NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 2021

GERTRUDE R. PAUL, YOLANDA ROBINSON ELLIS, BETTY R. RODDY, PENNY V. ROBINSON, LINDA M. ROBINSON, DEZEL L. ROBINSON, FORD ROBINSON, JR., & ROBERT W. ROBINSON; ON BEHALF OF FORD ROBINSON, SR.

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Judgment Rendered: June 8, 2007

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Appealed from the
Nineteenth Judicial District Court,
in and for the Parish of East Baton Rouge,
State of Louisiana
Docket Number 479,649

Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE, AND McDONALD, JJ.

WHIPPLE, J.

This matter is before us on appeal by plaintiffs from a judgment of the trial court, rendered in conformity with a jury's verdict, dismissing plaintiffs' claims with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Mr. and Mrs. Otis Edwards, Jr. had three children, William, Anne, and Jane. When Mrs. Edwards died in 1987, she was the sole owner of a 39-acre tract of wooded land in St. Helena Parish. Although their three children resided in other states, Mr. Edwards remained in Louisiana and maintained the property until his death on December 7, 1999. Upon his death, their three children inherited a one-third undivided ownership interest in the property. Because none of the children intended to return to Louisiana, they instructed the lawyer settling their father's estate to sell the property in St. Helena Parish.

Shortly thereafter, on June 10, 2000, Ford Robinson, Sr. was traveling on Louisiana Highway 1045 ("Highway 1045") when his vehicle struck a tree that had fallen from the Edwardses' property and crossed both lanes of travel. Robinson died as a result of injuries received in the impact.

Several of Mr. Robinson's children filed the instant law suit against the State of Louisiana through the Department of Transportation and Development ("the DOTD") seeking damages. Plaintiffs subsequently filed a supplemental and amending petition naming the landowners, William, Anne, and Jane Edwards, as additional defendants. The matter was tried before a jury on January 3, 4, 5, and 6, 2006. At the conclusion of trial, the jury returned a verdict finding there was no liability on the part of the DOTD or the landowners. On February 27, 2006, the trial court rendered a judgment in conformity with the jury's verdict and dismissed plaintiffs' claims.

Plaintiffs appeal, contending that the jury was manifestly erroneous in failing to find the defendants liable for their father's death.

DISCUSSION

Liability of the DOTD

It is undisputed that the tree that fell in this case was located on private property not within the state's right-of-way along Highway 1045. When trees are outside of the right-of-way, they are outside the ownership or "garde" of the entity charged with maintaining the highway. Williams v. Square League Corporation, Inc., 2003-1158 (La. App. 1st Cir. 6/25/04), 885 So. 2d 1166, 1168. Accordingly, strict liability under Louisiana Civil Code article 2317 is inapplicable and simple negligence principles apply. Murphree v. Daigle, 2002-1935 (La. App. 1st Cir. 9/26/03), 857 So. 2d 535, 537, writ denied, 2003-2927 (La. 1/9/04), 862 So. 2d 990; see also LSA-C.C. art. 2317.1.

Under these principles, to establish a breach of the DOTD's duty to maintain safety to the motoring public, a plaintiff must show that a hazardous condition existed and that the DOTD had actual or constructive knowledge of said condition, but failed to take corrective action within a reasonable time. Murphree, 857 So. 2d at 537. "Constructive notice" in negligence cases is deemed to exist when the defect or condition has existed for such a period of time that it would have been discovered and repaired had the public body exercised reasonable care. Williams, 885 So. 2d at 1168.

Similarly, "constructive notice," pursuant to LSA-R.S. 9:2800, is defined as "the existence of facts which infer actual knowledge." LSA-R.S. 9:2800(D). Pursuant to LSA-R.S. 9:2800, entitled, "Limitation of liability for public bodies," in order for the DOTD or any other public entity to be held liable "for damages caused by the condition of things within its care

and custody," the DOTD or other public entity must have had actual or constructive notice of the defect or vice. LSA-R.S. 9:2800(C).

The ultimate determination of whether a condition creates an unreasonable risk of harm is subject to review on appeal under the manifest error standard. Under this standard, the trier of fact's findings are reversible only when there is no reasonable factual basis for the conclusions, or if they are clearly wrong. Dennis v. The Finish Line, Inc., 99-1413 (La. App. 1st Cir. 12/22/00), 781 So. 2d 12, 21, writ denied, 2001-0214 (La. 3/16/01), 787 So. 2d 319. Likewise, in this case, where the matter was heard before a jury, if the jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse. Sistler v. Liberty Mutual Insurance Company, 558 So. 2d 1106, 1112 (La. 1990).

Similarly, the question of whether or not the DOTD had actual or constructive notice of a hazardous condition creating a risk for motorists is a factual issue and is reviewed under the manifest error standard, see Brown v. Louisiana Indemnity Company, 97-1344 (La. 3/4/98), 707 So. 2d 1240, 1244, whereas the existence of a duty is an issue of law to be determined by the court. Meany v. Meany, 94-0251 (La. 7/5/94), 639 So. 2d 229, 233.

The evidence reflects that William Claxton, the Parish Superintendent for the DOTD, routinely patrolled this highway and regularly conducted road inspections. According to Claxton, as part of his road inspection, he routinely inspected for any trees that might endanger the highway. He inspected from the road surface, to the right-of-way, then to the tree line. Claxton testified that if he saw a tree that drew his attention in some manner, such as protruding past the tree line, leaning over, appearing to be dead, dying, or "visibly rotten," he would stop and conduct a close-up inspection of the tree. He stated that if he had noticed a problem with this

particular tree or any other tree in the area, he would have "went [sic] out there and [he] would have took [sic] care of it." In all of his inspections, there was nothing with regard to this particular area of Highway 1045 or this particular tree that drew his attention or appeared to pose any threat to the motoring public. Likewise, the DOTD personnel responsible for cutting the grass in the right-of-way along Highway 1045 in that area, who were also charged with the responsibility of reporting any potential tree problems to Claxton, did not notice or report any problem with this tree. Moreover, Claxton received no complaints or reports concerning this particular tree in the years preceding the fall of this tree.

Trooper Oliver C. Jackson, III, the investigating officer, testified that he was called to the scene of the accident at 9:10 p.m., and that because it was a clear night with no high winds or stormy weather, he was not sure what caused the tree to fall. Upon examination of the tree, he found that the portion of the tree that had fallen across the roadway appeared green, was hard, did not appear to be rotten, and overall, appeared to be in "good shape." The day after the accident, Trooper Jackson returned to the scene and walked down into the woods to examine the base of the tree where it snapped before it fell. He observed that the tree was "hollowed out and rotten" at the base. The base, however, was not easily visible from the road because of the immense underbrush in front of it. In fact, Trooper Jackson testified that at the time of the accident, "it would have been impossible to see the base of the tree from the roadway" because of the underbrush. Further, he testified that the dry-rot that he observed was on the part of the base of the tree that was opposite from the road. Moreover, although Trooper Jackson patrolled this area of St. Helena Parish along Highway 1045 "on many occasions," he had not observed

any trees leaning towards the road or otherwise positioned to present a danger of falling to the road.

Contrariwise, four of Mr. Robinson's children, who were plaintiffs in this case, variously testified that they had actually seen this particular tree leaning or hanging over the highway for some time prior to their father's accident. However, they candidly admitted that they never reported this potential danger to anyone nor did they notify the DOTD.[1]

Clearly, the DOTD had the duty to maintain Highway 1045 and to keep the road and its shoulders in a reasonably safe condition. Thompson v. State, 97-0293 (La. 10/31/97), 701 So. 2d 952, 956. The DOTD is not, however, the guarantor of the safety of motorists. Thompson, 701 So. 2d at 956. The DOTD's duty to protect against the risk of a tree falling on the highway and obstructing it or striking a passing vehicle is to inspect for dead trees and remove them within a reasonable time. The DOTD is not required to inspect for all trees which could fall on the road to remove every tree simply because it has the potential to fall onto the road. Thompson, 701 So. 2d at 956. See also Lewis v. State, Department of Transportation and

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[1]Plaintiff, Penny Virginia Robinson, a daughter of the deceased, claimed that the particular tree in question had been leaning for ten to fifteen years prior to this accident. Plaintiff, Robert Robinson, a son of the deceased, testified that he had seen this particular tree "hanging out over the highway" prior to the accident. Plaintiff, Linda Marie Robinson, another daughter of the deceased, testified that this tree was leaning since the 80's and 90's, but admitted she never reported this to anyone. Plaintiff, Dezel Robinson, another daughter of the deceased, also claimed that the tree had been leaning over the roadway for at least five years prior to the accident, but similarly admitted that although she had seen it on a number of occasions, she too never contacted anyone to report it.

Development, 94-2370 (La. 4/21/95), 654 So. 2d 311, 314-315;[2] Williams, 885 So. 2d at 1169-1170; and Murphree, 857 So. 2d at 537-541. Further, where an object or hazard has entered the path of traffic, or manifests some indication that it is likely to fall into the roadway, the DOTD has a duty to remove such hazard, providing it has notice. Thompson, 701 So. 2d at 956, n.3.

After careful review of the record and testimony presented at trial, including, in particular, the testimony of William Claxton, the DOTD Parish Superintendent who conducted regular inspections of this stretch of roadway, we find that a reasonable basis exists to support the jury's determination that the DOTD did not have actual or constructive prior notice that the tree at issue had fallen or that it posed a danger of falling on the roadway, a prerequisite for finding liability against the DOTD.

In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and meet the following two-part test: (1) find that a reasonable factual basis does not exist for the finding; and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. Stobart v. State, Through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Consequently, when there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Stobart, 617 So. 2d at 883. Accordingly, as a reviewing court, if there

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[2]In Lewis, the Supreme Court reversed the court of appeal's finding that the district court was "plainly wrong" in determining that the DOTD neither knew nor should have known of the hazardous condition of a dead tree, which collapsed across a state highway. Lewis, 654 So. 2d at 312. The Court reasoned therein, that the plaintiffs failed to meet their burden of proving that the DOTD was actually or constructively aware of a hazardous condition, and failed to take corrective action within a reasonable time where the DOTD highway superintendent diligently inspected the roadway but did not detect the dead tree due to foliage created by two other trees in close proximity. Lewis, 654 So. 2d at 315.

is a reasonable basis in the record to support the jury's findings, such findings must be affirmed, absent a showing of manifest error.

As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. See Green v. K-Mart Corporation, 2003-2495 (La. 5/25/04), 874 So. 2d 838, 843. Considering the record herein and conflicts in the testimony, we are unable to say that the jury erred in its apparent decision to credit the testimony of Mr. Claxton and Trooper Jackson over that of the plaintiffs. Given this testimony, we find that a reasonable basis exists to support the jury's finding that plaintiffs failed to prove that the DOTD was actually or constructively aware of a hazardous condition and failed to take corrective action within a reasonable time. Thus, we find no manifest error in the jury's ultimate finding that the DOTD was not at fault herein.

Liability of the Landowners

A landowner owes a plaintiff a duty to discover any unreasonably dangerous condition and to either correct the condition or warn of its existence. Pitre v. Louisiana Tech University, 95-1466, 95-1487 (La. 5/10/96), 673 So. 2d 585, 590, cert. denied, 519 U.S. 1007, 117 S. Ct. 509, 136 L. Ed. 2d 399 (1996). It is the fact finder's obligation to decide which risks are unreasonable, based upon the facts and circumstances of each case. Harris v. Pizza Hut of Louisiana, Inc., 455 So. 2d 1364, 1371 (La. 1984).

> [T]he proper test to be applied in determining a landowner's liability under articles 2315 and 2316 of the Civil Code is "'whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others,'" .... The duty of a landowner is not to insure against the possibility of an accident on his premises, but rather to act reasonably in view of the probability of injury to others. Thus[,] the landowner is not liable for an injury resulting from a condition which should have been observed by an

individual in the exercise of reasonable care or which was as obvious to a visitor as to the landowner.

Pitre, 673 So. 2d at 590 (citing Shelton v. Aetna Casualty & Surety Company, 334 So.2d 406, 410 (La.1976).).[3]

In support of their claim that the jury erred, plaintiffs cite the testimony of Todd Finley Schupe, an associate professor of forestry at Louisiana State University, who was called by plaintiffs to testify. Schupe was accepted by the trial court as an expert in the field of forestry and wood science. Prior to rendering his opinion, Schupe reviewed photographs of the tree and stump taken one to two days after the accident and visited the site on June 10, 2004, four years after the accident. Schupe testified that the tree was decayed from the ground line to at least twelve feet up the tree. He stated that at the ground line, where a tree generally has the highest area of decay exposure, the tree at issue evidenced "severe decay," which compromised the structural integrity of the tree. Referring to a photograph he took in June of 2004, he opined that if the tree were standing up, the decayed side would have faced the roadway and would have been visible to anyone. Schupe further opined that if the decayed portion of the tree had been hidden by underbrush, the underbrush would have had to exceed a height of twelve feet. After suggesting that landowners who have large pine trees near the roadway should hire a consulting forester to inspect such trees to insure the safety of motorists, Schupe conceded that it

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[3]Plaintiffs suggest in brief that liability should be imposed against the defendants pursuant to LSA-C.C. arts. 2317 and 2317.1. We note that plaintiffs cite the former version of LSA-C.C. art. 2317, prior to its revision in 1996. However, in 1996, the legislature enacted LSA-C.C. art. 2317.1, which effectively abolished the concept of strict liability by requiring that the owner or custodian of a defective thing must have actual or constructive knowledge of its dangerous propensity and have failed to take reasonable preventive measures in order for the owner or custodian to be liable for any damages occasioned by the defective thing. See Dennis, 781 So. 2d at 21, n.8.

Nonetheless, based on our review of the record, we find that the jury correctly determined that plaintiffs failed to prove that the landowners had actual or constructive notice of the rotten tree, thus negating any imposition of liability pursuant to LSA-C.C. art. 2317.1.

was not a common practice for non-commercial landowners, such as people who are not in business of commercially developing timber, to inspect every tree off of the roadway. Further, he acknowledged that he was not aware of any landowners not in the timber business who had, in fact, hired forestry consultants to conduct inspections. Nonetheless, Schupe concluded that the tree had "a lean" prior to its fall and opined that the landowner should have inspected the tree.

Citing the testimony of Trooper Jackson, the defendants contend that the jury correctly found no liability on the part of the landowners, as no reasonable person could have detected that the tree was defective. As previously noted, Trooper Jackson testified that he could not determine what caused the tree to fall as it appeared to be "good and solid," in "good shape" from the road, and "alive with needles." Trooper Jackson testified that Highway 1045 was elevated and that the tree was located off the south side of Highway 1045 in the wooded area "within the wood line" on the other side of the ditch. He stated that the area was "very bushy" along the ditch and that the entire base of the tree was not visible from the road because of the dense undergrowth. Trooper Jackson further stated that in order to see that the tree was rotten a person would be required to go around to the backside of the tree. Trooper Jackson further noted that, even while traveling this stretch of roadway in the winter months when there was less undergrowth, the rot was not visible on the side of the tree facing the roadway.

Thus, the jury was again faced with conflicting testimony, i.e., the testimony of Trooper Jackson (that the rot or decay was not visible or observable by an individual in the exercise of reasonable care), and the testimony of Professor Schupe (that the rot or decay on the tree was facing the roadside and extended at least twelve feet up the tree where it would not

have been obscured by any undergrowth or brush). Considering its verdict, the jury obviously accepted Trooper Jackson's testimony over that of Professor Schupe. Inasmuch as the testimony and evidence of record sets forth a reasonable basis for the jury's decision, we do not find that the jury's verdict was manifestly erroneous or clearly wrong. Stobart, 617 So. 2d at 883.

We note that the trooper's testimony supports the conclusion, which the jury may have reached, that any defective condition of the tree was obscured, at least partially, by natural underbrush and vegetation, such that the landowners, even through the exercise of reasonable care, would not necessarily have been able to see the defect or have been put on notice of the defective nature of the tree. See Greer v. State, Department of Transportation and Development, 2006-417 (La. App. 3rd Cir. 10/4/06), 941 So. 2d 141, 148, writ denied, 2006-2650 (La. 1/8/07), 948 So. 2d 128.

Although plaintiffs argue that the landowners should have retained a forestry consultant to conduct inspections of the trees near the roadway on the property, we are aware of no authority that imposes such a burden on a landowner. Instead, a duty to exercise reasonable care, i.e., the established duty of a landowner is to protect against an injury resulting from a condition which would have been observed by an individual in the exercise of reasonable care, not to protect against an injury resulting from a condition only observable by an expert. See Pitre, 673 So. 2d at 590. Accordingly, we reject plaintiffs' suggestion that we should impose such a heightened burden on the landowners.

On review, we find the record amply supports the jury's factual findings. Because we find the conclusions of the jury in this case to be reasonably supported by the record, we reject plaintiffs' assertion that the jury verdict was manifestly erroneous or clearly wrong and we decline to disturb

the jury's factual findings on liability. Although the result is harsh under the tragic facts of this case, we are bound by the standards which govern our review to give great deference to the jury's findings.

Thus, the assignment of error is meritless.

CONCLUSION

For the above and foregoing reasons, the February 27, 2006 judgment of the trial court entered in conformity with the jury's verdict is affirmed. Costs of this appeal are assessed against the plaintiffs/appellants.

AFFIRMED.