

Case No. 2008-CA-00006
IN THE SUPREME COURT OF MISSISSIPPI

**RITA M. HIGGINBOTHAM, INDIVIDUALLY PLAINTIFFS/APPELLANTS
AND AS MOTHER AND PERSONAL REPRESENTATIVE
OF THE WRONGFUL DEATH BENEFICIARIES
OF HEATHER DAWN HIGGINBOTHAM, DECEASED**

VS.

**LEHMAN-ROBERTS COMPANY, HILL BROTHERS DEFENDANTS/APPELLEES
CONSTRUCTIONS CO., INC., HILL BROTHERS
CONSTRUCTION & ENGINEERING COMPANY, INC.
EAST ARKANSAS CONTRACTORS, INC., AMERICAN
FIELD SERVICE CORPORATION, APAC-TENNESSEE, INC.,
PRO TURF, INC., TRAFFIC CONTROL PRODUCTS, INC.
AND JOHN DOES 1-20**

**Appeal from the Circuit Court of Tunica County, Mississippi
Honorable Albert B. Smith, III, Circuit Court Judge**

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

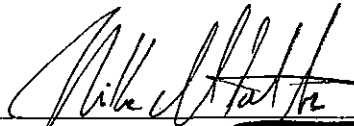
The undersigned counsel of record certifies that the persons listed below are either parties to this appeal or have an interest in the outcome of this lawsuit. These representations are made in order that the Justices of this Court may evaluate possible recusal or disqualification.

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I hereby certify that to the best of my knowledge and belief, these are the only persons having an interest in the outcome of this appeal.

THIS the 22nd day of July, 2008.



Michael N. Watts
Attorney for Appellee

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I. STATEMENT REGARDING ORAL ARGUMENT

The issue presented for appeal in this matter can be resolved on the basis of the record and briefs of the parties. Appellee does not believe oral argument would be helpful.

II. STATEMENT OF ISSUES ON APPEAL

The Appellant did not designate any issues on appeal as required by M.R.A.P. 28(a)(3). Accordingly, the Court, in its discretion, should only review issues for plain error.

III. STATEMENT OF THE CASE

A. Statement of the Relevant Facts

On December 3, 2007, the Tunica County Circuit Court granted summary judgment to Appellee Lehman-Roberts Company. R.E. 150-151. Higginbotham filed this wrongful death lawsuit alleging negligence by various entities in connection with two (2) separate highway projects left by the Mississippi Department of Transportation, being numbers 97-0009-05-034-10 ("North Project") and 17-0009-05-011-10 ("South Project"), respectively. R.E. 27-28. With respect to each project, a "temporary connector" was constructed to divert traffic from a four-lane highway to a two-lane highway, while construction was being performed. R.E. 42. In the previous appeal of related issues, those connectors were referred by the Court as the "first temporary connector," (associated with the North Project), and the "second temporary connector," (associated with the South Project). Appellee will utilize this same terminology in the instant appeal. The first temporary connector was completely finished and open to the traveling public. R.E. 42. The second connector was under construction at the time of the accident and was in the process of being prepped for asphalt by defendant Hill Brothers Construction Co. Inc. R.E. 42; R. 249. It is undisputed that the puddle

accumulated and the accident took place on the first temporary connector (i.e. North Project). A timeline of events are outlined below.

1. October 4, 1996: Lehman Roberts Employed to Perform Asphalt Paving Work For Prime Contractor ENDEVCO.

Former defendant ENDEVCO was the prime contractor for the North Project, which was awarded by the Mississippi Department of Transportation on June 25, 1996, and for which notice to proceed was issued by the Mississippi Department of Transportation on July 16, 1996. R.E. 28. Lehman-Roberts Company was hired as a subcontractor to do the asphalt paving work for ENDEVCO on the North Project on October 4, 1996. R.E. 28. ENDEVCO was granted summary judgement and was dismissed from the case. *See Higginbotham v. Hill Bros. Const. Co., Inc., et al*, 962 So.2d 46 (Miss. Ct. App. 2006) ("*Higginbotham I*"), *reh'g denied*, May 15, 2007; *cert. denied*, 962 So.2d 38 (Miss. Aug 02, 2007).

2. December 8, 1998: Lehman Roberts Given Final Maintenance Release By MDOT

After construction was completed, ENDEVCO was given its Final Maintenance Release relating to said project on December 8, 1998, by the Mississippi Department of Transportation. R.E. 28. This Final Maintenance Release specifically included asphalt pavement work performed by subcontractor Lehman-Roberts Company. R.E. 28. The release was given *over one full year prior* to the alleged incident giving rise to this litigation.¹

3. September 20, 1999: Lehman Roberts Given Written Notice of Satisfactory Completion & Final Acceptance of Work by MDOT.

ENDEVCO, as prime contractor for the North Project, was given *written notice* on

¹A certified true and correct copy of the Final Maintenance Release, specifically including asphalt pavement work performed by Lehman-Roberts Company, was attached to the Motion for Summary Judgment as Exhibit "B". R.E. 39.

September 20, 1999, by the Mississippi Department of Transportation of its *satisfactory completion* and *final acceptance* of the work covered under its contract with the Mississippi Department of Transportation, effective September 13, 1999. R.E. 28-29. This written notice specifically included asphalt pavement work provided by subcontractor Lehman-Roberts Company. R.E. 29. It was given approximately three months prior to the alleged incident giving rise to this litigation.²

4. December 12, 1999: Higginbotham's Accident Occurs on the Section of U.S. 61 Previously Known as Project 97-0009-05-034-10 ("North Project") Over One Year After MDOT Gave Lehman Roberts Its Final Release

The instant case alleges that on December 12, 1999, 19-year old Heather Higginbotham was driving a 1999 Pontiac Firebird south on a four-lane portion of U.S. Highway 61 in Tunica County, Mississippi. R.E. 41. When her vehicle entered the temporary crossover from the completed four-lane highway to the old two-lane highway, the vehicle hydroplaned and slid off the road, resulting in the death of the Plaintiff. R.E. 41-42. This temporary crossover where Higginbotham lost control, previously known as project 97-0009-05-034-10 (North Project), was the same section of road which MDOT had granted its Final Maintenance Release to Lehman Roberts on December 8, 1998, as well as its written notice of satisfactory completion and final acceptance on September 20, 1999. R.E. 28-29. Therefore, at the time of the accident, the property was in possession and control of MDOT, and not Defendant Lehman Roberts.

IV. PROCEDURAL HISTORY

On June 14, 2002, Higginbotham's estate sued ENDEVCO and all subcontractors, including

²A certified true and correct copy of the written acceptance of ENDEVCO's work by the Mississippi Department of Transportation as satisfactorily completed, specifically including asphalt pavement work performed by Lehman-Roberts Company, is attached to the Motion for Summary Judgment and incorporated therein by reference as Exhibit "C". R.E. 40.

Lehman-Roberts Company, alleging that their negligence in the new construction resulted in Higginbotham's loss of control of her vehicle.

A. **December 12, 2006: Prime Contractor ENDEVCO's Dismissal on Summary Judgment is Affirmed by the Mississippi Court of Appeals**

On November 12, 2004, Tunica County Circuit Judge Albert B. Smith, III granted ENDEVCO's motion for summary judgment, and issued a Final Judgment on January 10, 2005. On December 12, 2006, the Mississippi Court of Appeals affirmed Judge Smith's ruling with regard to ENDEVCO, specifically finding that the Mississippi Department of Transportation's satisfactory acceptance and final release of ENDEVCO on September 20, 1999, more than three months prior to the accident, relieved it of any liability to Plaintiff. The Court also found that Plaintiff had no evidence that ENDEVCO created an imminently dangerous condition or a nuisance *per se*. It was also determined by the Court that Lehman-Roberts' subcontractor on the South Project, Hill Brothers, had no duty to warn of or remedy the allegedly dangerous condition posed by the first temporary connector. Furthermore, no question of fact was created as to whether Hill Brothers' work on the unfinished second temporary created or contributed to the allegedly defective condition of the first temporary connector. The Court of Appeals denied rehearing on May 15, 2007.³ The Mississippi Supreme Court denied certiorari on August 2, 2007.⁴

On the heels of these determinations, in late August 2007, Lehman-Roberts moved for summary judgement. Tunica County Circuit Court Judge Albert B. Smith, III found that summary judgment was proper for Lehman Roberts. Judge Smith straightforwardly ruled that "as there are no genuine issues as to any material facts as to Lehman-Roberts, in this litigation, and thus, Lehman-

³*Higginbotham v. Hill Bros. Const. Co., Inc., et al*, 962 So.2d 46 (Miss. Ct. App. Dec 12, 2006), rehearing denied (May 15, 2007).

⁴*Higginbotham v. Hill Bros. Const. Co., Inc.*, 962 So.2d 38 (Miss. Aug 02, 2007).

Roberts Company is entitled to a judgement as a matter of law.” R.E. 150 -151.⁵ Higginbotham takes her appeal from Judge Smith’s second grant of summary judgment in the same cause of action.

IV. SUMMARY OF THE ARGUMENT

The issues presented in this case can be evaluated and dispensed with based solely on the “law of the case” doctrine or the similar and related concepts of res judicata and collateral estoppel, as the determinations made by the Court of Appeals in the previous interlocutory appeal, *Higginbotham I*, resolve all appellate issues. The Tunica County Circuit Court has properly held that a contractor is not liable to third parties after being released by public entities such as MDOT. Once the Mississippi Department of Transportation officially accepted as satisfactorily completed, ENDEVCO’s work on the North Project three months prior to the incident in question, Lehman-Roberts cannot be held liable in this suit. Lehman-Roberts Company, as subcontractor to ENDEVCO, had no relationship with, and no responsibility whatsoever, public or private, to or for the completed and accepted asphalt paving work on the North Project after its official acceptance by MDOT.

As to the South Project, the accident did not occur there. Accordingly, any quarrel with the the workmanship or maintenance of this project cannot be the proximate cause of Higginbotham’s injuries. Although Lehman-Roberts was initially involved in the construction of the first connector, after the completion of the project and the release provided by MDOT, it had no continuing obligation. As such, it stands in the same position as Hill Brothers (Appellee’s subcontractor),

⁵Although the Order was brief in content, the Mississippi Supreme Court has consistently held that “it will be assumed the trial judge made all necessary findings of fact in favor or appellee, whether stated or not.” *Patel v. Telerent Leasing Corp.*, 574 So. 2d 3, 6 (Miss. 1990); *Brown v. Williams*, 504 So. 2d 1181, 1191 (Miss. 1987).

whose summary judgment was affirmed in *Higginbotham I*. With regard to any work being performed on the unfinished second temporary connector, as a matter of law, there is no duty to warn or remedy an alleged defective condition posed by the first temporary connector. The Court in *Higginbotham I* also reviewed the specific evidence against Lehman-Roberts regarding actual or constructive notice and found it lacking. There is no credible evidence Lehman-Roberts had actual or constructive notice of the ponding of water after the completion and acceptance of the project by MDOT until the time of the accident (i.e. the relevant period).

Lastly, all of the elements of res judicata and/or collateral estoppel are present and work to preclude any remaining possibility of liability against Appellee. Appellant is again arguing that the negligence of the contractors that worked on the temporary connectors, now including Lehman-Roberts, caused Higginbotham's loss of control. This issue has already been raised and rejected by the Mississippi Court of Appeals. The Court held that Lehman-Roberts' prime contractor on the North Project and its subcontractor on the South Project were entitled to summary judgment. Summary judgment is likewise appropriate for Appellee.

V. ARGUMENT

The issues presented in this case can be evaluated and dispensed with based on the "law of the case" doctrine or principles of res judicata, as the determinations made by the Court of Appeals in *Higginbotham I* resolve all issues now on appeal. In *Higginbotham I*, the Court was previously faced with two separate issues regarding the legal liability of two contractors associated with Lehman-Roberts: 1) Lehman-Roberts' prime contractor, ENDEVCO, on the North Project; and 2) Lehman-Roberts' subcontractor, Hill Brothers, on the South Project. Although Lehman-Roberts was not a participant in the earlier interlocutory appeal, the legal rulings made apply with equal force to

Lehman-Roberts.

A. *Higginbotham I* Settled All Legal Issues Involved in the Instant Appeal Either by the Law of the Case Doctrine or Res Judicata.

The Court of Appeals decision in *Higginbotham I* foreclosed any possible remaining issue with regard to the liability of Appellee Lehman-Roberts Company. Appellant tries to escape the consequences of that decision and argues that *Higginbotham I* “did not address the present issue and is neither res judicata nor the law of the case.” More specifically, the Appellant asserts that the previous appeal “only involved the North Project and did not involve Lehman-Roberts. At the time of the accident, Defendant Lehman-Roberts was the prime contractor on the South Project, which was neither completed nor accepted by MDOT. Therefore, no findings in the *Higginbotham* opinion applies to Lehman-Roberts.” See Brief of Appellant at 3-4.

To the contrary, as explained below, *Higginbotham I* did in fact involve both a discussion and determination of liability regarding the North Project *as well as the South Project*. Indeed, the Court of Appeals paid particular attention to the theories raised (and even some not raised) by the Appellant in seeking to hold Lehman-Roberts’ subcontractor liable for its work on the South Project.

1. LAW OF THE CASE

In discussing the law of the case doctrine, the Court of Appeals recently explained:

The law of the case is similar to res judicata but is restricted to questions of law only. *Cont'l Turpentine & Rosin Co. v. Gulf Naval Stores Co.*, 244 Miss. 465, 479-80, 142 So.2d 200, 206-07 (1962). When an appellate court issues a ruling and sends the case back on remand, the ruling is the law of the case. *Moeller [v. Am. Guar. & Liab. Ins. Co.]*, 812 So.2d [953] at 960. It is binding on the trial court unless it falls under an exception. *Id.* Exceptions include material changes in evidence, pleadings or findings, or the need for the court to depart from its earlier decision to avoid unjust results.⁶

⁶*Southland Enterprises, Inc. v. Newton County*, 940 So. 2d 937 (Miss. App. 2006).

The Mississippi Supreme Court provided useful guidance on the application of the doctrine:

The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as the controlling legal rule of decision, between the same parties in the same case⁷, continues to be the law of the case, so long as there is a similarity of facts. This principle expresses the practice of courts generally to refuse to reopen what has previously been decided. It is founded on public policy and the interests of orderly and consistent judicial procedure.⁸

This doctrine embodies the concept that if an appellate court considers a subsequent appeal in the same case it has previously reviewed, its prior holdings and determinations are not to be changed absent some exceptional circumstance.⁹ In other words, principles of law established on one appeal should continue to apply on subsequent proceedings in the case. *Higginbotham I* judicially determined that there was no legal liability for Lehman-Roberts' prime contractor for the North Project and similarly found no liability for Lehman-Robert's subcontractor on the South Project. Those principles lead the Circuit Court to the inescapable conclusion that summary judgement was proper in favor of Lehman-Roberts.¹⁰ The Court should now affirm that decision.

In examining *Higginbotham I*, we find that the Court of Appeals tackled the liability issues raised regarding the two temporary connectors. The first temporary connector (North Project) was a fully completed project. It was accepted by the Mississippi Department of Transportation. On that project, ENDEVCO was the prime contractor and Lehman-Roberts was the subcontractor. On the

⁷The "same party" requirement is met here as the rule's application is directed at the party plaintiff/appellant, who fully participated and litigated the prior determinations and is the same party now resisting its effect. See also *In re: Estate of Jetter*, 590 N.W. 2d 254, 259 (S.D. 1999) (same party requirement subject to exception in proper circumstance);

⁸*Mauck v. Columbus Hotel Co.*, 741 So. 2d 259 (Miss. 1999).

⁹*Wilner v. Wilner*, 929 So.2d 343 (Miss. App. 2005)

¹⁰Summary judgement decisions are particularly appropriate for the application of the law of the case doctrine, as the appellate court is making determinations, *as a matter of law*, based on uncontested facts.

South Project, Lehman-Roberts took over as the prime contractor and hired Hill Brothers as subcontractors.

Higginbotham I made several key determinations, as a matter of law, based on the facts presented that are equally applicable now. They include the following:

1) The automobile accident occurred on the first temporary connector (North Project), *Higginbotham I* 962 So. 2d at 49, 50;

2) The puddle that accumulated, which contributed to the accident, was located on the first temporary connector (North Project), *Id.* at 50;

3) The first temporary connector was completed and open to the traveling public, *Id.* at 49;

4) The second temporary connector (South Project) was under construction at the time of the accident. It had been graded and prepped for asphalt paving, but was not paved at the time of the accident; *Id.* at 49;

5) As to Endevco, MDOT's acceptance of the company's work on the first temporary connector along with the full and final release given to Endevco effectively shifted the liability for the use and maintenance of the first temporary connector from Endevco to MDOT; *Id.* at 62;

6) Neither of the two exceptions to the contractor immunity rule applied in this case to shift liability back to Endevco, *Id.*;

7) As to Hill Brothers (Lehman-Roberts' subcontractor on the unfinished second temporary connector), the company had no duty to warn of or remedy the allegedly dangerous condition posed by the first temporary connector, *Id.*;

8) Even if a duty existed for Hill Brothers, there was no question of fact that was created as to whether Hill Brothers had notice of the ponding of water prior to the accident, *Id.*; and

9) No question of fact was created as to whether Hill Brothers' work on the second temporary created or contributed to the allegedly defective condition of the first temporary connector. *Id.*

The First Temporary Connector

Lehman-Roberts Company's position in this case parallels that of ENDEVCO as to any and

all allegations of liability for its work on the first temporary connector. The Mississippi Department of Transportation, by inspecting the completed work and providing the primary contractor with a full and final release of all further liability, specifically mentioning the asphalt pavement work, stands in the best position to determine whether ENDEVCO and its subcontractors had met MDOT specifications. Here, clearly ENDEVCO and all subcontractors, including Lehman-Roberts Company had met all MDOT specifications, or the release would have never been granted. The Court of Appeals determined that neither of the two general exceptions to this rule applied, and affirmed summary judgement. The Appellant in the instant appeal does not raise an objection to the lower court's application of the contractor immunity rule.¹¹

Accordingly, if Lehman-Roberts' prime contractor was entitled to summary judgement as to the work performed on the first temporary connection, than it follows that Lehman-Roberts is also entitled to summary judgement.

The Second Temporary Connector

Before a discussion related to work on the second temporary connector can be had it bears repeating that it is undisputed that the accident, and the pooling of water at issue, occurred only on the first temporary connector. As Court of Appeals noted, the first temporary connector was the only connector completed and open to the public. "The temporary connector on which the puddle accumulated was moving southbound traffic from the two newly constructed lanes on the western side of the highway"¹² The Court also noted that "the first temporary connector . . . was the

¹¹Indeed, the Appellant's brief appears to be a wholesale adoption of her brief in opposition to summary judgement to the trial court, and does not contain a proper identification of the issues on appeal. Thus, it is unclear what specific quarrel Appellant has with the trial court's grant of summary judgment.

¹²*Higginbotham I*, 962 So. 2d at 49.

connector involved in Heather's fatal accident"¹³ Further, it is undisputed that the second temporary connector was not complete, was not paved, and was not in service on December 12, 1999. As a result of *Higginbotham I*, and based on MDOT's acceptance of the North Project, it has been conclusively established that there was no deviation from standard of care with regard to the construction of the North Project. Neither ENDEVCO nor Lehman-Roberts can be held liable for any alleged negligence with respect to the work performed on the first temporary connector. Since this is the connector involved in the accident, any alleged deviation from construction standards relating to the *unfinished second temporary connector* cannot be the proximate cause of the accident. Because the Appellant failed to create a genuine issue as to proximate cause a discussion of the second temporary connector is moot.

Nevertheless, as it relates to the work performed on the second temporary connector, the Court of Appeals undertook a valuable analysis as to the potential theories of liability before rejecting similar arguments asserted by Appellant with regard to the second connector. Lehman-Roberts acted as the prime contractor as to the second temporary connector and the grading work performed at the time of the accident was performed by a subcontractor, Hill Brothers.¹⁴ After examining all potential causes of action, the Court determined that no issue of fact was created by Appellant and affirmed summary judgement.

A. No Duty

One of the critical rulings made by the Court of Appeals was that Hill Brothers had no duty under Mississippi law to warn or remedy any alleged dangerous condition (even if it knew of one)

¹³*Id.* at 50. *See also id.* at 60 (" . . . (first temporary connector), which is where the fatal accident took place.").

¹⁴ *Id.*

under the circumstances of this case.¹⁵ The Court based this legal determination on the fact the Appellant failed to establish that Hill Brothers had any ongoing responsibility for the first temporary connector.¹⁶ Similarly, although Lehman-Roberts was initially involved in the construction of the first connector, after the completion of the project and the release provided by MDOT, it had **no continuing obligation**. Indeed, *Higginbotham I* makes it clear that Lehman-Roberts Company, as subcontractor to ENDEVCO had no relationship with, and no responsibility whatsoever, public or private, to or for the completed and accepted asphalt paving work on the first temporary connector after its official acceptance by MDOT. The Court explained Mississippi law on this issue: “after the contractor has turned the work over and it has been accepted by a public board or a commission as satisfactory, the contractor incurs no further liability to third parties, by reason of the condition of the work, and that the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the public board or commission.”¹⁷

Accordingly, since Lehman-Roberts had no continuing responsibility to maintain the first temporary connector, it stands in the same position as Hill Brothers. With regard to any work being performed on the unfinished second temporary connector, as a matter of law, there is no duty to warn or remedy an alleged defective condition posed by the first temporary connector.¹⁸

B. No Notice

The Court of Appeals also determined that even assuming a duty existed, Hill Brothers had

¹⁵ *Id.* at 56-57.

¹⁶ *Id.*

¹⁷ *Id.* at 52.

¹⁸ *Id.* at 56 (“our own independent research reveals that the Mississippi Supreme Court has expressly found no duty to warn under analogous circumstances.”).

no actual or constructive notice of the ponding of water on the first temporary connector. The specific claims the Appellant now raises on appeal were considered and rejected by the Court in *Higginbotham I*. Throughout the discussion of this topic there were instances where the Court discussed the alleged evidence of notice with respect to both Hill Brothers and Lehman-Roberts. In many cases, the Court assumed, for the sake of argument, that notice to the prime contractor Lehman-Roberts could be imputed notice to Hill Brothers.¹⁹ Even utilizing this legal fiction (as an appropriate way of taking a conservative approach to the errors asserted), the Court found that there was no set of facts presented that created a genuine issue of material fact on the question of notice. Since the evidence against Lehman-Roberts was expressly included in this discussion, it applies and controls the current dispute. There is no credible evidence Lehman-Roberts had actual or constructive notice of the ponding of water after the completion and acceptance of the project by MDOT until the time of the accident (i.e. the relevant period).

2. RES JUDICATA/COLLATERAL ESTOPPEL

To the extent the “law of the case” doctrine does not fully dispose of the issues presented on appeal, the similar and related doctrines of res judicata and collateral estoppel should. The purpose of *res judicata* is to provide finality to litigation.²⁰

Res judicata requires identity of (1) subject matter, (2) cause of action, (3) parties, and (4)

¹⁹In one instance the Court did not assume facts would be imputed to Hill Brothers involving some remedial work performed by Lehman-Roberts. However, the Court first determined that such remedial work was performed two months after the accident and as such had no bearing on whether there was notice prior to the accident. See *Higginbotham I* at 59.

²⁰*Res judicata* is fundamental to the equitable and efficient operation of the judiciary and “reflects the refusal of the law to tolerate a multiplicity of litigation.” It is a doctrine of public policy “designed to avoid the expense and vexation attending multiple lawsuits, conserve judicial resources and foster reliance on judicial actions by minimizing the possibility of inconsistent decisions.” *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 232 (Miss. 2005) citing *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973-74, 59 L. Ed. 2d 210 (1979).

quality or character of person against whom claim is made.²¹ Higginbotham's current claims, which were the subject of the appeal in *Higginbotham I*, involve the *same* car wreck at the *same* temporary connector, the *same* negligence claims against construction companies, the *same* defendants, and the character of those defendants has not changed. The four identities of *res judicata* are clearly present.

Collateral estoppel focuses on something relatively narrow - an *issue* that was litigated and determined in the first case, and that is relevant in the second case. With collateral estoppel the issue is deemed established in the second case without the need to proffer evidence on it.²² Collateral estoppel protects litigants from the burden of relitigation.²³ Collateral estoppel may be asserted *only against* someone who is a party (or in privity with a party) in a previous case where the issue was actually litigated and determined.²⁴ The effect of collateral estoppel is to establish "conclusively questions of law or fact that have received a final judgment for the purposes of a later lawsuit."²⁵

Four elements must be satisfied before collateral estoppel can operate as a bar to litigation of an issue: (1) the plaintiff is seeking to relitigate a specific issue, (2) the issue has already been litigated in a prior lawsuit, (3) the issue was actually determined in the prior lawsuit, and (4) the determination of the issue was essential to the judgment in the prior lawsuit.²⁶ Here, Higginbotham is again arguing that the negligence of the contractors that worked on the temporary connectors, now

²¹ *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 232 (Miss. 2005) citing *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973-74, 59 L. Ed. 2d 210 (1979).

²² "Once a court has decided an issue essential to its judgment, collateral estoppel precludes the issue from being relitigated in another suit on a different cause of action involving a party to the first case." *Walker v. Kerr McGee Chemical Corp.*, 793 F.Supp. 688, 694 (N.D. Miss. 1992).

²³ *McCoy v. Colonial Baking Co., Inc.*, 572 So. 2d 850, 854 (Miss. 1990).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Walker v. Kerr McGee Chemical Corp.*, 793 F.Supp. 688, 695 (N.D. Miss. 1992).

including Lehman-Roberts, caused her loss of control. This issue has already been before the Mississippi Court of Appeals. The Court issued its opinion in 2006 (1) that the wreck occurred on the first temporary connector that ENDEVCO and its subcontractors had built and turned over to MDOT after a Final Maintenance Release and official acceptance²⁷, and that no exception to this contractor immunity rule applied.²⁸ The Court further held that Hill Brothers, Lehman-Roberts' own subcontractor for the second temporary connector, was properly granted summary judgement. These holdings were not only essential to the judgment in the previous lawsuit, they *were the judgement* in the prior lawsuit. The four elements of collateral estoppel are satisfied and collectively work to preclude any possible remaining issue of liability as against Lehman-Roberts.

VI. CONCLUSION

Extending into its sixth year of litigation, the case of *Higginbotham v. Lehman-Roberts Company, et al.* no longer contains any issues on which to base further litigation. For the foregoing reasons, Lehman-Roberts Company respectfully requests that this Court affirm the judgment of the Circuit Court of Tunica County.

²⁷*Higginbotham I*, ("ENDEVCO was the prime contractor responsible for the construction of the temporary connector *on which Heather hydroplaned.*" "Hill Brothers had absolutely no responsibility for the *first temporary connector, which was the connector involved in Heather's fatal accident.*"). See also *Id.* at 60 fn. 2 ("There were two connectors mentioned on the north end of the approximately eleven mile project: *the old connector where the accident took place (first temporary connector)*, and the new connector on which Hill Brothers was performing the subgrade work (second temporary connector).") (emphasis added).

²⁸*Id.* at 62.

CERTIFICATE OF SERVICE


I, Michael N. Watts, one of the Attorneys for Appellee, Lehman-Roberts Company, do certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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DATED this 22nd day of July, 2008.



Michael N. Watts