

**IN THE SUPREME COURT OF MISSISSIPPI**

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**CASE NO. 2008 - TS-00006**

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

**APPELLANT**

**VS.**

**LEHMAN-ROBERTS COMPANY,  
HILL BROTHERS CONSTRUCTION CO., INC.,  
HILL BROTHERS CONSTRUCTION & ENGINEERING  
COMPANY, INC., ET AL.**

**APPELLEE**

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**APPEALED FROM THE CIRCUIT COURT OF TUNICA COUNTY  
CASE NO. 2002-0204**

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**BRIEF OF APPELLANT**

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**RITA M. HIGGINBOTHAM**

**APPELLANT**

**VS.**

**CASE NO. 2008-TS-00006**

**LEHMAN-ROBERTS COMPANY, HILL BROTHERS  
CONSTRUCTION CO. INC., ET AL.**

**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

Honorable Albert B. Smith  
Circuit Court Judge  
P.O. Box 478  
Cleveland, MS 38732

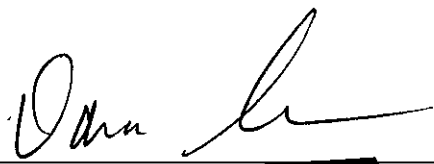
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**APPELLANT**

**VS.**

**CASE NO. 2005-CA-00006**

**LEHMAN-ROBERTS COMPANY, HILL BROTHERS  
CONSTRUCTION CO. INC., ET AL.**

**APPELLEE**

**BRIEF OF APPELLANT**

COMES NOW THE APPELLANT/PLAINTIFF, by and through counsel, and files this her Brief of Appellant and would show unto the Court that the trial court was in error in granting Lehman-Roberts Company's summary judgment.

**I.**

**COURSE OF PROCEEDING BELOW**

This wrongful death suit was originally filed against Appellee/Defendant Lehman-Roberts Company (Lehman-Roberts), as well as Defendant Hill Brothers and others on or about January 14, 2002. The Complaint was subsequently amended and Defendant Endevco Inc., was added as a defendant. After considerable discovery, Defendant Endevco and Defendant Hill Brothers filed Motions for Summary Judgment which was granted by the trial court on or about November 23, 2004. An appeal was timely taken from the dismissal of these two Defendants and the Court of Appeals affirmed the dismissal in *Higginbotham v. Hill Brothers Construction Co., Inc.*, 962 So.2d 46 (Miss. App. 2006).

On August 31, 2007, the remaining Defendant, Lehman-Roberts, filed its Motion for Summary Judgment. On November 21, 2007, the trial court granted Lehman-Roberts' motion for summary judgment, but no copy of the judgment was mailed to the Plaintiff's attorneys. See Affidavit of Mia Rush, ( R. 159-160). On or about December 3, 2007, the lower court entered another order granting summary judgment as to Lehman-Roberts. The Plaintiff's attorneys received a copy of that order and filed the notice of appeal of that order on December 28, 2007.

Lehman-Roberts filed a motion to dismiss the appeal as untimely. On January 15, 2007 Plaintiff's responded to the motion to dismiss and on February 1, 2008, the trial court denied the motion and allowed the Plaintiff an additional fourteen days to file an appeal. On February 12, 2008, a second notice of appeal was filed. Lehman-Roberts also filed a Motion to Dismiss in the Supreme Court which was also denied by Justice Lamar.

## II.

### FACTS

This cause of action arises from a one car motor vehicle accident which occurred on or about December 12, 1999 on Highway 61 in Tunica County, Mississippi. The accident which is the subject of this lawsuit occurred when Heather Higginbotham, deceased, lost control of her vehicle and was fatally thrown from her vehicle due to hydroplaning. Eyewitnesses to the accident have stated under oath that Heather's vehicle hit a large puddle of water in the roadway, which ultimately caused her to hydroplane which resulted in her being fatally ejected.

At the time of the accident, there was considerable highway construction which involved the four-laning of Highway 61 from Clarksdale, North to Memphis. The accident occurred in a construction area where traffic was diverted from four lane traffic to two lane traffic. The construction of the four lane highway from Clarksdale to Memphis involved constructing a new two lane road West of and parallel to the old two lane Highway 61. There were actually two separate projects involving the construction led by the Mississippi Department of Transportation ("MDOT"). One such project was project 97-0009-05-34-10 (hereinafter the "North Project"). The other project was 17-0009-05-011-10 (hereinafter the "South Project"). The North Project was let in 1996, completed on December 8, 1998 and finally accepted by MDOT on September 20, 1999. Endevco, Inc., was the prime contractor for the North Project and Lehman-Roberts was a subcontractor. The South project was on going at the time of the accident and was not completed until February 4, 2000. Lehman-Roberts was the prime contractor for the South Project and this project had not yet been completed at the time of the accident.

Traffic was four lane North of the accident scene and two lane South of the accident scene. North of the accident scene, North bound traffic from Clarksdale to Memphis utilized the old section of Highway 61. Conversely, traffic moving South bound from Memphis to Clarksdale traveled on the newly constructed section. South of the accident scene, only the old section of Highway 61 was opened to traffic. The newly constructed portion of Highway 61 West and parallel to old Highway 61 was completely constructed with asphalt but was not open to traffic at the time of the accident. Therefore, traffic South bound from Memphis was required to cross over from the newly constructed South bound lane into the old portion of Highway 61. This was accomplished by means of what the traffic engineers refer to as a "temporary connector." When Heather Higginbotham lost control of her vehicle, she was on the temporary connector in the median between the two previously mentioned portions of Highway 61.

According to two fact witnesses<sup>1</sup>, Heather Higginbotham was traveling South from Memphis to Clarksdale on what was the four lane portion. Upon entering the temporary connector previously described, Heather Higginbotham, Deceased, encountered a large puddle of water, began to hydroplane, lost control of her vehicle, and was ultimately fatally ejected from her vehicle. See Affidavit of Tina Read, attached to the Plaintiff's response as Exhibit "A" and excerpts of the deposition of Jackie Ray Tucker, attached to the Plaintiff's response as Exhibit "B."

A wrongful death action was filed against Defendant Lehman-Roberts Company as well as Endevco. By a prior ruling of this Court, Defendant Endevco was dismissed because the project for which they were the prime contractor had already been accepted by MDOT, citing *McCay b. Boyd Constr. Co.*, 571 So.2d 916, 925 (Miss. 1990) (contractor not liable for work accepted by a public agency after it is accepted). An appeal was taken and the trial court was affirmed by the Court of Appeals in *Higginbotham v. Hill Brothers Construction Co., Inc.*, 962So.2d 46 (Miss. App. 2006). The appeal only involved the North Project and did not involve Lehman-Roberts. At the time of the

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<sup>1</sup> Eyewitness Tina Read testifies by way of affidavit, Exhibit "A" to the Plaintiff's Response (R. 50-52) and eyewitness Jackie Tucker testifies by way of deposition, Exhibit "B" to Plaintiff's Response. (R. 53-61).



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.

The South Project construction plan was to transfer all traffic South of the North Project to the newly constructed West road and to close the old Highway 61 so it could be reconstructed and re-paved. The traffic North of the connector would continue to be four lane and the traffic South of the connector would continue to be two lane but the two lanes would be on the newly constructed road West of old Highway 61. Old Highway 61 would then be re-worked and when completed Highway 61 would be four lane all the way from Clarksdale to Memphis.

Before the new two lane road West of old Highway 61 South of the accident scene could be opened Lehman-Roberts was required to build a new connector across the first connector to transfer the traffic.

At the time of the accident, the new connector had not been completed, but dirt and gravel had been put in place and some grade work had been performed to help construct the new connector. The asphalt had not been put on the new connector. All of the dirt work, placement of gravel and grade work was being done in the median between the two road beds and on each side of the old connector. It should be noted that the new connector intersected with the old connector at approximately the central portion of the old temporary connector and made an "X." Traffic continued to use the old connector until sometime in February of 2000 when the new temporary connector was utilized.

At the accident cite, you had two elevated road beds with a median between them. Both connectors crossed the median and made an "X" at its lowest elevation. At the "X" water ponded. The ponded water caused Heather Higginbotham's vehicle to hydroplane. The ponding of the water had to be caused by poor or stopped drainage. The drainage problem had to have been caused by the construction of the South project in either the construction of the new connector or the construction of the new roadbed West and parallel to old Highway 61. It is further undisputed that when

Heather's vehicle entered the area where the old and new connectors made the "X" at the lowest point in the median where the construction was on going for the South project it was like they she driven off into the ocean. Tucker deposition page 55. ( R. 61).

### III.

#### SUMMARY OF ARGUMENT

Lehman-Roberts cannot rely upon *Higginbotham v. Hill Brothers Construction Co., Inc.*, 962So.2d 46 (Miss. App. 2006) as a basis for summary judgment as that did not address the present issue and is neither res judicata nor the law of the case. *Bush Const Co. V. Walters*, 254 Miss. 266, 272, 179 So. 2d 188, 190 (Miss. 1965)(doctrine limited to those issues actually litigated). The liability of Lehman-Roberts is their alleged failure to construct the intersection according to MDOT specifications and their failure to warn of a hazardous condition of which they have constructive notice. SEE *Mississippi Department of Transportation v. Cargile*, 487So.2d 258 (Miss. 2003).

### IV.

#### ARGUMENT

Lehman-Roberts Motion for Summary was based solely on their argument that, because the North Project was completed and accepted by the Mississippi Department of Transportation, they can incur no liability to the public. ( R. 27-40). In support of their position, they relied solely upon the *Higginbotham* opinion. However, Lehman-Roberts completely ignores the fact *Higginbotham* only addressed the completed and accepted North Project and that they were the general contractor for the South Project, which had not been completed at the time of the accident. *Higginbotham*, therefore, provides no relief for Defendant Lehman-Roberts as the South Project was not the subject of *Higginbotham*. Lehman-Roberts cannot rely upon *Higginbotham v. Hill Brothers Construction Co., Inc.*, 962So.2d 46 (Miss. App. 2006) as a basis for summary judgment as that did not address the present issue and is neither res judicata nor law of the case. *Bush Const Co. V. Walters*, 254 Miss. 266, 272, 179 So. 2d 188, 190 (Miss. 1965)(doctrine limited to those issues actually litigated).

The Plaintiff retained the services of Derek Ballentine, a highway construction engineer, who

opined that Lehman-Roberts was negligent in the construction of the site where Higginbotham was fatally injured. His opinion is found at pages 62-70 of the Record and portions of his deposition are found at pages 71-92 of the Record. Derek Barrentine is a licensed professional engineer in the State of Alabama since 1991. He has provided professional services as a civil engineer since 1984 and has been a government official, consultant, land developer, and expert witness. He is also a professional accident reconstructionist.

The above mentioned opinions are stated to a reasonable degree of probability within his area of expertise and are sworn to. An examination of his opinion, as well as excerpts from the contents of his deposition, provide a basis for concluding that Appellee Lehman-Roberts was negligent in the construction of the intersection where Heather Higginbotham was fatally injured, and, therefore, created a factual issue which precluded the granting of summary judgment. A summary of his opinion is found on Page 68 of the record and states as follows: Lehman-Roberts was the general contractor on the South Project underway at the time of the accident; being primarily responsible for construction and completion of the project and for maintaining public safety in the construction area. The roadway conditions present at the time of Ms. Higginbotham's accident were hazardous, in that the roadway was incomplete as specified in the construction drawings, and without proper drainage; preceding a hydroplane condition. There were insufficient signs, barrels or other warning devices provided along the edge of the pavement at locations where roadway hazards posed a greater threat to traffic than normally anticipated. Likewise, additional more informative and more restrictive traffic controlled devices should have been installed until the hazards could be resolved. Lehman-Roberts Company was negligent, in that they failed to recognize state and federal guidelines for drainage and traffic control of the accident site, and failed to complete construction in a timely manner. Failure to do so created an ongoing hydroplane and edge drop-off hazard. These breaches of duty of Lehman -Roberts caused or contributed to the automobile accident that resulted in the death of Ms. Higginbotham.

Although the aforementioned excerpt paragraph was a summary of Barrentine's opinions,

the facts and basis of his opinions were contained in more detail in his entire opinion and the lower court was invited to review the entire opinion. In addition, even more detail as to Barrentine's opinion was expressed in his deposition, which was taken by Defendant Lehman-Roberts on January 17, 2007. Excerpts from that deposition are found at pages 71-92 and again the lower court was invited to peruse his opinion should it feel that more detail was needed on the basis of Barrentine's opinion.

The Plaintiff also took the deposition of Ulmer Bullock, III, who was the Senior Engineer from the Mississippi Department of Transportation assigned to the construction project at Highway 61. Mr. Bullock's deposition was taken on September 22, 2004 at the offices of the Mississippi Department of Transportation in Batesville, Mississippi. Excerpts of his deposition were attached to the Plaintiff's Response as Exhibit "E" and are found at pages 92-124 of the record. According to Mr. Bullock, he was currently the District Materials Engineer for the Department of Transportation in Batesville at the time of the deposition. At the time of the accident he was the Resident Engineer at the Batesville's Project Office and oversaw the construction contracts and projects that were assigned to the Batesville office. Bullock Deposition Record 101. He was familiar with the project which is the subject of this lawsuit. Id. A typical section of a connector was attached as an Exhibit to his deposition. The connector has a crown in the middle which has to do with both drainage and speeds of traffic. Bullock Deposition. One of the purposes of the specification is to prevent water from collecting or puddling up in a connector. Bullock Deposition Record page 114. When asked if a connector was properly constructed, would there be any puddling or ponding of water in the connector, Bullock answered "we wouldn't want any ponding or puddling." Bullock Deposition Record Page 118. He stated the same position several times in his deposition that he wouldn't want any puddling or ponding in the connector. Record page 119. He also testified that ponding of water or pooling of water is not acceptable to the Department of Transportation. Bullock Deposition Record Page 123. When asked if there was ponding in the road, would that indicate that the connector was not constructed according to the specifications

because the specifications are designed to prevent ponding, he testified that “if it was ponding it would indicate that we had a problem somewhere.” Bullock Deposition. Record Page 124. Bullock testified that the purposes of the specifications for connector is to prevent water from collecting or puddling up in a connector. Bullock Deposition. Record Page 114. When asked why do you want to prevent water from puddling in a connector, Bullock testified “it would present an unsafe condition.” *Id.*

Two things were clear from Bullock’s testimony at this point. The first is that puddling or pooling of the water is an unsafe condition and creates a hazard for the traveling public. The second thing is that if the connector is constructed according to specifications, there will be neither puddling nor pooling on the temporary connector.

This Court has held that pooling of water in a roadway is a dangerous condition because it can cause hydroplaning, the same condition which fatally injured Heather Higginbotham. SEE *Mississippi Department of Transportation v. Cargile*, 487So.2d 258 (Miss. 2003). In *Cargile*, the plaintiff was injured when he lost control of his vehicle after hydroplaning when it ran through a large pool of water on Mississippi Highway 528 during a storm. He sued MDOT for negligently failing to inspect and maintain the road and that there was a dangerous condition of the road which proximately caused his injuries. After a bench trial, the trial court found that MDOT was 50% negligent at fault for the dangerous condition of the road. In affirming the trial court, the Mississippi Supreme Court held that the “testimony proved that dangerous conditions that Cargile apparently faced on the night of the accident.” *Id.* at 266. The Court in *Cargile* also held that proof of pooling of water in the highway could be proved by lay witnesses who observed the water on other occasions on the highway. *Id.* at 255-256.

Two witnesses have testified that there was puddling or pooling of water in the connector which caused Heather Higginbotham, Deceased, to lose control of her vehicle. Indeed, Tina Reed stated in her Affidavit that there was puddling at the connecting road every time it rained. She further testified that on the day of the accident, she remained at the accident scene for approximately

one hour and during this entire time, there was puddling of water on the connector. Therefore, this testimony creates two factual questions. The first is whether or not Lehman-Roberts negligently constructed the connecting road according to specifications. Bullock testified that if the road were properly constructed according to specifications there would be no puddling. Therefore, the connecting road must not have been constructed according to specifications and was, therefore, negligently constructed. The second factual issue is whether or not proper warnings were given concerning the hazards of the construction area. According to Bullock, water on the road is a hazardous condition and would be dangerous to the public.

For these reasons, the Plaintiff would state that Lehman-Roberts' Motion should have been denied as factual questions remained to be resolved as to their alleged negligence in construction the intersection and as to whether or not proper warnings were given.

There was testimony that every time it rained there was puddling on the connecting road. See Affidavit of Tina Reed. Lehman-Roberts either had actual notice, or constructive notice of the puddling of the water and should have taken steps to correct this drainage problem. It should also be noted that on the day of the accident, according to Bullock, there was two inches of rain at the project site. Since it was Lehman-Roberts duty as the prime contractor to maintain the drainage area, summary judgment is not appropriate as a factual question remains as to whether or not they violated the duty owed to the public. In *W.J. Runyon & Son, Inc., v. Davis*, 605 So. 2d 38, 42 - 43 (Miss. 1992), the Mississippi Supreme Court held that a highway subcontractor was charged in law to appreciate a hazard created by road construction and to take reasonable steps that it not create undue danger to the motoring public. Therefore, Lehman-Roberts' is charged with not creating a hazard to the motoring public. A factual question certainly exists which precludes the granting of summary judgment.

V.

CONCLUSION

In conclusion, summary judgment as to Lehman-Roberts should have been denied. They cannot escape liability solely for the reason that the North Project was accepted by the Mississippi Department of Transportation as the South Project had not been so accepted. Therefore, they do not come within the holding of *Higginbotham*, supra, and cannot escape liability as they are charged with the duty of recognizing a hazard and taking steps to correct the hazard so as not to pose a danger to the motoring public. The motion should have been denied and the trial court was in error in granting the motion .

RESPECTFULLY SUBMITTED this the 28 day of May, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dana Swan, do hereby certify that I have this day served via U.S. Mail, postage paid, a true and correct copy of the above and foregoing document to the following:

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Circuit Court Judge  
P.O. Box 478  
Cleveland, MS 38732

Ms. Betty W. Sephton  
Supreme Court Clerk  
Court of Appeals of the State of MS  
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This the 28 day of May, 2008.

By: \_\_\_\_\_

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