NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1387

CLINTON BOE AND LORI BOE

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ELBERT L. CLEMENS, AND USAGENCIES CASUALTY INSURANCE COMPANY

Judgment Rendered: NOV 0 1 2017

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket Number 82,359

Honorable Katherine Tess Stromberg, Judge Presiding

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BEFORE: WHIPPLE, C.J., GUIDRY, AND PENZATO, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by the State of Louisiana, Department of Transportation and Development ("DOTD") from a judgment of the trial court awarding damages and medical expenses to plaintiffs and casting the DOTD with all costs.

FACTS AND PROCEDURAL HISTORY

On January 20, 2005, Deputy Clinton Boe of the Ascension Parish Sheriff's Office was dispatched to an accident at the intersection of Louisiana Highway 431 and Louisiana Highway 931. Deputy Boe was directing traffic at the accident site and was wearing his uniform, an orange and yellow reflective safety vest, and holding a flashlight, when tow truck operator, Luke Newman, arrived at the scene to retrieve the two vehicles involved in the accident. After stopping traffic, Deputy Boe and Newman began to assess how and where to position the tow truck in the roadway to retrieve the overturned vehicles from the sides of the roadway. While doing so, Deputy Boe and Newman walked on the roadway because, according to their testimony, it was unsafe to walk on the shoulder of the roadway, which was very narrow and was composed of loose gravel that dropped off into a steep ditch or deep embankment. While the two men were walking side by side northbound in the southbound lane on the edge of the roadway, Deputy Boe was suddenly struck by a vehicle driven by Elbert Clemens.

As a result, Deputy Boe and his wife Lori filed suit against Clemens, his insurer USAgencies Casualty Insurance Company, and the DOTD, seeking damages for injuries sustained as a result of this accident.[1] Following a two-day bench trial, the trial court issued "Reasons for Judgment," finding that the DOTD was 75% at fault and Clemens was 25% at fault for the accident. By an "Order"

[1]Subsequent to the filing of this suit, Deputy and Lori Boe divorced. At the time of trial, Lori had remarried and testified that she was going by the name of Lori Forbes. The trial court's reasons, order, and judgments, however, refer to her as Lori Braud.

signed on February 16, 2016, the trial court ordered the DOTD to pay: Deputy Boe general damages in the amount of $262,500.00 (75% of $350,000.00) and past medical expenses in the amount of $35,288.40 (75% of $47,051.20). The trial court further ordered the DOTD to pay Lori Braud damages in the amount of $7,500.00 (75% of $10,000.00).

Thereafter, the DOTD filed a motion for new trial on the issue of damages, contending that plaintiffs' stipulation that damages for each of their respective claims did not exceed $50,000.00 should apply to limit the damages awarded. At the hearing on the motion for new trial, the parties agreed to reduce the damage award to the stipulated amount of $50,000.00, minus Clemen's percentage of comparative fault. Further, pursuant to plaintiffs' oral motion for costs, costs were awarded with judicial interest to date.

Following the hearing, the trial court issued two judgments: (1) a May 3, 2016 "Judgment" assessing the DOTD with 75% comparative fault and Clemens with 25% comparative fault for the accident, ordering the DOTD to pay Deputy Boe general damages and medical expenses in the amount of $37,500.00, ordering the DOTD to pay Lori Braud damages in the amount of $7,500.00, and casting the DOTD with all costs of court, including $14,559.83 in costs and $2,826.50 in "Clerk of Court Costs," plus judicial interest from January 19, 2006, until paid; and (2) a May 5, 2016 "Judgment on Motion for New Trial and on Oral Motion for Costs," granting the DOTD's motion for new trial and amending the trial court's earlier February 16, 2016 order, to award Deputy Boe general damages and medical expenses in the amount of $37,500.00, Lori Braud damages in the amount of $7,500.00, and granting plaintiffs' oral motion for costs "at an amount to be determined, plus judicial interest until paid."

The DOTD filed a motion for appeal, seeking to appeal the February 16, 2016 "Order" of the trial court and the "Judgment on the Motion for New Trial

signed on May 3, 2016," and contending that the trial court erred in: (1) ruling that the shoulder was defective; (2) ruling that the DOTD had notice of any defect; (3) ruling that the shoulder was a cause-in-fact of any damages; (4) allocating 75% comparative fault for the accident; and (5) awarding interest on costs from the date that suit was filed rather than the date of the judgment.[2]

DISCUSSION

A trial court's finding of fact may not be set aside by a court of appeal absent manifest error or unless it is clearly wrong. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. See generally Cosse v. Allen-Bradley Company, 601 So. 2d 1349, 1351 (La. 1992); Housley v. Cerise, 579 So. 2d 973, 976 (La. 1991); Sistler v. Liberty Mutual Insurance Company, 558 So. 2d 1106, 1112 (La. 1990). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

In the first four assignments of error, the DOTD challenges the trial court's finding that the shoulder was defective, the DOTD had notice of this defect, the shoulder was a cause-in-fact of Deputy Boe's damages, and the resulting allocation of 75% comparative fault to the DOTD.

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[2]The DOTD's motion for appeal incorrectly identified the judgment granting the motion for new trial as being signed on May 3, 2016, when, in fact, this judgment was signed on May 5, 2016. Nonetheless, where it is clear from the DOTD's motion for appeal and brief that it sought to appeal from the judgment awarding interest on costs from the date upon which suit was filed, the DOTD's mistake in listing the wrong date of judgment is insufficient grounds for the dismissal of its appeal, particularly since appeals are favored and will be dismissed only when the grounds are free from doubt. See Byrd v. Pulmonary Care Specialists, Inc., 2016-0485 (La. App. 1st Cir. 12/22/16), 209 So. 3d 192, 195.

In order for the DOTD to be held liable, the plaintiff must prove that (1) the DOTD had custody of the thing which caused plaintiffs' damages, (2) the thing was defective because it had a condition which created an unreasonable risk of harm, (3) the DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time, and (4) the defect was a cause-in-fact of plaintiffs' injuries. Cormier v. Comeaux, 98-2378 (La. 7/7/99), 748 So. 2d 1123, 1127. The DOTD has a duty to maintain the public highways in a condition that is reasonably safe for persons exercising ordinary care and reasonable prudence. Law v. State, Department of Transportation and Development, 2003-1925 (La. App. 1st Cir. 11/17/04), 909 So. 2d 1000, 1004, writs denied, 2004-3224, 2004-3154 (La. 4/29/05), 901 So. 2d 1062. The DOTD must also maintain the shoulders and the area off of the shoulders, within its right-of way, in such a condition that they do not present an unreasonable risk of harm to motorists using the adjacent roadway, when motorists or others are using the area in a reasonably prudent manner. Moss v. State, 2007-1686 (La. App. 1st Cir. 8/8/08), 993 So. 2d 687, 694, writ denied, 2008-2166 (La. 11/14/08), 996 So. 2d 1092.

The DOTD's duty to maintain safe shoulders encompasses the foreseeable risk that for any number of reasons, including simple inadvertence, a motorist might find himself traveling on, or partially on, the shoulder. Cormier v. Comeaux, 748 So. 2d at 1127. As to the area off the shoulder of the road, but within the right of way, DOTD owes a duty to maintain the land in such a condition that it does not present an unreasonable risk of harm to motorists using the adjacent roadway or to others, such as pedestrians, who are using the area in a reasonably prudent manner. Cormier v. Comeaux, 748 So. 2d at 1127.

In its reasons for judgment, the trial court rendered the following findings:

This Court finds that Highway 431 was not maintained as per its 1943 construction standards, which were the last standards adopted for that road. The 1943 standards called for five-foot shoulders, and those shoulders were taken away in the subsequent overlay projects. [David] Hall [, DOTD's expert,] testified that the last-adopted plans for Highway 431 called for a 5-foot shoulder, and then surface projects removed a foot of shoulder and gave it to the lane of travel. The last project before the accident called for 3-and-a-half-foot average shoulders. However, there is no proof that new design standards that called for a shoulder of less than five feet were ever adopted.

This Court further finds that the shoulder portion in question was not sufficiently wide enough for [Deputy Boe] and Newman to traverse. [Deputy Boe] and Newman were present at the scene and attempted to walk along the shoulder before discovering the condition of the shoulder. Newman discovered the drop off of the shoulder when he slipped as he attempted to walk along the shoulder. While there was photographic evidence that [Deputy Boe] and Newman were able to stand on the shoulder when they examined the site a year after the accident, this is not proof that the shoulder was safe to walk along. As [Deputy Boe] and Newman were present at the accident and actually attempted to walk along the shoulder, this Court gives their testimony more weight. [Deputy Boe's] expert Douglas Robert also testified regarding the width of the shoulder. Robert opined that the shoulder was not sufficiently wide enough to safely walk along considering the slope of the headwall of the ditch adjacent to the shoulder.

This Court finds that the portion of the shoulder of Highway 431 was defective. James Clary and Doug Robert testified that the shoulder was too narrow, the slope adjacent to the headwall was too steep, and the surface was uneven. Though no measurements were taken the night of the accident, [Deputy Boe] and Newman were there and testified that they stepped off of the paved surface, and that the unpaved portion of the shoulder did not feel safe to walk on. Newman testified that he did not measure the drop-off, but that he estimated it to be between four and six inches. Clary testified that the condition of the shoulder was approximately the same as it would have been at the time of the accident. Doug Robert estimated the shoulder edge drop-off to be between three and five inches. Considering the testimony of Newman and Doug Robert, this Court finds that it is more likely than not that the shoulder edge drop-off on the night of the accident was five inches. The Louisiana Supreme Court has held that a shoulder edge drop-off of more than four inches presents an unreasonable risk of harm.

This Court finds that DOTD had constructive knowledge of the defective shoulder. DOTD performed biweekly maintenance on Highway 431. Those biweekly maintenance records reflect that the unpaved portion of the shoulder was patched on October 10, 2004, less than three months before the accident. There was no proof of shoulder edge maintenance produced by DOTD. DOTD employees

had the opportunity to perceive the shoulder edge drop-off during the biweekly inspection reports. Though there were no complaints about the condition of the shoulder, there is testimony that there was a shoulder-edge drop off of three to five inches. The circumstantial evidence that the shoulder stayed in the same condition from the time Clary inspected in 2007 to the time Douglas Robert inspected it in 2015 shows that the shoulder was likely in the condition it was in at the time of the accident for quite some [time] before the accident occurred.

This Court finds the Highway 431's defective shoulder was the cause in fact of [Deputy Boe's] injuries. [Deputy Boe] testified that he chose to walk in the roadway instead of on the shoulder because of the four-inch drop off, the unstable surface of the unpaved portion of the shoulder, and the steepness of the slope of the ditch. Had DOTD maintained the shoulder to its 1943 standards, the shoulder would have been sufficiently wide enough for [Deputy Boe] to walk along it, and he would not have been in the roadway where he was struck by Mr. Clemens' vehicle.

This Court finds that DOTD was seventy-five percent at fault in causing the accident, while Clemens was twenty-five percent at fault in causing the accident. Though Clemens was cited for careless operation and negligent injuring, [Deputy Boe] would not have been in the roadway at the time of the accident had the shoulder been properly maintained. [Footnotes omitted.]

After a thorough review of the record, testimony, and evidence herein, we are unable to say the trial court erred in its findings, which are amply supported by the record. The record reflects that the trial court was presented with competing views of the evidence and conflicting expert opinions from Deputy Boe's two experts, James Clary and Douglas Robert, and the DOTD's expert, David Hall, regarding the condition of the roadway and adjacent shoulder and the cause of the accident herein. As set forth in the trial court's reasons above, the trial court accepted the testimony of Deputy Boe's witnesses and experts and rejected the opinions of DOTD's expert. Where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Guzman v. State, 95-0957 (La. App. 1st Cir. 12/15/95), 664 So. 2d 1343, 1348 (citing Stobart v. State, Department of Transportation and Development, 617 So. 2d at 883.). Moreover, on review of the record before us, we find that a

reasonable factual basis exists for the trial court's finding that the shoulder was defective, the DOTD had notice of this defect, the shoulder was a cause-in-fact of Deputy Boe's damages, and that the DOTD was 75% at fault for this accident.

Accordingly, we find no merit to these assignments of error.

INTEREST ON COSTS

In the DOTD's final assignment of error, it contends that the trial court erred in awarding interest on costs from the date that suit was filed rather than from the date of the judgment.

The court may render judgment for costs, or any part thereof, against any party, as it may consider equitable. LSA-C.C.P. art. 1920. The court shall determine the amount of the fees of expert witnesses, which are to be taxed as costs, to be paid by the party cast in judgment. LSA-R.S. 13:3666. The court shall award interest in the judgment as prayed for or as provided by law. LSA-C.C.P. art. 1921.

In their petition for damages, plaintiffs prayed for "damages ... with legal interest from the date of judicial demand, until paid, and for all costs of these proceedings." In its judgment, the trial court cast the DOTD "with all costs of court, including the sum of $14,559.83 in costs and the sum of $2,826.50 in Clerk of Court Costs, plus judicial interest from January 19, 2006 [the date plaintiffs' petition for damages was filed] until paid."[3]

Expert witness fees and costs are not ascertainable until awarded by the court, and interest on such awards runs from the date of the award. Thomas v. A. Wilbert & Sons, LLC, 2015-0928, 2015-0929 (La. App. 1st Cir. 2/10/17), 217 So. 3d 368, 406 n.96 (citing Aucoin v. Southern Quality Homes, LLC, 2007-1014 (La. 2/26/08), 984 So. 2d 685, 698). Thus, although the trial court awarded legal

[3]An itemized spread sheet was submitted to the trial court in support of the award of $14,559.83, which included costs for court reporters, depositions, medical records, and expert witness fees.

interest from the date of judicial demand pursuant to plaintiffs' request, plaintiffs are not entitled to prejudgment interest on the awards of expert witness fees and costs. See Cajun Electric Power Cooperative v. Owens-Corning Fiberglass Corporation, 616 So. 2d 645, 646-647 (La. 1993). Finding the trial court erred in awarding interest on all costs from the date of the filing of plaintiffs' petition, we hereby amend the judgment of the trial court to order that judicial interest on all costs awarded accrues from May 3, 2016, the date of the judgment awarding same.

CONCLUSION

After a thorough review of the record and relevant jurisprudence, we find that the trial court's reasons for judgment adequately explain the decision and that plaintiffs were entitled to judgment in their favor. We hereby amend the judgment to provide that judicial interest on the award for costs (i.e., $14,559.83 in costs and $2,826.50 in Clerk of Court Costs) shall run from May 3, 2016, the date of the judgment awarding same.

Thus, in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1(B), the judgment of the trial court is affirmed in part and amended in part. Costs of this appeal in the amount of $9,015.00 are assessed against the appellant, the State of Louisiana, Department of Transportation and Development.

AFFIRMED IN PART AND AMENDED IN PART.