

**IN THE COURT OF APPEALS 04/23/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00419 COA**

**MRS. BILLIE BURKE THOMAS**

**APPELLANT**

**v.**

**COOK COGGIN ENGINEERS, INC.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK ALLISON RUSSELL

COURT FROM WHICH APPEALED: TISHOMINGO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES E. PRICE, JR.

ATTORNEY FOR APPELLEE:

MICHAEL D. COOKE

NATURE OF THE CASE: CIVIL; SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO COOK COGGIN  
ENGINEERS

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Billie Thomas's suit against Cook Coggin Engineers, Inc. arising from damage to Civil War breastworks on the Thomas property was dismissed on summary judgment. Thomas appeals, contending that the trial court erroneously found that Cook Coggin did not owe her a duty. We conclude that the trial court was correct and affirm.

## FACTS

In 1992, the Tishomingo County Water District undertook a project to improve water distribution. In pursuit of this project, the district entered into a contract with Cook Coggin to provide "the necessary design investigations, accomplish the design of the project, and prepare construction plans, specifications and contract documents." Under the original plans for the project prepared by Cook Coggin, a water line was to pass over property owned by Thomas.

While the water line's path was being marked, Thomas refused to give permission to create an easement across her property. She told Cook Coggin that the property contained Civil War breastworks that she did not want to be disturbed. Thereafter, Cook Coggin re-marked the water lines' path to avoid Thomas's property and advised the construction company in charge of the actual work on the project not to go on Thomas's property. On more than one occasion a Cook Coggin employee walked the property line with employees of the contractor and pointed out the Thomas property. It was admitted that Cook Coggin had put flags on the route that the water line was to travel, and the flags did not intrude onto the Thomas property. Cook Coggin also provided a drawing to the contractor indicating the route, which located the Thomas property and properly marked the route to avoid encroaching on that property. A Cook Coggin employee and the job superintendent for the contractor tied ribbons to some trees and painted others to mark the boundary with the Thomas property.

The water district and Cook Coggin were notified that an archeologist needed to be employed to inspect the route of the water line and that clearance had to be obtained from the Mississippi Department of Archives and History prior to constructing the water line. Cook Coggin employed an archeologist who made recommendations relating to preservation of the breastworks.

Despite Cook Coggin's instructions, the construction company moved equipment across Thomas's land to begin work on the water line. In so doing, it damaged some of the breastworks.

Thomas sued the construction company and Cook Coggin, seeking \$600,000.00 in damages plus attorneys' fees and costs. Her action against Cook Coggin rested on alternative theories of negligence and willful failure to properly supervise construction. Thomas settled her action against the construction company.

## DISCUSSION

The case is appealed from a summary judgment granted Cook Coggin. We must look at the record to determine whether there is any dispute as to a material fact that would prevent the granting of judgment. Acknowledging the measures Cook Coggin took to inform the contractor, Thomas argues that Cook Coggin should have done one more thing:

Representatives of Cook Coggin Engineers, Inc. never gave Freeland & Lemm

Construction Company any information or instructions about the existence of Civil War breastworks on Mrs. Thomas's property, about their historical importance, nor about the importance of avoiding any damage to them.

Thomas solely relied upon this theory to prevent summary judgment. In essence, Thomas argues Cook Coggin's warning would have been more persuasive if the contractor had been told why Thomas did not grant an easement. To prove a negligence theory on these facts, Thomas must demonstrate that giving this specific information was a duty Cook Coggin owed to her, and that the cause of damage to her property was reasonably closely related to this failure. *Carpenter v. Nobile*, 620 So. 2d 961, 964 (Miss. 1993).

As a part of her argument that Cook Coggin breached a duty owed to her, Thomas asserts the duty arose by virtue of the role Cook Coggin contractually agreed to undertake in the district's project. Cook Coggin was contractually obligated to "perform the necessary design investigations, accomplish the design of the project, and prepare the construction plans, specifications and contract documents." In addition, the contract provided that Cook Coggin would "provide general construction overview of the work of the Contractor." However, Cook Coggin was not required "to assume responsibility for the means and methods of construction . . . ."

Thomas's argument on appeal is that the contract gave rise to a duty owed her by Cook Coggin. Under general tort law, Cook Coggin had a duty to perform its work in a non-negligent manner to avoid injury to foreseeable third parties. *Couch v. City of D'Iberville*, 656 So. 2d 146, 151-52 (Miss. 1995). It is admitted by Cook Coggin that its employees met with Thomas at her home to acquire an easement, and Thomas refused to grant one. It was further admitted that Cook Coggin notified the contractor of this refusal. Thus whether acquiring easements was part of Cook Coggin's contractual obligations, *Magnolia Constr. Co. v. Mississippi Gulf South Eng'r, Inc.*, 518 So. 2d 1194, 1202-03 (Miss. 1988), or was instead an additional duty assumed, *Lloyd Wood Constr. Co. v. Little*, 623 So. 2d 968, 973 (Miss. 1993), it was obligated to perform non-negligently as to foreseeable third parties. Thomas had shown the existence of a duty, but we must now define its parameters.

Thomas admitted that Cook Coggin did the following prior to any damage to her property:

1. Changed construction maps to show the new route of the water line, indicating that Thomas's property was to be bypassed;
2. Placed flags on the south and west boundaries of the Thomas property;
3. More than once walked those boundaries with contractor employees;
4. Orally advised the contractor of the change of routes;
  5. Informed the contractor, including the job superintendent, that Thomas prohibited the contractor to enter her property;
  6. With the contractor's job superintendent, walked the boundary and tied ribbons to trees along the Thomas property boundary; and

7. Thomas's two sons saw that her property boundary was marked with "a lot of tape" and orange and red paint on trees.

There was a duty to inform the contractor of the easements acquired, since procuring easements was part of Cook Coggin's explicit or assumed contractual undertaking. Thomas admits that duty was performed. There was a duty to change the water line route once it was determined an easement could not be acquired, and that duty was performed. Cook Coggin assumed a duty, which perhaps fell under one of its general contractual obligations, to mark property boundaries and the route of the right of way. That too was performed and is not the basis for the alleged liability.

Less clear is whether there was a duty to pass along information to the contractor regarding landowners who refused to grant easements. Since the contractor would have no legal right to go onto any landowner's property without an easement or other permission, relaying information regarding landowners who denied access is literally tangential to the duty owed by Cook Coggin. Two threshold questions would need to be answered. Does the duty exist in the first place, and is such a duty owed to third parties or just to the contractor and/or water district? If any duty exists, then the questions of breach and causal connection to damage come into play.

We pretermitted resolution of the threshold issues because of the clarity of the answer to the question of whether any such duty was breached. Thomas does not argue a complete failure of a duty, but only that Cook Coggin should have done a better job of performing that duty. If a duty existed, and if it was owed to Thomas, Cook Coggin took substantial steps to comply. Among those steps was telling the contractor that Thomas prohibited access to her property. Cook Coggin walked the boundary line with the contractor's superintendent, showed on the ground and on charts the rerouting of the pipeline, and marked Thomas's property boundaries with flags, paint, and tape. She is not arguing there was any ambiguity created by Cook Coggin regarding the need to stay off her property, but only that the contractor would have taken its obligations more seriously if the additional information was relayed on just why she was not granting an easement. There is some record support for this view of events.

The contractor's president testified at a deposition that the company's superintendent on the job was fully aware that they were not to go on Thomas's property. He was aware they had not gotten an easement from Thomas. He further testified that the "ramrod" on the crew that committed the trespass knew he was supposed to stay off the Thomas property, but just did not know where the boundary was. When asked what effort the employee had expended to determine the boundary, the president of the company, with commendable candor, answered "[n]ot enough." From one perspective that supports Thomas's view of the case. Had the contractor known the seriousness of the possible damage, its employees would have been more careful.

Of course, the existence of some facts does not mean there is a legal structure within which to fit those facts, i.e., the facts may not be "material" so as to avoid summary judgment. Cook Coggin passed along more than sufficient information to cause the contractor to know not to trespass on Thomas's property. The contractor admitted it knew not to trespass, and admitted Cook Coggin walked the boundary lines with contractor employees and marked the lines. Still, Thomas argues

Cook Coggin retained a piece of information that if conveyed, would have made it less likely the contractor's on-the-scene employee would have been cavalier about this obligation. If there is to be liability imposed on Cook Coggin, it is because of this gap, i.e., the space between the unambiguous information Cook Coggin gave fully informing the contractor of its obligation to stay off the Thomas property, and the additional information not conveyed that might have heightened the awareness of the obligation.

We find the answer in the definition of fault that appears in several supreme court precedents:

In Mississippi, actionable fault must be predicated upon action or inaction, prompted by knowledge, actual or implied, of facts which make the result of the defendant's conduct not only the probable result but also a result which the defendant should, in view of the facts, have reason to anticipate.

*Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315, 323 (Miss. 1987) (citing *Sprayberry v. Blount*, 336 So. 2d 1289, 1294 (Miss. 1976)).

What did Cook Coggin do? It provided the contractor with complete information on the legal rights that it had, and indeed on Thomas's specific refusal to allow access. It left nothing out regarding what the contractor would need to do in order for the contractor to comply with its legal obligations. When would that level of information be inadequate? Only if the contractor ignored its legal responsibilities would this prove insufficient. Since there is nothing in the record even hinting that the contractor had a propensity to trespass while engaged in its work, Cook Coggin did not have "reason to anticipate" that trespassing was the contractor's practice. There being no dispute as to that fact, there is no question of material fact that would prevent summary judgment. Cook Coggin was not an insurer of the contractor or any other parties' actions. Thomas settled her claim against the contractor, and under these facts that is the only claim she had.

**THE JUDGMENT OF THE TISHOMINGO COUNTY CIRCUIT COURT IS AFFIRMED AND ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., AND THOMAS, P.J., COLEMAN, DIAZ, AND MCMILLIN, JJ., CONCUR.**

**KING, J. DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BRIDGES, P.J., BARBER AND PAYNE, JJ.**

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**KING, J., DISSENTING:**

I disagree with the majority opinion, which states that summary judgment was properly granted. Under Mississippi's negligence law, reasonable care must be exercised in preventing foreseeable injuries to foreseeable plaintiffs. *See Swan v. I.P., Inc.*, 613 So. 2d 846, 856 (Miss. 1993); *Boyd v. Lynch*, 493 So. 2d 1315, 1318-19 (Miss. 1986). Furthermore, "courts have [increasingly] found that construction managers, consulting engineers, and architects (under the traditional construction arrangement) bear responsibility to act in situations where they are the only party in a position to prevent a loss." *Berkel & Co. Contractors, Inc., v. Providence Hosp.*, 454 So. 2d 496, 502 n.5 (Ala. 1984) (citations omitted).

Based upon the evidentiary matters in this case, Cook Coggin knew or reasonably should have known: (1) that there was a problem with the Civil War breastworks and that there existed a need to protect them; (2) that the construction company was doing its work in accordance with the plans and designs formulated by Cook Coggin; (3) that certain heavy equipment would have to be transported to the construction site to comply with its plans; and (4) that access to the construction site, based on the geography, required entry upon Mrs. Thomas' land. Under these special circumstances, the jury might reasonably have inferred negligence on the part of Cook Coggin, thereby precluding summary judgment.

For the foregoing reasons, I would reverse and remand.

**BRIDGES, P.J., BARBER AND PAYNE, JJ., JOIN THIS OPINION.**