

SUPREME COURT OF LOUISIANA

*No. 96-C-1027*

KIMBERLY SYRIE ET AL

Versus

VICTOR R. SCHILHAB ET AL

c/w

ROBERT SIDNEY ETIE ET AL

Versus

VICTOR R. SCHILHAB

LEMMON, J., Dissenting

I voted to grant certiorari in this case because it appeared that the court of appeal acted as a second tier finder-of-fact and substituted its judgment for that of the trial court. However, irrespective of the factual findings of the trial court,<sup>1</sup> I have applied a duty-risk analysis and now conclude that the trial court's incorrect focus on Trooper Segura's failure to use flares for a brief highway blockage caused error in the court's cause-in-fact determination. I further conclude that the trooper was negligent in attempting to stop all traffic on a high speed elevated interstate highway after sundown in dark clothes using only a flashlight, when he could have parked the police unit with its flashing blue lights in the travel lane (rather than on the shoulder) during a break in the flow of traffic or could have used the flares in the police unit to warn oncoming

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<sup>1</sup>The testimony of the independent eyewitnesses flatly contradicts that of the state trooper and arguably justifies the court of appeal's conclusion that the trial court's acceptance of the trooper's testimony was manifestly erroneous. Nevertheless, because I conclude that the court of appeal should be affirmed on the basis of a duty-risk analysis, I include a discussion of the testimony on Trooper Segura and four eyewitnesses in an appendix.

traffic that it was necessary, not just to slow as indicated by the flashing lights on the police unit on the shoulder, but that both traffic lanes were being blocked. Finally, while I agree with the majority that the trooper was only required to choose a reasonable course of conduct rather than to choose the best available option, I disagree that the trooper chose a reasonable course of conduct under the circumstances.

### Cause-in-Fact Element

The initial inquiry in the duty-risk analysis is whether the complained-of conduct by the defendant was a cause-in-fact of the tort victim's injuries. The cause-in-fact inquiry must focus on the particular conduct that is alleged to be negligence on the part of the defendant. In the present case, the conduct of the driver of the eighteen wheeler in driving inattentively and in failing to keep his vehicle under control clearly was a cause-in-fact of the injuries. However, there can be, and frequently is, more than one cause-in-fact of the tort victim's injuries.

The cause-in-fact element is usually a "but for" inquiry which tests whether the injuries would not have occurred but for the defendant's conduct. To be a cause-in-fact, the conduct must be a substantial factor in bringing about the tort victim's harm. Fowler v. Roberts, 556 So. 2d 1 (La. 1989); Frank L. Maraist & Thomas C. Galligan, Jr., Louisiana Tort Law §§4.2, 4.3 (1996).

As to Trooper Segura, plaintiffs alleged he was negligent (1) in blocking both lanes of traffic, rather than only one,<sup>2</sup> and (2) in failing to use the police unit's flashing blue lights in the travel lanes or flares on the scene in order to accomplish the traffic

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<sup>2</sup>The court of appeal concluded that the trooper was negligent in both particulars, but only discussed whether the conduct in blocking both lanes was a cause-in-fact of the injuries.

control.<sup>3</sup> However, since I agree with the majority that blocking both lanes was not negligence, I focus only on whether the trooper's failure to use the flashing blue lights of the police unit or flares to accomplish the lane blockage was a cause-in-fact of the injuries.

Most of the eyewitnesses testified that they saw flashing blue lights on the shoulder of the highway from a considerable distance and believed that a trooper probably had stopped a "speeder." They slowed slightly and moved into the left lane, but were not expecting an impending necessity to stop and were surprised when they were required to stop. Several testified that they would have expected to stop if they had seen flares or if the police unit with its flashing blue lights had been on the highway rather than the shoulder.

While generally the determination of cause-in-fact is primarily a question of fact, the trial court ruled that the trooper's failure to use flares was not a cause-in-fact of the accident primarily because of testimony of other troopers that flares are generally used for lengthy lane blockages. The appropriate analysis of cause-in-fact in the present case is not whether the lanes had to be blocked for a lengthy period, but whether flashing blue lights of the police unit in the traffic lanes or flares on the scene would have alerted the driver of the eighteen wheeler and caused him to stop in time to avoid the accident.<sup>4</sup> If plaintiffs proved that the use of such devices would have prevented

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<sup>3</sup>Plaintiffs also alleged the trooper was negligent in failing to remove Hart from the scene after the initial mishap. The lower courts correctly ruled there was no breach of duty under the circumstances when the trooper instructed the adult woman to stay in a safe place, but did not order her to leave the scene when the local deputy sheriff departed.

<sup>4</sup>The cause-in-fact inquiry does not test whether the trooper was negligent in failing to use flares or the police unit with its flashing blue lights in the traffic lanes. The reach of the cause-in-fact inquiry is whether such use would have prevented the accident, and my determination of that inquiry does not conflict with any express or implied factual findings by the trial judge.

the accident, then conversely the trooper's failure to use such devices was a cause-in-fact of the accident.

The pivotal cause-in-fact issue in this case is whether the inattentive driver of the eighteen wheeler would have acted differently if he had been warned of the necessity to stop by flashing blue lights in the travel lanes or by flares. If so, then the trooper's failure to use these devices was a concurrent cause of the accident.

I conclude that plaintiffs, by presenting witnesses who testified that they would have been prepared to stop a greater distance from the point of impact if the trooper had used the flashing blue lights of the police unit in the lanes of travel or flares on the scene, proved more probably than not that the inattentive driver of the eighteen wheeler would have been alerted to the fact that he was required to stop at a much earlier time and that he attentively and at a slower speed would have brought his unit to a successful stop, thereby avoiding the accident.

#### Duty Element

The court of appeal correctly held that Trooper Segura had a duty to take reasonably safe steps under the circumstances to control the traffic on the high speed elevated interstate highway during the turnaround maneuver. The critical inquiry is whether he breached that duty.

#### Breach of Duty Element

Trooper Segura attempted to block both lanes of a high speed elevated interstate highway after sundown in dark clothes using only a small flashlight, although he had flares available in his police unit and he also could have moved the police unit with its flashing blue lights into one or both travel lanes when there was a sufficient break in

the oncoming traffic.<sup>5</sup> As stated earlier, most of the eyewitnesses testified that they believed, upon seeing the flashing blue lights on the shoulder of the highway from a great distance, that a policeman was issuing a ticket for a traffic violation. They slowed slightly and moved into the left lane, but were not alerted by the flashing blue lights on the shoulder that cars in the traffic lanes would be required to stop. Several eyewitnesses testified that had they seen flares in the area, they would have expected to stop and would have reacted accordingly. Although it is significant that all of the motorists who stopped in the left lane did so without making contact with the vehicle in front, although several had to slam on their brakes, it is at least equally significant that the eighteen wheel tractor-trailer unit with a 70,000-pound load required much more stopping distance than an automobile or a minivan.

A trooper's stopping traffic on a high speed elevated interstate highway after sundown is an extremely dangerous task, even when carried out with the utmost safety precautions. Attempting to do so in dark clothes with only a flashlight, while the flares remained in the police unit parked with its flashing blue lights on the shoulder of the road, does not measure up to the required standard of care for police officers under the circumstances of this case. Here, Trooper Segura not only did not choose the best option of the available methods for blocking the highway (which the law did not require him to do), but he chose an option that was an unreasonable method of performing this extremely dangerous task.

I conclude that Officer Segura's attempting to stop both lanes of traffic on a high

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<sup>5</sup>The trial court properly ruled that Trooper Segura was not negligent in blocking both lanes of traffic rather than only the right lane. While arguably it may have been preferable to keep the left lane flowing, particularly since traffic generally was slowing slightly after crossing the high rise bridge and moving into the left lane upon seeing the flashing blue lights ahead, it was not negligent to block both lanes briefly as long as it was done with reasonable care to prevent worsening of the hazards inherent in any blocking of a high speed highway after sundown.

speed interstate highway in dark clothing using only a flashlight was a breach of his duty to use reasonable care under the circumstances in performing this inherently dangerous traffic control maneuver. This negligence, combined with the excessive speed and the inattention of the driver of the eighteen wheeler, were concurrent legal causes of this accident.

#### Scope of Duty Element

There is no dispute that the risk of the injuries sustained by the tort victims was within the scope of protection of the rule of law which imposed the duty on law enforcement officers that was breached in this case.

#### Conclusion

I would affirm the judgment of the court of appeal, although for different reasons.