04/03/02 "See News Release 028 for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

No. 01-C-0876

LAJUANA B. PETRE

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

C/W

VINCENT PETRE

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL THIRD CIRCUIT, PARISH OF AVOYELLES

CALOGERO, Chief Justice[*]

We granted this writ to consider whether, because of unreasonably dangerous defects in La. Hwy. 107, the Department of Transportation and Development (DOTD) can be held liable for damages sustained in a single car accident, when the vehicle driver's intoxication was a major cause of the accident. We find that DOTD can be held liable in part for the ensuing claims. Accordingly, there was no error in the decisions of the lower courts, and we affirm the judgments.

Facts and Procedural History

The matter before us arises out of a single automobile accident that occurred at 9:20 p.m. on September 1, 1992. Lajuana Petre was traveling with her ten-year-old daughter, Shauna, on La. Hwy. 107. The two had visited a friend of Ms. Petre's in the

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[*]Melvin A. Shortess, assigned as Associate Justice ad hoc, sitting for Justice Jeannette T. Knoll, recused. Retired Judge Robert L. Lobrano, assigned as Associate Justice *Pro Tempore*, participating in the decision.

Pineville area from approximately 6:00 p.m. to 8:30p.m., and Ms. Petre testified that during the visit, she consumed three drinks. The two then drove to the Kingsville Burger King, where Shauna ate a hamburger and french fries, and Ms. Petre did not eat. They then proceeded on a twenty mile trip to visit another friend who lived on La. Hwy. 107 in Avoyelles Parish.

While traveling on La. Hwy. 107, Ms. Petre inadvertently passed her friend's driveway, traveling around two curves, and turned around in the parking lot of an abandoned store. She then proceeded back towards her friend's house and encountered a vehicle that she thought might be driven by the friend. While glancing to the left at the other vehicle and traveling at a speed of forty to forty-five miles per hour, the right side wheels of her car left the paved surface. According to Ms. Petre's testimony, she attempted to turn the wheels to the left to reenter the highway without applying the brakes, and possibly by accelerating, but she traveled along the ditch a short distance until she hit a culvert. A driveway running perpendicular to the highway and ditch acted as a launching ramp, causing her vehicle to become airborne and travel an additional 122 feet. The vehicle bounced off of two trees, overturned, and ultimately came to rest on a stump. Ms. Petre suffered physical injuries and was rendered unconscious for two days. Shauna suffered numerous serious injuries, which resulted in her untimely death.

State Trooper Nathaniel Beaubouef arrived at the accident scene and took measurements to determine the vehicle's path. He found no marks on the surface of the highway and concluded that the vehicle was under control when it left the highway. He concluded that Ms. Petre's inattentiveness caused the accident. He issued Ms. Petre a citation for careless operation of a vehicle in violation of La. Rev. Stat. 32:58. Nearly two hours after the accident, the hospital obtained a blood sample from Ms.

Petre that yielded a blood-alcohol reading of 0.247 percent based on grams of alcohol per 100 cubic centimeters of blood. Ms. Petre ultimately pled guilty to vehicular homicide of her daughter, a violation of La. Rev. Stat. 14:32.1. In the prior twenty-four months, she had been arrested for and presumably convicted of two DWI's.[1]

La. Hwy. 107 is a two-lane, asphalt-surfaced highway that became a part of Louisiana's highway system in the 1920s. It was a gravel roadway until it received an asphalt surface in 1952. In 1987, the travel lanes of the highway were widened at the expense of the shoulder. At the time of the accident, the area in which the accident occurred was made up of two curves in the roadway and was marked in both directions by yellow diamond-shaped signs illustrating the configuration of the curve and advising motorists not to exceed forty miles per hour while traveling through the curves. At the time of the accident, no other warning signs were present.

However, between 1985 and 1988, DOTD had initiated a "substandard road program." During that time, district administrators were instructed to place yellow diamond-shaped warning signs reading "DRIVE CAREFULLY SUBSTANDARD ROADWAY" on the most dangerous ten percent of the roads in their districts, and the speed limit in those areas was reduced to forty-five miles per hour. Choosing the roads to be signed was left to the discretion of the district administrators, and the area of this accident was signed in accordance with this program. In 1990, the program was abandoned, and by the time of the accident, the "substandard roadway" sign had been removed, the speed limit was again set at fifty-five miles per hour.

Ms. Petre filed suit against DOTD for her injuries and for the wrongful death of her daughter. Vincent Petre, Shauna's father and Ms. Petre's former husband, filed

[1]The record is not entirely clear that the two prior arrests resulted in DWI convictions.

suit against Ms. Petre, the vehicle insurer Louisiana Indemnity Company,[2] and DOTD for the wrongful death of his daughter. The actions were consolidated for trial. Prior to trial, Mr. Petre settled with the insurance company, which was then dismissed from the lawsuit.

Following a bench trial, the district court found that Ms. Petre and DOTD were equally at fault in causing the accident and provided written reasons for the judgment. Mr. Petre was awarded $259,120.95 in a judgment against both Ms. Petre and DOTD.[3] Ms. Petre was awarded by judgment against DOTD approximately $279,715.30. The trial judge had found that she suffered damages in the amount of $559,430.59, but reduced those damages by 50%, the portion of fault allocated to her.[4]

With regard to DOTD's liability, the district court considered La. Civ. Code art. 2317,[5] which provides for strict liability for damages caused by things in one's custody. Generally, the difference between strict liability and negligence is that under strict liability, the plaintiff is relieved of proving that the owner or custodian of the thing that caused the damages knew or should have known of the risk involved. Kent v. Gulf States Utility Co., 418 So. 2d 493, 497 (La. 1982). However, the district court recognized that La. Rev. Stat. 9:2800 limited the liability of public entities for the damage caused by things in their custody, and the public entity will only be held liable when it had actual or constructive notice of the defect and a reasonable opportunity

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[2]Louisiana Indemnity Company later became Patterson Insurance Company.

[3]Mr. Petre was awarded $250,000 in general damages for the wrongful death of his daughter and $9,120.95 in special damages.

[4]Ms. Petre was awarded $250,000 in general damages for the wrongful death of her daughter; $272,000 in general damages for her own injuries, and per a joint stipulation, $37,430.59 in special damages.

[5]La. Civ. Code art. 2317 provides in pertinent part as follows: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

to remedy the defect yet failed to do so.[6] Considering the La. Rev. Stat. 9:2800 guidelines, and citing Graves v. Page, 96-2201 (La. 11/7/97), 703 So. 2d 566, 571, the district court acknowledged that DOTD's duty to the plaintiff is the same under La. Civ. Code art. 2317 limited by La. Rev. Stat. 9:2800 as under La. Civ. Code art. 2315. As a result, the district court found that plaintiff must meet the following requirements to establish a breach of DOTD's duty: 1) defendant has care and custody over the thing which caused the damage; 2) the thing that caused the damage was defective and created an unreasonable risk of harm to others; 3) the defendant had actual or constructive knowledge of the defect or risk of harm and failed to take corrective actions within a reasonable time; and 4) the defective thing caused the injury to the plaintiff.

The district court found that considering the evidence as a whole, the plaintiffs met their burden of proving each of these four elements. First, regarding custody, the highway in question was within the control and custody of DOTD, which has constructed, maintained, and inspected it. Second, regarding the defectiveness of the

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[6] La. Rev. Stat. 9:2800 provided as follows:

> A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.
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> B. Except as provided for in Subsection A of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.
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> C. Constructive notice shall mean the existence of facts which infer actual knowledge.
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> D. A violation of the rules and regulations promulgated by a public entity is not negligence per se.
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> E. "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions.

road, plaintiff presented an expert in highway design who testified that the highway's shoulders were defective as to both slope and width. Furthermore, regarding DOTD's knowledge of the defect, plaintiff's expert testified that he had previously given testimony relating to the defectiveness of this very curve in an earlier case arising from a 1988 accident that had occurred there. Moreover, plaintiffs produced the evidence of another witness who testified that, while he was employed by the state as an expert witness in the case involving the 1988 accident, he reached the same conclusion: that the curve in question was defective and dangerous. Finally, regarding causation, plaintiff's expert testified that these defects prevented Ms. Petre from recovering once her vehicle left the road, and had the shoulder been properly designed and constructed, Ms. Petre would have been able to recover control of the vehicle and reenter the road. The district court found that along with the plaintiff's intoxication, the defective curvature and shoulder of the highway as well as the absence of chevrons delineating the curve were all substantial contributors in bringing about the accident that resulted in Ms. Petre's injuries and Shauna's death. On appeal, the Third Circuit affirmed the district court's decision. Petre v. State, Through the Dept. of Transp. And Dev., 00-00545 (La. App. 3 Cir. 12/29/00), 775 So. 2d 1252. Recognizing that it could only set aside the trial court's finding of fact if it found such findings were manifestly erroneous or clearly wrong, the court found a reasonable factual basis to support the district court's findings that both DOTD and Ms. Petre caused the accident. Furthermore, the court of appeal found that Ms. Petre's intoxication should not prevent her proportionate recovery in light of DOTD's fault.

Law and Analysis

Because we were concerned about this intoxicated driver recovering from the

state, we granted DOTD's writ application to review both lower courts' decisions, each of which were favorable to the plaintiffs. Petre v. State, Through Dept. Of Transp. And Development, 01-0876 (La. 6/01/01), 793 So. 2d 171. Considering the facts and procedural posture of the case, we find that our law does not allow us to prohibit Ms. Petre from recovering in part from DOTD because she was intoxicated at the time of the accident.

In an effort to convince this court to reverse the judgment of the district court and court of appeal, DOTD presents three arguments for our consideration. First, DOTD argues that no unreasonably dangerous defect in the road existed, and that if any unreasonably dangerous defect did exist such was not a substantial factor in bringing about the accident. Second, DOTD asks this court to find that because the court of appeal found that a major reconstruction of the highway had been performed, the court of appeal applied a faulty standard in determining whether the highway was unreasonably dangerous. Finally, DOTD argues that the lower courts erred in apportioning fault because Ms. Petre was a highly intoxicated driver who lost control of her vehicle and struck a clearly visible object. We will address each of these arguments in turn.

Unreasonably Dangerous Defect

Whether the condition of a road is unreasonably dangerous is a question of fact and should only be reversed if it is manifestly erroneous or clearly wrong. Ledoux v. Dep't of Transp. And Dev., 98-0024, p. 3 (La. 9/18/98), 719 So. 2d 43, 44-45. When applying a manifest error or clearly wrong standard, even if an appellate court may feel that its own evaluations and inferences are as reasonable as those of the district court, it should not disturb the findings of the district court. Canter v. Koehring, Co., 283 So. 2d 716, 724 (La. 1973). In this case, the lower courts found an unreasonably

dangerous defect in the road that was a substantial factor in causing plaintiffs' damages, and, as a result, DOTD was liable to plaintiffs. Petre, 775 So. 2d at 1264. We find, as did the court of appeal, that this determination of the district court was not manifestly erroneous or clearly wrong.

DOTD argues that the lower courts erred in holding that any unreasonably dangerous defect in the highway, specifically the width of the shoulder, the steepness of the adjacent ditch, and the failure to place chevrons marking the curve, were substantial factors in bringing about the accident. DOTD points out that Ms. Petre testified that she did not leave the road as a result of a defect in the road, but rather because she lost her concentration. Furthermore, according to DOTD, the testimony demonstrates that regardless of the slope of the ditch, plaintiff ran off of the road too close to the driveway and, therefore, did not have enough time to recover. DOTD argues that as a result, the slope of the ditch played no part in causing the accident. DOTD additionally argues that the narrow shoulders did not render the highway unreasonably dangerous because as explained in Myers v. State Farm Mutual Automobile Ins. Co., 493 So. 2d 1170 (La. 1986), highway safety was increased by widening the travel lanes at the expense of the shoulder. Id. at 1173.

On the other hand, in spite of the fact that lane widening improved the road, the reduction in the shoulder width to a severe degree creates a different and independent risk that a motorist who travels onto or partially onto the shoulder for any reason, whether as a result of inattentiveness or negligence, will be unable to recover in time to avoid an accident. DOTD's duty to maintain the road and shoulder encompasses the risk that a motorist may travel onto or partially onto the shoulder. Graves v. Page, 96-2201 (La. 11/7/97), 703 So. 2d 566, 572. In this case, the shoulder consisted of one and one-half feet of usable surface area before it descended into a ditch. Mr.

Evans, an expert witness who inspected the accident scene in February of 1993, testified that the ditch adjacent to the road varied in slope from 4:1 to 3:1. He stated that a 3:1 slope is not recoverable by a vehicle traveling on it, and a 4:1 slope is barely so. Mr. Evans testified that in this situation, once a motorist left the road, even sober, she would not have been able to recover and reenter the road. Considering Mr. Evans's testimony, we find that the record supports the lower courts' findings that the width of the shoulder along with the slope of the adjacent ditch was a substantial factor in causing the damages. Regardless of whether another fact finder might have concluded differently, because the finding is supported by the record and is not unreasonable overall, we cannot say it is manifestly erroneous.

No Major Reconstruction of the Road

Despite a finding that an unreasonably dangerous defect in the road was a substantial factor in contributing to the accident, DOTD argues that it did not have the duty to widen the shoulder of the road because it has no duty to bring old highways up to modern standards, citing Myers, 493 So. 2d 1170; Holloway v. State, Through Dept of Transp. and Dev., 562 So. 2d 1341 (La. App. 3d Cir. 1990) writ denied, 567 So. 2d 102 (La. 1990). DOTD correctly argues that such a duty does not exist unless a new construction or major reconstruction of the highway has taken place. Ledoux v. State, Through Dept. of Transp. and Dev., 98-0024 (La. 9/18/98), 719 So. 2d 43, 46. Presumably relying on the court of appeal's recognition that "Mr. Evans concluded that the highway shoulder did not meet the state design specifications in effect in 1952 when the highway was constructed," Petre, 775 So. 2d at 1261, and noting that the highway was built in the 1920's but asphalted in 1952, DOTD argues that the court of appeal erred in finding that the hard-surfacing of the road was a major reconstruction that gave rise to an obligation to update the road to meet 1952

standards.

This court decided a factually similar case in Aucoin v. State Through the Dept. of Transp. and Dev., 97-1938 (La. 4/24/98), 712 So. 2d 62. In Aucoin, plaintiff was proceeding on Greenwell Springs Road, Highway 37, when she swerved to avoid hitting a dog. As she swerved, the vehicle's wheels traveled past the white fog line onto a one-foot-wide shoulder and down a steeply-sloped ditch. Her vehicle collided with a tree that was growing on the back slope of the ditch. In determining whether the trial court was manifestly erroneous in holding DOTD liable for the unreasonably dangerous condition of the road, we reaffirmed our decision in Myers, supra. finding that DOTD's failure to reconstruct a state highway to conform with modern standards did not establish the existence of a hazardous defect. However, we did not find that Myers shielded DOTD from liability, simply because it has no duty to update roads to present standards. We found that while the failure to adhere to AASHTO standards may not alone attach liability, DOTD's conformance to those standards or not is a relevant factor in determining whether the roadway is unreasonably dangerous. Aucoin, 712 So. 2d at 66 (citing Dill v. DOTD, 545 So. 2d 994 (La. 1989)). Based on this, in Aucoin, we affirmed the district court's findings that the slope of the ditch, the narrowness of the shoulders, and the limited horizontal clearance contributed to the unreasonably dangerous condition of the road, and as a result, DOTD was held liable to the plaintiff.

We disagree with DOTD's contention that the court of appeal's decision in this case stands for the proposition that the hard-surfacing of a road constitutes a major reconstruction that gives rise to a duty to conform the road to the minimum requirements in place at the time. Presumably, in considering whether the shoulder was unreasonably dangerous, the court of appeal was simply describing Mr. Evans's

position that the shoulder did not meet the minimum standards in place in 1952, so as to emphasize the defective condition of the road. We find in accordance with Aucoin, even without a duty to update the road in question to conform to current design standards or even the design standards in place in 1952, DOTD is not shielded from liability for all unreasonably dangerous defects in the road. Furthermore, the court of appeal's use of Mr. Evans's observation that the shoulder did not conform to the minimum design standards in place in 1952, at the time the road was hard-surfaced, merely provided persuasive evidence that the shoulder of the road was defective. The court of appeal's use of this testimony does not stand for the proposition that the hard-surfacing of the road imposed a duty on DOTD to update the entire road to meet the minimum design standards at the time. Therefore, regardless of whether DOTD had a duty to update the road, the court of appeal did not err in holding DOTD partially liable to plaintiff for the unreasonably dangerous shoulder, the unreasonably dangerous adjacent slope, and absence of chevrons.

Apportionment of Fault

DOTD further asserts that it should not be held liable to the plaintiffs because the driver was intoxicated, and that plaintiff Ms. Petre should not recover, irrespective of any unreasonably dangerous condition of the road. Citing Cormier v. Comeaux, 98-2378 (La. 7/7/99), 748 So. 2d 1123, DOTD argues that its duty to maintain safe highways does not encompass the risk that an intoxicated driver will drive off of the road and strike a clearly visible obstacle.[7] In posing such an argument, DOTD asks

[7]DOTD cites Cormier, 748 So. 2d 1123 and Ledoux, 719 So. 2d 43, both involving accidents that occurred when the drivers were intoxicated. We find that these cases provide little support for DOTD's position that it should not be held liable because the driver was intoxicated at the time of the accident. In both Cormier and Ledoux, the district court, as fact-finder, found that DOTD was not liable, and the accident was solely the result of driver fault. This court simply reviewed such findings under the manifest error standard. The instant case is distinguishable from Cormier and Ledoux, because the district court in this case made a finding of fact that DOTD was partially at fault for causing the accident. Once again, we must simply apply a manifest error standard to review this factual finding.

this court to create a rule that would disallow an intoxicated driver's recovery from DOTD, even when an unreasonably dangerous defect in the road is a substantial factor in contributing to an accident. We find it improper to create such a rule absent legislative direction, and agree with the court of appeal's treatment of the issue:

> While no one would take issue with the fact that Ms. Petre's unacceptable and illegal actions in driving while intoxicated should be weighed heavily against her in considering the extent of DOTD's duty to her, intoxication alone is not enough to automatically prevent her from recovering for DOTD's fault. It is merely a factor to consider in Louisiana's comparative negligence scheme. The trial court clearly recognized this and addressed this issue directly in its reasons for judgment by stating that the courts of this state have "not relied solely upon blood tests to close the door and [charge] the intoxicated driver with sole fault in the accident. Rather they look to other credible testimony which determines the effect of alcohol upon the ability of the driver to operate the vehicle and the extent of the impairment."

Petre, 775 So. 2d at 1263. (Citations omitted). We find that the trial court and court of appeal properly considered Ms. Petre's intoxication in assessing her comparative fault.

La. Civ. Code art. 2323(A), which sets out our comparative negligence scheme, explains the extent to which DOTD may be held liable to the plaintiffs:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

La. Civ. Code art. 2323 (A).

Whether or not we agree with the equal allocation of fault between Ms. Petre

and DOTD, we find it difficult, if not impossible, to conclude that the district court's reasoning was manifestly erroneous. In analyzing the allocation of fault of the parties, the court of appeal correctly applied the manifest error standard. Petre, 775 So. 2d at 1265. Furthermore, the court of appeal was correct in applying the Watson factors, which include the following: 1) whether the conduct results from inadvertence or involved an awareness of the danger; 2) how great a risk was created by the conduct; 3) the significance of what was sought by the conduct; 4) the capacities of the actor, whether superior or inferior; and 5) any extenuating circumstances that might require the actor to proceed in haste, without proper thought. In finding DOTD 50% liable for the damages sustained as a result of the accident, the court of appeal was especially persuaded by the fact that for four years DOTD was aware of the danger posed by the road but failed to remedy it. The site of the accident had been analyzed after a previous accident that occurred in the same curve, and the road had been selected as a substandard road during the "substandard road program" in effect from 1985 to 1988. Furthermore, the district court and court of appeal recognized that once Ms. Petre left the paved surface, her intoxication was no longer a factor in causing the accident. Accordingly, we find that the court of appeal did not err in affirming the equal allocation of fault on the part of DOTD and Ms. Petre.

We note that our decision in this case is in line with Campbell v. Louisiana Dept. of Transp. & Dev., 94-1052 (La. 1/17/95), 648 So. 2d 898. In Campbell, the driver fell asleep while operating a vehicle and struck a bridge abutment. The distirct court found that the driver was 25% at fault and DOTD was 75% at fault for failing to install guardrails on the bridge, even though the accident was initially caused by the driver's falling asleep. The court of appeal reduced DOTD's liability to only 10%, and this court reversed, reinstating the district court's apportionment of 25%. We found that

"[the driver's] negligence set the course for an accident to happen, but the harm or injuries . . . were a direct result of the impact with the bridge abutment." Campbell, 648 So. 2d at 902, 903. Similarly, in the instant case, although Ms. Petre's intoxication or inadvertence caused her to drive off the road, according to Mr. Evans's testimony it was the unreasonably dangerous shoulder and slope of the adjacent ditch that prevented her from reentering the road and which caused the vehicle to become airborne and overturn. Therefore, an equal allocation of fault to her and DOTD as found by the lower courts is not manifestly erroneous.

As stated earlier, we granted this writ because we were concerned about allowing an intoxicated driver who was involved in a single car accident to recover in part damages from the state. However, properly applying the manifest error standard, we will affirm the findings in the two lower courts. The district court was in the best position to evaluate the testimony and evidence, and because its findings were supported by the record and not unreasonable, we do not reverse these findings.

DECREE

For the foregoing reasons, we affirm the judgments of the trial court and the court of appeal.