

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

DEAN E. KELLY and LAUREN M. BRUNELLE

PLAINTIFFS

VERSUS

CAUSE NO. A2401-09-369

**KENAN BEL BUCHERT, MISSISSIPPI DEPARTMENT
OF TRANSPORTATION, GRANITE CONSTRUCTION
COMPANY and ARCHER WESTERN CONTRACTORS, LTD.**

DEFENDANTS

CONSOLIDATED FOR ALL PURPOSES WITH:

EDWARD VINCENT BRADLEY

PLAINTIFF

VERSUS

CAUSE NO. A2401-09-370

KENAN B. BUCHERT

DEFENDANT

CONSOLIDATED FOR ALL PURPOSES WITH:

JOSHUA DRIGHT

PLAINTIFF

VERSUS

CAUSE NO. A2401-09-377

**STATE OF MISSISSIPPI, INDIVIDUALLY, AND ON BEHALF
OF MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
MISSISSIPPI TRANSPORTATION COMMISSION, GRANITE
CONSTRUCTION COMPANY, ARCHER WESTERN
CONTRACTORS, LTD., and GRANITE ARCHER WESTERN,
A JOINT VENTURE**

DEFENDANTS

CONSOLIDATED FOR ALL PURPOSES WITH:

BRANDON ALEXANDER

PLAINTIFF

VERSUS

CAUSE NO. A2401-09-378

**STATE OF MISSISSIPPI, INDIVIDUALLY, AND ON BEHALF
OF MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
MISSISSIPPI TRANSPORTATION COMMISSION, GRANITE
CONSTRUCTION COMPANY, ARCHER WESTERN
CONTRACTORS, LTD., and GRANITE ARCHER WESTERN,
A JOINT VENTURE**

DEFENDANTS

CONSOLIDATED FOR ALL PURPOSES WITH:

KENAN BEL BUCHERT

PLAINTIFF

VERSUS

CAUSE NO. A2401-10-32

**MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
GRANITE CONSTRUCTION COMPANY and ARCHER
WESTERN CONTRACTORS, LTD., AND JOHN DOES 1-5**

DEFENDANTS

ORDER

This cause came on for hearing on November 16, 2012, upon the Motion for Summary Judgment of Defendants, Granite Construction Company, Archer Western Contractors, LTD., Granite Archer Western, A Joint Venture, [GAW]¹ and Ingram Signalization, Inc., [Ingram] [88]², the Motions for Summary Judgment of the Defendant Powell Construction Services, Inc. [Powell] [65] [66] [68] [70], the Motion and Supplemental Motion for Summary Judgment of the Defendant Mississippi Department of Transportation [MDOT] [76] [98], and the Motion for Summary Judgment of the Defendant HNTB [97] and the Court, having heard arguments from the parties, and having reviewed and considered the pleadings, affidavits and the law, finds that the Motions are well taken and should be sustained.

This lawsuit is a consolidated personal injury action arising out of an October 26, 2008, nighttime fishing trip which ended when the boat carrying the Plaintiffs collided with the Bay St. Louis Bridge. The boat was owned and operated by Kenan Buchert. His passengers were Dean

¹Buchert's claims against the Granite /Archer Defendants have been dismissed. [#51] in 24CI1:10cv32.

²The docket numbers are from 24CI1:09-cv-0369.

Kelly, Lauren Brunelle, Joshua Dright, Brandon Alexander, and Edward Bradley.³ Five lawsuits were filed by Dean Kelly and Lauren Brunelle, Joshua Dright, Brandon Alexander, Edward Bradley who sued only Buchert, and by Kenan Buchert, who is also a defendant in the other four lawsuits. A review of the responsibilities and actions of each of the Defendants prior to the date of this accident and of Buchert's actions at the time of the accident leads the Court to conclude that there are no genuine issues of material fact and the Defendants are entitled to summary judgments as a matter of law.

In August 2005 Hurricane Katrina destroyed the "old" bridge over the Bay of St. Louis. Subsequently, the Mississippi Department of Transportation contracted with GAW to design and construct the "new" Bay St. Louis Bridge. Defendant, GAW then entered into subcontracts with the Defendant, HNTB for the design of the electrical lighting control panels and with Defendant Ingram to install the lighting. The bridge was reopened in May 2007, and on February 15, 2008, the Mississippi Department of Transportation released GAW of "further maintenance and public liability on items of your contract completed in accordance with the contract, excluding the Warranty Provisions of the Contract, effective February 15, 2008." MDOT acknowledged its responsibility for bridge maintenance and repair including the lighting system.

The "new" Bay St. Louis Bridge is 1.9 miles long with the highest point or rise in the bridge located above the navigation channel in the Bay. The bridge carries four lanes of traffic with the deck lit by street lights. There are also column and "necklace" lights beneath the traffic lanes which automatically turn off each night at ten o'clock. As required by the U.S. Coast

³There was one other passenger who did not file a lawsuit and so is not included in the narrative of facts.

Guard there are also six red and green navigational lights which mark the navigation channel as it passes under the bridge. The navigation lights are located below the rise in the bridge and above the channel.

On September 1, 2008, Hurricane Gustav extinguished the lights on the Bay St. Louis Bridge. On September 16, the MDOT contacted Powell Construction to restore/repair the navigation and roadway lights and requested Powell provide a quote to the MDOT for moving the control panels “up the hill.” On September 16, 2008, Powell was on site and by September 19, 2008, Powell had completed temporary repairs which had the roadway lights and four of the six navigational lights in the channel working. The two navigational lights that were not working needed bulbs, which had to be secured through MDOT. Powell was also working on the quote to remove and replace the lighting control boxes, a project that would not be completed for weeks after the accident involving these Plaintiffs. Between September 19, 2008, and October 26, 2008, MDOT was not notified that the navigation lights had stopped working. Because of their various roles, responsibilities and relationships with the bridge, these parties, GAW, Ingram, MDOT, Powell and HNTB were named Defendants in one or more of these five lawsuits.

To recover on their claims of negligence the plaintiffs must establish four elements: duty, breach, causation, and damages. See *Price v. Park Management, Inc.*, 831 So.2d 550 (Miss. Ct. App. 2002). If a breach of a duty is found, the breach must be shown to be both the cause in fact and the legal cause of the damages. *City of Jackson v. Spann*, 4 So.3d 1029, 1033 (¶ 11) (Miss.2009) (citing *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1277 (¶ 31) (Miss.2007)). If the negligence was both the cause in fact and the legal cause of the damage, it is the proximate

cause of the injury and the defendant is liable for any resulting damages. On the other hand, if the defendant's negligence is not "the proximate cause of the injury" he is not liable to the plaintiff. *Utz v. Running & Rolling Trucking, Inc.*, 32 So.3d 450, 466 (¶ 41) (Miss.2010)

Plaintiffs allege that each of the Defendants was negligent and that each Defendant's negligence caused or contributed to the injuries they suffered. **Miss. Code Ann. Section 11-7-17** provides that all questions of negligence and contributory negligence shall be for the jury to determine. However, when there are no issues of fact the court determines the negligence question. *McGee v. Bolen*, 369 So.2d 487, 493 (Miss. 1979). The Defendants who have moved for summary judgment are the MDOT, Powell Construction, GAW, Ingram, and HNTB. The work they performed and/or their responsibilities for the Bay St. Louis Bridge neither caused nor contributed to this accident. There are no issues of fact that require submission of this matter to a jury. Under the undisputed facts, Kenan Buchert's actions were the sole proximate cause of the boat's collision with a column of the Bay St. Louis Bridge.

Forty-four year old Buchert has fished the Bay of St. Louis since he was eight years old and has worked as a commercial crab fisherman. By his own account, Buchert had made 300 to 500 trips under the bridge since it was rebuilt following Hurricane Katrina in August 2005. The night of October 26, 2008, he was fishing at night with six people aboard his 21-foot boat. They fished for forty-five minutes to an hour north of the Bay St. Louis Bridge around the pier lights. Then the group decided to fish south of the bridge under the train bridge lights. To get there they had to pass under the Bay Bridge. From afar, Buchert could see the rise of the bridge as well as the lights along U.S. Highway 90. He did not see and did not expect to see the decorative column lights or necklace lights on the bridge. It was after 10:00 p.m. and those lights

(when they were working) automatically shut off at 10:00 p.m. each night. Buchert knew and could see that the red and green navigation lights located below the rise in the bridge and above the channel were not illuminated. Knowing that the navigation lights for the channel were out, Buchert made a conscious decision to navigate under a different section of the bridge, some 400 feet from the channel, while relying on a GPS course generated on previous trips. It is important to note that it was so dark in the area where Buchert attempted to pass under the bridge that he could see nothing ahead of his boat. This time, instead of a successful passage under the bridge, Buchert struck column 41 with his boat.

This accident did not occur because the lighting control panels were not in a safe location, or because there was some design defect in the lighting. It did not occur because of negligent installation or maintenance of the lights. It did not occur because of a failure to warn. It did not occur because the navigation lights were out. Even if the defendants were negligent in any of these matters, such negligence “cannot be a proximate cause of the plaintiffs’ injuries because the undisputed fact is that Buchert chose his course, blindly running his boat into an area of total darkness, then failed to successfully navigate it. “[C]ause in fact requires proof that, but for the alleged negligent act or omission, the injury would not have occurred.” *Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390, 406 (Miss. Ct. App. 2007). Proximate cause is the “cause which in natural and continuous sequence unbroken by an efficient intervening cause produces the injury and without which the result would not have occurred.” *Sample v. Haga*, 824 So.2d 627, 632 (Miss. Ct. App. 2001) [House guests escaped but then re-entered a burning house and lost their lives. The Court held that the cause in fact of their death was the voluntary act of re-entering the house and not the failure of the homeowner

to install smoke detectors.] As a result, the Court in *Haga* found there was no genuine issue of material fact for a jury to decide regarding causation and summary judgment was appropriate.

Id. The same is true here. The absence of functioning channel lights was not the cause in fact of the accident. Kenan Buchert knew and was fully aware of the bridge, knew he was not traveling in the navigation channel, and knew he was traveling in total darkness. The course Buchert chose had no lighting the night in question or any other night. It was not the absence of lights that caused Buchert's boat to collide with the bridge column, but the absence of care and caution on the part of Buchert. No act of any Defendant which caused or contributed to the lights being out, caused or contributed to this accident. Under the undisputed facts in this cause, and the law of Mississippi, the moving Defendants are entitled to judgments as a matter of law. It is, therefore,

ORDERED AND ADJUDGED that Motion for Summary Judgment of the Defendant the Mississippi Department of Transportation [MDOT] [76] [98] is granted with final judgment being entered dismissing the actions against the Mississippi Department of Transportation. It is further,

ORDERED AND ADJUDGED that Motion for Summary Judgment of the Defendant Granite Construction Company, Archer Western Contractors, LTD., Granite Archer Western, A Joint Venture, [GAW] and Ingram Signalization, Inc., [Ingram] [88] is granted with final judgment being entered dismissing the actions against Granite Construction Company, Archer Western Contractors, LTD., Granite Archer Western, A Joint Venture, and Ingram Signalization, Inc.. It is further,

ORDERED AND ADJUDGED that the Motion for Summary Judgment of the Defendant Powell Construction Services, Inc. [Powell] [65] [66] [68] [70] is granted with final judgment being entered dismissing the actions against Powell Construction Services, Inc. It is further,

ORDERED AND ADJUDGED that the Motion for Summary Judgment of the Defendant HNTB [97] is granted with final judgment being entered dismissing the actions against HNTB.

SO ORDERED AND ADJUDGED this, the 27 day of February, 2013.



ROGER T. CLARK
CIRCUIT COURT JUDGE

FILED
FEB 27 2013
GAYLE PARKER, CIRCUIT CLERK
By Catherine Peter DC