

SUPREME COURT OF LOUISIANA

No. 98-C-2378

PATRICIA DESHOTEL CORMIER, ET AL.

versus

MICKEY L. COMEAUX, ET AL.

consolidated with

MICKEY LOUIS COMEAUX, ET AL.

versus

STATE OF LOUISIANA, THROUGH THE DOTD

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

JOHNSON, Justice, dissenting

In the case *sub judice*, this court has held that DOTD is not liable for Plaintiff's injuries. The majority reasons that DOTD owed no duty to Plaintiffs because the driver was intoxicated and possibly asleep when the car ran off the road. However, the fact that the driver fell asleep does not relieve DOTD of its duty to keep the highways in a reasonably safe condition nor should it prevent Plaintiffs from recovering damages from DOTD for the injuries they sustained. The fact that more than one party can contribute to a person's injuries is the reason for Louisiana's comparative fault system¹. Campbell v. Louisiana Dep't of Transp. & Dev., 94-1052 (La. 1/17/95), 648 So. 2d 898, 902. In Campbell, the plaintiffs were

¹ The Civil Code article establishing comparative fault in Louisiana states: "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 Ann. art. 2323(A) (West 1997).

traveling west along Louisiana Highway 6 between the hours of 4:30am and 5:00am when the driver fell asleep. The vehicle moved out of the travel lane and onto the right shoulder. The driver awakened and turned the steering wheel to the left to try to get back onto the highway. In doing so, the driver lost control of the vehicle and struck the concrete abutment of a bridge. The plaintiffs brought suit against DOTD for the injuries they sustained. DOTD argued that their failure to maintain the highway in a reasonably safe condition was not the cause-in-fact of the plaintiffs' injuries because the driver fell asleep and lost control of the vehicle. This court rejected DOTD's argument stating, "[T]he failure of [the driver] to maintain control of the vehicle does not relieve DOTD of its duty to keep the highways safe." Campbell, 648 So. 2d at 902. This court held DOTD seventy-five percent (75%) at fault in causing the plaintiffs' injuries.

The facts in Campbell are very similar to the instant case. In the instant case, the majority incorrectly relies on the fact that Comeaux was intoxicated and asleep in holding that DOTD did not breach its duty to Plaintiffs. This court should have allocated a percentage of fault to both DOTD and Comeaux rather than finding DOTD without fault.

DOTD was negligent in failing to maintain that portion of Highway 90 where the accident occurred in a reasonably safe condition. At the scene of the accident, the shoulder was too narrow, the foreslope of the ditch was too steep, the back slope of the ditch was too severe, and there was no clear recovery zone provided. In 1968, the Louisiana Department of Highways recommended ten foot wide shoulders, a 6:1 fore slope, and a 4:1 back slope along Highway 90. In April 1969, additional construction took place along Highway 90 at which time DOTD could have brought Highway 90 in compliance with the State Department of Highways' recommendation. Nevertheless, Highway 90 had three foot wide shoulders, a 3.8:1

fore slope, and a 1.8:1 back slope at the scene of the accident.

Admittedly, DOTD has no duty to bring all highways in compliance with modern safety construction standards. However, whether or not the DOTD has conformed to those standards is a relevant factor in determining whether or not a roadway is unreasonably dangerous. Dill v. Department of Transp. & Dev., 545 So. 2d 994, 996. In this case, the narrow shoulder, steep foreslope, and severe back slope created a dangerous condition whereby any vehicle leaving the roadway would be unable to make a safe recovery back onto the roadway. DOTD's duty to keep the highways in a reasonably safe condition encompasses the foreseeable risk that, for any number of reasons, including simple inadvertence, a motorist might find himself traveling on, or partially on the shoulder. Begnaud v. Department of Transp. & Dev., 93-639 (La. Ct. App. 5 Cir. 1/12/94), 631 So. 2d 467, 470. DOTD also has a duty to keep the area off the highway shoulder in such a condition that it does not pose an unreasonable risk of harm to motorists using the travel lanes or shoulder. Oster v. Department of Transp. & Dev., 582 So. 2d 1285, 1286 (La. 1991). The DOTD breached its duty to keep the shoulder and the area adjacent to the shoulder in a reasonably safe condition. As Plaintiffs' experts explained:

If the shoulder meets the minimum safety standards, the driver who exits the travel lane . . . has the benefit of the eight-foot wide shoulder on which to recover. Even when, as in this case, the shoulder does not meet minimum safety standards, a properly designed foreslope will give the driver additional protection. If the fore slope is 4:1 or flatter, the driver has a margin of safety in which to regain control of his (or her) vehicle. . . . A foreslope that does not meet minimum safety standards is made even more dangerous by a back slope which does not meet minimum safety standards. Even if the shoulder and the foreslope do not meet minimum standards and a vehicle is pulled into the ditch, if the back slope is properly designed, the vehicle may be able to exit on the far side of the ditch under control. However, a vehicle trapped into a downward spiral by a too-severe foreslope is destined to collide with an improperly-designed and too-steep back slope.

Cormier v. Comeaux, 97-645 (La. Ct. App. 3 Cir. 7/1/98), 714 So. 2d 943, 949.

The combination of defects along Highway 90 basically guaranteed that any vehicle leaving the travel lane, for any reason, would ultimately collide with the back slope of the adjacent ditch. Therefore, I would hold DOTD liable because their negligence contributed to the severity of Plaintiffs' injuries. This court should review the correctness of the apportionment of fault and consider the adequacy of the damages awarded.