

NOT DESIGNATED FOR PUBLICATION

**FRANK J. ROSATO AND
SELEMA ROSATO**

*

NO. 2000-CA-2791

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**LOUISIANA DEPARTMENT
OF TRANSPORTATION AND
DEVELOPMENT, BOH BROS.
CONSTRUCTION CO., INC.,
WORK ZONE, INC., AND
JACK B. HARPER,
CONTRACTOR, INC.**

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

CONSOLIDATED WITH:

KATHLEEN LOUISE BLAND

NO. 2000-CA-2792

VERSUS

**ALLSTATE INSURANCE
COMPANY, AVIS T.
HENDERSON, EDWARD
GAINS, JR., AND XYZ
INSURANCE COMPANY, ABC
CONSTRUCTION COMPANY,
DEF CONSTRUCTION
COMPANY AND THE STATE
OF LOUISIANA**

CONSOLIDATED WITH:

CHARLOTTE MCGUIRE

VERSUS

**AVIS T. HENDERSON,
EDWARD GAINES, JR.,
ALLSTATE INSURANCE
COMPANY, CITY OF NEW
ORLEANS, PARISH OF
ORLEANS, AND STATE OF
LOUISIANA THROUGH THE
DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT**

CONSOLIDATED WITH:

NO. 2000-CA-2793

CONSOLIDATED WITH:

HENRY NUILA

VERSUS

**STATE OF LOUISIANA AND
DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT**

CONSOLIDATED WITH:

NO. 2000-CA-2794

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 93-2459 C/W 93-8509 C/W 93-20594 C/W 93-20602
DIVISION "K-14"**

Honorable Richard J. Ganucheau, Judge

*** * * * ***

Judge Miriam G. Waltzer

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(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge Miriam G. Waltzer)

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AFFIRMED

Plaintiffs, Frank and Selema Rosato and Kathleen Bland, appeal a judgment dismissing all claims against the State of Louisiana, Department of Transportation and Development. After a multi-vehicle accident, in which the Rosato's daughter died, the Rosatos and Bland filed suit against various defendants, including DOTD. They alleged that DOTD's negligence in certain construction activities combined with the fault of a drunk and

reckless driver to cause the accident. However, the trial court found, and we find ample evidence in the record to support his conclusion, that DOTD's actions did not cause the accident. For these reasons, we affirm the judgment of the trial court.

STATEMENT OF FACTS AND HISTORY OF THE CASE

Avis Henderson drove her car onto a section of the Pontchartrain Expressway then under construction, crossed the 9 inch median separating the opposing travel lanes, and collided with several vehicles. At the time of the accident, Henderson was severely intoxicated. Her blood alcohol concentration measured .127 percent by weight based on grams of alcohol per one hundred cubic centimeters of blood. Moreover, Henderson was driving in a reckless manner. Her car was traveling at a speed in excess of the posted speed limit. Numerous people, including the plaintiffs, suffered serious injuries from the collision.

The Rosatos and Bland sued DOTD and various contractors for the damages resulting from Henderson's collisions, alleging that the construction created an unreasonable risk of harm, without providing adequate safety measures, in particular failing to install the new, higher median as the first step in the project and/or failing to install temporary barriers during the construction phase. DOTD and the contractors moved

for summary judgment. The trial court granted summary judgment and dismissed all claims against DOTD and the contractors. On appeal this court reversed the judgment dismissing the claims against DOTD, finding that “there are genuine issues of material fact concerning whether DOTD created and maintained a hazardous condition which was a contributing cause of plaintiff’s damages.”

The parties agreed to submit the matter for resolution on briefs and documentary evidence. The trial court concluded that the sole cause of the accident was Henderson’s conduct in driving both in an intoxicated state and at an excessive rate of speed. Moreover, the trial court concluded that the existing median on the Pontchartrain Expressway was not unreasonably dangerous and was not a cause of the accident. Specifically, the trial court found that the location at which Henderson’s car crossed the median was identified as a point parallel with the first orange barrel marking the construction site, and thus, Henderson lost control of her car before entering the construction zone. For these reasons, the trial court dismissed all claims against DOTD. Bland and the Rosatos appeal.

DISCUSSION

Plaintiffs appeal arguing that the trial court erred in concluding that Henderson’s negligence constituted the sole cause of the accident. The trial

court found that Henderson lost control of her car before the construction site and therefore concluded that the construction did not contribute to the accident and resulting damages.

Generally, an appellate court reviews the factual findings of a trial court using the manifest error standard of review. This standard applies to both findings by judges and juries and has been stated as follows:

When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error. Stated another way, the reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts.

Powell v. Regional Transit Authority, 96-0715 p. 3 (La. 6/18/97), 695 So.2d 1326, 1328-29, quoting *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La. 1973).

The trial court found that Henderson lost control of her car before the construction site, and from this finding the trial court concluded that Henderson's negligence caused plaintiffs' damages. The plaintiffs do not contest the factual finding, that Henderson lost control of her vehicle before entering the area under construction, but they argue that the trial court erred in concluding that Henderson's negligence constituted the sole cause of the

accident. Because the record supports the finding that Henderson lost control before the site of construction, we affirm the conclusion of the trial court that Henderson's negligence constituted the sole cause of the accident.

Plaintiffs argue that DOTD had a duty to install a different median to protect the public from changes in the road's configuration due to the construction. However, we are not confronted with the issue of DOTD's alleged duty, since the trial court found, and we find no manifest error in his finding, that Henderson lost control of her vehicle before the area under construction. To recover damages, plaintiffs must prove (1) DOTD had custody and control of the thing causing plaintiffs' injuries, (2) a defect in the thing from a condition creating an unreasonable risk of harm, (3) DOTD's actual or constructive notice of the defect and its failure to take corrective measures within a reasonable time, and (4) the defect caused plaintiffs' injuries. *Brown v. Louisiana Indemnity Co.*, 97-1344 p. 3 (La. 3/4/98), 707 So.2d 1240, 1242. Plaintiffs must prove each element to state a cause of action against DOTD. Without proof of cause in fact, we need not concern ourselves with DOTD's duty. Because Henderson lost control of her vehicle before entering the section of the Expressway under construction, we find no error in the trial court's conclusion that Henderson's negligence constituted the sole cause of the accident.

CONCLUSION

For the above reasons, we affirm the judgment of the trial court dismissing all claims against DOTD.

AFFIRMED