SUPREME COURT OF LOUISIANA

No. 97-C-1344

MAURIO BROWN

Versus

LOUISIANA INDEMNITY COMPANY, ET AL.

Consolidated with

WILLIE BALLARD

Versus

LOUISIANA INDEMNITY COMPANY, ET AL.

Consolidated with

JESSE GREEN, JR.

Versus

LOUISIANA INDEMNITY COMPANY, ET AL.

VICTORY, J., concurring in part and dissenting in part

To hold DOTD liable, the plaintiffs had the burden of proving "the defect was a cause in fact of [their] injuries." ***Lee v. State Through Dept. of Transp.***, 97-0350 p.4 (La. 10/21/97); 701 So.2d 676, 678. A defendant's conduct is a cause-in-fact of the harm only if it is a "substantial factor" in bringing about the harm. ***Graves v. Page***, 96-2201 p.8 (La. 11/7/97); 703 So.2d 566, 570 (*citing* Frank L. Maraist & Thomas C. Galligan, **Louisiana Tort Law**, § 4-3 at 86-88 (1996)). A thorough analysis of the evidence the plaintiffs presented leads to the conclusion that the plaintiffs failed to prove that the shoulder slope was a substantial factor in either the accident or the injuries sustained.

Reginald Taylor, the driver of the vehicle, gave the following testimony as to how the accident occurred:

> Q: And then in the curve where the accident occurred, is that where you ran off of the road?
>
> A: Yes, sir. We — Obviously, by not seeing the curve, *I just went straight off the road. I didn't see a curve*.
>
> * * * * *
>
> Q: Did you have any particular reason before you ran off of the road to apply your brakes or slam on brakes?
>
> A: *No, sir, I thought that I was on a straight away*.
>
> Q: As soon as you realized that you had run off of the road, did you attempt to react to do anything to alter your course or stop your car or anything like that?
>
> A: *It happened too fast*. I guess looking at it now, I wish I could have, *but there's no way that I could have done anything*.
>
> Q: All right. Would it be fair to say that within perhaps a second after you ran off of the road that you felt your vehicle — you felt what you referred to as the bump and then you felt your vehicle going air borne?
>
> A: Yes, sir.
>
> Q: Obviously if you're air borne, you can't alter your course and you can't apply the brakes?
>
> A: No, sir.
> [emphasis added]

According to Taylor's testimony, he steered his car off of the road because he did not realize the road curved at the point of the accident; he thought he was on a straight away. Once off of the road, he never swerved, applied the brakes, or took *any* other action to avoid this accident. Yet the majority relies on the testimony of plaintiffs' experts, Duaine Evans and James Justice, to find that "Taylor's vehicle was pulled off the road and into a ditch by DOTD's excessively sloped shoulder." But Taylor never testified that the shoulder pulled him off of the highway. To the contrary, he said he drove off of the highway because he failed to realize the road curved.

Assuming the plaintiffs' experts are correct in finding that the slope of this shoulder is defective, Taylor's testimony establishes that he simply drove straight in a curve, and was not pulled off the road by the shoulder. Further, their conclusion that "Taylor had virtually no chance of recovery from the moment his front tire hit the shoulder," is irrelevant. Taylor *never attempted* to re-enter the roadway once he left it, so his potential chance of recovery had no bearing on the accident.

Even so, the trial court correctly concluded that even without the excessive slope of the shoulder "there probably would have been an accident anyway." So "but for" the excessively sloped shoulder, the accident still would have occurred. How, then, is it possible to conclude that the shoulder is a cause-in-fact of the harm suffered in this case? The trial court did so by using the following analysis:

> A distinction must be made between the cause-in-fact of the accident and the resulting harm which was caused by the accident. In this case if the cross-slope had not been excessive and if the connecting abandoned driveway had not been present, *there probably would have been an accident anyway, but it probably would have been less severe*. [emphasis added]

Thus, the trial court concluded that the shoulder and the abandoned driveway were a cause-in-fact only because the accident in this case would have been less severe. This analysis, where the cause-in-fact is measured by looking at the resulting harm, has been used by this Court in the past. *See* ***Campbell v. Louisiana Dept. of Transp. & Development***, 94-1052 pp.5-8 (La. 1/17/95), 648 So.2d 898, 901-903.

In reapportioning the fault in this case, the majority notes the trial court's reliance on ***Campbell***. Yet the majority *specifically rejects* the trial court's analysis by finding that "the evidence in this case is insufficient to support a finding that, given a properly sloped shoulder, plaintiffs' injuries would have been substantially altered either in type or degree." The majority then uses the distinction between ***Campbell*** and

this case to find DOTD only 25% at fault.

But what the majority fails to realize is that instead of using this distinction to lower the fault of DOTD, this distinction frees DOTD from liability altogether. If "but for" the shoulder the accident would have happened anyway (as the trial court found), and "but for" the shoulder the plaintiffs' injuries would have been the same (as the majority states), the shoulder is simply not a cause-in-fact of either the accident or the plaintiffs' injuries. I respectfully dissent from the portion of the opinion which holds DOTD 25% at fault.