UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3304

ROUAL HEBERT,

Plaintiff-Appellant,

MARYLAND CASUALTY COMPANY,

Intervenor-Appellant,

v.

NME HOSPITALS, INC., ET AL,

Defendants,

GULF COAST PRE-STRESS CO. INC., ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
90 CV 4093 E

May 31, 1993

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

The district court granted summary judgment to all defendants in this personal injury suit. We agree with the assessment of the district court and therefore affirm.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

On March 26, 1990, appellant Roual Hebert was working on a pile driving crew doing preliminary ground preparation work for the construction of a parking garage adjacent to Meadowcrest Hospital in Gretna, Louisiana. The pile driving crew was employed by S.K. Whitty Co.[1] While the crew was positioning an 80-foot pile to be driven, an apple-sized chunk of concrete was chipped from the upper end of the pile and fell 80 feet, striking Hebert on the back of his hard hat and causing serious injuries.

Hebert received worker's compensation and medical benefits paid by Whitty's insurer, Maryland Casualty Company. Hebert then brought suit against the present defendants: (1) NME Hospitals, Inc. (landowner); (2) Gulf Coast Pre-Stress Co., Inc. (manufacturer of the concrete pile); (3) Harvard, Jolly, Marcet & Associates, P.A. (project architects); and (4) Vulcan Iron Works (manufacturer of the pile driving equipment). Maryland Casualty intervened. After over a year of discovery, the defendants moved for summary judgment. Those motions were granted, and the district court entered judgment in the defendants' favor. Hebert appeals. We review the granting of a summary judgment de novo.

DISCUSSION

In this case Hebert attempted to defeat the defendants' summary judgment motions, and now on appeal he attempts to defeat the summary judgments granted in the defendants' favor, by spinning

[1] NME Hospitals hired Doster Construction Co. as general contractor to build the parking lot. Doster hired Whitty as subcontractor to perform pile-driving services.

out theories of what might have happened at the jobsite and asserting that the jury should be allowed to pass judgment on those theories. Creating factual theories is an essential element of successfully prosecuting a tort claim. But it is not the only element. In the absence of admissible evidence tending to corroborate the plaintiff's theory of the case, even the most creative and appealing theory cannot be submitted to the jury. That is what has happened in this case.

A. NME Hospitals

Hebert's claims against NME are premised on negligence, strict liability, and absolute liability for ultrahazardous activities.[2] On appeal, Hebert has abandoned his negligence claim under article 2322. Moreover, Hebert's brief relies almost entirely on evidence and arguments that were not presented to the district court for its consideration in ruling on the defendants' summary judgment motions. Although we examine the record de novo when reviewing a summary judgment, this court should not consider evidence or arguments not presented to the district court for its consideration. Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-16 (5th Cir.), cert. denied, ____ U.S. ____, 113 S. Ct. 98, 121 L.Ed.2d 59 (1992); Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988). But notwithstanding the introduction of new evidence not presented to the district court, Hebert has still failed to show the existence of a genuine issue of material fact.

[2] These claims arise under La. Civ. Code arts. 2315, 2317, 2322.

Under Louisiana law, a principal generally is not liable for torts committed by an independent contractor in the course of performing its contractual duties. Ainsworth v. Shell Offshore, Inc., 829 F.2d 548, 549 (5th Cir. 1987), cert. denied, 485 U.S. 1034, 108 S. Ct. 1593, 99 L.Ed.2d 908 (1988); Hawkins v. Evans Cooperage Co., 766 F.2d 904 (5th Cir. 1985). This rule is subject to two exceptions: (1) a principal may not avoid liability for injuries resulting from an ultrahazardous activity by hiring out the work to an independent contractor; and (2) a principal may not escape liability for the negligent acts of an independent contractor when the principal retains or exercises operational control. Ainsworth, 829 F.2d at 549-50.

Liability for an ultrahazardous activity may be imposed only when the defendant was directly engaged in the injury-producing activity. Perkins v. F.I.E. Corp., 762 F.2d 1250, 1267 (5th Cir. 1985). All parties agree that pile driving is an ultrahazardous activity. See id. Hebert argues that NME was directly involved in the pile driving because the employee of another independent contractor, Chris Wolfe, was monitoring the pile driving. Wolfe's presence at the site as a monitor, however, is insufficient to demonstrate direct involvement in the pile driving activities. Direct involvement requires a closer nexus to the ultrahazardous activity itself than is demonstrated in this case. Normally, liability for direct involvement in an ultrahazardous activity extends only to the person or entity "using the instrument that occasioned the injury." Perkins, 762 F.2d at

1267 (emphasis in original). That is clearly not the case here. Were we to hold otherwise, every landowner who monitored or inspected ongoing construction projects might be held absolutely liable for injuries caused by ultrahazardous activities conducted on the property. We similarly find that Hebert has failed to present evidence that NME retained or exercised operational control over the pile driving activity.

Strict liability is imposed under Article 2317 when (1) the thing causing damage was in a defendants' custody; (2) the thing had a vice or defect; and (3) the vice or defect occasioned damage. Ainsworth, 829 F.2d at 551; Stewart v. Sam Wallace Indus., 409 So.2d 335 (La. App. 1981), writ ref'd, 413 So.2d 497 (La. 1982). "Custody" means supervision and control. Ainsworth, 829 F.2d at 551. As we have already noted, at most NME undertook to monitor the ongoing construction at the site. Control of the pile driver rested squarely on Whitty as subcontractor for the pile driving. The district court properly granted NME's motion for summary judgment.

B. Gulf Coast Pre-Stress

Hebert advanced a products liability claim against Gulf Coast under the Louisiana Products Liability Act. La. Rev. Stat. Ann. § 9:2800.54. To succeed on this claim, Hebert needed to show that the pile was unreasonably dangerous in construction. The district court found, however, and we agree, that Hebert has presented no evidence that the concrete pile was defectively made. Although Hebert has presented plausible theories about how the

concrete pile might have been defective, he has pointed to absolutely no evidence demonstrating any defect in the pile. The district court properly granted summary judgment in favor of Gulf Coast.

C. Vulcan Iron Works

Hebert also asserted a products liability claim against Vulcan, the manufacturer of the pile driving hammer used by the crew. Hebert's claim was based solely on the fact that the concrete pile slipped out from under the bell used to hold the pile in place for the hammer. In opposing Vulcan's motion for summary judgment, Hebert did not identify a single witness, expert or lay, who would testify that the Vulcan hammer was defective. Moreover, Hebert adduced no evidence to show that the Vulcan hammer was unreasonably dangerous in any way. Instead, Hebert asks the court to allow a jury to infer unreasonable dangerousness from the fact that the concrete pile slipped out from under the bell. But in the absence of any evidence that the hammer was defective, we cannot do so. The district court's summary judgment in favor of Vulcan was proper.

D. Harvard, Jolly, Marcet & Associates

Hebert asserted a professional negligence claim against Harvard, Jolly, architects for the parking garage project, alleging that the firm improperly specified the use of square concrete piles rather than round piles. This claim rests entirely on Hebert's unsupported claim that square concrete piles were not commonly used and were subject to a greater danger of breakage. Moreover, Hebert

never identified a single witness who could testify about architectural practices at trial. Consequently, at trial Hebert would have been unable at trial to prove that Harvard, Jolly violated any duty that it may have owed Hebert. Consequently, the district court had no choice but to grant Harvard, Jolly's motion for summary judgment.

CONCLUSION

Hebert has failed to demonstrate the existence of a genuine issue of material fact with regard to his claims against all of these defendants. We agree with the district court's determination that summary judgment was proper in each case and AFFIRM that court's judgment.