

**JOHN LAM, A MINOR,
THROUGH THOM LAM IN
HIS CAPACITY AS THE
ADMINISTRATOR OF THE
ESTATE OF HIS MINOR
CHILD, JOHN LAM**

*** NO. 2003-CA-0180
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

VERSUS

**STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, THOMAS
PERINO, MILDRED PERINO
INDIVIDUALLY AND AS THE
ADMINISTRATOR OF THE
ESTATE OF THOMAS
PERINO, SALVADOR PERINO
INDIVIDUALLY AND AS THE
ADMINISTRATOR OF THE
ESTATE OF THOMAS
PERINO, ET AL.**

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**CANNIZZARO, J. DISSENTS IN PART AND CONCURS IN PART
WITH REASONS**

Liability of Lakeside Toyota

I respectfully dissent from the majority’s finding of fault on the part of Lakeside Imports, Inc. d/b/a Lakeside Toyota (“Lakeside”). The majority held that Lakeside’s failure to advise Mr. Nguyen to make certain repairs on the 1989 Toyota Supra was a cause of the accident. I do not find there is any way that liability for an accident that occurred *a year* after Lakeside serviced the car can be determined to have been the fault of Lakeside. At

issue is whether engine failure that occurred in the car a year later was a result of Lakeside's failure to advise Mr. Nguyen that oil found in the area of the sparkplugs in the car's engine needed to be cleaned.

Not only did a year elapse during which any number of intervening factors could have occurred, but the car was also driven an additional 6,000 miles before the accident occurred. The relationship between any failure to clean the oil from the area of the sparkplugs is so attenuated that causation simply cannot be established. If the car had been properly maintained, the oil would have been changed at least once during the year after Lakeside noted the problem with the engine. If the oil had been changed, then the problem should have been noted and corrected at that time. If the oil had not been changed, the failure to maintain the car superceded any act or omission on the part of Lakeside.

Another reason that I would not find liability on the part of Lakeside is that I do not think that this Court should second guess the jury's determination of credibility. As the majority states "the jury undoubtedly questioned Nguyen's credibility, affording it little if any credence." The majority states:

To begin with, Nguyen gave inconsistent answers to questions regarding Lakeside's communication with him regarding additional repairs. Nguyen claimed he always gave the okay on whatever Lakeside recommended but could not

explain why there were notes on the work order advising the technician that the client had declined a number of additional other recommended repairs.

Nguyen vehemently denied having problems with his vehicle prior to the night of the accident. He also denied speaking with Trooper Derrick Stewart, the investigating officer, on the night of the accident, and claimed he was not cited for the accident. However, Trooper Stewart testified that he spoke with Nguyen at the hospital. During their conversation Nguyen stated he lost power in his vehicle causing a decrease in speed. He further informed Trooper Stewart that he experienced similar problems a week earlier, indicating he had knowledge of the problem. Concluding that a contributing factor in the accident was engine malfunction, the trooper issued Nguyen a citation for failing to maintain his vehicle.

Obviously, there was ample reason for the jury to disregard Mr. Nguyen's testimony. They saw Mr. Nguyen testify, observed his demeanor, and compared his demeanor and testimony with the demeanor and testimony of Lakeside's witnesses. Then they determined that his testimony was not to be believed. There was no manifest error in the jury's finding that Mr. Nguyen, not Lakeside, was at fault for any unmade repairs. I find that the jury's factfinding regarding the allocation of no fault to Lakeside should be upheld. Either Lakeside's testimony regarding Mr. Nguyen's refusal to authorize the clean-up of the oil is accurate, or Mr. Nguyen's testimony on this issue is accurate. If Mr. Nguyen were not a credible witness, as both the

jury and the majority found, it is completely incongruous to find Lakeside at fault. Either Lakeside notified Mr. Nguyen of the problem and he did not authorize the repairs, as Lakeside contended, or Lakeside did not notify him, as Mr. Nguyen testified. If Mr. Nguyen is not credible, he should not be believed on the question of whether Lakeside informed him of the need for repairs.

Daubert Hearing

I find that it was error for the majority to find that a *Daubert* hearing was required for the simple demonstration of how spark plugs perform. In *Cheairs v. State Through the Department of Transportation and Development*, 2003-0680, p. 2 (La. 12/3/03), 861 So.2d 536, 538, the Louisiana Supreme Court found that “the only issue directly addressed by *Daubert* is the reliability of an expert’s methodology.” The demonstration presented at trial was a showing that in the presence of oil and an inoperative sparkplug, intact sparkplugs still fired. There was no methodology for which reliability needed to be determined. Mr. Cubit was not testifying about the results of an experiment using a particular methodology. He was presenting a simple demonstration. The plaintiffs had the opportunity to cross examine Mr. Cubit regarding the validity of the demonstration. The decision to let Mr. Cubit testify as an expert was within the discretion of the trial court

judge, and I do not find that she abused her discretion.

Reallocation of Liability Attributed to Mr. Lam

I agree with the majority's reversal of the finding of fault on the part of Mr. Lam. Rather than reallocate to Lakeside the percentage of liability originally attributed to Mr. Lam, I would attribute that percentage to Thomas Perino, who I think was primarily responsible for the tragic accident that occurred in this case. Had Mr. Perino not been speeding and had he been paying proper attention to his driving, this accident might well have been avoided. Mr. Perino, not Lakeside, should bear the responsibility improperly imposed on Lakeside. As sympathetic as I am to the plaintiffs' situation, I do not think that liability for an accident should be allocated based on the depth of a party's pockets. It should be allocated based on the facts of the case that are proven at trial.