STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0526

MICHELLE LEE SULLIVAN YOUNG AND KIRTLAND ANTHONY YOUNG, SR., HUSBAND AND WIFE INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, KIRTLAND ANTHONY YOUNG, JR.

VERSUS

STATE OF LOUISIANA DEPARTMENT OF TRANSPORTATION & DEVELOPMENT, AND GENERAL MOTORS CORPORATION

DATE OF JUDGMENT: DEC 3 0 2020

ON APPEAL FROM THE TWENTIETH JUDICIAL DISTRICT COURT
NUMBER 34034, DIVISION A, PARISH OF EAST FELICIANA
STATE OF LOUISIANA

HONORABLE KATHRYN E. JONES, JUDGE

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BEFORE: WHIPPLE, C.J., WELCH, AND CHUTZ, JJ.

Disposition: AFFIRMED. ANSWER DENIED AS MOOT.

CHUTZ, J.

Plaintiffs-appellants, Michelle Sullivan Young and her son, Kirtland Anthony Young, Jr.,[1] appeal the trial court's judgment granting a motion for summary judgment filed by defendant-appellee, the Louisiana Department of Transportation and Development (DOTD), and dismissing their claims for damages as a result of injuries sustained in a single-car accident in which Ms. Young was the driver. We affirm. DOTD's answer, raised in the alternative, is denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

On December 16, 2000, around 9:30 a.m., on a morning that it had rained, Ms. Young was traveling in a southeasterly direction on Louisiana State Highway 964 (Hwy 964), a roadway with a 55 MPH speed limit, from her home near St. Francisville to her job in Zachary, Louisiana. Where the roadway curved due south at mile marker 11.1, approximately .2 miles north of Louisiana Highway 412, Ms. Young lost control of her 2000 Pontiac Grand Prix GT. Her car crossed the centerline, returned to its lane, and then ran off the roadway onto the western shoulder to her right. The vehicle then quickly moved in an easterly direction, to Ms. Young's left, across the centerline, onto the eastern shoulder, and down an embankment where she hit a tree. Ms. Young was thrown out of the car, sustaining serious injuries, which, among other things, rendered her a paraplegic.

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[1] At the time the lawsuit was filed, Kirtland Young, Jr., born in February 2000, was represented by both his mother and his father, Kirtland Anthony Young, Sr., who additionally sued in his individual capacity as Ms. Young's husband. On June 12, 2017, Kirtland Anthony Young, Sr., was dismissed as a party plaintiff in this matter "without prejudice to any claims or causes of action asserted ... by [Ms. Young], individually, and on behalf of her minor child, Kirtland Anthony Young, Jr." The record does not establish that, upon reaching the age of majority, Kirtland Anthony Young, Jr. has been substituted as a proper party plaintiff.

The Youngs subsequently instituted this lawsuit, naming DOTD as a defendant.[2] Although the Youngs' claims were initially dismissed on a finding of abandonment, the trial court subsequently rendered judgment, setting aside the dismissal.[3]

On July 19, 2019, DOTD moved for summary judgment, averring that the Youngs were unable to prove that any unreasonably dangerous roadway condition was the cause-in-fact of the accident. The Youngs filed an opposition, and on August 7, 2019, the trial court heard the motion. At the conclusion of the hearing, the trial court issued oral reasons for judgment, agreeing with DOTD. A judgment in conformity with the trial court's reasons, granting DOTD's motion for summary judgment and dismissing the Youngs' claims, was signed on August 27, 2019. A timely motion for new trial filed by the Youngs was heard on October 21, 2019. The trial court subsequently signed a judgment, denying the new trial. The Youngs appeal.

DISCUSSION

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. A summary judgment is reviewed on appeal de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law.

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[2] Although General Motors Corporation (GM) was also named as a defendant, the claims against it were amicably resolved and on September 23, 2003, GM was voluntarily dismissed from the lawsuit.

[3] DOTD unsuccessfully challenged the trial court's judgment setting aside the dismissal on the basis of abandonment. See ***Young v. State of Louisiana, Dep't of Transp. and Dev.***, 2011-2298 (La. App. 1st Cir. 4/4/12) (unpublished writ action).

Beer Indus. League of Louisiana v. City of New Orleans, 2018-0280 (La. 6/27/18), 251 So.3d 380, 385-86.

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that it negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1).

A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. ***Walker v. City of Independence Police Dep't***, 2018-1739 (La. App. 1st Cir. 2/7/20), 296 So.3d 25, 30. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in light of the substantive law applicable to the case. ***Pumphrey v. Harris***, 2012-0405 (La. App. 1st Cir. 11/2/12), 111 So.3d 86, 89.

In order to find DOTD liable based on the design, construction, or a condition of a state roadway, a plaintiff must prove that (1) DOTD had custody of the thing which caused the plaintiff's damages, (2) the thing was defective because it had a condition which created an unreasonable risk of harm, (3) 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 the plaintiff's injuries. Failure to establish any one of these elements is fatal to the case. ***Smith v. Landry***, 2015-1742 (La. App. 1st Cir. 8/31/16), 202 So.3d 1108, 1110-11, writ denied, 2016-2112 (La. 2/3/17), 215 So.3d 693.

The cause-in-fact element requires a determination of whether the harm would have occurred but for the defendant's alleged substandard conduct, or, when concurrent causes are involved, whether the defendant's conduct was a substantial factor in bringing about the harm. ***Walker***, 296 So.3d at 31. Generally, the cause-in-fact inquiry is a factual determination best made by the fact-finder. But summary judgment may be appropriate when there is no evidence to show that the cause-in-fact inquiry has been met. See ***Scott v. City of Shreveport***, 49,944 (La. App. 2d Cir. 6/24/15), 169 So.3d 770, 773, writ denied, 2015-1438 (La. 10/9/15), 186 So.3d 1149.

Lack of Advisory Speed Plate:

On appeal, the Youngs urge that they produced factual support sufficient to establish the existence of a genuine issue of material fact as to whether the lack of a speed plate advising 45 MPH as an appropriate speed on Hwy 964 prior to the vehicle's entry into the curve was an unreasonably dangerous condition that was a cause-in-fact of Ms. Young's accident. Thus, they maintain, the trial court erred in granting summary judgment on this basis.

The trial court admitted into evidence the deposition testimony of several witnesses, including that of Ms. Young. Ms. Young testified that she received her driver's license in March of 1994, over six years before the accident. She was familiar with Hwy 964 and the curve, having often driven the road to go to work at her job in Zachary as she was doing on the day of the accident. She also had driven southbound Hwy 964 when she had to shop or pay a bill in Zachary, "maybe about

1,000 times." Ms. Young stated that she never had any difficulty negotiating the curve on prior occasions, including occasions when the pavement was wet as it was on the day of the accident.

Ms. Young's recollection was that before the accident, she usually drove between 45 and 55 MPH through the curve and had never had any problems staying on the roadway. Because it had been raining on the morning of December 16, 2000, Ms. Young explained that she drove at a cautious speed, traveling down Hwy 964 at a rate of between 45 and 50 MPH. She remembered that the highest rate of speed she had ever seen posted was 45 MPH; noted that she normally observes speed limit signs; and did not recall having ever driven over 45 to 50 MPH on the Hwy 964 roadway. Ms. Young also testified that insofar as her rate of speed at the time of the accident, she relied upon the police report in which the estimated rate of her speed was 55 MPH.

Also admitted into the record relative to the motion for summary judgment was the deposition testimony of Marvin B. Foster, a former sign specialist who worked for DOTD for over 30 years before he retired in 2014. Foster testified that working for District #61, his area included East Feliciana Parish and specifically the signage of the section of the roadway with the curve where the accident occurred. He explained that as part of his job duties, he signed all the state roads in the district and that advisory speed plates were among the types of signs he installed. Looking at a photograph of the back of two vertically placed signs as well as a copy of a daily report, Foster stated that he installed a new advisory speed plate on June 20, 2002 in the section of Hwy 964 where the accident occurred. He indicated that it may not have been a replacement of an existing speed advisory plate since the curve warning sign, which had an arrow designating a right curve existed ahead on the roadway and was located directly above the advisory speed

plate, had the handwritten date of July 8, 1994 on its back. That, according to Foster, showed that a right-curve-ahead warning sign had consistently been erect at the location north of the curve for the eight years preceding its replacement on June 20, 2002. Because the advisory speed warning plate did not include an earlier date, he surmised it may have been missing on June 20, 2002, which he said was not uncommon in rural parishes where signs are often damaged.

With this evidence, DOTD established that Ms. Young was familiar with the roadway and had safely negotiated the curve on numerous occasions such that an advisory speed plate of 45 MPH would have served no purpose since it would have merely advised her of something she already knew. See ***McLeod v. East Baton Rouge Parish***, 414 So.2d 1341, 1344 (La. App. 1st Cir.), writ denied, 420 So.2d 455 (La. 1982) (holding that because the lack of an advisory speed plate did not induce the plaintiff to take the curve at an unsafe speed, it was not the cause-in-fact of the accident). DOTD also showed that Ms. Young was on notice to slow down on the roadway since it was wet. See La. R.S. 32:64A ("No person shall drive a vehicle on the highway within this state at a speed greater than is reasonable and prudent under the conditions and potential hazards then existing, having due regard for the traffic on, and the surface and width of, the highway, and the condition of the weather."). Additionally, Ms. Young was on notice that she was going to have to negotiate a right curve by the right-curve-ahead sign and, therefore, needed to slow down or use caution as she traveled through the curve in Hwy 964, regardless of the absence of an advisory rate of speed plate.

In response, the Youngs point to their accident reconstructionist expert Gene Moody who, on his visit to the accident site in October 2001 approximately ten months after the accident, noted the missing advisory speed plate, which designated 45 MPH as a safe rate of speed for southbound traffic heading into the

curve. Based on his testing, Mr. Moody determined that traveling at a rate between 45 and 50 MPH was safe but 55 MPH was not. He described the curve that Ms. Young encountered on the day of the accident as a broken-back or compound curve, which meant that the arc of the curve changed as a driver proceeded in a southerly direction on Hwy 964. According to Mr. Moody, he was not familiar with the actual method that the State of Louisiana used to determine the rate of speed for the advisory sign with this particular curve but indicated that the State usually initially bases it on math calculations, later adjusting it for real-life experiences.

Conceding that Ms. Young had traveled Hwy 964 without losing control of her vehicle many times prior to the accident, Mr. Moody explained that on December 16, 2000, "she could have heeded a posted speed advisory sign" and successfully negotiated the curve. He additionally suggested that in light of the inclement weather conditions at the time of the accident, a posted speed advisory sign was "essential to safely drive this curve," and, therefore, opined that the lack of the advisory sign was an unreasonably dangerous condition that contributed to the crash.

But most pertinent to our analysis is Ms. Young's testimony indicating, when asked, what she thought DOTD had done wrong relative to the lack of an advisory sign. She responded, "I don't know if the accident would have occurred.... I am just saying if the [advisory] speed limit sign was there, maybe the accident would not have occurred as bad as it did. Maybe I would have slowed down or [taken] precautionary measures to get ready to approach that curve." Ms. Young also testified that she normally reads speed limit signs.

Although the Youngs assert the evidence was sufficient to establish that the lack of the sign was a cause-in-fact of the accident, Ms. Young's testimony will

not allow for a finding that but for the lack of appropriate signage, the accident would have been avoided. Rather, according to Ms. Young, she did not know whether the accident would have occurred in the presence of the advisory signage. This same testimony by Ms. Young makes it impossible for a trier of fact to conclude that the missing advisory signage was a substantial factor in causing the accident. Thus, the evidence was insufficient to support a finding that the lack of the 45 MPH advisory speed plate was either the cause-in-fact of the accident or a substantial factor in causing Ms. Young's accident. This is particularly true because Ms. Young was already on notice to negotiate the curve at a slower rate of speed or with caution due to both the wet roadway and the right-curve-ahead warning sign she had driven past prior to entering the curve. Accordingly, the trial court correctly granted summary judgment insofar as the Youngs' theory of recovery based on the premise that an unreasonably dangerous condition in Hwy 964 existed due to the lack of an advisory speed plate having been installed before the curve for southbound traffic at mile marker 11.1.[4]

Condition of the Shoulder:

Preliminarily, we note that Ms. Young lost much of her memory of the events around the time of the accident. Thus, the sequence of the path of Ms. Young's car was established by the testimonies of the Normands, who were in a truck traveling north, in the opposite direction of Ms. Young, on Hwy 964 and

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[4] The Youngs rely on ***Hager v. State, ex rel. Dep't of Transp. & Dev.***, 2006-1557 (La. App. 1st Cir. 1/16/08), 978 So.2d 454, writs denied, 2008-0347 & 2008-0385 (La. 4/18/08), 978 So.2d 349, to assert that a material issue of fact exists as to whether a lack of a speed advisory plate was a cause-in-fact of Ms. Young's accident. In ***Hager***, on a clear day, a relatively inexperienced driver attempted to negotiate a series of curves for which there was neither a curve-ahead warning sign nor an advisory speed plate. 978 So.2d at 459-61. This court concluded that the total lack of signage in light of the configuration of the series curves was a substantial factor in causing an accident. ***Hager***, 978 So.2d at 468. Ms. Young was a driver who had successfully driven the roadway many times before the accident. Most importantly, she had actual notice to slow down and proceed with caution by both the posted right-curve-ahead sign and the wet road conditions. Thus, the absence of a speed plate advising her to slow her speed from the posted 55 MPH did not induce Ms. Young to drive through the curve at an unsafe speed. Accordingly, we find ***Hager*** is inapposite.

witnessed the accident. Thomas Normand was driving his 1999 Chevy Silverado, with his 16-year-old daughter, Talitha, and his wife, Judy, as passengers. Talitha said that she was in the front passenger seat and Judy testified that she was in the extended cab's back seat behind Talitha. Thomas and Judy recalled that the roadway was wet and Talitha remembered that it had rained that morning. Although the Normands' recollection of events varied in details, Thomas and Talitha agreed that Ms. Young crossed the centerline in front of the truck and moved back into her lane of travel before passing the Silverado. Judy, who was alerted by their hollering, turned around and looked out of the back window immediately after the vehicles crossed paths. She saw Ms. Young's vehicle run off the roadway, onto the western shoulder, and then cross the roadway behind the Normands' truck and land in a ditch on the eastern side of the roadway. Both Thomas, who looked through the rearview mirror, and Talitha, who turned around, saw Ms. Young's car hit a tree. According to Thomas, from the time he saw Ms. Young's car in his lane of travel until he saw her hit the tree, not even a second had passed. And Judy stated, "it all happened so fast."

On appeal, the Youngs contend that the western shoulder of southbound Hwy 964 created an unreasonably dangerous condition for which DOTD is liable. They reason that a material issue of fact exists as to whether the failure of DOTD to maintain the shoulders on Hwy 964 in conformity with its 1984 design was the cause-in-fact of the accident.

The primary duty of DOTD is to continually maintain the 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. La. R.S. 48:21A. DOTD's duty is not limited to just the roadway but extends to the shoulders of highways as well. ***Brown v. Louisiana Indem. Co.***, 97-1344 (La.

3/4/98), 707 So.2d 1240, 1242. DOTD's duty to maintain safe shoulders encompasses the foreseeable risk that for any number of reasons motorists might find themselves on, or partially on, the shoulder. The duty extends to the protection of those people who may foreseeably be placed in danger by an unreasonably dangerous condition. This duty extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding the speed limit or momentarily inattentive. ***Johnson v. State Through Dep't of Transp. & Dev.***, 2017-0973 (La. App. 1st Cir. 4/3/19), 275 So.3d 879, 892-93, writ denied, 2019-00676 (La. 9/6/19), 278 So.3d 970. DOTD cannot knowingly allow a condition to exist that is a hazard to a reasonably prudent driver but must take reasonable measures to eliminate or reduce the risks associated with the dangerous condition or may warn the public of the danger, risk, or hazard involved. ***Id.***, 275 So.3d at 893.

DOTD is neither a guarantor of the safety of all the motoring public under every circumstance nor the insurer for all injuries or damages resulting from any risk posed by defects in the roadway. But DOTD has a duty to correct conditions existing on old highways that are unreasonably dangerous. ***Id.***

To prevail on its motion for summary judgment, DOTD had to prove that any failure to correct any then-existing unreasonably dangerous conditions of the western shoulder of Hwy 964 in the curve where Ms. Young's vehicle ran off the roadway was not the cause-in-fact of the accident. In other words, DOTD had to point out a lack of evidence to support a finding that either but-for the then-existing unreasonably dangerous conditions of the western shoulder, the accident would not have occurred or that the then-existing unreasonably dangerous conditions of the western shoulder were a substantial factor in bringing about the accident.

At the hearing, the trial court admitted into evidence the deposition testimony of Dr. Joseph David Blaschke, DOTD's expert in design and analysis of highway road systems. Dr. Blaschke testified that Hwy 964 was a part of Governor Long's roadway system between 1900 and 1930. In 1925, the federal government provided monies to help states build new or improve existing highways and Hwy 964, a gravel roadway, was improved although it remained gravel. He stated that Hwy 964 was further developed in March 1956 and that at some point before that, the roadway became the bituminous surface that it is today. According to Dr. Blaschke, the typical section of Hwy 964 had 20-foot-wide paved roads made of asphaltic material, which called for 9-foot-wide travel lanes, with an extra foot of buffer, and 3-foot-wide shoulders adjacent to the edge of the asphalt on both sides.[5]

State Project 19-31-12 was the last modification to the Hwy 964 roadway prior to Ms. Young's accident and included the section with the curve where her vehicle left the roadway. That project included the widening of the travel lanes from 10 feet to 11 feet with additional base materials. The shoulders, which remained 3 feet wide, consisted of aggregate. Although the plans set forth in State Project 19-13-12 were consistent with the configuration of the curved section of the Hwy 964 as of April 2016 when Dr. Blaschke examined the accident site, he admitted that he could not say whether they were at the time of the accident.

Mr. Moody indicated that the western shoulder, to Ms. Young's right as she traveled in a southeasterly to southern direction, was dirt, covered with grass and weeds, and included some ruts in the shoulder of the edge of the pavement based on his observations and photographs he took in October 2001. Mr. Moody

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[5] Dr. Blaschke reluctantly agreed that Hwy 964 appeared to originally have been part of U.S. Highway 61 for which a typical section of the roadway required 12-foot-wide lanes and 10-foot shoulders, but stated that Hwy 964 never conformed to those specifications. When asked why Hwy 964 was not built in conformity with typical sections of U.S. Highway 61, Dr. Blaschke responded that with the construction of the interstate highway system, a lot of existing roadways were altered.

explained that Ms. Young would have traveled over some of these portions of the western shoulder prior to steering her car to the left (east) to return to the paved portion of the roadway and losing control of the vehicle. According to Mr. Moody, the presence of dirt, covered with grass and weeds, along with ruts in the shoulder existed because of DOTD's failure to properly maintain the shoulder with aggregate as specified in State Project 19-31-12. Therefore, Mr. Moody opined that once Ms. Young's vehicle traveled off the pavement onto the western shoulder, she had a minimal chance of regaining control of her vehicle.

The Youngs' suggestion that the narrowness of the western shoulder, ostensibly measuring only 2 feet at the time of Mr. Moody's October 2001 visit despite a design of 3 feet as set forth in State Project 19-31-12, is insufficient to establish the cause-in-fact element of their claim. Nothing in Mr. Moody's testimony explained the relationship between the criteria set forth in State Project 19-31-12 and Ms. Young's accident. Simply stated, the Youngs offered no evidence to support a finding that had the shoulders been maintained as specified in State Project 19-31-12, the accident would not have occurred.

Based on the summary judgment evidence, DOTD pointed out a lack of support for the cause-in-fact element of the Youngs' claims. The Youngs failed to produce factual support to show that had DOTD maintained the shoulder with aggregate as specified in State Project 19-31-12, the accident would not have occurred. Accordingly, the trial court correctly dismissed the Youngs' claims against DOTD on this basis as well.

Answer:

In an answer, DOTD requested as an alternative basis for dismissal, the reversal of the trial court's earlier judgment, granting the Youngs' motion to set aside the order dismissing their case on the basis of abandonment. Because we

have concluded that the trial court correctly dismissed the Youngs' claims in its grant of summary judgment, we find the answer moot and deny relief. See ***City of Hammond v. Parish of Tangipahoa***, 2007-0574 (La. App. 1st Cir. 3/26/08), 985 So.2d 171, 178 ("Cases submitted for adjudication must be justiciable.... A 'justiciable controversy' is one presenting an existing actual and substantial dispute involving the legal relations of parties who have real adverse interests and upon whom the judgment of the court may effectively operate through a decree of a conclusive character.").

DECREE

For these reasons, the trial court's judgment is affirmed. DOTD's answer is denied as moot. Appeal costs are assessed against Michelle Sullivan Young and Kirtland Anthony Young, Jr.

AFFIRMED. ANSWER DENIED AS MOOT.