NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1267

LOLA BROOKS, BRIDGETTE GOSNAY, AND JESSE BROOKS, JR.

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

J.E.K. by jmm

DATE OF JUDGMENT: JUL - 6 2010

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
NUMBER 63,022, DIVISION C, PARISH OF IBERVILLE,
STATE OF LOUISIANA

HONORABLE ALVIN BATISTE, JR., JUDGE

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, PARRO, KUHN, GAIDRY, AND McDONALD, JJ.

Disposition: JUDGMENT RENDERED; TRIAL COURT JUDGMENT AMENDED AND, AS AMENDED, AFFIRMED.

Whipple, J. Concurs and assigns reasons. (by jmm)
Gaidry, J. Concurs and assigns reasons. (by jmm)
Parro, J. dissents and will assign reasons. (by jmm)
McDonald, J. dissents

KUHN, J.

Defendant, the State of Louisiana through the Department of Transportation and Development ("DOTD"), appeals an adverse judgment in a wrongful death action filed by the decedent's surviving widow, Lola Brooks, and his adult children, Bridgette Gosnay and Jesse Brooks, Jr. The decedent, Jesse M. Brooks, Sr. ("Mr. Brooks"), was killed when the backhoe he was driving overturned on the shoulder of a state highway. DOTD argues on appeal that: 1) the duty it owes to the motoring public to maintain the state highways in a reasonably safe condition does not encompass the risk that a backhoe would turn over while traveling 10 to 15 miles per hour across a 2- to 4- inch depression on the shoulder of the highway; 2) plaintiffs failed to establish that the depression in the shoulder was the cause of the accident; 3) the jury erred in failing to assign fault to Mr. Brooks and erred in assigning fault to DOTD; and 4) the trial court erred in refusing to admit testimony establishing that Mr. Brooks was not wearing the seat belt while operating the backhoe, and that if he had done so, such action would have prevented his death or serious injury. Our review of the record reveals error in the jury instructions that interdicted some of the jury's findings. After conducting a *de novo* review of these affected issues, we conclude that Mr. Brooks was negligent, we allocate twenty percent fault to him, and we amend the judgment accordingly. As amended, we affirm the judgment in favor of plaintiffs.

I. FACTUAL AND PROCEDURAL BACKGROUND

At around noon on June 20, 2005, Mr. Brooks, an operating engineer who worked for Industrial Plant and Maintenance, asked a co-worker, Steve Harris, to follow him in a truck while he drove a backhoe along Louisiana Highway 30 in St.

Gabriel, Louisiana, to deliver it to another company, Syngenta. Mr. Brooks drove the backhoe on the shoulder of the highway while Harris followed behind him with his truck lights turned on. Harris explained that they travelled on the shoulder of the road to avoid obstructing other traffic. A short distance later, Harris noticed that Mr. Brooks failed to turn on the road that led to Syngenta, but it appeared to Harris that Mr. Brooks began to make a turn on the shoulder at the entrance of the driveway to Suttles Trucking Company ("Suttles"). Harris presumed that Mr. Brooks was making a u-turn to return in the opposite direction on the other side of the highway. However, Harris also reasoned that Mr. Brooks may not have intended to turn left at that point. He explained that Mr. Brooks may have mentioned Syngenta in error as he had previously done and may have had another destination in mind that would have required him to continue travelling in the same direction. Regardless of the intended destination, Harris stated that when the backhoe reached the shoulder at the entrance of the driveway to Suttles, "it went up on its left-hand side and laid over …." Harris stated he did not see Mr. Brooks steer the backhoe to the right, and he did not know whether Mr. Harris was actually going to turn left at that point, but he did see the backhoe "go to the right."

When the accident occurred, Harris was 25 to 50 feet behind the backhoe. Although he had been following Mr. Brooks for a short distance, Harris testified that he had not been paying attention to his speedometer, his estimates regarding Mr. Brooks' speed were only "a guess," and he was not sure how fast Mr. Brooks was travelling when the accident occurred. While Harris stated that a backhoe can travel 10 to 20 miles per hour, he estimated that Mr. Brooks was probably

traveling 18 to 20 miles per hour that day on the shoulder of the road. In his previous deposition testimony, he had estimated 10 to 15 miles per hour. Although he believed Mr. Brooks was going too fast when he reached Suttles' driveway, Harris also testified that Mr. Brooks had decreased his speed immediately before the backhoe made the turn. Harris also testified that there had been no problems on the shoulder of the road until Mr. Brooks reached that point. After the accident occurred, Harris found Mr. Brooks unconscious under the cab of the backhoe.

Sergeant Jamal Carter, a patrolman with the St. Gabriel Police Department who investigated the accident scene, testified that when he arrived, he found the backhoe turned over on Mr. Brooks in the gravel section of Suttles' driveway. He stated that he did not take photographs of the condition of the shoulder or driveway on the day of the accident. Initially, he stated he did not have reason to believe that anything inherent in the driveway caused the backhoe to turn over. Upon viewing a photograph of the depression in the shoulder, however, Sergeant Carter admitted that it was possible that he overlooked the problem in the shoulder because he was concerned with tending to Mr. Brooks. When questioned regarding his opinion of the cause of the accident, Sergeant Carter testified that Mr. Brooks "might [have been] going too fast and caused [the backhoe] to turn over." However, when questioned during cross-examination by plaintiffs' counsel, Sergeant Carter explained that he did not say that the road did not contribute to the accident.

During trial, several experts testified regarding the condition of the shoulder and gave their opinions regarding the cause of the accident. Plaintiffs offered the

testimony of Andrew Jefferson McPhate, an expert in the fields of mechanical engineering, accident reconstruction, and vehicle dynamics, and Duaine Evans, an expert in the field of traffic engineering. DOTD offered the testimony of Dr. John Mounce, an expert in the fields of accident reconstruction, highway design and maintenance, and highway operations and safety.

McPhate, who evaluated the accident site and took photographs in November 2005, before any remedial work was performed by DOTD, testified that Suttles' driveway, which was perpendicular to Highway 30, was at least 70 feet wide. He stated the 10-foot wide, paved, asphalt shoulder was crumbling and broken where the driveway met the highway. He estimated the depth of the irregularities and depressions in the shoulder surface as 2 to 4 four inches deep. He also described the area as "a region in which the elevation changed suddenly."

Regarding the backhoe that Mr. Brooks operated on the day of the accident, McPhate testified that it had a 2-wheel drive rather than a 4-wheel drive, and it was equipped with a front-end loader. He stated that when the outriggers were pulled up on the backhoe, as they would have been when Mr. Brooks was operating it on the shoulder of the highway, the backhoe had a "fairly high center of gravity" with a "relatively large inertia for rocking front to back." He explained it had no springs and no shock absorbers.

When asked whether backhoes had an equilibrium problem, McPhate answered that when executing a turn, if the backhoe encountered significant friction, "it would turn over relatively easily." He described one area of the depression in the shoulder as having a 4-inch rise or lift. He stated that if Mr. Brooks had travelled through the depression at a speed of close to 15 miles per

hour, he would have expected the front wheels of the backhoe to bounce a few inches. He further opined that if the backhoe had been traveling in a straight line, it should have been able to traverse that particular surface without a lot of difficulty, although it would have bounced some.

Regarding the cause of the accident, McPhate initially opined that Mr. Brooks was traveling down the shoulder and attempted to execute a turn into the area of the depression. McPhate believed that in all likelihood, the left front wheel or both wheels engaged the irregularities of the depression and very likely increased the steering angle, and "[Mr. Brooks] entered that particular pavement ... turning too sharply for the speed he was travelling." McPhate also stated that Mr. Brooks was going too fast for the sharpness of his turn. McPhate later qualified his testimony by acknowledging that the sharpness of the turn could have been exaggerated because of the conditions Mr. Brooks encountered on the shoulder.

McPhate also testified that the rubble on the shoulder would have increased the steering and have taken "all the slack out" of the backhoe. When plaintiffs' counsel asked, "So it might not have all been [Mr. Brooks's] doing, some of it had to do with the rubble and the condition of the highway," McPhate answered, "Oh, yes. Right. And as the vehicle starts to tip, the loading on the wheel is such that it would increase the steering and cause it to turn even more." If the surface had been flat and the irregularities in the shoulder had not existed, he opined that Mr. Brooks could have executed the turn. He stated, "The irregularities in the surface are right in the travel lane. ... [I]t will interact with this [backhoe]."

Plaintiffs' other expert, Evans, testified that he did not visit the accident scene until January 2007, and by that time some patchwork repairs had been performed on the depression in question. He stated that McPhate had relayed information to him describing the prior deterioration of the surfacing material in that area. He had also viewed photographs of the depression taken before the repair work was performed. With regard to the deteriorated condition of the shoulder, Evans explained that it could disrupt steering and cause reduced steering control. When asked whether someone could have successfully maneuvered a turn with a backhoe while travelling over the deteriorated area, he replied that the driver would have trouble on that type of surface. He testified the maneuver could have been successfully performed on a flat, smooth surface. Based on photographs of the accident scene, Evans further opined that the backhoe would have had to traverse the area of the depression to reach the point where it overturned. He also stated that Mr. Brooks had no reason to make a sharp turn because he had a wide driveway within which to negotiate his turn. Additionally, he opined that a 1-inch depression in a shoulder or travel way is an unreasonably dangerous condition. Evans also testified that the deterioration that was present when the accident occurred took many months, possibly even years, to develop.

Evans had also reviewed DOTD's Maintenance Planning Manual and related that it indicated that all roads should be inspected once a week, and at a minimum, every 2 weeks. The manual further provided that shoulder depressions should be repaired when depressions are greater than one-inch deep over a ten-foot area or when water ponds over a half inch deep. Evans also addressed a separate publication, DOTD's Maintenance Manual, and related that Section 7.06

of the manual prescribed that shoulders should receive the same maintenance as prescribed for rigid or flexible pavements. Further, Section 7.02 prescribed that sections of shoulders that are used repeatedly as a turnout should be given special attention. Section 7.02 further requires that "shoulders should be maintained reasonably smooth and flush with the edge of the surfacing."

DOTD's expert, Dr. Mounce, who had observed photographs of the accident scene, testified that although he believed Mr. Brooks had encountered the depression prior to the accident, he also believed the depression could not have been a cause of the accident. Factoring in the backhoe's high center of gravity, he opined that more probably than not the cause of the accident was Mr. Brooks's rate of speed and his sharp turning maneuver. Dr. Mounce acknowledged, however, that pavement roughness can have an effect on steering and loose material has less ability to retard force, and he agreed that sections of shoulders with repeated activity should receive special care.

Based on the evidence, the jury determined that: 1) on the date of the accident, there was a defect at the accident scene that created an unreasonable risk of harm; 2) the defect was a cause in fact of the accident that resulted in Mr. Brooks's death; and 3) Mr. Brooks was not negligent in his operation of the backhoe. The jury also answered questions quantifying plaintiffs' damages.[1] Because the jury found Mr. Brooks was not negligent, it did not reach the interrogatory which asked it to apportion fault between Mr. Brooks and DOTD.

[1] On appeal, DOTD does not challenge the quantum of damages assessed.

Based on the jury's findings, the trial court signed a judgment in favor of plaintiffs and against DOTD, and it is from this judgment that DOTD appeals.[2]

II. ANALYSIS

A. Standard of Review

It is well settled that an appellate court may not disturb a jury's findings of fact unless the record establishes that a reasonable factual basis does not exist and the finding is clearly wrong or manifestly erroneous. See ***Syrie v. Schilhab***, 96-1027, p. 4 (La. 5/20/97), 693 So.2d 1173, 1176. An appellate court must do more than simply review the record for some evidence which supports or controverts the findings. ***Stobart v. State of La., through Dep't of Transp. & Dev.***, 617 So.2d 880, 882 (La. 1993). It must instead review the record in its entirety to determine whether the factual findings were clearly wrong or manifestly erroneous. ***Fontenot v. Patterson Ins.***, 09-0669, p. 8 (La. 10/20/09), 23 So.3d 259, 267. When legal error interdicts the fact finding process, however, the manifest error standard no longer applies to any findings affected by that legal error. If the record is otherwise complete, the reviewing court should conduct a *de novo* review of the interdicted findings. See ***Picou v. Ferrara***, 483 So.2d 915, 918 (La. 1986); ***Abney v. Smith***, 09-0794, p. 6 (La. App. 1st Cir. 2/8/10), ___ So.3d ___, ***writ denied***, 10-0547 (La. 5/7/10, ___ So.3d ___.

B. Mr. Brooks's Negligence

DOTD alleges that the jury erred in failing to find that Mr. Brooks was negligent. Our review of the record reveals error in the jury instructions

[2] DOTD also filed a motion for judgment notwithstanding the verdict or alternatively for a new trial, but these motions were denied.

pertaining to Mr. Brooks' conduct of driving on the shoulder of the highway. As explained below, this error interdicted the jury's finding regarding whether Mr. Brooks was negligent in the operation of the backhoe.

The trial court is required to instruct jurors on the law applicable to the cause submitted to them. La. C.C.P. art. 1792B; ***Abney***, 09-0794 at p. 4, ___ So.3d at ___. The charge must correctly state the law and be based on evidence adduced at trial. ***Id.*** Adequate jury instructions are those which fairly and reasonably point out the issues and which provide correct principles of law for the jury to apply to those issues. ***LeBlanc v. Landry***, 08-1643, p. 5 (La. App. 1st Cir. 6/24/09), 21 So.3d 353, 358-59, ***writ denied***, 09-1705 (La. 10/2/09), 18 So.3d 117. Although the trial judge is under no obligation to give any specific jury instructions that may be submitted by either party, the judge must correctly charge the jury. ***Id.***, 08-1643 at pp. 5-6, 21 So.3d at 358. If the trial court omits an applicable, essential legal principle, its instruction does not adequately set forth the law applicable to the issues to be decided by the jury and may constitute reversible error. ***Id.***, 08-1643 at p. 6, 21 So.3d at 358-59. Correlative to the judge's duty to charge the jury as to the law applicable in a case is a responsibility to require that the jury receives only the correct law. ***Id.***

In assessing whether the jury instruction was erroneous, it is the duty of the reviewing court to assess such impropriety in light of the entire jury charge to determine if the charges adequately provided the correct principles of law as applied to the issues framed in the pleadings and the evidence and whether the charges adequately guided the jury in its deliberation. Ultimately, the determinative question is whether the jury instructions misled the jury to the extent

that it was prevented from dispensing justice. ***Adams v. Rhodia, Inc.***, 07-2110, p. 7 (La. 5/21/08), 983 So.2d 798, 804. When a jury is erroneously instructed and the error probably contributed to the verdict, an appellate court must set aside the verdict. ***LeBlanc***, 08-1643 at p. 6, 21 So.3d at 359.

Because the adequacy of a jury instruction must be determined in the light of jury instructions as a whole, when small portions of the instructions are isolated from the context and are erroneous, error is not necessarily prejudicial. ***Adams***, 07-2110 at p. 7, 983 So.2d at 805. Furthermore, the manifest error standard for appellate review may not be ignored unless the jury charges were so incorrect or so inadequate as to preclude the jury from reaching a verdict based on the law and facts. ***Id.*** Thus, on appellate review of a jury trial, the mere discovery of an error in the judge's instructions does not of itself justify the appellate court conducting the equivalent of a trial *de novo* without first measuring the gravity or degree of error and considering the instructions as a whole and the circumstances of the case. ***Id.***, 07-2110 at pp. 7-8, 983 So.2d at 805.

In the instant case, the jury was instructed regarding DOTD's duty to maintain and repair its roadways and shoulders and was further instructed that Louisiana Revised Statutes 32:299A(2) provides, "Off-road vehicles may travel on the shoulders of all public roads or highways, except interstate highways, during each day starting thirty minutes after sunrise and ending thirty minutes before sunset."[3]

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[3] "Shoulder" is defined as "the portion of the highway contiguous with the roadway for accommodation of stopped vehicles, for emergency use, and for lateral support of base and surface." La. R.S. 32:1(65). A "highway" is defined as "the entire width between the boundary lines of every way or place of whatever nature publicly maintained and open to the use of the public for the purpose of vehicular travel ...; synonymous with the word 'street.'" La. R.S. 32:1(25).

Louisiana Revised Statutes 32:299A(1), provides, in pertinent part, as follows:

> Off-road vehicles, including but not limited to three-wheelers, four-wheelers, or other all-terrain vehicles which are not specifically designated for road use may travel on the shoulders of all public roads and highways except interstate highways in the manner provided for in this Section solely for the purposes of farm-related activities within a five-mile radius of a farmer's farm, provided that the operator possesses a valid Class "E" driver's license. The owner or operator of the off-road vehicle shall carry a copy of the motor vehicle registration, upon his person or on the off-road vehicle, to prove he owns at least one motor vehicle which is registered as a vehicle engaged in the business of actual farming under the provisions of R.S. 47:462. As an alternative to the ownership of the motor vehicle, the operator of the off-road vehicle may carry a sworn affidavit attesting that he is engaged in the business of actual farming under the provisions of R.S. 47:462.

(Emphasis added.)

This Subsection makes clear that the authorization for off-road vehicles to travel on the shoulders of roads and highways is limited to farm-related activities within a five-mile radius of a farmer's farm.[4] The evidence in the instant case does not establish that the backhoe was being used as farm equipment. Thus, La. R.S. 32:299A(2) is inapplicable to the facts of this case, and Mr. Brooks was not authorized to travel the shoulder of the highway with the backhoe. Accordingly, the trial court erred in including this statutory provision in its jury instructions.

Rather, the trial court should have instructed the jury in accordance with La. R.S. 32:71, which provides, in pertinent part that "a vehicle shall be driven upon the right half of the roadway"[5] and in accordance with La. R.S. 32:79(1), which

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[4] The jury was not instructed regarding this Subsection.

[5] "Roadway" is defined, in pertinent part, as "that portion of a highway improved, designed, or ordinarily used for vehicular traffic, *exclusive of the* berm or *shoulder*. La. R.S. 32:1(59). (Emphasis added.)

provides, "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Since the jury was instructed contrary to the applicable law, the inaccurate instructions misled the jury regarding the appropriateness of Mr. Brooks' conduct. Thus, we find the instructions contained a "plain and fundamental error" that probably contributed to the jury's finding that Mr. Brooks was not negligent in the operation of the backhoe.[6] Accordingly, we must conduct a *de novo* review of this issue.

Because Mr. Brooks violated La. R.S. 32:71 and 32:79 by traveling on the shoulder rather than within the travel lane of the roadway, we conclude his conduct was negligent. We further acknowledge that the record contains testimony suggesting that Mr. Brooks may have been travelling too fast to safely negotiate a turn and that he may have executed his turn too sharply. However, the testimony to that effect was strictly conjecture. The record reveals Harris did not know how fast Mr. Brooks was traveling when the accident occurred, and he did not know whether Mr. Brooks was attempting to execute a turn. We additionally note that Harris testified that Mr. Brooks had slowed down immediately before the accident occurred. Thus, we find the record does not establish that Mr. Brooks was travelling at an excessive rate of speed at the time he encountered the depression in the shoulder.

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[6] Although DOTD did not object to the jury instruction in question, the contemporaneous objection requirement of La. C.C.P. art. 1793C is relaxed where there is "plain and fundamental" error in the jury instructions. In such instance, an appellate court may recognize and review the issue. See ***Berg v. Zummo***, 00-1699, p. 13 n. 5 (La. 4/25/01), 786 So.2d 708, 716 n. 5; ***Nicholas v. Allstate Ins. Co.***, 99-2522, pp. 6-10 (La. 8/31/00), 765 So.2d 1017, 1022-24.

C. DOTD's Liability

Because the error in the jury instructions pertained only to the law as it related to Mr. Brooks' conduct, we find the error affected only the jury's finding regarding whether Mr. Brooks was negligent and the determination regarding the percentage of fault attributed to his conduct in causing the accident, i.e., the interrogatory which the jury pretermitted based on its finding that Mr. Brooks was not negligent. Otherwise, the jury was properly instructed, so the error in the jury instructions did not affect the jury's findings on the issues of whether the highway had a defect that created an unreasonable risk of harm on the date of the accident and whether the defect was a cause in fact of the resulting accident. Accordingly, the manifest error standard of review applies to these findings. See ***Picou***, 483 So.2d at 918; ***Lam ex rel. Lam v. State Farm Mut. Auto. Ins. Co.***, 05-1139, p. 3 & 6 (La. 11/29/06), 946 So.2d 133, 135-36 & 137-38.

Regarding DOTD's liability, tort claims may be pursued against a public entity under strict liability pursuant to La. C.C. art. 2317, as modified by La. C.C. art. 2317.1, and La. R.S. 9:2800, as well as in negligence pursuant to La. C.C. art. 2315. ***Fontenot***, 09-0669 at pp. 9-10, 23 So.3d at 267. When addressing an action under either theory, the legal analysis is the same. The plaintiff bears the burden of showing that: (1) DOTD had custody of the thing that caused the plaintiff's injuries or damages; (2) the thing was defective because it had a condition that created an unreasonable risk of harm; (3) DOTD had actual or constructive knowledge of the defect and did not take corrective measures within a reasonable time; and (4) the defect in the thing was a cause-in-fact of the plaintiff's injuries. ***Id.***, 09-0669 at pp. 9-10, 23 So.2d at 267-68.

DOTD has a duty to maintain the public roadways, including adjacent shoulders, in a condition that is reasonably safe and does not present an unreasonable risk of harm to the motoring public exercising ordinary care and reasonable prudence. *See* La. R.S. 48:21A; ***Forbes v. Cockerham***, 08-0762, p. 31 (La. 1/21/09), 5 So.3d 839, 858. This duty "extends to the protection of those people who may be foreseeably placed in danger by an unreasonably dangerous condition." ***Sevario v. State ex rel. Dep't of Transp. & Dev.***, 98-1302, p.14 (La. App. 1st Cir. 11/10/99), 752 So.2d 221, 231, ***writ denied***, 99-3457 (4/7/00), 759 So.2d 760, ***writs not considered***, 99-3638, 00-0044 (La. 4/7/00), 759 So.2d 81 & 82. This duty further encompasses the *foreseeable* risk that for any number of reasons a motorist might find himself traveling on, or partially on, the shoulder. ***Adam v. State ex rel. Dept. of Transp. and Dev.***, 08-1134, pp. 6-7 (La. App. 1st Cir. 2/13/09), 5 So.3d 941, 946, ***writ denied***, 09-0558 (La. 5/15/09), 8 So.3d 584. Admittedly, this duty does not render DOTD the guarantor for the safety of all of the motoring public or the insurer for all injuries or damages resulting from any risk posed by obstructions on or defects in the roadway or its appurtenances. ***Forbes***, 08-0762 at pp. 31-32, 5 So.3d at 858. Whether a duty is owed to a particular plaintiff is a question of law. ***Brewer v. J.B. Hunt Transport, Inc.***, 09-1408, p. 7 (La. 3/16/10), ___ So.3d ___, ___. Whether the DOTD breached its duty, that is, whether the shoulder was in an unreasonably dangerous condition, is a question of fact and will depend on the facts and circumstances of each case. ***Fontenot***, 09-0669 at pp. 15-16, 23 So.3d at 271.

On appeal, DOTD argues that the duty it owes to the motoring public to maintain the state highways in a reasonably safe condition does not encompass the

risk that a backhoe, which is unstable and top heavy, would turn over while traveling 10 to 15 miles per hour across a 2- to 4-inch depression on the shoulder of the highway. We disagree. We find no authority for this position and conclude that the general duty owed by DOTD extends to all motor vehicles that travel the highways of this state.[7] Further, in this case Harris's testimony confirmed that the area where the accident occurred was an industrial area in which construction equipment was commonly driven for short distances on the highways. Harris testified that his employer, Industrial Plant and Maintenance, transported such equipment for short distances by driving them on the shoulder of the highway. McPhate also testified that he has seen backhoes and heavy construction equipment travel on state highways. While construction equipment is not designed primarily for roadway use, our state law acknowledges that similar equipment, i.e., road rollers and road machinery, is temporarily moved upon the highways of this state. See La. R.S. 47:502. Thus, we conclude the risk of injury to motorists, including those driving construction equipment such as a backhoe, caused by defective conditions in the roadways or shoulders, was foreseeable.

Further, in determining whether liability exists under a duty-risk analysis, a plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm. ***Brewer***, 09-1408 at p. 7, ___ So.3d at ___. While DOTD disputes the shoulder was a cause-in-fact of the accident, we find the jury's finding to the contrary is well supported by the evidence, particularly the testimony of McPhate regarding the likely impact of the depression on the steering of the backhoe.

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[7] Louisiana Revised Statutes 32:1(40) provides, in pertinent part, "'Motor vehicle' means every vehicle which is self-propelled ...."

DOTD focuses on only portions of the expert testimony to advance its argument that plaintiffs have not met their burden of proof on this issue. However, the trial testimony must be considered in its entirety. Although DOTD presented evidence to support contrary conclusions regarding causation, the jury obviously found the testimony of plaintiffs' experts to be more credible than that of DOTD's expert and made reasonable inferences based on the expert testimony. We cannot find the jury manifestly erroneous in its determination regarding causation.

Addressing the remaining elements of plaintiffs' cause of action, DOTD does not dispute that it had custody of the shoulder in question. Likewise, DOTD does not challenge the jury's findings regarding notice of the condition of the shoulder. Although DOTD urges that "the minor shoulder discontinuity could not have been any substantial factor in causing the accident," it asserts no other argument against the classification of the shoulder deterioration as a defect. Moreover, we find no manifest error in the jury's finding that the deterioration in the shoulder was a defect, due to the uncontradicted testimony regarding its size and depth, and in light of the testimony that such a depression could impact the steering of a backhoe or other construction equipment.

D. Comparative Fault Assessment

As discussed earlier, the erroneous jury instruction probably contributed to the jury's finding that Mr. Brooks was not negligent and, thus, the jury pretermitted the interrogatory contained in the jury verdict form pertaining to the allocation of fault between Mr. Brooks and DOTD. Because we have concluded that Mr. Brooks was negligent and because the jury did not conduct a comparative fault assessment, this court must conduct a *de novo* assessment as to both parties.

In determining percentages of fault, a court must consider the nature of the conduct of the parties and the extent of the causal relationship between the conduct and the damages claimed. ***Watson v. State Farm Fire and Casualty Ins. Co.***, 469 So.2d 967, 974 (La. 1985). In assessing the nature of the conduct of the parties, various factors (the ***Watson*** factors) may influence the degree of fault, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. ***Clement v. Frey***, 95-1119, p. 8 (La. 1/16/96), 666 So.2d 607, 611.

The evidence establishes that the asphalt on the 10-foot-wide, paved shoulder at the entrance of the driveway where the accident occurred was crumbling and that the deteriorated condition of the shoulder developed over many months or possibly even years. DOTD either knew or should have known of the defective condition of the shoulder and the dangers it presented to the motoring public. Although the shoulder depression was 2 to 4 inches deep across this 10-foot area and DOTD's Maintenance Manual prescribed that sections of the shoulders that are used repeatedly as a turnout are to be given special attention, DOTD had taken no action to repair the defective shoulder, which created a significant risk to all who travelled across that area.

Although Mr. Brooks' improper operation of the backhoe on the shoulder of the road must be weighed against him, the record establishes that he operated the slow-moving backhoe on the shoulder of the highway so as to not impede other

motor vehicles travelling on the highway; the record does not demonstrate any intent to disregard the law. Further, the record does not reveal that Mr. Brooks was aware of the defect in the shoulder before he encountered it.

After carefully considering the ***Watson*** factors, we conclude that DOTD was in a superior position to have knowledge of the shoulder defect and to remedy it. Accordingly, we assign 80 percent fault to DOTD and 20 percent fault to Mr. Brooks.

E. Seat Belt Evidence

DOTD also assigns as error the trial court's refusal to admit testimony establishing that Mr. Brooks failed to wear the seat belt with which the backhoe was equipped. DOTD proffered the testimony of McPhate, which established that Mr. Brooks was not wearing the seat belt when the accident occurred, and if he had been wearing the seatbelt, he likely would not have sustained significant injury as a result of the accident. DOTD urges that the jury should have been allowed to hear this evidence, urging that the prohibition against the introduction of evidence regarding seat belt non-use by the driver of a passenger "car, van, or truck" as referenced in La. R.S. 32:295.1 is not applicable to the instant case.

Louisiana Revised Statutes 32:295.1 provides, in pertinent part:

> A. (1) Each driver of a passenger car, van, or truck having a gross weight of ten thousand pounds or less, commonly referred to as a pickup truck, in this state shall have a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion. The provisions of this Section shall not apply to those cars, vans, or pickups manufactured prior to January 1, 1981.
>
> ...
>
> E. In any action to recover damages arising out of the ownership, common maintenance, or operation of a motor vehicle, failure to wear a safety belt in violation of this Section shall not be

> considered evidence of comparative negligence. Failure to wear a safety belt in violation of this Section shall not be admitted to mitigate damages.

The backhoe is not encompassed within the wording of Paragraph A of the referenced statute; it is not a "passenger car, van, or truck having a gross weight of ten thousand pounds or less." Trial testimony established that the backhoe weighed between 13,000 and 16,000 pounds. Although the backhoe is a "motor vehicle," as referenced in Paragraph E, that paragraph further states that "failure to wear a safety belt in violation of this Section shall not be considered evidence of comparative negligence." (Emphasis added.) Because a violation of the Section occurs only when a driver of a "car, van, or truck having a gross weight of ten thousand pounds or less" fails to properly fasten his safety belt, there is no violation if a driver of another type of motor vehicle fails to fasten his safety belt. Thus, because Mr. Brooks' failure to wear the seat belt while operating the backhoe was not in violation of this Section, we agree that the limitation referenced in Paragraph E of the statute does not apply in this case. However, for other reasons, we conclude that the trial court did not err in excluding the evidence of seat belt non-use despite the inapplicability of the statute.

Because there is no statutory or jurisprudential law in Louisiana imposing a duty on a backhoe driver to use a seat belt, Mr. Brooks was not negligent in failing to secure his seat belt while operating the backhoe. See ***Smith v. Regional Transit Authority***, 559 So.2d 995, 997 (La. App. 4th Cir.), ***writ denied***, 566 So.2d 986

(La. 1990).[8] Thus, the evidence was not relevant to the issue of Mr. Brooks' alleged negligence. Further, the law relative to the duty of an injured party to mitigate damages presumes that further injury has occurred after the initial injury has been inflicted. See ***Bordelon v. Affordable Movers, L.L.C.***, 09-429, p. 2 (La. App. 3d Cir. 11/4/09), 22 So.3d 1139, 1141; ***Kent v. Cobb***, 35,663, p. 23 (La. App. 2d Cir. 3/8/02), 811 So.2d 1206, 1220, ***writ denied sub nom. Doug v. Cobb***, 02-1011 (La. 6/7/02), 818 So.2d 772. Thus, there is no duty to mitigate damages prior to sustaining an injury.

Because Mr. Brooks died at the scene of the accident, there is no basis to claim that he could have taken action to reduce his injuries after the initial injury was sustained. Admitting such evidence to the jury could result in undue prejudice, and the trial court properly excluded it.

III. CONCLUSION

For these reasons, we render judgment assessing 80 percent fault to DOTD and 20 percent fault to Mr. Brooks. Accordingly, we amend the trial court's judgment in favor of plaintiffs based on the percentage of fault assessed to Mr. Brooks. Thus, the judgment rendered in favor of Lola Brooks is reduced to $649,130.88, with that amount comprised of $360,000.00 in general damages and $289,130.88 in special damages. The judgments rendered in favor of Bridgette Gosnay and Jesse Brooks, Jr. are each reduced to $120,000.00. Appeal costs in the

[8] Under the applicable law prior to the enactment of La. R.S. 32:295.1 by 1985 La. Acts, No. 377, § 1, effective July 1, 1986, our courts generally held that a motorist's failure to wear a seat belt does not constitute contributory negligence, reasoning that seat belt non-use was not a cause of the accident. See ***Hammer v. City of Lafayette***, 502 So.2d 301, 304 (La. App. 3d Cir. 1987); ***Lawrence v. Westchester Fire Ins. Co.***, 213 So.2d 784, 786 (La. App. 2d Cir.), ***writ denied***, 252 La. 969, 215 So.2d 131 (1968).

amount of $1,426.93 are assessed against DOTD. The remaining appeal costs in the amount of $356.73 are assessed against plaintiffs-appellees.

JUDGMENT RENDERED; TRIAL COURT JUDGMENT AMENDED AND, AS AMENDED, AFFIRMED.

LOLA BROOKS, BRIDGETTE GOSNAY, AND JESSE BROOKS, JR.

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1267

WHIPPLE, J., concurring.

I respectfully concur for the sound reasons expressed and noted by Judge Gaidry. Accordingly, because I agree with the ultimate result reached in this matter, I respectfully concur.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 1267

LOLA BROOKS, BRIDGETTE GOSNAY, AND JESSE BROOKS, JR.

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

GAIDRY, J., concurring.

I concur in the result reached only, as I disagree with certain conclusions and reasoning in the plurality opinion.

After review of the jury instructions as a whole, I disagree with the plurality's conclusion that the one-sentence excerpt from La. R.S. 32:299(A)(2) could have so misled the jury as to interdict its findings and to constitute prejudicial error, warranting *de novo* review of that issue. I also disagree with the plurality's conclusion that the omission of language from La. R.S. 32:71 and 32:79(1) likewise misled the jury regarding the propriety of operating the backhoe on the shoulder of the highway. I further disagree with the plurality's conclusion that Mr. Brooks was negligent simply by virtue of operating the backhoe on the shoulder. Rather, I conclude that the trial court erred in excluding the evidence relating to his failure to use the available seatbelt, and that the jury committed manifest error in failing to

find that the manner of Mr. Brooks's operation of the backhoe during the turn was negligent and contributed to the occurrence of the accident.

In a tort action, the determination of whether conduct is negligent is not always dependent upon a specific statutory standard of care, nor does such a statutory standard necessarily define and delimit the parameters of the general duty to act as a reasonable and prudent person. The plurality concludes that because the backhoe was not the type of passenger vehicle defined in La. R.S. 32:295.1, Mr. Brooks could not have been under any legal duty to use an available seatbelt. A person is under a general legal duty to exercise reasonable care and prudence for his own safety, and the duty to use available safety equipment, including a seatbelt, in the operation of heavy equipment depends upon the particular factual circumstances, and not upon the existence of specific "statutory or jurisprudential law . . . imposing a duty on a backhoe driver to use a seat belt," as postulated by the plurality. The preponderance of the evidence suggests that the use of the seatbelt might have protected Mr. Brooks from being pinned under the cab of the backhoe after it overturned and thus prevented or minimized the initial injury, rather than to merely serve as an instrument to mitigate injuries already inflicted.

Despite my differences with the plurality opinion on the foregoing issues, I agree that DOTD was properly found negligent, that the findings of fact were manifestly erroneous as to Mr. Brooks's contributory negligence, and that the preponderance of the evidence (including the evidence improperly excluded) warrants the apportionment of 20% of the fault for the accident to him.