

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0899

MICHAEL SANDERS

VS.

STEVEN DOMANGUE AND DAVE PATEL

JUDGMENT RENDERED: NOV 14 2008

ON APPEAL FROM THE
THIRTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 149,923
PARISH OF TERREBONNE, STATE OF LOUISIANA

THE HONORABLE TIMOTHY C. ELLENDER, JUDGE

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Gemini Insurance Company

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ

9/21 Pettigrew, J. concurs

Handwritten signature and initials

McDONALD, J.

The threshold issue in this case is whether this is a workers' compensation case or an intentional tort case. The plaintiff filed suit asserting that he was the victim of an intentional act for purposes of the intentional act exclusion of the Workers' Compensation Act. The trial court granted a summary judgment in favor of the defendants and dismissed the suit. The plaintiff-appellant asserts that the trial court erred in granting a summary judgment on the issue of an intentional tort.

On November 22, 2005, the plaintiff-appellant, Michael Sanders, was driving a tractor-trailer for Reliable Soil Company delivering soil for road repairs. He made his delivery to a jobsite for Barriere Construction Company, L.L.C. (Barriere Construction Company), which had a contract with the Louisiana Department of Transportation and Development (DOTD) to repair and construct shoulders along Highways 56 and 57. Barriere Construction Company had a subcontract with Reliable Soil Company, which provided tractor-trailers and drivers for the project.

Steven Domangue and Dave Patel were employees of Barriere Construction Company. When Mr. Sanders arrived at the job site with the soil, Mr. Domangue was operating a load hopper, which was connected behind the tractor-trailer as it dumped the aggregate into the hopper to construct the road shoulder. Mr. Patel chained the tailgate of the truck, and when the back of the truck was lifted, the contents did not come out. This caused the truck to turn over on its side, injuring Mr. Sanders.

Mr. Sanders filed suit against Mr. Domangue, Mr. Patel, and Barriere Construction Company (the defendants). Mr. Sanders asserted that Mr. Domangue and Mr. Patel were either grossly negligent or they intentionally injured Mr. Sanders. The defendants filed an answer, asserting that the accident was not

caused by the defendants, but rather by the negligence of Mr. Sanders, that the claim was prescribed, that Mr. Sanders failed to mitigate his damages, that any medical condition of Mr. Sanders' was pre-existing or congenital, and that Mr. Sanders had no cause of action as Barriere Construction Company was his statutory employer. Also, defendants filed a third-party demand, naming as defendants Reliable Soil Company, First Financial Insurance Company, and Gemini Insurance Company.

The defendants asserted that Mr. Patel and Mr. Domangue were third-party beneficiaries to the contract between Barriere Construction Company and Reliable Soil Company, and that under the contract Reliable Soil Company was to indemnify, defend, and hold harmless Barriere Construction Company, its partners, employees, officers, directors, agents, and employees for claims against it brought by or on behalf of employees of the Reliable Soil Company.

The affidavit of Mr. Patel indicated that he had no intention to injure Mr. Sanders and no reason to think he would be injured and that the same operation had been performed on other trucks without incident. The affidavit of Mr. Domangue indicated that he had no intention to injure Mr. Sanders and no reason to think he would be injured and that the same operation had been performed on other trucks without incident. Mr. Robert Peck, Jr., vice-president of Reliable Soil Company, stated in his affidavit that he went to the scene of the accident and found the overturned truck with the tailgate chained. Mr. Peck stated that he had never seen a truck with a tailgate chained like that before. Mr. Peck added that he believed it was a dangerous maneuver and likely to cause the truck to overturn.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Malbrough v. Halliburton Logging Services, Inc.**, 97-0378, p.

4 (La. App. 1 Cir. 4/8/98), 710 So.2d 1149, 1151, writ denied, 98-1212 (La. 6/19/98), 720 So.2d 1217. In order to recover in tort in this case, plaintiff must demonstrate that his injuries resulted from an intentional act. An intentional act requires that the actor either 1) consciously desires the physical result happening from his conduct, or 2) knows that the result is substantially certain to follow from his conduct. **Smith v. Tanner Heavy Equipment Co., Inc.**, 01-0886, p. 1 (La. 6/15/01), 790 So.2d 615.

After a *de novo* review of the record, we find that there are genuine issues of material fact as to how much the tailgate was chained and the likelihood that the truck would overturn depending on how the tailgate was chained. The affidavits of Mr. Patel and Mr. Domangue do not address chaining the tailgate, nor do they refute that the tailgate was chained and that such a situation would likely cause the truck to overturn.

Therefore, for the foregoing reasons, the trial court judgment granting the motion for summary judgment in favor of the defendants is reversed, and the case is remanded to the trial court for further proceedings. Costs are assessed against Mr. Domangue, Mr. Patel, and Barriere Construction Company. This memorandum opinion is rendered in accordance with the Uniform Rules-Courts of Appeal, Rule 2-16.1.B.

REVERSED AND REMANDED.