintain its roads. Because the plaintiff alleged that his sight was obstructed from his vantage point on Tusa Drive, a parish road, the DOTD contended that any unsafe condition existed on Tusa Drive, rather than on its highway. As such, the question of whether the Parish breached any duty owed to the plaintiff under the facts of this case was an issue of fact not addressed by the Parish in its motion. The DOTD submitted that, even assuming the trees in question were within its right-of-way, such a fact is insufficient to prove that the Parish owed no duty of care to the plaintiff. In other words, the DOTD argued that the Parish's motion was too limited in scope to resolve the many issues of material fact regarding the potential liability of the Parish to the plaintiff or to the DOTD as a comparatively negligent joint tortfeasor.

The DOTD also attacked the sufficiency of the affidavits of Mr. Estopinal, upon which the Parish's motion was based. First, it alleged that the project map, dated 31 January 1931, upon which he based his May 1998 survey was merely a "proposed" project map. It further pointed out that if the State had ever formally acquired the right-of-way designated in that proposed project, such acquisition would be recorded in the public records of the Parish. The DOTD submitted two affidavits, one from a registered

land surveyor and another from a professional abstractor, attesting to the fact that no such record of acquisition exists. The DOTD submitted that in the absence of a formal acquisition of a right-of-way by the State, the width of the State's right of way along a state highway is governed by La. R.S. 48:220.1. The DOTD contends that the application of that statute to this case necessarily rests on issues of fact that must be determined by the trier of fact, but which were not addressed to the court at the hearing on the Parish's motion.

On 5 May 2000, the date of the hearing, the Parish filed a third affidavit of Mr. Estopinal wherein he challenged the assertion made by the DOTD in its opposition to the Parish's motion, that the project map upon which he relied in making his survey was merely a "proposed" project map. Therein Mr. Estopinal stated that various notations superimposed on the map evidence that it was also the "as built" map. Citing the lack of notations of abandonment or adoption with reference to the fifty foot right-of-way, Mr. Estopinal opined that the dimensions shown for the state highway and the state right-of-way in the area of Tusa Drive are "as built."

Following the hearing, the trial court granted the Parish's motion for summary judgment from the bench, dismissing the plaintiff's claims against it with prejudice. The court also dismissed with prejudice the cross-claim

filed against the Parish by the DOTD. In addition, the court held that at the time of the accident in question, the DOTD “was the owner of a fifty (50) foot right-of-way from the centerline on each side of St. Bernard Highway, Highway 46, within which is located the trees which form part of the basis of the plaintiff’s lawsuit.”

APPLICABLE LAW

The DOTD owes a duty to travelers to keep the highways and their shoulders in a reasonably safe condition. *Myers v. State Farm Mut. Auto. Ins. Co.*, 493 So.2d 1170 (La. 1986). Part of that duty is to remove obstacles that are dangerously close to the traveled portion of the highway. *Wilson v. State, Through Dept. of Highways*, 364 So.2d 1313 (La. App. 3 Cir. 1978).

"Although DOTD is not an insurer of the safety of motorists using state highways, it cannot knowingly allow a condition to exist which is hazardous to a reasonably prudent motorist." *Deville v. State, Through DOTD*, 498 So.2d 1142, 1144 (La. App. 3 Cir. 1986). With regard to the area off the shoulder of the road, but within the DOTD’s right-of-way, the DOTD owes a duty to maintain the land in such condition as to not present an unreasonable risk of harm to motorists using the adjacent roadway in a reasonably prudent manner. *Oster v. Department of Transp. and Development, State of La.*, 582 So.2d 1285 (La. 1991).

The elements that a plaintiff must prove to recover damages from a governmental defendant based upon a dangerous condition of a roadway are the same, whether based on negligence or strict liability. LSA-R.S. 9:2800; C.C. art. 2317. Under either theory, the plaintiff must prove: (1) that the defendant owned or had custody of the thing that caused the damage; (2) that the thing was defective in that it created an unreasonable risk of harm to others; (3) that the defendant had actual or constructive knowledge of the defect or risk of harm and failed to take corrective action within a reasonable time; and (4) causation. *Holt v. State Through Dept. of Transp. and Development*, 28,183, p. 6-7 (La. App. 2 Cir. 4/3/96), 671 So.2d 1164, 1169-1170.

In *Clifton v. Coleman*, 32,612 (La. App. 2 Cir. 12/23/99), 748 So.2d 1263, *writ denied* 2000-0201 (La. 3/24/00), 758 So.2d 151, the plaintiff was injured in an accident at the intersection of Louisiana Highway 546 (“La. 546”) and Cheniere Cutoff Road (“the Cutoff”), an Ouachita Parish road. The car plaintiff was traveling in had been proceeding down the Cutoff in the wrong direction and was struck by another vehicle as it pulled out from the stop sign at the intersection. The court found that there was an extreme sight obstruction at the intersection obscuring the view of oncoming northbound traffic on La. 546 due to a railroad trestle located only twenty

feet away from the intersection that rendered it unreasonably dangerous. As such, the court held that as the owner of La. 546, the DOTD shared responsibility with the Parish of requiring that the Cutoff be designated as a one-way road away from the highway to alleviate the blind intersection. Accordingly, the case stands for the proposition that both the DOTD and a parish can owe a duty to motorists when an unreasonably dangerous condition exists at the intersection of a state highway with a parish road.

ASSIGNMENTS OF ERROR

In its first assignment of error on appeal, DOTD contends that the trial court erred by granting summary judgment when it believed that the DOTD had established the existence of genuine issues of material fact. In support of this argument, the DOTD refers to the transcript of the 5 May 2000 hearing on the Parish's motion for summary judgment, wherein the trial judge stated:

Mr. D'Angelo (referring to counsel for the DOTD), I believe that under the old summary judgment laws, your argument might hold water, and that there might be a material issue of fact; but under the new laws, things have dramatically changed.

The DOTD notes that the Parish twice had to amend and clarify Mr. Estopinal's original affidavit, indicating it was insufficient for purposes of

summary judgment. In addition, it points to many deficiencies in Mr. Estopinal's affidavits. For example, the DOTD questioned the basis for Mr. Estopinal's first affidavit in which he concluded that the trees in question were located within the State's right-of-way for La. 46 as shown in the survey that he conducted in May of 1998. The DOTD pointed out that the 1931 project map relied upon by Mr. Estopinal was merely a "proposed" plan. As shown by the DOTD in its two opposing affidavits, the Parish public records indicate that the DOTD never formally acquired the right-of-way shown in the State's 1931 proposed plan for La. 46. Thus, in the absence of any formal acquisition by the State, the extent of the State's right-of-way along one of its highways is governed by La. R.S. 48:220.1, which necessarily rests on issues of fact not addressed by the trial court at the hearing on the Parish's motion. Although the Parish, on the day of the hearing, submitted Mr. Estopinal's third affidavit wherein he averred that the so-called "proposed" map upon which he relied was also the "as built" map, the trial judge properly excluded from consideration the untimely affidavit, pursuant to La. C.C.P. art. 966(B). We find, that upon viewing the evidence submitted at the hearing as a whole, the DOTD successfully showed the existence of a genuine issue of material fact as to the location of the State's right of way, precluding the trial court's granting of summary judgment in

favor of the Parish.

The DOTD also argues that the trial court erred in granting summary judgment in favor of the Parish and dismissing it entirely from the suit because the Parish's motion failed to address all of the claims made against it by both the plaintiff and by the DOTD in its cross-claim. Specifically, both the plaintiff and the DOTD alleged that the Parish is liable for its failure to properly maintain Tusa Drive, a parish road, and that the Parish had a duty to remove any obstruction that may endanger motorists using that road. In light of our finding that the evidence presented by the Parish was insufficient to conclusively determine the State's right-of-way with respect to La. 46 and whether the trees in question were contained within that right-of-way, we find that the trial court erred in dismissing the Parish from the suit without first considering any potential duty it may have owed under the facts presented in this particular case.

The DOTD also assigns as error the trial court's granting of the Parish's motion for summary judgment when the depositions of key expert and factual witnesses, initially scheduled to take place before the hearing on the Parish's motion, had been cancelled. The deposition of Mr. Estopinal, along with that of the Director of Public Works for the Parish, Mr. Robert Turner, was scheduled to take place on 3 May 2000. The plaintiff canceled

Mr. Estopinal's deposition, apparently with no prior notice to the DOTD, and the deposition of Mr. Turner was cancelled due to an emergency in the Parish. The DOTD asserts that the cancellations of those depositions prejudiced its ability to adequately oppose the Parish's motion since it was deprived of cross-examining those witnesses regarding the "facts" attested to in Mr. Estopinal's affidavits and in the other evidence presented by the Parish in support of its motion.

We find that the DOTD was in fact prejudiced by the last minute cancellations of the depositions of Mr. Estopinal and Mr. Turner and that the hearing on the Parish's motion should have been continued until after those depositions had taken place. Thus, we also find merit to this assignment of error.

As we have found overwhelming grounds on which to reverse the trial court's granting of summary judgment in favor of the Parish, we do not specifically address the DOTD's remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment of the trial court granting summary judgment in favor of St. Bernard Parish and dismissing, with prejudice, the claims filed against it by the plaintiff and by the DOTD is

hereby reversed and the matter is remanded to the trial court for further proceedings.

REVERSED AND REMANDED