

**NOT DESIGNATED FOR PUBLICATION**

FELTON MCBRIDE AND JANICE  
MCBRIDE, ET AL

NO. 03-CA-1304

VERSUS

FIFTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY AND SCOTT T.  
FALGOUT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT  
PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA  
NO. 32818, DIVISION "C"  
HONORABLE J. STERLING SNOWDY, JUDGE PRESIDING

COURT OF APPEAL  
FIFTH CIRCUIT

APRIL 13, 2004

FILED APR 13 2004

**THOMAS F. DALEY**  
JUDGE

*John J. Fitzpatrick, Jr.*  
CLERK

Panel composed of Judges James L. Cannella,  
Thomas F. Daley, and Marion F. Edwards

**EDWARDS, J., DISSENTS AND ASSIGNS REASONS:**

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**AFFIRMED AS AMENDED**

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OKC

This is the second appeal by the plaintiffs in this tort case that arises out of an automobile accident. For the reasons that follow, we affirm as amended.

**FACTS:**

This appeal stems from an accident that occurred when a car driven by Lashonda Williams (Williams) collided with a car driven by Scott Falgoust. The named plaintiffs are guest passengers and parents of the passengers in the Williams car. These plaintiffs are Felton and Janice McBride, individually for loss of consortium and on behalf of their then minor children, Jason and Paul McBride; Charlotte Mazique Davis, individually for loss of consortium and on behalf of the minor Eric Mazique; Presley and Ruth Taylor, on behalf of the then minor Ponce Taylor; and George and Leona Grimsley, on behalf of the then minor Justin Grimsley. After the initial suit was filed, plaintiffs amended their petition to include the State of Louisiana through the Department of Transportation and Development (DOTD). Plaintiffs proceeded to trial against DOTD and following a

judge trial, the trial court found that DOTD was not at fault in causing this accident.

The matter was appealed to this Court where the trial judge's finding was reversed. McBride v. State Farm Mutual Automobile Insurance Company, 01-954 (La. App. 5 Cir. 3/26/02), 815 So.2d 249, writ denied, 2002-1484 (La. 9/24/02), 825 So.2d 1182 and writ denied, 2002-1639 (La. 9/24/02), 825 So.2d 1183. This Court found DOTD to be 25% at fault in causing this accident and Williams to be 75% at fault. Damages were awarded subject to a reduction representing the percentages of fault attributed to DOTD and Williams. Plaintiffs filed an Application for Rehearing, claiming that pursuant to C.C. art. 2324(B), as it existed at the time of this accident, the finding that DOTD was 25% at fault mandated that DOTD be responsible for 50% of the damages. This court rejected that argument and denied plaintiffs' Application for Rehearing.

After writs to the Supreme Court were denied, plaintiffs filed a Rule to Tax Costs and To Give Effect to Judgment. In this pleading, plaintiffs asserted that by operation of law in effect at the time of the accident, DOTD is responsible for 50% of the damages assessed against them. The trial judge rejected this argument and ordered DOTD to pay plaintiffs' damage awards as ordered by this Court. The trial court also awarded costs based on each "defendant's percentage of liability". Plaintiffs then filed the instant appeal.

#### **LAW AND DISCUSSION:**

Plaintiffs have appealed claiming the trial judge erred in not setting plaintiffs' judgment for 50% of their assessed damages. Plaintiffs contend that the prior version of C.C. art. 2324(B) was self-operative and in enforcing this Court's judgment, the trial court was bound to award plaintiffs 50% of the damages assessed. We disagree.

In their initial appeal to this Court, plaintiffs requested that we review the record and apportion fault as we found appropriate. A unanimous five-judge panel of the Court agreed to 25% liability on the part of DOTD, holding therein that “[a]ll damages awarded above are subject to a reduction representing the percentages of fault attributed to the DOTD and Williams [25% and 75% respectively].” On rehearing to this Court, plaintiffs raised for the first time the issue concerning the effect of La. C.C. art. 2324(B), arguing that it was applicable and that the portion of DOTD’s fault should be raised to 50%. This Court considered that argument and a majority rejected it. This same argument was re-urged in plaintiffs’ writ applications to the Supreme Court. The Supreme Court, finding no error in this court’s ruling, declined to address this argument and denied plaintiffs’ writ applications.

Once again on this appeal, plaintiffs urge us to order DOTD to pay 50% of damages assessed. This issue has already been addressed by this Court. The Supreme Court denied plaintiffs’ writ applications and upon the expiration of the delays for the application of rehearing by the Supreme Court, the judgment of this Court became final. C.C.P. art. 2166E. Thus, the trial court was without authority to change the ruling of this Court and had no alternative but to impose judgment on DOTD for 25% of plaintiffs’ damages.

In the decision rendered by this Court, we ordered DOTD to “bear half of all plaintiff’s court costs and costs of appeal.” McBride v. State Farm Mut. Auto Ins. Co., supra at 259. The trial court ordered that court costs be assessed based on “each defendant’s percentage of liability”. The trial court erred in awarding costs contrary to this Court’s disposition. Accordingly, the judgment of the trial court is amended to order DOTD to pay 50% of plaintiffs’ court costs and costs of appeal.

**CONCLUSION:**

For the foregoing reasons, the judgment of the trial court is affirmed as amended. Each party is to bear its own costs of this appeal.

**AFFIRMED AS AMENDED**

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 **EDWARDS, J., DISSENTS AND ASSIGNS REASONS:**

I respectfully dissent from the majority's opinion that the award of damages by the trial court should be affirmed. Pursuant to the holding of the Louisiana Supreme Court in Aucoin v. State Through Dept. of Transp. and Development, 712 So.2d 62, 1997-1938 La. 4/24/98, (La. 1998), it is my opinion that that the application of former La. C.C. art. 2324(B) is automatically triggered by a finding of liability below 50%, without specifically having to be plead. For this reason, I would reverse the trial court's judgment and hold the DOTD liable for 50% of each plaintiff's damages and for 50% of plaintiffs' court costs.

EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
SUSAN M. CHEHARDY  
CLARENCE E. McMANUS  
WALTER J. ROTHSCHILD

JUDGES

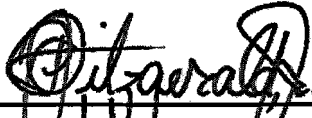


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**CERTIFICATE**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **APRIL 13, 2004** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
\_\_\_\_\_  
PETER J. FITZGERALD, JR.  
CLERK OF COURT

**03-CA-1304**

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