KATIE DIXON MATHERNE AND DANIEL MATHERNE	*	**NO. 2000-CA-1088**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
LUHR BROS INC., AND STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 92-20223, DIVISION "I-7"
Honorable Terri F. Love, Judge
* * * * * *
Judge Steven R. Plotkin
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin, and Judge David S. Gorbaty)
(ARMSTRONG, J., DISSENTS WITH REASONS)

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AFFIRMED

This dispute arises out of a single car accident that occurred on Highway 90, east of Houma, Louisiana. The jury and the trial court ruled in favor of defendants and dismissed the case with prejudice. On appeal, plaintiffs raise ten assignments of error. We affirm for the reasons that follow.

STATEMENT OF THE CASE:

On November 25, 1992, the Katie Dixon Matherne and Daniel Matherne, filed suit against Luhr Bros, Inc. and the State of Louisiana, through the Department of Transportation and Development, ("DOTD") alleging negligence and strict liability, and seeking damages for injuries they suffered as a result of a car accident. The Mathernes requested a trial by jury against Luhr Bros. On December 11, 1997, DOTD filed a cross-claim against Luhr Bros., Inc. seeking indemnity and/or contribution from Luhr Bros., should DOTD be held liable for damages.

The jury found that Luhr Bros., Inc. was free from fault in causing plaintiffs' accident. The claims against DOTD were heard by the trial court; however, interrogatories related to these claims were submitted to the jury. The jury concluded that DOTD was not negligent and its actions were not a legal cause of plaintiffs' injuries. The trial court entered a judgment in favor of Luhr Bros., Inc. and DOTD and against plaintiffs with extensive reasons, dismissing the case with prejudice.

In its Reasons for Judgment, the trial court stated:

> The Court finds that the DOTD and Luhr Bros. discharged their duty to motorists, including Ms. Matherne, by providing an adequate warning. The court also finds the

> condition of Highway 90 and the driveway in question did not create an unreasonable risk of harm to the motoring public.
>
> A review of the testimony and evidence presented by plaintiff in this matter failed to demonstrate any right to relief against the State/DOTD, based upon the facts and the law. The court finds plaintiffs have failed to establish the alleged hazardous property was a cause-in-fact of the accident.
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> * * * *
>
> Thus, this Court finds DOTD owed no duty to plaintiffs to improve the condition of the roadside shoulder, ditch or driveway.

The Mathernes now appeal the judgment of the trial court. Specifically, the Mathernes argue that the trial court erred in not assigning fault to Luhr Bros., Inc. and DOTD in causing the November 28, 1991 car accident; and in finding Katie Matherne 100% negligent and solely responsible for the accident.

STATEMENT OF THE FACTS:

On Thanksgiving Day, November 28, 1991, Katie Matherne was driving with her husband, Daniel Matherne, as passenger, on Highway 90 from Houma toward New Orleans, Louisiana. At that time, Luhr Bros., Inc. was under contract with DOTD to construct a gravel roadbed adjacent to Highway 90, along a three and one-half mile stretch, east of Houma.

However, on Thanksgiving Day 1991, Luhr Bros., Inc. was not working at the site. When the Mathernes passed through this construction zone the car immediately ahead of them, a late model Lincoln, displayed its brake lights. To avoid hitting the Lincoln, Katie Matherne turned her vehicle to the right, towards the shoulder of the road. When the tires hit the gravel on the shoulder, the Matherne car began to slide. Katie Matherne lost control of the vehicle as it slid down the slope and into a drainage ditch. As the car continued to slide, it went over a driveway and drainage pipe apparatus. The car then flipped over and landed upside down on the opposite side of the ditch. The driver of the Lincoln fled the scene and was never identified. Neither Katie nor Daniel Matherne has any independent recollection of the accident.

Stephen Brooks, who was driving behind the Mathernes, was the only eyewitness who testified. The video deposition of Brooks was admitted at trial in lieu of his appearance in person. Brooks testified that he was driving on Highway 90 from Houma to Raceland, Louisiana, on Thanksgiving Day 1991. Brooks was driving at approximately 60 miles per hour, behind the Mathernes' vehicle, which was about five car lengths ahead of him. As he

drove between the towns of Blue Bayou and Raceland, Brooks noticed that the Mathernes' vehicle began to pull away from him and close in on the Lincoln, in such a manner that he thought the Mathernes' car was going to hit the Lincoln. Brooks stated that when the Lincoln displayed brake lights, the Mathernes' car made no attempt to stop, but veered off the road. The car then became airborne as it left the shoulder and then flipped in the air before landing upside-down in the ditch. Brooks then stopped his truck and proceeded to the scene to offer assistance. As he approached the Matherne vehicle he noticed two people inside of the car. The passenger, a man, was wearing a seatbelt. The driver, a woman, was not wearing a seatbelt. Brooks remained at the scene until emergency workers arrived.

As a result of the accident, Daniel Matherne suffered a cut to his head requiring stitches. Katie Matherne underwent eleven surgeries, including a posterior spinal fusion and bone, cartilage and muscle grafts, to address her severe back, neck, head and face injuries. Katie Matherne incurred approximately $355,000.00 in medical expenses and sustained serious permanent injuries.

NEGLIGENCE/STRICT LIABILITY:

The Mathernes argue that DOTD and Luhr Bros.,Inc. are liable under La. Civ. Code art. 2315, for negligence, and under La. Civ. Code art. 2317, for strict liability.

The Mathernes assert that DOTD breached its duty to them by knowingly maintaining a defective or unreasonably dangerous shoulder and by failing to protect motorists from the hazards and obstructions present during construction. Specifically, the Mathernes argue that DOTD is in violation of the American Association of State Highway and Transportation Officials ("AASHTO") guidelines for failing to maintain a "clear zone", of thirty (30) feet from the paved edge of the highway, clear from unprotected obstructions and hazards. Additionally, the Mathernes argue that barriers should have been erected to protect motorists from obstructions at the site, particularly the drainage ditch, which had a steep foreslope, in violation of AASHTO guidelines. As an alternative to barriers, the Mathernes assert that DOTD should have posted safety and warning signs in the area.

DOTD contends that the Mathernes did not meet their burden of proof that DOTD is negligent or strictly liable. DOTD relies on the testimony of

expert witness, Russell Doyle, who testified that Highway 90 is in conformance with DOTD and AASHTO standards applicable in 1956, at the time of the reconstruction of Highway 90, and that these design standards meet and surpass all current design guidelines.

Additionally, DOTD contends that Katie Matherne's driving violations were the sole cause of the accident. DOTD argues that Katie Matherne was following too close behind the Lincoln at a speed of over 60 miles per hour, in a 55 mile per hour zone, and this negligent operation of a motor vehicle was the sole and proximate cause of her accident and injuries. DOTD also relies on the testimony of Trooper Ronald Dies, who investigated the accident. Trooper Dies testified that he did not find anything that contributed to the accident, other than the operation of the vehicle driven by Katie Matherne.

Luhr Bros., Inc. argues that the Mathernes' appeal brief does not contain arguments directly against Luhr Bros., Inc. Nevertheless, Luhr Bros., Inc. contends that it is not at fault because it had only a remote connection to the accident. Luhr Bros., Inc. asserts that it was given plans and specifications by DOTD, and that its contract did not require Luhr Bros, Inc. to perform any work on the existing highway or shoulders of the

highway. Luhr Bros., Inc. began work on the project in April 1991, however the worked stopped in September 1991, when the power company failed to relocate its power lines. Between September 29 and November 29, 1991, Luhr Bros., Inc. worked at the site only one day, in October 1991.

In the recent case, Lasyone v. Kansas City Southern Railroad, 00-2628, (La. 4/3/01), ___ So. 2d ___, 2001 WL 316265, the Louisiana Supreme Court stated the standard of review for appellate courts:

> A trial court's finding of fact may not be reversed absent manifest error or unless clearly wrong. Stobart v. State of Louisiana, Through Department of Transportation and Development, 92-1328 (La. 4/12/93), 617 So.2d 880. The reviewing court must do more than just simply review the record for some evidence which supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. Stobart, 617 So.2d at 882. 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. Id. The reviewing court must always keep in mind that "if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, 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." Stobart, 617 So.2d at 882-83, citing Housley v. Cerise, 579 So.2d 973 (La. 1991) (quoting Sistler v. Liberty Mutual Ins. Co., 558 So.2d 1106,1112 (La. 1990)).

Lasyone, ___ So. 2d at ___, 2001 WL 316265, at *3.

In Lasyone, a truck driver, carrying 80,000 pounds of asphalt, collided with a train while traveling on Highway 1. The truck driver was traveling at

40 m.p.h. as he approached the train crossing. Unable to slow down in time, the driver drove off the road and struck a 90-foot long guardrail, which redirected his truck into the path of the train. The truck driver sued the train company, DOTD and the Pointe Coupee Parish for damages. The trial court found Lasyone and DOTD each 50% at fault. The trial court found that DOTD breached its duty to protect Lasyone from unreasonable risk of harm that the guardrail posed to passing motorists.

The appellate court reversed, finding that plaintiff had failed to prove that the guardrail posed an unreasonable risk of harm, and that plaintiff was solely responsible for the accident.

The Louisiana Supreme Court reversed, finding that "the appellate court failed to heed the manifest error rule and instead impermissibly substituted its opinion for that of the trial court." The Court found that the record clearly supported the trial court's findings that the guardrail posed an unreasonable risk of harm and that it redirected the truck into the path of the train thereby removing Lasyone's ability to avoid the collision.

In the present case, the Mathernes are before this Court claiming that the trial court erred in not finding DOTD and Luhr Bros., Inc. negligent, under La. Civ. Code art. 2315, and strictly liable under La. Civ. Code art. 2317.

La. Civ. Code art. 2315 provides, in pertinent part, that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

La. Civ. Code art. 2317 provides, in pertinent part:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody.

In order for the Mathernes to prevail on their claims of negligence and strict liability against DOTD, they must prove: 1) the property which caused the damage was in the custody of DOTD; 2) the property was defective because it had a condition that created an unreasonable risk of harm; 3) DOTD had actual or constructive notice of the risk and failed to take corrective measures within a reasonable time; and 4) the defect in the property was a cause-in-fact of the plaintiff's injuries. Brown v. Louisiana Indemnity Company, 97-1344 (La. 3/4/98), 707 So. 2d 1240, 1242.

La. R.S. 48:35(A) provides, in pertinent part:

> A. The Department of Transportation and Development shall adopt minimum safety standards with respect to highway and bridge design, construction, and maintenance. These standards shall correlate with and, so far as possible, conform to the system **then current** as approved by the American Association of State Highway and Transportation Officials. Hereafter, the state highway system shall conform to such safety standards. (emphasis added).

It is undisputed that DOTD was in custody of Highway 90 at the time and scene of the accident.

As to unreasonable risk of harm, DOTD has "a duty to maintain the public highways in a condition that is reasonably safe for persons exercising ordinary care and reasonable prudence." Brown, 97-1344 (La. 3/4/98), 707 So. 2d 1240, 1242; La. R.S. 48:21(A). When a highway is undergoing construction, DOTD's duty "is relaxed in connection with construction activities according to the reasonable necessities of the circumstances . . . [and] is usually discharged by the giving of adequate warning." Brandon v. State, Through Dept. of Highways, (La. App. 2 Cir. 1979) 367 So. 2d 137, 142-43.

The duty of DOTD to maintain safe shoulders includes the foreseeable risk that a driver may enter the shoulder area. Graves v. Page, 96-2201 (La. 11/7/97), 703 So. 2d 566, 572.

> This duty extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding the speed limit or momentarily inattentive. Ledbetter v. State, Through La. Dep't of Transp. & Dev., 502 So.2d 1383,1387 (La.1987). This duty however, does not render DOTD the guarantor for the safety of all the motoring public. Graves, 703 So.2d at 572; Briggs v. Hartford Ins. Co., 532 So.2d 1154,1156 (La.1988). Further, DOTD is not the insurer for all injuries or damages resulting from any risk posed by obstructions on or defects in the

> roadway or its appurtenances. Id. Moreover, not every imperfection or irregularity will give rise to liability, but only a condition that could reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances. Entrevia v. Hood, 427 So.2d 1146, 1149 (La.1983). Whether DOTD breached its duty to the public, by knowingly maintaining a defective or unreasonably dangerous roadway, depends on all the facts and circumstances determined on a case by case basis. Campbell [v. Department of Transp. & Dev., 94-1052, (La.1/17/95), 648 So.2d 898], at 901-02.

Lasyone v. Kansas City Southern Railroad, 00-2628, (La. 4/3/01), ___ So. 2d ___, ___, 2001 WL 316265 at *4.

We must first determine if DOTD is liable because its actions were a cause-in-fact of the plaintiffs' harm. See Cay v. State, Dep't of Transp. & Dev., 93-0887 (La.1/14/94), 631 So.2d 393, 395.

The Mathernes argue that DOTD's failure to conform to AASHTO guidelines for maintaining a "clear zone" and protecting motorists from the steep foreslope, created an unreasonable risk of harm and caused the November 28, 1991 accident.

At trial, Leonard Quick testified as an expert in the field of civil engineering. Mr. Quick testified that in 1995, four years after the accident, he took measurements of the slope of the drainage ditch were the accident occurred. He measured the slope of the ditch on both sides near the driveway, at five feet intervals to a distance of 20 feet. The slope had a 3.5:1

horizontal to vertical ratio. Mr. Quick stated that the 3.5:1 slope was in violation of the AASHTO standards, adopted by the State of Louisiana in 1968, which require a slope ratio of 4:1 or flatter. Under the AASHTO guidelines a slope steeper than 4:1 is required to be shielded or guarded by a barricade.

Additionally, Mr. Quick testified that a "clear zone" is the distance from the edge of the highway that is required by AASHTO to be free of obstructions. He stated that the minimum clear zone distance required by the AASHTO guidelines is thirty feet in this circumstance, where the slope is 3.5:1. Mr. Quick stated that in absence of a thirty-foot clear zone, either barricades should have been erected or the slope should have been flattened. Mr. Quick testified that the clear zone area extends through recoverable slopes (4:1 or flatter) and stops at non-recoverable slopes (steeper than 4:1).

Stephen Irwin testified as an expert in civil engineering and accident reconstruction. Mr. Irwin testified that he took measurements of the drainage ditch slope in early 1998. The slope changes where Highway 90 curves, and becomes steeper near the driveway. However, farther away from the driveway the slope is approximately 4:1 or 5:1. Mr. Irwin testified

that in the area where the accident occurred, the slope was flatter than 3.5:1 and that under these conditions barricades were not required by AASHTO.

Russell Doyle, a district construction engineer for DOTD, testified that in 1991, he was in charge of all construction for the district wherein the accident took place. Mr. Doyle testified that the portion of Highway 90 including the accident site was completed in about 1957 with a 4:1 slope.

Although Mr. Quick testified that the slope of the drainage ditch was 3.5:1, which required barricades, the trial court accepted the expert testimony of Mr. Irwin. Mr. Quick testified that he only took measurements in five feet intervals for a length of twenty feet on either side of the ditch, near the driveway. Mr. Irwin testified that he determined the slope at the accident site was flatter than 3.5:1, based on his measurements that extended to where the Matherne car left the road. Under the AASHTO guidelines, this slope, which is 4:1 or flatter, is "recoverable" and does not require the use of barricades within the thirty-foot clear zone.

Mr. Quick testified that the driveway was an obstruction to the motoring public. Mr. Quick further stated that it was foreseeable that a vehicle could have made impact with the driveway, thus it should have been

shielded with a barrier.

Mr. Irwin testified that the driveway was an obstacle within the thirty-foot clear zone. However, he stated that barricades or signs were not necessary for the driveway. Mr. Irwin further testified that according to the Roadside Design Guide, published by AASHTO, barriers and guardrails were not required along this portion of the highway.

The trial court found that the highway did not create an unreasonable risk of harm to the motoring public. Because the record in its entirety reveals a reasonable factual basis for this finding, we cannot conclude that the trial court is clearly wrong.

DOTD and Luhr Bros., Inc. assert that if there were any duty to protect the Mathernes in this situation, it was negated by Katie Matherne's grossly negligent operation of her vehicle.

"The duty owed by DOTD [to protect the motoring public] does not include the obligation to protect a plaintiff against harm which would not have occurred but for the grossly negligent operation of the motor vehicle by plaintiff." Burge v. City of Hammond, 509 So. 2d 151, 156 (La. App. 1 Cir. 1987).

Here, in its Reasons for Judgment, the trial court agreed with the defendants and cited La. R.S. 32:81, which provides, in pertinent part:

> A. The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.

The trial court found that Katie Matherne was aware of the condition of the highway, the gravel on the shoulder and the ditch adjacent to the road, and that "Ms. Matherne's negligence was the only cause of her accident."

At deposition, the eyewitness, Mr. Brooks, testified that he was traveling down Highway 90 at 60 miles per hour and that the Matherne car was traveling faster than he was. The Matherne vehicle was closely following the Lincoln and did not appear to even attempt to slow down, once the Lincoln displayed its brake lights. Mr. Brooks did not see the Matherne car display brake lights as it left the road. After the Matherne vehicle left the road, Mr. Brooks was able to drive onto the shoulder and stop without problem. When Mr. Brooks approached the Matherne car to offer assistance, he noticed that Katie Matherne was not wearing a seatbelt.

Trooper Dies, the investigating officer, testified that he did not see any skid marks leaving the road and he saw no other evidence at the scene of the accident to suggest Katie Matherne engaged her car's brakes. He

measured the vehicle's point of departure from the highway as 109 feet from the crossover. Trooper Dies also testified that according to his investigation, the manner in which the Mathernes' vehicle left the roadway was not in accordance with proper operational procedure for a motor vehicle. Trooper Dies concluded that the accident was the sole fault of Katie Matherne.

Mr. Irwin testified that he found no physical evidence that Katie Matherne attempted to brake or to reenter the highway after her car left the road. Mr. Irwin stated that based on the evidence presented, Katie Matherne was following too closely behind the Lincoln and that she was not paying attention.

The testimony presented clearly supports a finding that Katie Matherne was grossly negligent in the operation of her vehicle. The record reveals that she was driving at an excessive rate of speed, that she was following the Lincoln "more closely than is reasonable and prudent," and that her actions were the cause-in-fact of the accident. Under these facts, DOTD is not obligated to protect the Mathernes from harm that would not have occurred but for the grossly negligent operation of the motor vehicle by Katie Matherne.

After careful review of the record in its entirety, we find that the trial court was not manifestly erroneous in finding that DOTD and Luhr Bros.,

Inc. are not liable to the Mathernes, and that Katie Matherne was the sole cause of the accident. Thus, we decline to disturb the trial court's judgment.

We distinguish the case at bar from Lasyone v. Kansas City Southern Railroad, 00-2628, (La. 4/3/01), ___ So. 2d ___, 2001 WL 316265. In Lasyone, the plaintiff truck driver attempted to slow down and avoid a collision with the train. Here, Katie Matherne made no attempt to brake or return to the road before she lost control of her vehicle. While plaintiffs in both cases were speeding, here Katie Matherne was also more than momentarily inattentive. She avoided a collision with the Lincoln at the last possible moment and did not take further evasive action once she steered to avoid the car. Additionally we note that in Lasyone, the plaintiff struck an improperly placed guardrail that redirected his truck into the path of the train. In the case at bar, DOTD complied with the applicable AASHTO guidelines. Specifically, the slope of the culvert was recoverable and the driveway did not require the placement of a barrier.

CONCLUSION:

For the foregoing reasons, we affirm the judgment of the trial court finding in favor of defendants, DOTD and Luhr Bros., Inc., and dismissing the claims of the Mathernes with prejudice.

AFFIRMED