W. THOMAS KAMMERER, II	*	**NO. 2000-CA-2572**
VERSUS	*	**COURT OF APPEAL**
PROCYCLE GROUP, INC., D/B/A PEUGEOT, CITY OF NEW ORLEANS, AND SEWERAGE AND WATER BOARD OF NEW ORLEANS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 91-6772, DIVISION "J"
HONORABLE NADINE M. RAMSEY, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

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The City of New Orleans appeals the Judgment of the trial court in favor of the plaintiff, W. Thomas Kammerer, II.

STATEMENT OF THE FACTS

On April 12, 1990 the plaintiff was riding his bicycle on Orleans Avenue. As he was riding along the curb it became necessary for him to pass around a parked car. A large pothole protruded from beneath the driver's side of the parked car, and became visible as he attempted to pass the car. Plaintiff saw the pothole but was unable to stop and unable to swerve because of traffic. When his bicycle hit the pothole his front tire became wedged in the hole and the bicycle literally flipped over. Plaintiff was thrown, face-first, into a fire hydrant. Plaintiff sustained disfiguring and permanent facial injuries as a result of the accident.

Several witnesses saw the accident and confirmed that the pothole had caused Mr. Kammerer to be thrown from his bicycle. One witness, a former RTA bus driver who had driven the Orleans Avenue route, testified that the pothole in question had existed for at least five years prior to the accident,

and that she had reported it on numerous occasions to the RTA.

The trial court found that the City had notice of the pothole and found for the plaintiff. The trial court awarded general damages of $300,000.00, $6,433.95 past medical expenses, and $7,204.00 for future medicals, or a total of $323,907.85 (with the judgment recognizing the privilege of Louisiana Health Care Authority on behalf of Charity Hospital and Medical Center of Louisiana at New Orleans (see La. R.S. 40:2002.5) in the amount of $6,433.95 as provider of the services giving rise to the past medical expenses).

ASSIGNMENT OF ERRORS

The City assigns several errors. Because the assignments overlap, we summarize them as follows: First, it alleges the trial court erred in not recognizing that plaintiff, by riding his bicycle in a parking lane, was engaging in an activity specifically prohibited by the New Orleans Municipal Code and that such conduct constituted negligence that proximately caused his accident. Second, it claims the trial court erred in its treatment of mixed law and fact determinations. Third, the City asserts the

trial court erred in failing to recognize that plaintiff did not plead the unconstitutionality of La. R.S. 9:2800's notice requirement thereby leaving the statute applicable, and the trial court's failure to apply it to exonerate the City was in error. The fourth assignment is that the trial court erred in failing to recognize that the alleged parking lane irregularity was so insignificant that an RTA driver, who encountered it on a frequent basis over several years, did not see fit to report it to the City of New Orleans. Finally, the City claims the trial court erred in failing to recognize that a bicycle rider has a duty to look down at the roadway and become aware of the nature of the surface ahead.

STANDARD OF REVIEW

The applicable standard of review in this case for factual findings is that of manifest error, or the clearly wrong standard. *Newman v. Fernwood Transportation*, 2000-1036 (La. App. 4 Cir. 4/25/01), 785 So.2d 1026; *Mistich v. Volkswagen of Germany, Inc.*, 95-0939 (La. 1/29/96), 666 So.2d 1073. However, if a trial court's findings of fact are not reasonable in light of the record reviewed in its entirety, then a court of appeal may reverse.

Stobart v. State, Through Dept. of Transp. & Development, 617 So.2d 880 (La. 1993).

DISCUSSION

The City argues that the New Orleans Municipal Code defines a bicycle as a vehicle; it cites N.O.M.C. Section 154-379, for the proposition that driving in the parking lane is not permitted. While it is true that plaintiff was driving in what could be considered the parking lane, this was not the case at the time of the accident. The pothole, which was the proximate cause of the accident, was located in the far right hand lane of travel. In this case, La. R.S. 32:197(A) supersedes the New Orleans Municipal Code. It states:

> Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable … .

La. R.S. 32:197(A)

Here, plaintiff was as near to the right side of the roadway as practicable, and it was in that area that he encountered the pothole that caused his fall. Thus, we find no comparative fault on the plaintiff based upon a New Orleans ordinance that is superseded by State Law. This

assignment of error has no merit.

The City argues that the trial court erred in finding an actionable parking lane defect without first making factual determinations as to the size and nature of the alleged defect, thereby making it impossible for a reviewing court to determine whether the defect constituted an unreasonable risk of harm to others. It cites *Green v. City of Thibodaux*, 94-1000 (La. App. 1 Cir. 10/6/95), 671 So.2d 399, as the standard of review for determinations of mixed questions of law and fact.

However, in *Reed v. Wal-Mart Stores, Inc.*, 97-1174 (La. 3/4/98), 708 So.2d 362, 364, the Supreme Court stated: "We now reject *Green*, 671 So.2d 399, and find that the manifest error standard of review is the proper standard." The Supreme Court continued, reasoning:

> "The unreasonable risk of harm criterion entails a myriad of considerations and cannot be applied mechanically ... ."
>
> Because a determination that a defect presents an unreasonable risk of harm predominately encompasses an abundance of factual findings, which differ greatly from case to case, followed by an application of those facts to a less-than-scientific standard, a reviewing court is in no better position to make the determination than the jury or trial court. Consequently, the findings of the jury or trial court should be afforded deference and we therefore hold that the

> ultimate determination of unreasonable risk of harm is subject to review under the manifest error standard.

Reed, 708 So.2d, at 364-365 (citations omitted).

Hence, contrary to the City's argument, the trial court's determination that the pothole posed an unreasonable risk of harm is only reviewable under the manifest error standard.

We find sufficient testimony and photographic evidence in the record as to the location and characteristics of the pothole to support the trial court's conclusion that the hole posed an unreasonable risk of harm.

Ms. Toliver, a former RTA bus driver who worked at American Can Company (located directly across from the pothole) witnessed the plaintiff being flung into the air when his bicycle hit the pothole: "And when I seen it, the bike was up in the air. And he flipped and hit his head on that fire hydrant." Then, when asked what caused plaintiff's fall: "It is a big old pothole sitting right there in the middle." Ms. Toliver also testified that the pothole had been present for years and that she considered it enough of a danger to report it to the RTA. She recalled hitting the pothole while driving her route.

Peter Kammerer, the plaintiff's brother, testified that several days after the accident, he went with a friend and took pictures of the pothole.

These pictures were introduced into evidence at trial, including a picture of the friend standing in the pothole to provide scale. Peter Kammerer also testified that he had used his hand as a measure to gauge the depth of the pothole, which he estimated to be "approximately at least four inches deep in the hole."

The plaintiff also testified regarding the pothole: "And I came up behind a parked vehicle and went around to the let [sic] of it to pass it by, and either along side or very close to the car, I was confronted by a pothole that was very large."

Because of such testimony and evidence we reviewed, we are not at liberty to substitute our views for the trial court's reasonable finding. We find no manifest error, and thus affirm the trial court's findings on the issue of whether the pothole posed an unreasonable risk of harm.

The City argues the trial court erred in failing to recognize that plaintiff did not plead the unconstitutionality of La. R.S. 9:2800's notice requirement thereby, leaving the statute applicable, and the trial court's failure to apply it to exonerate the City was error. First, the aforementioned statute was declared unconstitutional in *Jacobs v. City of Bunkie*, 98-2510 (La. 5/18/99), 737 So.2d 14. Second, the trial court did not err in not applying the unconstitutional notice requirement. *See Lemire v. New Orleans*

Public Service Inc., 458 So.2d 1308. Once a statute has been declared unconstitutional, there is no need for a party to plead anything with regard to the statute; the statute is simply ineffective. This proposition was specifically part of the holding of *Jacobs*: "We find that La. R.S. 9:2800 was unconstitutional until acts 1995, No. 1328 and 828 became effective on November 23, 1995. Further, the law cannot be applied to pending cases asserting causes of action which arose prior to its effective date as the law is substantive and cannot be applied retroactively." *Id.* at 23. The present case was pending at the time: trial had not begun and a decision on the merits was not issued until December 15, 1999. Therefore, the requirements of La. R.S. 9:2800 do not apply.

Moreover, in this case, if notice was required, there is ample testimony in the record that it was provided. As the trial court stated in its Reasons for Judgment:

> The City's primary defense is that it did not have actual or constructive notice of the pothole in question. However, the testimony presented at trial indicates that the City had constructive notice of this pothole. Alene Toliver, a former RTA bus driver, whose route included Orleans Avenue, testified that the pothole in question existed for many years prior to the accident. Ms. Toliver claimed that the pothole may have been present for as many as five years prior to the accident. Therefore, this Court finds that the City had constructive notice of this pothole, and the City was therefore negligent in causing the accident and

the plaintiff's resulting injuries.

The City argues that plaintiff should be assessed comparative negligence based upon a duty to carefully scrutinize the ground directly in front of his tires and because the City alleges there was no traffic.

Claiborne Talbot testified that he was in his vehicle waiting to make a turn when he witnessed the plaintiff hit the pothole and be thrown from his bicycle: "I waited for traffic to dissipate. And in the part of the traffic was a man on a bicycle." Then Mr. Talbot stated:

> He turned right to get out of the lane of traffic. So in other words, as the cars were going by, there was a chance he may have gotten hit, I guess, because from riding a bike….So when he did that, he actually went into, I guess, a pothole. But let's say he hit a part of the street in which the front wheel stopped. And then the back wheel came over his head, and he and the back wheel did a flip.

Furthermore, the plaintiff testified that under the circumstances he thought it more prudent to watch the road "out in front" of him rather than directly in front of him.

The trial court weighed the testimony of the witnesses and found, with support in the record, that the plaintiff was acting in a reasonable and prudent manner in looking at the road ahead and traffic. The trial court's findings of fact are not a clear error, and we cannot disturb such a finding. Therefore, there is no merit in this assignment of error.

For the aforementioned reasons, we find the trial court did not commit any manifest error and thereby affirm the judgment and the damage award.

AFFIRMED