NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1255

NATHANIEL DAVIS

VERSUS

TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY, JOY AUCOIN, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment rendered JAN 05 2011

J.J.P.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 76806
Honorable Jane Triche-Milazzo, Judge

* * * * * *

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BEFORE: KUHN, PETTIGREW, JJ., and KLINE, J. *pro tempore*.[1]

WFK concurs with reasons
Kuhn, J. concurs with reasons by WFK

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* pursuant to special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

This action arises out of a vehicular collision wherein plaintiff's legally parked flatbed delivery truck was struck from the rear by an elderly motorist. The sole remaining defendant at the jury trial was the State of Louisiana through the Department of Transportation and Development ("DOTD"). Plaintiff now appeals from a verdict in favor of DOTD. For the reasons that follow, we hereby affirm.

FACTS

On or about 8:00 p.m. on the evening of April 22, 2003, Nathaniel Davis, plaintiff/appellant herein, and an employee at the time of Purpera Lumber Company, activated the red emergency flashers on his flatbed delivery truck, and temporarily stopped his truck in the northbound travel lane of La. Hwy. 308. At the time of the accident, Mr. Davis was attempting to deliver a load of lumber to a residential construction site adjacent to the highway. Mr. Davis testified that after several cars passed safely around his truck, he got out of the truck and removed the straps that secured the forklift to the rear of the truck. He then started the forklift so as to activate the red emergency flashers on the forklift, and stepped back onto the rear of the flatbed truck.

As Mr. Davis attempted to remove the chain that secured the forklift to the truck, he noticed a vehicle approaching from the rear. When he realized the car was not going to stop, Mr. Davis felt it would be safer to remain by his truck between the forklift and truck. The oncoming motorist, Mrs. Joy Aucoin, driving a Lincoln Continental, was proceeding northbound towards Donaldsonville on La. Hwy. 308 when, without attempting to stop, she collided with the rear of Mr. Davis's delivery truck. As a result of this accident, Mr. Davis's right leg was severely injured.

ACTION OF THE TRIAL COURT

Mr. Davis initially brought suit against Mrs. Aucoin, her insurer, as well as the UM carrier for the Purpera Lumber Company vehicle that Mr. Davis was operating at the time

of the accident.[2] Mr. Davis subsequently amended his petition to allege sole negligence on the part of DOTD for its failure to construct La. Hwy. 308 with an 8-foot shoulder. This matter proceeded to a jury trial on March 31 and April 1, 2010.

On April 2, 2010, the jury returned its verdict and found DOTD to be at fault as the accident site posed an unreasonable risk of harm due to its lack of an 8-foot highway shoulder, and that this condition caused the damages suffered by Mr. Davis. The jury also responded that DOTD did not know nor should they have known about the unreasonably dangerous condition of this portion of the highway. The trial court thereafter rendered judgment in favor of DOTD in accordance with the jury's findings and dismissed all claims put forth against DOTD by Mr. Davis. Following the denial of his motion for JNOV, Mr. Davis has now appealed.

ISSUES PRESENTED FOR REVIEW

In connection with his appeal in this matter, Mr. Davis presents the following issues for review and consideration by this court:

1) Did defendant/appellee, DOTD, have actual or constructive notice of the unreasonably dangerous condition which caused the accident?

2) If so, is plaintiff/appellant, Mr. Davis, entitled to damages, and if so, what is the quantum of those damages?

STANDARD OF REVIEW

The Louisiana Constitution of 1974 provides that the appellate jurisdiction of the courts of appeal extends to both law and facts. La. Const., art. V, § 10(B). A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. See **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882, n.2 (La. 1993). If the trial court or the jury findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been

[2] The elderly Mrs. Aucoin died prior to trial before any depositions could be scheduled. Mr. Davis's claims against Mrs. Aucoin and her insurer were thereafter compromised and dismissed.

sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

DISCUSSION

The gist of Mr. Davis's complaint against DOTD is that there was no shoulder adjacent to La. Hwy. 308 upon which he could have parked his delivery truck. As a result, Mr. Davis claimed that he elected to park his delivery truck on the highway and offload his lumber rather than turn into the residential lot via the newly-constructed dirt driveway, which he deemed too soft for the weight of his vehicle.

Louisiana Revised Statute 32:141 provides in pertinent part as follows:

> **§ 141. Stopping, standing, or parking outside business or residence districts**
>
> A. Upon any highway outside of a business or residence district, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main travelled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway.
>
> * * * *
>
> C. The driver of any vehicle left parked, attended or unattended, on any highway, between sunset and sunrise, shall display appropriate signal lights thereon, sufficient to warn approaching traffic of its presence.

The parties do not dispute, that at the time of the accident, Mr. Davis was legally parked, reasonably safely, in a residential district, with his vehicle well lit and visible for more than the statutorily required distance, and was not obstructing the opposite lane of traffic. Accordingly, he was found to be free from fault in connection with this accident.

In his brief to this court, Mr. Davis contends, as he did at trial, that the evidence demonstrated that La. Hwy. 308 had been subject to a "major reconstruction" and that nevertheless, at the time of the accident, the highway was not in compliance with standards promulgated by the American Association of State Highway and Transportation Officials ("AASHTO") since it lacked a broader roadside shoulder. DOTD responds that

even assuming *arguendo* that DOTD failed to meet its own standards, which it denies, such a fact, if true, does not establish the existence of an unreasonably dangerous defect.

Louisiana Civil Code articles 2315 and 2316 are the codal foundation for delictual liability for negligence in our state. Louisiana Civil Code articles 2317 and 2317.1 define the basis for delictual liability for defective things. Article 2317.1 provides that the owner or legal custodian of a defective thing causing injury or damage is liable "only upon a showing that he knew or, in the exercise of reasonable care, should have known of [the defect], that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care." Louisiana Revised Statutes 9:2800 further circumscribes the liability of public entities, including DOTD, with respect to La. Civ. Code arts. 2317 and 2317.1.

DOTD has a duty to maintain the public highways in a condition that is reasonably safe and does not present an unreasonable risk of harm to the motoring public exercising ordinary care and reasonable prudence. **Hager v. State ex rel. DOTD**, 06-1557, p. 13 (La. App. 1 Cir. 1/16/08), 978 So.2d 454, 464, writs denied, 08-0347, 08-0385 (La. 4/18/08), 978 So.2d 349 citing **Toston v. Pardon**, 03-1747, p. 10 (La. 4/23/04), 874 So.2d 791, 799. DOTD must also maintain the shoulders and the area off the shoulders, within its right of way, in such a condition that they do not present an unreasonable risk of harm to motorists using the adjacent roadway and to others, such as pedestrians, who are using the area in a reasonably prudent manner. **Hager**, 06-1557 at pp. 13-14, 978 So.2d at 464 citing **Netecke v. State ex rel. DOTD**, 98-1182, 98-1197, p. 8 (La. 10/19/99), 747 So.2d 489, 495. This duty, however, does not render DOTD the guarantor for the safety of all of the motoring public or the insurer for all injuries or damages resulting from any risk posed by obstructions on or defects in the roadway or its appurtenances. **Forbes v. Cockerham**, 08-0762, 08-0770, pp. 31-32 (La. 1/21/09), 5 So.3d 839, 858. Further, this court has held that DOTD's failure to design or maintain the state's highways to modern standards does not establish the existence of a hazardous defect in and of itself. **Id.** citing **Myers v. State Farm Mutual Auto Insurance Company**, 493 So.2d 1170, 1173 (La. 1986). Whether DOTD has breached its duty to

the public depends on all the facts and circumstances determined on a case by case basis. **Forbes**, supra, citing **Campbell v. State, Through Department of Transportation and Development**, 94-1052, p. 6 (La. 1/17/95), 648 So.2d 898, 901-902.

Mr. Davis argues that the width of the highway shoulder at the accident site was unreasonably hazardous and was a cause-in-fact or legal cause of the accident because DOTD did not meet its own minimum 1943 design standards for rural highways and that these modern standards were statutorily required because DOTD undertook reconstruction of a 9.551 mile section of La. Hwy. 308 in 1949. Our supreme court has held that DOTD does not have duty to bring old highways up to modern standards unless a new construction or a major reconstruction of the highway has taken place. **Forbes**, supra, citing **Aucoin v. State, Through Department of Transportation and Development**, 97-1938, 97-1967, p. 4 (La. 4/24/98), 712 So.2d 62, 64.

In the present case, the record reflects that Mr. Davis's only proof that the 1949 blacktop overlay of the original gravel roadway constituted a "major reconstruction" was the opinion of Mr. Davis's expert, Mr. James R. Clary, Sr. Mr. Clary, a retired civil engineer licensed in Mississippi, testified on behalf of Mr. Davis at trial as an expert in civil engineering with expertise in highway design, construction, and safety. Mr. Clary testified that in paving the roadway it was also necessary for the state to secure additional rights-of-way at certain locations so as not to encroach on the existing levee on the left side of the work. The contract documents further called for the straightening on several reverse curves in that stretch of roadway. In acquiring additional rights-of-way, and straightening several curves, the contract documents called for the moving of residences, stores, halls, post office buildings, barns, shacks, and brick pillars.

Ms. Deborah Guest, a civil engineer and consultant manager on new construction and major reconstruction projects for DOTD, agreed with Mr. Clary's deposition testimony categorizing this project as a reconstruction on substantially the same alignment. Ms. Guest testified that the La. Hwy. 308 overlay project began as a repaving job and that the substantial alignment of the roadway was not changed since prior to 1940. After the completion of the design specifications, the contractor realized that in order to avoid

breaching the integrity of the adjacent levee, ditches would have to be dug on the other side of the roadway. As a result, it was necessary for DOTD to acquire servitudes or rights-of-way from adjacent property owners for portions of the roadway totaling approximately one mile of the 9.551-mile overlay project.

Ms. Guest testified that major reconstruction projects are much more involved than an overlay or highway replacement project. Had this been a major reconstruction of this 9-mile portion of roadway, Ms. Guest estimated there would have been between 80-100 sheets of plans, and the work would have taken much longer to complete. Additionally, if the 1949 resurfacing project had been a major reconstruction, the Louisiana Department of Highway's Road Design Standards (Plaintiff's Exbt-12) published in January 1943 would have required the installation of additional signs and construction of at least an 8-foot shoulder.

At the conclusion of trial, the trial court instructed the jury as to the applicable law and provided the jury with an interrogatory form agreed to by the parties. During jury deliberation, the trial court received a note from the jurors with three questions:

> (1) Are we to discuss the 9.551 miles or the 1 mile that the curve was straightened out?
> (2) Did the accident occur within the 1-mile section of road that was straightened out?
> (3) Once the crown of the road is expanded, does the whole project have to be brought up to existing minimum standards?

Following consultation with counsel, the trial court brought the jury back into the courtroom and instructed them as follows:

> You all have been provided all of the evidence. You are to consider all of the evidence that was submitted during the course of the trial. You alone are the sole fact-finders in this matter, and these are questions of fact that you must determine. Thank you.

After further deliberations, the jury sent out a request for a "map that shows the stretch of road the project was completed on." In conjunction with this request, the trial court sent into the jury room "Plaintiff's Exhibit No. 4," which was a map depicting the entire length of the project which contains that section of highway that comprises the 9.551-mile section.

Thereafter, the jury, in a 10 to 2 vote, returned a verdict finding that La. Hwy. 308 at the site of the accident at issue posed an unreasonably dangerous risk to Mr. Davis due to the lack of an 8-foot highway shoulder upon which he could have parked his vehicle to unload his construction supplies. The jury also found that this unreasonably dangerous condition was the cause of Mr. Davis's damages. The jury further found that the State, through DOTD, did not know, or should not have known, about the unreasonably dangerous condition of this portion of the highway. On June 4, 2009, the trial court rendered and signed a judgment in accordance with the verdict of the jury.

Pursuant to La. Code Civ. Pro. art. 1811, Mr. Davis filed a timely motion for JNOV and Conditional Motion for New Trial in response to the jury's failure to find that the State had actual or constructive notice of the defective condition of La. Hwy. 308. In a judgment signed August 26, 2009, the trial court denied Mr. Davis's motion stating, "While this Court may have evaluated the evidence differently as to the sufficiency of constructive knowledge of the alleged defect, it does not rise to the level necessary to grant JNOV. Therefore, Plaintiff's Motion is denied." Mr. Davis thereafter appealed.

In connection with our review of this matter, we note although the jury found that La. Hwy. 308 at the site of the accident at issue posed an unreasonably dangerous risk to Mr. Davis due to the lack of an 8-foot highway shoulder, the accident that forms the basis of this litigation did not take place on the shoulder of the roadway. Although Mr. Davis was legally parked in the roadway when the accident occurred, we doubt that the accident resulting from driver inattention could have been avoided had Mr. Davis been proceeding ahead at a slow rate of speed.

The uncontroverted evidence at trial established that although it was necessary for the State to acquire additional rights-of-way in connection with its 1949 overlay of La. Hwy. 308, these rights-of-way comprised only about one mile of the 9.551-mile overlay project. Although the jury found that La. Hwy. 308 at the site of the accident posed an unreasonably dangerous risk to Mr. Davis due to the lack of an 8-foot highway shoulder, there is no evidence from which to conclude that the roadway underwent a major reconstruction at that location, or even that the State had obtained additional rights-of-

way in the area of the accident site. Additionally, the verdict form approved by the parties did not ask the jury to determine whether a major reconstruction had taken place in connection with DOTD's 1949 overlay of La. Hwy. 308. For these reasons, we must conclude that Mr. Davis failed to establish that a major reconstruction of La. Hwy. 308 took place at the site of his accident, and therefore, we decline to say that the State had notice of the existence of a defective condition.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court is hereby affirmed. All costs associated with this appeal shall be assessed against plaintiff-appellant, Nathaniel Davis.

AFFIRMED.

NATHANIEL DAVIS	**FIRST CIRCUIT**
VERSUS	**COURT OF APPEAL**
TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY ET AL.	**STATE OF LOUISIANA**
	NO. 2010 CA 1255

KUHN, J., concurring. JEK by WFK

I agree with the result that affirms the dismissal of Davis's claims against DOTD and, therefore, I concur.

The jury concluded that the failure of DOTD to construct Hwy 308 with an 8-foot shoulder created an unreasonably dangerous condition; and that this defect resulted in damages to Davis. It also concluded that DOTD did not know and should not have known about the unreasonably dangerous condition. The renovation to Hwy 308 was either a major reconstruction requiring the construction of an 8-foot shoulder for which DOTD would be presumed to know of the defect that it created, see ***Pickens v. St. Tammany Parish Police Jury***, 323 So.2d 430, 433 (La. 1975); or it was not a major reconstruction, in which case the lack of an 8-foot shoulder could not have created an unreasonable risk of harm and whether DOTD had notice would be irrelevant.

The verdict rendered by the jury contained answers that were inconsistent with one another and the general verdict. No one objected, the jury was not returned to render a consistent verdict, and the trial court did not grant either a JNOV or a new trial. See La. C.C.P. arts. 1811, 1813, and 1971-1973. Thus, it is now impossible for us to determine exactly what the jury intended. Accordingly, on appeal, this court should have conducted a *de novo* review of the evidence. See ***Sims v. CRC Holston, Inc.***, 442 So.2d 646,

649 (La. App. 1st Cir. 1983), ***writ denied***, 446 So.2d 316 (La. 1984) (citing ***Ragas v. Argonaut Southwest Ins. Co.***, 388 So.2d 707 (La. 1980) (where a finding of fact is interdicted because of some legal error implicit in the fact finding process or when a mistake of law forecloses any finding of fact, and where the record is otherwise complete, the appellate court should, if it can, render judgment on the record.).

On *de novo* review, I would conclude that the evidence fails to support a finding of an unreasonable risk of harm. Even if Hwy 308 was a major reconstruction, I would find that the lack of an 8-foot shoulder was not the proximate cause of Davis's injuries. The cause of the accident was the actions of Aucoin and/or Davis.

For these reasons, I agree that the trial court's judgment was correctly affirmed since it dismissed the suit. Accordingly, I concur in the result.

NATHANIEL DAVIS
VS.
TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY, JOY AUCOIN, STATE FARM MUTUAL INSURANCE COMPANY, LOUISIANA STATE DEPARTMENT OF TRANSPORTATION

NUMBER 2010 CA 1255

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

WFK

KLINE, J., CONCURS AND ASSIGNS ADDITIONAL REASONS.

I concur in the result, concluding that DOTD did not owe a duty to this particular plaintiff as a matter of law. Before the jury's finding of fault by DOTD, a predicate determination was necessary that there was a major reconstruction to the highway. Only this would require DOTD to upgrade the road to meet a standard for eight foot shoulders. The evidence does not support that predicate finding of major reconstruction.

Additionally, whether the existence of less than an eight foot shoulder posed an unreasonably dangerous condition that was known or should have been known is a question of fact which will depend on the facts and circumstances of the case. The evidence does not support a finding that the existing shoulder posed an unreasonably dangerous condition.

We do know that Nathaniel Davis made a considered election to park his heavily loaded truck on the asphalt surface of the highway which was a permissible and lawful option. Parking his truck on the hard surface highway facilitated the unloading and transportation of lumber to the building site by a forklift.

What Mr. Davis would have done otherwise is a matter of conjecture.

This was not an emergency situation. I simply cannot conclude with any degree of certainty that had there been a wider shoulder that Mr. Davis would have parked any differently to unload the lumber-laden truck.

In essence, the cause in fact and legal cause of the accident and resulting injury was that a negligent driver rear-ended a legally parked vehicle that had appropriate safety lights and warnings.

In spite of the mixed responses by the jury, its ultimate conclusion in favor of DOTD is correct, as was the trial court's judgment by its denial of the JNOV.