NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1754

MAE LEE RUCKER, BENNY S. M. RUCKER, MARCUS I. L. RUCKER, LATRICE RUCKER YOUNG, KIMBERLYN RUCKER BELONE, AND ALBERT T. K. RUCKER

VERSUS

PARISH OF ASCENSION

DATE OF JUDGMENT: SEP 21 2018

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 110,187, DIVISION C, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE KATHERINE TESS STROMBERG, JUDGE

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: AFFIRMED.

Welch Jr. concurs without reasons

CHUTZ, J.

This matter arises from a single-vehicle accident in which the driver, Albert Rucker, was killed. On January 8, 2014, Mr. Rucker was operating a cement truck in Ascension Parish on Merritt Evans Road in the course of his employment with Dolese Brothers Company. ("Dolese"). Mr. Rucker had made several previous trips down the road that same day to delivers loads of cement to a construction site. During his fourth trip, for an unknown reason, the truck went off the paved portion of the roadway partially onto the right shoulder. Upon reentering the roadway, the truck crossed the center line, overturned, and came to rest in a ditch on the left side of the roadway. Mr. Rucker died at the scene from the injuries he sustained. His widow and children, Mae Lee Rucker, Kimberlyn Rucker Belone, and Albert T.K. Rucker, Jr.,[1] filed this wrongful death suit against the Parish of Ascension ("the Parish"),[2] alleging the accident was caused by the defective condition of "the roadway and the adjacent right shoulder which had a steep drop off [from the roadway to the shoulder], a steep ditch and no recovery zone." By amended petition, the plaintiffs added the Parish's liability insurer, Berkley Insurance Company, as an additional defendant. Additionally, Dolese filed an intervention, seeking recovery for economic damages, property damages, and incidental expenses, including the total loss of the cement truck, as well as statutory workers' compensation benefits it paid as a result of Mr. Rucker's death.

Following a two-day bench trial, the trial court took the matter under advisement. On August 31, 2017, the trial court signed a written judgment in favor of the defendants, dismissing the plaintiffs' and Dolese's claims. In its written reasons for judgment, the trial court concluded that the Parish had no actual notice

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[1] Benny S.M. Rucker, Marcus I.L. Rucker, and Latrice Rucker Young, were originally also named as plaintiffs, but were dismissed from this matter pursuant to an unopposed motion to dismiss.

[2] The parties stipulated that Merritt Evans Road was in the care, custody, and control of the Parish at the time of the accident.

of the shoulder edge drop offs (as they were measured shortly after the accident) and that the plaintiffs failed to prove the drop offs had existed long enough to constitute constructive notice to the Parish.

The plaintiffs appealed the adverse judgment, alleging in a single assignment of error that the trial court committed manifest error in finding the Parish had no constructive notice of the shoulder edge drop offs as measured shortly after the accident, which ranged from approximately one to six inches. The plaintiffs argue the Parish's system of relying on citizen complaints for detection and repair of defective conditions, instead of inspecting the roadways and adjacent shoulders itself, was unreasonable. Nevertheless, in recognition of Louisiana jurisprudence to the contrary, the plaintiffs concede this fact alone did not give the Parish constructive notice of the condition of the right shoulder on Merritt Evans Road.[3] Rather, they allege the combination of the following facts establish the Parish had constructive notice of the defective conditions: (1) the testimony of a resident who lived near the accident scene that the shoulder edge drop offs had existed for at least three years before the accident; (2) Parish workers had performed maintenance and repair work on Merritt Evans Road on numerous occasions during that three-year period; and (3) a crash analysis performed by Jason Taylor, a

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[3] In ***Jones v. Hawkins***, 98-1259 (La. 3/19/99), 731 So.2d 216, 220, the Louisiana Supreme Court held:

> The absence of a plan of inspection in no way shows or implies that an employee of the appropriate public entity has actual knowledge of a dangerous defect or condition. Indeed, quite the opposite is true; in the absence of other facts, such as recorded complaints about a defect, lack of a plan implies that employees of the public entity have no actual knowledge of dangerous defects or conditions. Thus, a holding that lack of a plan infers knowledge effectively eviscerates the notice requirement of La. R.S. 9:2800.
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> Because we find that the City's duty to use reasonable care in maintaining its public ways does not encompass conducting periodic inspections of its streets, and the failure to conduct such inspections does not imply knowledge of a dangerous defect on those streets, we hold the failure to conduct inspections does not impute to the City constructive knowledge of defects in its streets.

See also ***Clark v. East Baton Rouge Parish Department of Public Works***, 17-1445 (La. App. 1st Cir. 4/6/18), 248 So.3d 409, 415; ***Racca v. St. Mary Sugar Cooperative, Inc.***, 02-1766 (La. App. 1st Cir. 2/23/04), 872 So.2d 1117, 1127, writ denied, 04-0698 (La. 5/7/04), 872 So.2d 1083.

former Parish transportation engineer, revealed there had been twenty-five crashes on Merritt Evans Road from 2007 to 2013 and that off-the-road crashes were the most common type of crashes in the Parish. Dolese also appealed, arguing in two assignments of error that the trial court committed manifest error: (1) in finding the evidence was insufficient to prove the defective condition existed for long enough to constitute constructive notice; and (2) in finding the Parish had no constructive knowledge of the defective condition on Merritt Evans Road.[4]

A governmental entity that has custody of a public roadway owes a duty to the traveling public to maintain the roadway in a condition that is reasonably safe for vehicular use and does not present an unreasonable risk of harm to the motoring public exercising ordinary care and reasonable prudence. Additionally, the governmental entity must maintain the roadway's shoulders in such a condition that they do not present an unreasonable risk of harm to motorists using the adjacent roadway who are using the area in a reasonably prudent manner. ***Granda v. State Farm Mutual Insurance Company***, 04-1722 (La. App. 1st Cir. 2/10/06), 935 So.2d 703, 708-09, writ denied, 06-0589 (La. 5/5/06), 927 So.2d 326. A governmental entity's duty to maintain safe shoulders encompasses the foreseeable risk that for any number of reasons a motorist might find himself on, or partially on, the shoulder. This duty extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding the speed limit or momentarily inattentive. ***Granda***, 935 So.2d at 709.

In order to recover against a governmental entity for failing to maintain a roadway or its adjacent shoulders in a reasonably safe condition, the plaintiff must prove: (1) the governmental entity had custody of the thing that caused the plaintiff's injuries or damages; (2) the thing was defective because it had a

[4] In a separate appeal, also decided this date, the Parish appealed a December 12, 2017 judgment of the trial court denying its motion to tax costs against the plaintiffs and Dolese. See ***Rucker v. Parish of Ascension***, 18-0139 (La. App. 1st Cir. 9/21/18) (unpublished).

condition that created an unreasonable risk of harm; (3) the governmental entity had **actual or constructive knowledge of the defect** and failed to take corrective measures within a reasonable time; and (4) the defect in the thing was a cause-in-fact of the plaintiff's injuries. La. C.C. arts. 2315, 2317, and 2317.1; La. R.S. 9:2800; ***Netecke v. State ex rel. DOTD***, 98-1182 (La. 10/19/99), 747 So.2d 489, 494; ***Smith v. Landry***, 15-1742 (La. App. 1st Cir. 8/31/16), 202 So.3d 1108, 1110-11, writ denied, 16-2112 (La. 2/3/17), 215 So.3d 693, cert. denied, ___ U.S. ___, 138 S.Ct. 81, 199 L.Ed.2d 25 (2017). The plaintiff's failure to prove any one of these essential elements is fatal to his claims. ***Netecke***, 747 So.2d at 494; ***Smith***, 202 So.3d at 1111.

In the instant case, the trial court found the plaintiffs failed to prove the essential element that the Parish had actual or constructive notice of the alleged defective condition. The plaintiffs and Dolese do not contest the finding that the Parish lacked actual knowledge, but argue the trial court committed manifest error in finding no constructive notice existed. "Constructive notice" is defined by La. R.S. 9:2800(D) as "the existence of facts which infer actual knowledge." Generally, constructive notice may be found to exist in negligence cases when the defect or condition has existed for such a period of time that it would have been discovered and repaired had the public body exercised reasonable care. ***Barthel v. State, Department of Transportation and Development***, 04-1619 (La. App. 1st Cir. 6/10/05), 917 So.2d 15, 19.

The trial court herein gave detailed written reasons for judgment explaining its finding that the Parish lacked notice of the shoulder edge drop offs, stating:

> The court finds that there was no evidence presented to show that the Parish had actual notice of the shoulder edge drop off. Mr. Richardson [assistant director for the Parish Department of Public Works] testified that the shoulders were leveled with the surface of the road in the 2007 overlay project, and further testified that the Parish had received no complaints since the completion of that

overlay project. As such, the Court finds that the Parish did not have actual notice of the defect.

The Court further finds that the road inspections performed in conjunction with the Parish's use of the Cartegraph program did not give the Parish actual or constructive notice of the shoulders. Mr. Taylor stated in his disposition that the Cartegraph program gathered two-dimensional data about the roadway. Mr. Taylor further stated that Mr. Breaux and Mr. Broussard were trained as pavement and asphalt inspectors. Though roads were typically rehabilitated in their entirety, including the shoulder, there is no testimony that Mr. Breaux and Mr. Broussard were trained or instructed to inspect the shoulder during these asphalt and pavement inspections. Mr. Rucker, who made seven trips down Merritt Evan Roads that day, was in a better position to notice the shoulder edge drop-off.

In *Jones v. Hawkins*, the Louisiana Supreme Court held that the failure to conduct inspections does not impute to the City constructive knowledge of defects in its streets. The Court finds that the Parish's utilization of a reactive complaint system in lieu of a periodic inspection system does not impute the Parish with constructive knowledge of the shoulder edge drop-off.

The Court finds that Mr. Taylor's crash data report did not give rise to constructive knowledge of the shoulder edge drop off along Merritt Evans Road. Though a majority of accidents on Parish roads involved motorists leaving the roadway, Mr. Taylor was unable to determine how many accidents along Merritt Evans Road involved motorists leaving the roadway. As such, the Court finds that Mr. Taylor's crash report did not give the Parish constructive knowledge of the shoulder edge drop-off.

The Court further finds that there was not sufficient evidence to show that the defect existed for a long enough period of time to infer constructive knowledge. Mr. [Coleman] testified that he lived along Merritt Evans Road for three years prior to the accident, and that the shoulder edge drop-off existed as long as he had been living there. However, he did not testify as to the depth of the drop-off at the time he began living there, or at the time of the accident. Mr. Tekell [the plaintiffs' expert] testified that the drop off along Merritt Evans Road where Mr. Rucker drove along the shoulder varied from roughly one inch to six inches. However, the Court finds that his testimony regarding the displacement of the shoulder material is unconvincing. Tekell first stated that he could not be sure that the truck did not displace the shoulder material, but then stated that westbound shoulder material was similarly displaced, which led him to the ultimate conclusion that the truck did not displace the shoulder material along the eastbound lane [where the cement truck travelled]. However, photographs entered into evidence [show] that emergency response vehicles were parked along the westbound shoulders. The Court finds that the cement truck, as well as the emergency response vehicle, could have displaced the material of their respective shoulders. As such, the Court finds that Plaintiff has not shown that it

> is more likely than not that the shoulder edge drop off as measured shortly after the accident existed for a long enough period of time to constitute constructive notice. [Footnote omitted.]

The issue of whether the Parish had constructive notice of the shoulder edge drop offs is a factual issue reviewable under the manifest error standard. ***Stobart v. State through Department of Transportation and Development***, 617 So.2d 880, 882 (La. 1993); ***Murphree v. Daigle***, 02-1935 (La. App. 1st Cir. 9/26/03), 857 So.2d 535, 537, writ denied, 03-2927 (La. 1/9/04), 862 So.2d 990. This test requires a reviewing court to do more than simply review the record for some evidence that supports or controverts the trial court's factual finding. The manifest error of appellate review precludes setting aside a trial court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. ***Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC***, 14-2592 (La. 12/8/15), 193 So.3d 1110, 1115; ***Stobart***, 617 So.2d at 882. Before reversing a trial court's factual conclusions, the appellate court must satisfy a two-step process based on the record as a whole: there must be no reasonable factual basis for the trial court's conclusion, and the finding must be clearly wrong. The issue to be resolved is not whether the trial court was right or wrong, but whether its factual finding was a reasonable one. ***Hayes Fund for First United Methodist Church of Welsh, LLC***, 193 So.3d at 1115-16; ***Stobart***, 617 So.2d at 882. If the trial court's findings are reasonable in light of the entire record, the court of appeal may not reverse, even if convinced that had it been sitting as the trier-of-fact, it would have weighed the evidence differently. ***Rosell v. ESCO***, 549 So.2d 840, 844 (La. 1989). Moreover, it is well-settled that the trier-of-fact is not bound by the testimony of an expert, which is to be weighed the same as any other evidence. The trier-of-fact may accept or reject in whole or in part the opinion expressed by an expert. ***Harris v. State ex rel. Department of***

Transportation and Development, 07-1566 (La. App. 1st Cir. 11/10/08), 997 So.2d 849, 866, writ denied, 08-2886 (La. 2/6/09), 999 So.2d 785.

After a thorough review of the record, we find the trial court's factual findings, including the finding that the Parish had neither actual nor constructive notice of the shoulder edge drop offs as they were measured shortly after the accident, are reasonably supported by the record and are not clearly wrong. The trial court's findings represent a permissible view of the evidence. Giving due deference to the trial court's factual findings, we cannot say they constitute manifest error. Accordingly, the judgment of the trial court dismissing the claims of the plaintiffs and Dolese is affirmed. The costs of this appeal are to be paid by the plaintiffs and Dolese, one-half to each. We issue this memorandum opinion in accordance with Uniform Rules–Courts of Appeal, Rule 2–16.1(B).

AFFIRMED.