NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 1628

EVELYN J. MENARD

VERSUS

COX COMMUNICATIONS LOUISIANA, INC. AKA COXCOM, INC., STATE OF LOUISIANA-DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ENTERGY CORPORATION, PARISH OF EAST BATON ROUGE, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: AUG 31 2016

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C528413

The Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McClendon, J. dissents for reasons assigned.
McDonald, J. concurs.

THERIOT, J.

In this personal injury case, the defendant-appellant, the State of Louisiana, through the Department of Transportation and Development ("DOTD"), appeals a judgment rendered by the Nineteenth Judicial District Court in favor of the plaintiff-appellee, Evelyn J. Menard, after a trial by jury. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

This case arises out of a single-car accident that occurred in Baton Rouge, Louisiana, on the morning of March 27, 2004. On that day, Ms. Menard was driving her 2001 Mitsubishi Galant westbound along Interstate-12 ("I-12") before the I-12 / Essen Lane overpass intersection. Ms. Menard's vehicle was preceded by an unidentified 18-wheeler carrying a piece of industrial equipment. The 18-wheeler snagged a wire suspended above the road directly in front of the intersection, pulling the wire down. The wire then struck Ms. Menard's car, whipping her vehicle around and causing her to sustain serious injuries to her lower back. The 18-wheeler did not stop; neither the owner nor the operator of the 18-wheeler were ever identified. No other vehicles were involved in the accident.

On January 19, 2005, Ms. Menard filed suit against several named defendants, including DOTD, Cox Communications Louisiana, Inc. ("Cox"), Entergy Corporation, the Parish of East Baton Rouge ("EBR"), and State Farm Mutual Automobile Insurance Company ("State Farm"). Through supplemental and amended petitions, Ms. Menard substituted Entergy Gulf States, Inc. ("Entergy") as party defendant for Entergy Corporation, and added Barber Brothers Contracting Company, L.L.C. ("Barber Brothers") as a named defendant. Prior to trial on the merits, the trial court dismissed Ms.

Menard's claims against Cox, Entergy, EBR, State Farm, and Barber Brothers. DOTD was the sole defendant to proceed to trial.

Following extensive pre-trial proceedings, the matter ultimately was tried before a jury in February of 2015. On February 9, 2015, the jury returned a verdict in favor of Ms. Menard, finding DOTD 100% liable for the accident and injuries sustained by Ms. Menard. The jury found Ms. Menard was entitled to a total award of $1,642,000.00, consisting of $500,000.00 for past and future physical pain and suffering, $150,000.00 for past and future mental pain and suffering, $327,000.00 for past medical expenses, $100,000.00 for future medical expenses, $165,000.00 for past lost wages, $330,000.00 for future loss of wages, and $70,000.00 for loss of enjoyment of life.

On March 12, 2015, the trial court signed a final judgment in accordance with the jury's verdict. Pursuant to the statutory cap on damages provided by La. R.S. 13:5106, the trial court reduced the general damage award rendered against DOTD to $500,000.00 and entered a total award of $1,322,000.00 in favor of Ms. Menard. DOTD timely moved for a judgment notwithstanding the verdict ("JNOV"), which the trial court denied. DOTD now appeals.

ASSIGNMENTS OF ERROR

DOTD presents the following four assignments of error on appeal:

1. The trial court abused its discretion in denying DOTD's motion to amend the pre-trial order to permit DOTD to add a liability expert, Louis Braquet, P.E., as an expert to testify on DOTD's behalf at trial.

2. The jury was manifestly erroneous in allocating DOTD with 100% fault in the cause of the accident.

3. The trial court made an error of law in denying DOTD's motion for judgment notwithstanding the verdict.

4. The trial court made an error of law by categorizing Ms. Menard's future wage loss damages in the judgment as special damages and failing to include them in the general damages award reduced pursuant to the statutory cap on damages provided by La. R.S. 13:5106.

DISCUSSION

Liability of DOTD

We begin our analysis by considering the jury's finding of fault and allocation of liability. In DOTD's second assignment of error, it contends the jury manifestly erred in finding DOTD 100% liable for the accident and injuries sustained by Ms. Menard. In DOTD's related third assignment of error, it contends that the trial court erred by denying its motion for JNOV. DOTD argues that the evidence does not support the jury's finding, and avers that the jury failed to consider the fault of the driver of the unidentified 18-wheeler.

In order for DOTD to be held liable to Ms. Menard for the injuries she sustained, Ms. Menard bore the burden of proving that: 1) DOTD had custody of the thing that caused her injuries; 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 unreasonable risk of harm; 4) DOTD failed to take corrective measures within a reasonable time; and 5) the unreasonable risk of harm was a cause-in-fact of her injuries. See **Falcon v. Louisiana Dept. of Transp.**, 13-1404 (La. App. 1 Cir. 12/19/14), 168 So.3d 476, 483, writ denied, 15-0133 (La. 4/10/15), 163 So.3d 813. See also La. R.S. 9:2800.

DOTD is not a guarantor of the safety of travelers. See **Ryland v. Liberty Lloyds Ins. Co.**, 93-1712 (La. 1/14/94), 630 So.2d 1289, 1300. Rather, DOTD owes a general duty to maintain public roadways 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. Whether DOTD breached its duty to the public by knowingly maintaining a defective or unreasonably dangerous roadway depends on all of the facts and circumstances determined on a case by case basis. See **Falcon**, 168 So.3d at 483; **Netecke v. State ex rel. DOTD**, 98-1182 (La. 10/19/99), 747 So.2d 489, 495.

Louisiana appellate courts apply the manifest error standard of review to factual determinations in civil cases. See **Hall v. Folger Coffee Co.**, 03-1734 (La. 4/14/04), 874 So.2d 90, 98. Under the manifest error standard, a factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong. In order to reverse the trier of fact's determination, an appellate court must review the record in its entirety and 1) find that a reasonable factual basis does not exist for the finding, and 2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. **Detraz v. Lee**, 05-1263 (La. 1/17/07), 950 So.2d 557, 561. The appellate court must not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. **Id.**

In this case, prior to trial, the parties jointly executed and filed two pre-trial agreements, wherein they stipulated as to several basic facts underlying the accident. In pertinent part, the parties stipulated that: 1) a sample of wire collected at the scene of the accident matched the type of cable used by DOTD to provide synchronization of traffic signals in the late-1960s to mid-1970s; 2) in January of 1967, DOTD installed a traffic signal to govern the entrance to I-12 West from the northbound lanes of Essen Lane; 3) the signal at the entrance to I-12 West from the northbound lanes of

Essen Lane was most likely synchronized with the signal governing traffic at Essen Lane and the Essen Lane I-12 East off-ramp through suspension of an interconnect wire across all lanes of vehicular traffic on I-12; 4) the traffic signal governing the entrance to I-12 West from the northbound lanes of Essen Lane was taken out of service in 1976; 5) the minimum height at which the suspended interconnect wire should have been suspended was twenty-feet; 6) the vertical clearance for a vehicle traveling under the I-12 / Essen Lane overpass intersection is sixteen feet, one inch; and 6) over time, there is a likelihood that sagging occurs in suspended wires.

At trial, Ms. Menard testified that the accident occurred when the unidentified 18-wheeler preceding her in traffic along I-12 West before the I-12 / Essen Lane overpass intersection "popped the power lines [sic] going across the interstate." She noted that, after snagging the wire, the 18-wheeler was able to travel under the overpass intersection without incident, which indicates the wire that struck her vehicle must have been suspended below the acknowledged vertical clearance of the overpass intersection, i.e., sixteen-feet, one inch, and well below the stipulated minimum height at which the interconnect wire should have been suspended, i.e., twenty-feet. DOTD's senior transportation engineer, Herbert Moore, acknowledged at trial that DOTD had no information pertaining to a record of service or maintenance of the pole, traffic signal, or component parts governing the entrance to I-12 West from the northbound lanes of Essen Lane, which had likely been synchronized through suspension of the interconnect wire across I-12, following decommission of the signal in 1976. In addition, Ms. Menard's liability expert, Daryl Ebersole, P.E., testified that the wire should have been suspended at an elevation greater than that of the overpass intersection in order to prevent injuries like that sustained by Ms. Menard,

and he averred that DOTD's abandonment of the wire, without inspection or efforts to maintain it, made it unreasonably dangerous.

When considered together, the pre-trial stipulations and evidence adduced at trial provided the jury with a reasonable factual basis for finding DOTD liable to Ms. Menard. The jury may have reasonably concluded that Ms. Menard was injured when her vehicle was struck by the interconnect wire originally installed by DOTD above I-12 in 1967; that remained in the custody and control of DOTD at the time of the accident; that had been unused since 1976 and posed an unreasonable risk of harm to motorists because of the risk of sagging of the wire over time. Based thereupon, we cannot say that the jury manifestly erred in finding DOTD violated its duty by knowingly maintaining an unreasonably dangerous roadway without taking corrective action within a reasonable time. See e.g., **Williams v. Square League Corp., Inc.**, 03-1158 (La. App. 1 Cir. 6/25/04), 885 So.2d 1166, 1168-69 (explaining that constructive knowledge exists when the defect or condition has persisted for such a period of time that it would have been discovered and repaired had the public body exercised reasonable care).

Next, we turn to consider the jury's allocation of fault. In support of its second and third assignments of error, DOTD argues that the jury erred by failing to allocate fault to the driver of the unidentified 18-wheeler. DOTD cites evidence introduced at trial regarding the height of the 18-wheeler. DOTD posits that the driver of the 18-wheeler necessarily bore liability to Ms. Menard under La. R.S. 32:381.

Louisiana Revised Statute 32:381 states as follows:

> A. (1) The height of any vehicle and its load shall not exceed thirteen feet, six inches, except that the height of any vehicle and its load which operates exclusively on the interstate

highway system shall not exceed fourteen feet, provided that vehicles operating on the interstate highway system shall have reasonable access, within one road mile from the interstate highway to terminals and facilities for food, fuel, repairs, and rest, unless prohibited for specific safety reasons on individual routes.

(2) The operator of a vehicle that is higher than thirteen feet six inches shall ensure that the vehicle will pass through each vertical clearance of a structure in its path without touching the structure.

(3) Any damage to a bridge, underpass, or similar structure caused by the height of a vehicle shall be the responsibility of the owner of the vehicle.

B. Nothing in this Section shall be interpreted to require the state or any subdivision thereof or any person, firm, or corporation in this state to raise, alter, construct, or reconstruct any overpass, wire, pole, trestle, or other structure to provide such clearance.

We find DOTD's reliance upon La. R.S. 32:381 to be misplaced. On the one hand, there was some evidence indicating the unidentified 18-wheeler may have been unusually tall. For example, Ms. Menard testified that, before the accident, she was concerned about the height of the 18-wheeler and questioned whether the 18-wheeler would be able to clear the overpass intersection. In addition, Sergeant Deborah Julian, the police officer who investigated the scene of the accident, testified at trial that she believed the wire had been pulled down because the 18-wheeler was carrying a load that was too tall for the area. However, the 18-wheeler was able to travel under the overpass intersection without incident, and neither Ms. Menard nor Sgt. Julian were able to confirm the exact height of the vehicle. Thus, the evidence does not definitively establish that the driver of the 18-wheeler violated his statutory duty by operating a vehicle in excess of the height restrictions contained in La. R.S. 32:831, and we cannot say that

the jury manifestly erred by failing to assign fault to the driver of the unidentified 18-wheeler.[1]

Having found that the jury did not manifestly err in its finding of fault or allocation of liability, we also conclude the trial court did not legally err in denying DOTD's motion for JNOV on these same grounds.[2] DOTD's second and third assignments of error do not merit relief.

Amendment of Pre-Trial Orders

In its first assignment of error, DOTD argues that the trial court erred in denying its motion to amend the pre-trial orders. DOTD states that it sought to add a liability expert, Louis Braquet, P.E., to testify on its behalf and to rebut the opinions of Ms. Menard's liability expert, Mr. Ebersole. DOTD notes that it filed its motion to amend approximately eleven months before the commencement of trial. DOTD avers that the improper exclusion of Mr. Braquet's testimony interdicted the fact-finding process such that a *de novo* review of the record is appropriate.

Louisiana Code of Civil Procedure art. 1551 provides trial courts with discretion in civil actions to render orders limiting the issues for trial and controlling the course of the action unless modified at the trial to prevent manifest injustice. The law provides that an orderly disposition of each case and the avoidance of surprise are inherent in the theory of pre-trial procedure and are sufficient reasons for allowing the trial court to require adherence to

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[1] We note that even if the evidence proved the driver of the 18-wheeler violated his statutory duty under La. R.S. 32:381, the jury would not have been required to find that the driver bore liability to Ms. Menard. While statutory violations may serve as guidelines for the courts in determining standards of negligence by which civil liability is determined, the doctrine of negligence per se has been rejected in Louisiana. See **Galloway v. State Through Dept. of Trans. & Develop.**, 94-2747 (La. 5/22/95), 654 So.2d 1345, 1347.

[2] A JNOV is a procedural device, authorized by La. C.C.P. art. 1811, under which a trial court may correct a legally erroneous jury verdict by modifying the jury's finding of fault or damages, or both. See **Davis v. Wal-Mart Stores, Inc.**, 00-0445 (La. 11/28/00), 774 So.2d 84, 89.

the pre-trial order in the conduct of an action. See **Southern Casing of Louisiana, Inc. v. Houma Avionics, Inc.**, 00-1930 (La. App. 1 Cir. 9/28/01), 809 So.2d 1040, 1055.

Although the trial court is vested with much discretion to amend pre-trial orders, the trial court must exercise its discretion to prevent substantial injustice to the parties that have relied upon the pre-trial rulings in structuring the preparation and presentation of their cases. The appellate court should only intervene upon a showing of an abuse of that discretion. **Southern Casing of Louisiana, Inc.**, 809 So.2d at 1055. See also **Grayson v. R.B. Ammon & Assoc., Inc.**, 99-2597 (La. App. 1 Cir. 11/3/00), 778 So.2d 1, 9, writs denied, 00-3270 and 00-3311 (La. 1/26/01), 782 So.2d 1026 and 782 So.2d 1027. Moreover, the trial court's discretion to control the admissibility of expert testimony is well-established in Louisiana law. **Southern Casing of Louisiana, Inc.**, 809 So.2d at 1055. See also La. C.E. art. 702.

As noted above, DOTD and Ms. Menard jointly executed and filed two pre-trial agreements with the trial court. The original pre-trial order was jointly submitted on April 8, 2013, and listed the established facts and the contested issues of fact and law in the dispute. The parties did not stipulate as to DOTD's liability or negligence; however, the parties did stipulate as to many of the basic facts underlying the accident. In addition, the parties listed all proposed witnesses and expert witnesses that each might call to testify at trial. DOTD did not designate a proposed liability expert, despite the fact that Ms. Menard did list a liability expert, Mr. Ebersole, whom she proposed to call at trial to testify on her behalf.

Thereafter, on July 11, 2013, the parties jointly filed an amended and supplemental pre-trial order. The amended pre-trial order detailed thirteen

changes to the original pre-trial order. In principal part, the parties agreed via the amended pre-trial order to modify the manner of testimony and identity of some of their expert witnesses. However, DOTD once again did not designate a proposed liability expert to testify on its behalf at trial. The amended pre-trial order did not change any of the established facts from the original pre-trial order.

The original and amended pre-trial agreements both included express provisions that circumscribed the rights of the parties to add additional expert witnesses. The original pre-trial order stated that the parties "waive their respective rights to and do not seek to add any other expert witnesses in this matter." The amended pre-trial order stated that the parties jointly agreed to a one-time waiver of the previously recognized restrictions on the right to add expert witnesses, but affirmed that any additional expert witnesses would thereafter be included within the pre-trial order "only by further written agreement of the parties or by court order."

Following submission of the amended pre-trial order, DOTD acquired new counsel. Then, in January of 2014, DOTD filed a motion to amend the pre-trial orders to reopen discovery and to designate Mr. Braquet as a liability expert to testify on its behalf at trial. On March 10, 2014, the trial court held a hearing on DOTD's motion to amend, and, on April 1, 2014, issued a written judgment denying same.[3]

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[3] DOTD argues in brief that the trial court denied its motion to amend as punishment for its practice of bringing in outside counsel to take over a case shortly before trial. DOTD appears to quote the trial court's oral reasons from the March 10, 2014 hearing in support of its position. We cannot consider these reasons, because the record on appeal does not contain a transcript of the March 10, 2014 hearing or the trial court's reasons for judgment. However, we do not regard the absence of oral reasons for judgment as controlling of our decision, because our concern as an appellate court is to review judgments, not reasons for judgments. See **LAD Services of Louisiana, L.L.C. v. Superior Derrick Services, L.L.C.**, 13-0163 (La. App. 1 Cir. 11/7/14), 167 So.3d 746, 753, writ not considered, 15-0086 (La. 4/2/15), 162 So.3d 392.

We find that the trial court was entitled to require DOTD to adhere to the pre-trial orders to ensure the orderly disposition of the litigation.[4] The trial court denied DOTD's motion to amend following nearly a decade of pre-trial proceedings. DOTD was well aware of the allegations and the contested issues of law and fact in the matter. DOTD had ample time to procure a liability expert, but chose to voluntarily enter into two separate agreements without designating a liability expert to testify on its behalf. Consequently, we cannot say that the trial court abused its discretion by denying DOTD's motion to amend the pre-trial order. DOTD's first assignment of error lacks merit.

Classification of Future Wage Losses

In DOTD's fourth assignment of error, it contends that the trial court erred as a matter of law by categorizing Ms. Menard's future wage losses as special damages. DOTD argues that Ms. Menard's economist, Pat Culbertson, Ph.D., testified as to Ms. Menard's residual earning capacity. DOTD therefore avers that the jury's award for future wage losses should have been classified as an award for loss of future earning capacity. DOTD contends that awards for loss of future earning capacity are subject to a $500,000.00 statutory cap on general damages.

It is undisputed that DOTD is an arm of the state and enjoys limited liability for general damages in accordance with La. R.S. 13:5106. The sole question raised by DOTD's fourth assignment of error is whether the trial

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[4] In addition, we recognize that the trial court was entitled to require DOTD to adhere to the pre-trial order to prevent substantial injustice to Ms. Menard, who relied upon the pre-trial agreements in preparing her case, because DOTD proposed to substantively alter the parties' agreements and change the issues for trial. DOTD acknowledges in brief that it sought to admit testimony from Mr. Braquet tending to establish "that the line at issue was classified as a telecommunications wire and ... was only required to be at a minimum height of 15.5 feet...." This proposed testimony directly contradicts the parties' agreement concerning the type of wire collected at the scene of the accident and the height at which the wire should have been suspended.

court properly excluded Ms. Menard's award for future wage loss from the statutory cap on damages under La. R.S. 13:5106(B)(1).

Louisiana Revised Statute 13:5106 provides, in pertinent part, as follows:

> B. (1) The total liability of the state and political subdivisions for all damages for personal injury to any one person, including all claims and derivative claims, exclusive of property damages, medical care and related benefits and loss of earnings, and loss of future earnings, as provided in this Section, shall not exceed five hundred thousand dollars, regardless of the number of suits filed or claims made for the personal injury to that person.
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> [D.] (2) "Loss of earnings" and "loss of support" for the purpose of this Section means any form of economic loss already sustained by the claimant as a result of the injury or wrongful death which forms the basis of the claim. "Loss of future earnings" and "loss of future support" means any form of economic loss which the claimant will sustain after the trial as a result of the injury or death which forms the basis of the claim.

In the context of La. R.S. 13:5106, Louisiana jurisprudence recognizes an important distinction between an award for loss of future earnings and an award for loss of earning capacity. See **Fecke v. Bd. of Sup'rs of Louisiana State University and Agr. and Mechanical College**, 15-0017 (La. App. 1 Cir. 7/7/15), 180 So.3d 326, 346-47, writs granted, 15-1806 and 15-1807 (La. 2/19/16), 186 So.3d 1177 and 186 So.3d 1175; **Cooper v. Public Belt R.R.**, 03-2116 (La. App. 4 Cir. 10/6/04), 886 So.2d 531, 538-39, writ denied, 04-2748 (La. 1/28/05), 893 So.2d 75. Unlike loss of future wages, loss of future earning capacity is not necessarily determined by actual loss. Louisiana courts have accordingly held that damages for loss of future earning capacity are not "economic losses" and remain subject to the $500,000.00 statutory cap on damages under La. R.S. 13:5106(B)(1).

Conversely, damages for loss of future earnings are excluded from the statutory cap on damages. See **Fecke**, 180 So.3d at 347-50; **Cooper**, 886 So.2d at 539.

In the case at bar, Ms. Menard was employed as a legal secretary with the Louisiana Workers' Compensation Corporation prior to the accident. Ms. Menard's vocational rehabilitation expert, Louis Lipinski, testified at trial that the accident severely limited Ms. Menard's employability and earnings. Based upon Mr. Lipinski's opinion and Ms. Menard's documented earnings, Dr. Culbertson calculated that Ms. Menard would suffer future lost wages of between $398,000.00 and $515,071.00. Following the submission of evidence, the trial court instructed the jury on the law applicable to loss of future income and submitted a verdict form to the jury that listed future loss of wages as a compensable item of damages. The trial court did not instruct the jury on the law applicable to loss of future earning capacity, nor did the jury verdict form list loss of future earning capacity as a compensable item of damages. DOTD did not object to the jury instructions or the jury verdict form concerning the itemization of compensable damages. The jury ultimately found that Ms. Menard was entitled to an award of $330,000.00 for future loss of wages.

We cannot say that the jury manifestly erred in awarding Ms. Menard damages for future loss of wages based upon the evidence introduced at trial. The trial court was required to enter judgment in accordance with the jury verdict, see La. C.C.P. art. 1916(A), and did not commit legal error by excluding the jury's award for loss of future wages from the statutory cap on damages under La. R.S. 13:5106(B)(1). DOTD's fourth assignment of error lacks merit.

DECREE

For the foregoing reasons, we affirm the trial court's March 12, 2015 judgment in all respects. Costs of this appeal in the amount of $8,764.50 are assessed to the defendant-appellant, the State of Louisiana, through the Department of Transportation and Development.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 1628

EVELYN J. MENARD

VERSUS

COX COMMUNICATIONS LOUISIANA, INC. AKA COXCOM, INC., STATE OF LOUISIANA-DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ENTERGY CORPORATION, PARISH OF EAST BATON ROUGE, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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McClendon, J., dissenting.

I disagree with the majority's conclusion that the trial court did not abuse its discretion in denying DOTD's motion to amend the pre-trial order to add Louis Braquet as an expert witness. While adherence to a pre-trial order is necessary for an orderly disposition of each case and to avoid surprises, "a trial court must be ever mindful of the fact that the objective of our legal system is to render justice between the litigants upon the merits of the controversy rather than to defeat justice upon the basis of technicalities." **McDuffie v. ACandS, Inc.**, 00-2779, (La.App. 4 Cir. 2/14/01), 781 So.2d 628, 631 (citing **Naylor v. Louisiana Dept. of Public Highways**, 423 So.2d 674, 679 (La.App. 1 Cir. 1982), writ denied, 427 So.2d 439 (La. 1983), and writ denied, 429 So.2d 127 (La. 1983) and writ denied, 429 So.2d 134 (La. 1983)). Further, Louisiana Code of Civil Procedure article 5051 recognizes that the code articles "are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves."

While the pretrial orders both referenced a waiver of the right to add additional expert witnesses, the amended pretrial order specifically recognized that additional expert witnesses could be added by court order. Further, at the time DOTD sought to amend the pre-trial order, the trial was more than one year away. As such, there was sufficient time for both parties to fully engage in additional discovery and for DOTD to address an alleged factual error in its prior stipulation regarding the minimum requisite

height of the interconnect wire.[1] Moreover, DOTD's liability potentially turns on the height of said wire. Under these facts, I disagree with the majority's finding that allowing the amendment to the pretrial order would result in a substantial injustice to Ms. Menard. Rather the injustice presented is that suffered by DOTD in not being allowed to present any expert testimony as to liability.

Accordingly, I find that the trial court abused its discretion in denying DOTD's request to amend the pre-trial order to reopen discovery and to designate Louis Braquet as its liability expert. Further, based on the trial court's failure to allow the amendment to the pretrial order and because said amendment may have resulted in additional evidence presented by Ms. Menard, I would grant a new trial.[2]

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[1] I acknowledge that a judicial confession constitutes full proof against the party who made it. However, such a confession may be revoked based on an error of fact. See LSA-C.C. art. 1853.

[2] DOTD's additional assignments of error would be pretermitted given my conclusion that a new trial is warranted.