SUPREME COURT OF LOUISIANA

NO. 97-C-1938
CONSOLIDATED WITH
NO. 97-C-1967

MICHELLE AUCOIN, ET AL.

versus

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT,
PARISH OF EAST BATON ROUGE

KNOLL, Justice[*]

The State of Louisiana, through the Department of Transportation and Development (DOTD), sought writs from a ruling in the Court of Appeal, First Circuit, which affirmed the trial court's judgment finding DOTD 15% at fault in this personal injury case. Plaintiffs also sought writs, asserting that the court of appeal erred in reducing special damages awarded for payment of the minor's medical expenses incurred as a result of her injury in the single car collision. For the following reasons, we affirm the judgment assigning 15% fault to DOTD, finding no manifest error; we reverse the court of appeal's reduction of special damages, finding that judgment contrary to the rule under the applicable version of La.Civ.Code art. 2324(B).

FACTS

On July 29, 1990, plaintiff, Michelle Aucoin, (Aucoin) was proceeding southbound on Greenwell Springs Road, Highway 37, with her one-year-old daughter Amber, who was strapped in her car seat. A dog ran into the road and Aucoin swerved

[*]Victory, J., not on panel. Rule IV, Part 2, §3.

right to avoid hitting the dog. When Aucoin swerved, her car's outer wheels ran outside the white fog line, onto a narrow shoulder approximately one foot wide, and down a steeply-sloped ditch. In less than two seconds from the time her wheels first left the road, Aucoin's car had traveled 123 feet before crashing into a tree that was growing on the back slope of the ditch in DOTD's right of way, eight and a half feet from the edge of the fog line.

As a result of the accident, Aucoin suffered injuries to her arm and Amber suffered severe closed head injuries requiring extensive treatment. Amber was hospitalized for three weeks and was diagnosed with a left frontal parietal hemorrhagic contusion complex, a left frontal fracture, a left subgaleal hematoma and a right femur fracture. As a consequence of the injuries to her head, Amber required surgery to implant a cerebralperitoneal shunt.

The trial court found that Aucoin suffered damages in the amount of $1,247.08 for past medical expenses and $90,000 for loss of consortium; Amber suffered damages in the amount of $85,294.18 for past medical expenses, $100,000 for future medical expenses, and $900,000 in general damages, plus legal interest. The trial court assigned fault: 85% to Aucoin, 15% to DOTD. Applying La.Civ.Code art. 2324(B), the trial court held DOTD liable for a total of $13,687.06 in favor of Aucoin, and solidarily liable for $542,647.09 in favor of Amber. The trial court, in its written reasons for judgment, determined that the accident was primarily caused by Aucoin, who failed to maintain control of her vehicle when faced with a sudden emergency. The court found that the "combination of shoulder width, slope angle and horizontal clearance created an unreasonable risk" of harm, and that DOTD had negligently failed to maintain the highway in accord with reasonable standards and failed to prioritize proper maintenance.

The court of appeal amended the judgment, reducing the past and future medical expenses awarded Amber from $185,294.18 to $27,794.13, a reduction of $157,500.05. Concluding that medical bills incurred by a minor are the responsibility of a parent, the court of appeal reduced the medical damage award by the 85% fault attributable to her mother. In all other respects, the judgment of the trial court was affirmed.

LAW AND DISCUSSION

DOTD has urged this court to hold them not liable based on this court's holdings in *Holloway v. DOTD,* 555 So.2d 1341 (La.1990) and *Myers v. State Farm Mutual Automobile Insurance Co.*, 493 So.2d 1170 (La.1986). In *Holloway*, the driver lost control of his vehicle for no apparent reason. His wheels dropped onto the shoulder and rolled onto an AASHTO (American Association of State Highway and Transportation Officials) conforming ditch (4:1 slope) before hitting a pine tree beyond the back slope of the ditch. The *Holloway* court found DOTD not liable because plaintiffs had not proven that the conditions of the roadway had caused the accident. *Myers* addressed DOTD's liability following a 1977 lane widening project undertaken to conform the roadway to the eleven-foot standard then applicable. This court determined that DOTD need not comply with all modern standards, which would have been a task this court considered physically and financially impossible. The *Myers* court held that DOTD's failure to reconstruct the state's highways to meet modern standards did not establish the existence of a hazardous defect. *Myers v. State Farm Mutual Automobile Insurance Co.*, 493 So.2d 1170, 1173 (La.1986).

We reaffirm the holdings in both cases. Nevertheless, we do not find persuasive DOTD's assertion that it should be shielded from liability based on those cases because we find them distinguishable. In the case *sub judice*, Aucoin has not suggested that

Greenwell Springs Road be reconstructed to meet modern standards, contrary to the holding in *Myers*. Nor was the side slope of the roadway recoverable, as in *Holloway*. The issue under consideration in this case requires a determination of whether, under the specific facts of this case, the trial court erred in finding the roadway in question unreasonably dangerous.

DOTD owes a duty to maintain its right of way in a condition that it does not present an unreasonable risk of harm. *Oster v. DOTD*, 582 So.2d 1285 (La.1991). Breach of duty and reasonableness of the risk depend on the facts and circumstances of each case. *Monasco v. Poplus*, 530 So.2d 548 (La.1988); *Hunter v. DOTD*, 620 So.2d 1149 (La.1993). The standard of review is manifest error in cases where unreasonable risk of harm is at issue. *Reed v. War-Mart, Inc.*, 97-1174 (La. 3/4/98), _ So.2d. _. The trial court's findings are reversible only when there is no reasonable basis for the conclusions, or they are clearly wrong. *Mart v. Hill*, 505 So.2d 1120 (La.1987).

In this case, the trial court found that the site of the accident on Greenwell Springs Road was unreasonably dangerous because of the combination of dangerous defects that were allowed to accumulate by DOTD. These defects included a "drop off" shoulder, a nonrecoverable sloping, and limited horizontal clearance.[1] We find the record supports the trial court's conclusions, and they are not clearly wrong.

Highway 37, or Greenwell Springs Road, is a two-lane highway that has been in existence since before 1927. Its history has been documented in *Myers v. State Farm Mutual Automobile Insurance Co.*, 493 So.2d 1170 (La.1986) and *Holloway v. DOTD*, 555 So.2d 1341 (La.1990). Briefly stated, its lanes were widened in 1958 and

[1]The trial court also found that DOTD negligently failed to prioritize the proper maintenance. Prioritizing would presumably earmark the roadway to receive funding for necessary improvements. Because we find the off roadway conditions presented an unreasonable danger to motorists, we pretermit a discussion concerning the prioritization issue.

1977, and it received an overlay of asphalt in 1988.

Over the years, traffic increased dramatically on the portion of Greenwell Springs Road involved in the instant accident. Traffic volume correlates directly with highway deficiency, according to Tom Buckley, DOTD's district traffic operations engineer. The evidence varied as to exact traffic volume, but by all accounts it was, at the time of the accident, in excess of 6000 per day. Another state highway, Highway 16, had undergone reconstruction to four lanes even though its traffic was only half that volume.[2] DOTD's district construction engineer, Gordon Nelson, conceded that Greenwell Springs Road was the only highway in his district that had such a high traffic count with such an acute situation for such a long period of time. According to his deposition, Trooper James Bentley considered the section of Greenwell Springs Road where the accident took place to be very dangerous, and that it had that reputation among his colleagues. Considering all the relevant factors, DOTD's chief design engineer, William Hickey, was unable to name any roadway that was more dangerous than Greenwell Springs Road. Lacking federal assistance to increase lanes to four, DOTD overlaid the existing roadway with asphalt to make the paved portion of the roadway safer.

The 1988 overlay project plans also called for an off roadway gradation. The drainage ditch paralleling the shoulder was to have a slope of 3:1. That proportion matched every three units of horizontal distance with a vertical drop of one unit. At the point of impact, the slope was 1.43:1, approximately twice as steep. According to Jim Clary, plaintiff's highway design expert, the increase in slope steepness was evidence that DOTD had not properly executed its own maintenance standards. He noted that

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[2]Highway 16, classified as an "arterial route" pursuant to La.R.S. 48:191, received federal money for the reconstruction project. Greenwell Springs Road, classified as a "collector route" pursuant to section 191, was not eligible for federal aid.

DOTD's 1986 Maintenance Standards Manual specified that shoulders were to be restored to their original grade and cross slope, which in this case was 3:1 as defined by the overlay plans. The failure to maintain the original slope was significant. According to mechanical engineer and accident reconstructionist Andrew McPhate, plaintiff's expert, the steeper the slope, the greater the force of gravity pulling a vehicle into a ditch, and the less likelihood there would be that a vehicle could recover and return safely to the roadway.

In point of fact, even the 3:1 slope called for in the plans may not have rectified plaintiff's situation. Experts on both sides agreed that a slope steeper than 4:1 was considered non-recoverable. That is, once a vehicle had begun its descent, it would not be expected to be able to return safely to the paved portion of the roadway. Thus, it was virtually inevitable that once Aucoin's car had left the shoulder, she would crash into any objects present within DOTD's right of way. We find the failure to maintain a reasonably safe slope was the significant factor which caused the accident.

The trial court also found that the limited horizontal clearance contributed to the unreasonable danger of the section of Greenwell Springs Road at issue. A clearance of thirty feet beyond the fog line was AASHTO's national standard as early as 1941. According to plaintiff's highway design expert, Jim Clary, AASHTO guidelines were in operation at DOTD when he worked for them in 1956. No one testified that DOTD did not know of such guidelines advance of that time. In fact, it behooved DOTD to be aware of any AASHTO guidelines because federal aid was tied to the utilization of those guidelines in the construction of new roads and reconstruction of old ones. Since 1968, the Louisiana state legislature has required DOTD to maintain all highways in conformity with AASHTO standards to the extent possible:

> The office of the Department of Transportation and Development shall adopt minimum safety standards with respect to highway and bridge

> design, construction, and maintenance. These standards shall correlate with and, so far as possible, conform to the system then current as approved by the American Association of State Highway and Transportation Officials. Hereafter, the state highway system shall conform to such safety standards.

La.R.S. 48:35(A). While failure to adhere to AASHTO standards may not in itself attach liability, whether DOTD has conformed to those standards is a relevant factor in determining the ultimate issue of whether the roadway is unreasonably dangerous. *Dill v. DOTD*, 545 So.2d 994 (La.1989).

DOTD's project development engineer, Richard Savoie, testified that the presence of a nonrecoverable slope, as in this case, was a factor in determining how much horizontal clearance was needed to prevent collision with fixed objects. Yet DOTD has neither maintained a conforming horizontal clearance nor a 4:1 recoverable slope, which has been the AASHTO standard since at least 1941. In addition, the shoulder at the site of the accident was only about one foot wide. According to Andrew McPhate, plaintiff's expert in mechanical engineering, vehicle dynamics and accident reconstruction, the narrowness of the shoulder meant that Aucoin could have avoided the ditch only if she had begun her recovery maneuver before actually leaving the roadway. DOTD's civil engineering expert, Neilon Rowan, conceded that a shoulder would need to be six feet wide to stop a vehicle without being in the lane, and the six-foot standard had been articulated as early as 1954.

DOTD was fully aware of the substandard condition of the section of Greenwell Springs Road where the accident occurred. While in 1986 the *Myers* court noted that the physical characteristics of the road were not unique, the facts in this case reveal that by 1990, DOTD could not name a more dangerous road given the combination of dangerous conditions.

We granted DOTD's writ out of concern that DOTD was found liable because

it failed to bring an old highway up to current standards. However, after carefully studying the facts peculiar to this case, we agree with the lower courts and find the area where the accident happened unreasonably dangerous. While the roadway in the present case was in good condition, the shoulders were substandard. Should a driver, such as Aucoin, inadvertently travel off the shoulder, the vehicle becomes trapped in a non-recoverable slope and does not have a clear recovery zone. Under these dangerous conditions, DOTD cannot escape liability by claiming that it has no duty to bring this old highway up to current standards.

The combination of more than one dangerous condition was allowed to accumulate by DOTD, rendering this off roadway area unreasonably dangerous to the motoring public. Under these circumstances, DOTD does have a duty to maintain this off roadway area so it does not pose an unreasonably dangerous condition to the motoring public, notwithstanding that the roadway at issue is an old highway.

RETROACTIVITY OF AMENDMENT TO ARTICLE 2324(B)

Under the comparative fault provision of La.Civ.Code art. 2323, the trial court found DOTD 15% at fault and Aucoin 85% at fault. The minor, Amber, a guest passenger, was found free of fault. Pursuant to La.Civ.Code art. 2324(B) as it existed at the time of the accident, DOTD would be solidarily liable for 50% of Amber's damages regardless of Aucoin's ability to pay.[3] In 1996, La.Civ.Code 2324(B) was amended and resulted in the adoption of pure comparative fault.[4] Under the amended

[3]At the time of the accident, La.Civ.Code art. 2324(B) provided:
If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages.

[4]The 1996 amendment of 2324(B) provided in pertinent part:
If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person....

version, DOTD would be liable only for the degree of fault found. Before addressing the award of medical expenses, it is necessary to discuss the issue of whether the 1996 amendment to article 2324(B) should be retroactively applied.

Act 3 amended both La.Civ.Code art. 2323 and 2324 in the First Extraordinary Session of 1996. This court has already determined that amended article 2323 was merely procedural legislation. Therefore, it was to be applied retroactively. *Keith v. United States Fidelity & Guaranty Company*, 96-2075 (La.5/9/97), 694 So.2d 180. However, as noted by Chief Justice Calogero in his concurrence, *Keith* was limited to that specific issue. Whether article 2324(B) was also to be applied retroactively has not been addressed by this court.

Laws which are procedural or interpretive may apply retroactively, but "[i]n the absence of contrary legislative expression, substantive laws apply prospectively only." La.Civ.Code art. 6. Laws establishing new rules, rights, and duties, or changing existing ones are substantive. Laws which merely establish the meaning the statute had from the time of its enactment are interpretive. *Keith* at 183; *St. Paul Fire & Marine Insurance Company*, 609 So.2d 809, 817(La.1992). Before 1996, article 2324(B) held defendants liable "solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages." The 1996 amended article revoked solidarity for non-conspiratorial acts and expressed defendant's liability instead as a "joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person...." That shift from solidary liability to joint and several obligation altered the existing rule. Moreover, since the amendment resulted in changing the amount of damages recoverable, the change was clearly substantive. *Socorro v. City of New Orleans*, 579 So.2d 931, 944 (La.1991). As such, the amendment can have only prospective

application.[5] La.Civ.Code art.6. Therefore, the applicable article 2324(B) was that which existed at the time of the accident. Under the relevant provision, DOTD is solidarily liable for 50% of Amber's damages, including medical expenses.

REDUCTION OF MINOR'S MEDICAL DAMAGES

A defendant is liable for damages occasioned by his fault. La.Civ.Code art. 2315. The public policy behind this tort recovery is to make a victim whole. *Boudreaux v. DOTD*, 96-0137 (La.App. 1 Cir. 2/14/97), 690 So.2d 114; *LeBlanc v. Mercedes-Benz of North America, Inc.*, 93-907 (La.App. 3 Cir. 3/2/94), 633 So.2d 399, *writ denied*, 94-1225 (La. 7/1/94), 639 So.2d 1169; *Capone v. King*, 467 So.2d 574 (La.App. 5 Cir.1985), *writ denied*, 468 So.2d 1203, 1205 (La.1985); *Quinlan v. Liberty Bank & Trust Co.*, 575 So.2d 336 (La.1990) (indemnity contract). Therefore, when a minor is injured, damages for the injury belong to the minor child. *Coleman v. Audubon Insurance Co.*, 572 So.2d 352 (La.App. 1 Cir.1990), *writ denied*, 576 So.2d 31 (La.1991); *Matthews v. State Farm Fire & Casualty Insurance*, 550 So.2d 936 (La.App. 3 Cir.1989); *Butler v. State Farm Mutual Automobile Insurance* Co., 195 So.2d 314 (La.App. 4 Cir.1967); *Lane v. Mud Supply Co., Inc.*, 111 So.2d 173 (La.App. 5 Cir.1959). Damages include recovery of medical expenses as well as general damages. *Rowe v. State Farm Mutual Automobile Insurance Co.*, 95-669 (La.App. 3 Cir.3/6/96), 670 So.2d 718, *writ denied*, 96-0824 (La. 5/17/96), 673 So.2d 611; *Matthews v. State Farm Fire & Casualty Insurance*, 550 So.2d 936 (La.App. 3 Cir.1989).

The court of appeal determined: "Special damages in the form of medical bills incurred by a minor are the responsibility of and recoverable by his parent, and are

[5]At least three appellate court cases have correctly noted that 1996 Act 3 made a substantive change to La.Civ.Code 2324(B). *Jones v. Hawkins*, 29,914 (La.App. 2d Cir. 4/9/98), 1998 WL 161880; *Moore v. Safeway, Inc.*, 95-1552 (La.App. 1 Cir. 11/22/96), 700 So.2d 831, 855; *Thornhill v. DOTD*, 95-1950 (La.App. 1 Cir. 6/28/96), 676 So.2d 799, 810.

subject to a reduction by the degree of the parent's negligence in an accident." *Aucoin v. DOTD*, 96-1047 (La.App. 1 Cir. 6/20/97), at 19 (case not designated for publication), citing to *McFarland v. Industrial Helicopters, Inc.*, 502 So.2d 593, 598-99 (La.App. 3 Cir.1987). In so concluding, the court of appeal misinterpreted *McFarland* and confused parental obligation with a tortfeasor's responsibility under article 2324(B) to attempt to make the victim whole. *McFarland* did not reduce recovery proportional to the parent's allocation of fault premised on a parental responsibility to pay, as the court of appeal suggested. Instead, a reduction occurred because the parent sought to recover individually for medical bills she incurred on the minor's behalf. Thus, the damages she sought to recover were not the minor's, but hers alone. See, e.g., *Coleman v. Audubon Insurance Co.*, 572 So.2d 352 (La.App. 1 Cir.1990), *writ denied*, 576 So.2d 31 (La.1991); *Christophe v. Department of Health and Hospitals*, 95-398 (La.App. 3 Cir. 10/4/95), 663 So.2d 289; *Veillion v. Fontenot*, 96-1075 (La.App. 3 Cir. 3/12/97), 692 So.2d 639, *writ denied*, 97-0932 (La. 5/10/97), 693 So.2d 801.

The case *sub judice* stands in stark contrast to the *McFarland* situation. Only the child's medical damages are here under consideration. The contributory negligent parent, Aucoin, did not bring suit individually; she brought suit as tutrix to recover on behalf of her minor child medical damages that belonged solely to the child. Where the parent merely brings suit as tutor or tutrix to recover medical expenses that belong to the child, the parent's recovery is not personal. See, *e.g.*, *Pazereckis v. Thornhill*, 462 So.2d 296 (La.App. 1 Cir.1984); *Jefferson v. Costanza*, 628 So.2d 1158 (La.App. 2 Cir. 1993); and *Rollins for Rollins v. Concordia Parish School Board*, 465 So.2d 213 (La.App. 3 Cir. 1985). Therefore, Amber could invoke the benefits of La.Civ.Code art. 2324(B) and institute suit through her tutrix Aucoin. Under article 2324(B), Amber,

who was free from fault, is entitled to recover fifty per cent of her damages, including medical expenses, from DOTD. Therefore, the court of appeal erred as a matter of law in reducing Amber's medical damages award by the degree of fault attributable to Aucoin.

DECREE

For the foregoing reasons, the judgment of the court of appeal is reversed and set aside on the issue of reduction of medical damages, and the judgment of the trial court is reinstated to that extent. Otherwise, the decision of the court of appeal is affirmed.

AFFIRMED IN PART, REVERSED IN PART AND RENDERED.