

**SUPREME COURT OF LOUISIANA**

**No. 99-C-3651**

**MR. AND MRS. LAWRENCE DUPREE**

**VERSUS**

**CITY OF NEW ORLEANS**

*ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FOURTH CIRCUIT, PARISH OF ORLEANS*

**VICTORY, J, dissenting.**

Although I do not agree that the S&WB had garde of the 5'x5' pothole, the majority appears to say there was dual garde, yet refuses to attribute any fault to the City who owns the street, unquestionably had the legal responsibility to protect the public from and to repair the huge pothole<sup>1</sup>, and was not required to have notice of the pothole to be held liable.<sup>2</sup> Yet, in my view, the evidence cited by the majority that the pothole had existed for months before the S&WB first was contacted about the hole

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<sup>1</sup> The City is not relieved of its legal duty to maintain its streets in a safe condition for use by the public simply because another agency undertakes an investigation of a defect on a street to determine if it is legally responsible for correcting the defect. The only exception is perhaps where that agency turns out to be responsible for correcting the defect. In fact, in all the cases relied upon by the majority for its finding that the S&WB had the duty or properly and adequately label, mark and barricade the site, it was the S&WB that actually created the dangerous condition. See *Carr v. Boh Bros. Const. Co.*, 557 So. 2d 356 (La. App. 4 Cir. 1990) (contractor hired by S&WB caused pipe to break); *Toledano v. Sewerage & Water Bd. Of City of New Orleans*, 95-1130 (La. App. 4 Cir. 3/14/96), 671 So. 2d 973 (S&WB dug 12 foot hole that caused damage); *Warfield v. Fink & McDaniel Plumbing & Heating*, 203 So. 2d 827 (La. App. 4 Cir. 1967) (S&WB created hole by removing sidewalk and excavating a trench).

<sup>2</sup>The trial court granted the City's motion for summary judgment because it found that "the City of New Orleans had no prior notice of the alleged dangerous pothole prior to the accident in question, as required by R.S. 9:2800 *et seq.*" However, majority opinion expressly holds that R.S. 9:2800 does not apply to this case because of our recent decision in *Jacobs v. City of Bunkie*, (La. 5/18/99), 737 So. 2d 14 (holding that the knowledge requirement of La. R.S. 9:2800 altered the government's duty under La. C.C. art. 2317 an as such was an abrogation of the government's sovereign immunity contained in Article XII, § 10(A) and could not therefore be applied retroactively to any case prior to November 23, 1995), making the trial court's dismissal of the City on those grounds clearly wrong.

clearly shows that the City, through its employees (police, etc.), had to know of the pothole long before the S&WB first became involved, and should have placed and maintained barricades until the hole was repaired, including the time when the S&WB was testing for leaks.

That the plaintiffs failed to oppose the City's motion for summary judgment, and thus allowed the City to erroneously escape a judgment against it due to finality, is no reason to now impose 100% liability against the S&WB. If the City were still a party, the bulk, if not all, of the fault for this accident would clearly be assigned to the City.

For all of the above reasons, I respectfully dissent.