NOT DESIGNATED FOR PUBLICATION

JAMES LEE, SR. AND GLENDA LEE INDIVIDUALLY, AND AS CURATOR AND CURATRIX OF, AND ON BEHALF OF THEIR SON, JAMES LEE, JR.	*	**NO. 2005-CA-0838**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

VERSUS

*** * * * * * ***

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, FORD MOTOR COMPANY, ABC INSURANCE COMPANY, WALLACE DEGENNARO, AS REPRESENTATIVE OF THE SUCCESSION OF MICHAEL VICKERS, AIR COMPRESSOR ENERGY SYSTEMS, INC., ET AL.

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 93-751, DIVISION "A"
Honorable Robert A. Buckley, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr., and Judge Leon A. Cannizzaro, Jr.)

CANNIZZARO, J. CONCURS IN PART AND DISSENTS IN PART

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AFFIRMED

MAY 23, 2007

The Department of Transportation and Development (the DOTD) appeals the judgment of the district court finding it twenty-four percent liable to the Appellees, James Lee Sr., et al., and awarding the Appellees a total of $11,149,464. We affirm.

Facts

This case arises out of an automobile accident. Michael Vickers was operating a 1993 Ford Explorer and James Lee, Jr. was a front seat

passenger. While attempting to maneuver a curve on Highway 75 in Iberville Parish, Mr. Vickers' automobile went airborne, sideswiped a utility pole and crashed front-end first on a concrete driveway. Mr. Vickers' automobile hit a drainage inlet or "culvert" prior to him loosing control of the vehicle. Ultimately the vehicle crashed into a hackberry tree.

Shortly after the crash, an air ambulance transported Mr. Vickers and James Lee, Jr. to Our Lady of the Lake Hospital in Baton Rouge, Louisiana. Mr. Vickers' blood alcohol level read 116.7 or .099 blood alcohol concentration. Mr. Vickers died nineteen days after the accident.

James Lee, Jr. remained at the hospital where he received extensive medical care until being transferred to Touro Infirmary in New Orleans where he stayed for two months. James Lee, Jr. has severe, permanent brain injury and was rendered a quadriplegic. He requires twenty-four hour care.

Procedural History

On July 10, 2001, James Lee, Sr. and Glenda Lee, individually and as curator and curatrix on behalf of their son, James Lee, Jr., filed a Petition for Personal Injuries naming the State of Louisiana through the DOTD, Ford Motor Company, Air Compressor Energy System, Inc., Illinois National Insurance Company and the Succession of Michael Vickers as defendants. The petition was later amended to add State Farm Mutual Automobile

Insurance Company as a defendant. Illinois National, Air Compressor Energy System, Inc. and State Farm were all dismissed for different reasons.

Trial began on March 29, 2004 and the jury returned a verdict on April 13, 2004. The Lees filed a Motion for New Trial/Additur or alternatively for a Judgment Not Withstanding the Verdict seeking reallocation of fault and an increase in damages. On October 6, 2004, the district court denied the Lee's Motion for New Trial/Additur, denied their request for JNOV as it related to the issue of liability, but increased damages for James Lee. Jr.'s past medical expenses. The district court also increased the loss of earning capacity. It is from this judgment that the DOTD takes the instant appeal.

Assignments of Error by the DOTD

The DOTD offers the following five assignments of error for this Court's review: (1) the district court erred in finding that the DOTD is twenty-four percent negligent; (2) the district court erred in finding that the plaintiffs rebutted the DOTD's *Batson* challenge; (3) the district court erred in granting plaintiff's Motion for Judgment Notwithstanding the Verdict; (4) the district court erred in relieving James Lee, Jr. of any liability; and (5) the district court erred in limiting the testimony of Richard Savoie, the DOTD

expert in highway design.

Standard of Review

In civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard which precludes the setting aside of a trial court's finding of fact unless those findings are clearly wrong in light of the record reviewed in its entirety. *Cenac v. Public Access Water Rights Assn.,* 2002-2660 (La. 6/27/03), 851 So.2d 1006, *citing Rosell v. ESCO,* 549 So.2d 840 (La. 1989). A reviewing court may not merely decide if it would have found the facts of the case differently, the reviewing court should affirm the trial court where the trial court judgment is not clearly wrong or manifestly erroneous. *Ambrose v. New Orleans Police Dep't Ambulance Serv.,* 93-3099, 93-3110, 93-3112, p. 8 (La. 7/5/94), 639 So.2d 216, 221. Because the jury verdict is based on a credibility call, we are restrained from finding the jury's decision to be manifestly erroneous or clearly wrong. The trial court is in a much better position to evaluate live witnesses (as opposed to the appellate court who must review a cold record). Further, this principle of review is designed to ensure the proper allocation of trial and appellate functions between the respective courts. *Canter v. Koehring Co.,* 283 So.2d 716 (La. 1973); *Ramirez v. Transit Management of Southeast Louisiana, Inc* 2003-0233(La. App. 4 Cir. 8/27/03) 855 So.2d

379, 382.

Assignment of Error #1

The DOTD maintains that the jury verdict, which found it twenty-four percent negligent, was clearly wrong. The DOTD argues that the evidence shows that the roadway was not defective and that Mr. Vickers was intoxicated at the time of the accident.

"As to the area off the shoulder of the road, but within the right of way, the 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." "Whether the condition of a road is unreasonably dangerous is a question of fact and should only be reversed if it is manifestly erroneous or clearly wrong." *Petre v. State, Dep't of Transp. & Dev.*, 01-876, p. 7 (La. 4/3/02), 817 So.2d 1107, 1111. "When applying a manifest error or clearly wrong standard, even if an appellate court may feel that its own evaluations and inferences are as reasonable as those of the district court, it should not disturb the findings of the district court." *Bouley v. Guidry* 2004-469, p.5 (La. App. 3 Cir. 9/29/04), 883 So.2d 1099, 1104.

In order for the DOTD to be held liable under the circumstances of this case, the trial judge must have concluded (1) that the DOTD had custody

of the thing which caused plaintiffs' damages, (2) that the thing was defective because it had a condition which created an unreasonable risk of harm, (3) that the DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time, and (4) that the defect was a cause-in-fact of plaintiffs' injuries. *Lee v. State, Through Dep't of Transp. & Dev.*, 97-0350, p.3-4 (La.10/21/97), 701 So.2d 676, 677-78; *Brown v. Louisiana Indem. Co.* 1997-1344 (La. 3/4/98) 707 So.2d 1240, 1242.

There is no question that the DOTD had custody of La. 75 at the time of the accident. However, the DOTD argues that the original 1948 plans for the highway called for a gravel surface. The DOTD maintains that in 1980 it applied cement to the existing gravel to stabilize the roadway, however, it was not required to do major reconstruction to bring Highway 75 up to current American Association of State Highway and Transportation Officials standards at that time.

The Lees maintain that there was conflicting testimony between their expert and the DOTD's expert regarding the classification of La. 75 and the proper design standards. At trial, James Clary, an expert in civil engineering, testified for the Lees. The Lees maintain that Mr. Clary concluded that Hwy 75 was defective because of substantial "banking."

When questioned, Mr. Clary explained on direct examination that:

> A. This section right here (indicating on a roadway plan) is super elevation details in feet with reference to grade. This tells you, depending on the sharpness of the curve, how much you're going to tilt the road. You can super elevate it in order to get around the curve in comfort.
>
> Q. Super elevation? Banking?
>
> A. Banking of the curve, right. That's where they tilt the road when you go around a curve to the left, or they tilt it high on the right. And for our curve, they call for nine percent. Point 09 feet per foot. For every foot you go out should come up an inch to an inch and an eighth.
>
> Q. All right. Did you measure the super elevation in the area where the Lee accident occurred?
>
> A. Yes, sir, I did.
>
> Q. Does it meet the requirement?
>
> A. No, sir, it does not. It's got about half of that.
>
> Q. Is it defective in your opinion?
>
> A. Yes, sir.

The DOTD offered the expert testimony of Joseph Blaschke, who qualified as an expert in accident reconstruction. Mr. Blascke testified that the width of the lane in which Mr. Vickers traveled was sufficient for him to safely travel with no defects. He also testified that the "superelevation" of

the highway was no factor in the accident by stating:

> Superelevation of the highway, really they are more for comfort than anything else, the road is banked. If you see vehicles on the race tracks [sic], the banking is much more severe that you find on our highways because they are designed to allow the racing vehicles to go at higher rates of speed around curves, but we don't do that on highways. We don't want to encourage high speeds, plus all kinds of drainage problems and whatnot to deal with. We provide on highways a very gentle superelevation to provide comfort. Drivers, generally, cannot go around the curve without steering. You still have to steer. How much of the superelevation really helped keep the vehicle on the roadway. Not a whole lot, especially during dry pavement conditions, and by that, the easiest way of explaining that is we have a manner in which we can determine how fast a vehicle can go around a curve. It's called critical speed and that's the speed at which the vehicle begins to slide off. Now, obviously, if the pavement is wet, you can't go fast because you can slide off the roadway a lot easier on wet pavement than on dry pavement. But if the roadway is not wet, the pavement is dry, then critical speeds are much higher.
>
> …that means that assuming Mr. Clary is correct and the sharpest radius point on this curve is 815 feet, that means that the vehicle is going 78, 80 miles an hour, it's going to slide off the roadway because it can't make the curve. There's not enough friction holding that vehicle on. That's literally what it means. Now, how much does superelevation play in that? In the computations, if you put superelevation rate, which I believe here was like 2 percent, somewhere around 2 percent. If you increase it to 4 percent, instead of going 75 miles an hour around the curve, now you can go 78.

When asked whether he thought superelevation had anything to do with the accident, Mr. Blaschke responded:

> Well, it didn't because we know the vehicle did not go off the roadway at a high rate of speed. All the estimates given, except for the police officer, all of our estimates we have been given, has been in the 20-mile an hour, maybe 60 at the most.

At trial, the Lees also maintained that there was a large unmarked dangerous hole within the DOTD's right-of-way and that James Lee was injured as a result of that.

The jury concluded that (1) La. 75 was in the custody of the DOTD; (2) La. 75 contained a defect(s) that made it unreasonably dangerous; (3) the defect(s) caused this accident; and (4) James Lee, Jr. was injured as a result.

> Louisiana's three-tiered court system allocates the fact finding function to the trial courts. *Virgil v. American Guarantee and Liability Ins. Co.*, 507 So.2d 825 (La.1987). Due to that allocation and the trial court's opportunity to evaluate live witnesses or to evaluate a mixture of deposition and live testimony, great deference is accorded to the trial court's factual findings. *Id.* Where the testimony of expert witnesses differ, it is the responsibility of the trier of fact to determine which evidence is the most credible. *Economy Auto Salvage v. Allstate Ins. Co.*, 499 So.2d 963 (La.App. 3d Cir.1986), *writ den.*, 501 So.2d 199 (La.1986); *Thompson v. Tuggle*, 486 So.2d 144 (La.App. 3d Cir.1986), *writ den.*, 489 So.2d 919 (La.1986). *See Rosell v. Esco*, 549 So.2d 840 (La.1989). Consequently, on appellate

review the trial court's reasonable factual findings, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed. *Virgil, supra.*

Absent “manifest error” or unless it is “clearly wrong,” the jury or trial court's findings of fact may not be disturbed on appeal. This standard is set forth in *Canter v. Koehring Co.,* 283 So.2d 716, 724 (La.1973), as follows:

> When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trier of fact's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error… [W]here there is conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel its own evaluations and inferences are as reasonable.

Thus, the appellate court's disagreement with the trial court, alone, is not grounds for substituting its judgment for that of the trier of fact. *Borden, Inc. v. Howard Trucking Co., Inc.,* 454 So.2d 1081 (La.1983). 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 though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Rosell, supra.* Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.; Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978).

Sistler v. Liberty Mut. Ins. Co. 558 So.2d 1106, 1111-1112(La. 3/12/90).

The contradiction of expert testimony is not enough for this Court to reverse the jury's findings. It was not erroneous for the jury to find that the DOTD is negligent considering the testimony and evidence contained in the record. Further, although the DOTD argues that the sole cause of the accident was Michael Vickers being intoxicated and unable to control his vehicle, we cannot accept this allegation. The record before this Court is 22 volumes and contains numerous boxes of exhibits. If Michael Vickers' intoxication was the lone cause of the accident, the jury could have easily come to such a conclusion in light of all of the evidence it had to weigh. The mere fact that the jury found the DOTD twenty-four percent liable indicates that great consideration was put in that decision and we are in no position to substitute our judgment for that of the jury.

We will not reverse the amount of negligence allocated to the DOTD on appeal, and quite simply find it fair and accurate.

Assignment of Error #2

The DOTD maintains that the district court erred in finding that the Lees rebutted the DOTD's *Batson* challenge. Specifically, the DOTD maintains that the Lees failed to articulate a gender-neutral explanation for exercising their preemptory challenges in a manner that discriminated

against potential male jurors on account of their gender.

In the landmark case of *Batson v. Kentucky*, 476 U.S. 79, 88-89, 106 S.Ct. 1712, 1717-18, 90 L.Ed.2d 69 (1986), stated:

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder, supra,* 100 U.S., at 308; see *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra,* 100 U.S., at 309.

The Lees maintain that this Court is in no position to review this assignment of error because the DOTD failed to seek a supervisory writ.

Until recently, we "repeatedly have held that when a party in a civil case wishes to seek appellate court review of an *Edmonson/Batson* issue, it must do so by an application for supervisory writs and may not do so by an appeal after the trial. *Cooke v. Allstate Ins. Co.,* No. 93-CA-1057, 635 So.2d

1330, 1333 (La.App. 4th Cir. 4/14/94); *writ denied,* 94-1257 (La. 9/2/94), 659 So.2d 496; *White v. Touro Infirmary,* No. 93-CA-1617, (La.App. 4 Cir. 2/11/94), 633 So.2d 755, 760; *Holmes v. Great Atlantic and Pacific Tea Co.,* 622 So.2d 748, 760 (La.App. 4th Cir. 1993), *writ denied,* 629 So.2d 1178 (La.1993). Therefore, we will not consider the merits of this issue. *Phillips v. Winn Dixie Stores, Inc*. 94-0354 (La. App. 4 Cir. 2/23/95), 650 So.2d 1259, 1263.

However, *Phillips* was overruled by *Alex v. Rayne Concrete Services*, 05-1457, 05-2344, 05-2520 (La. 1/26/07), 951 So.2d 138. The Supreme Court reasoned, "After considering the matter, we find that the precepts of judicial economy and fundamental fairness would be better served by allowing a party to a civil suit to have his *Batson/Edmonson* challenge heard on appeal, rather than solely on application for supervisory writ." *Id.* at 42

The Lees rely on *Phillips v. Winn Dixie Stores, Inc*., the law at the time this appeal was taken. However, in light of the recent case law, we must review this assignment of error.

The DOTD maintains that the district court committed reversible error by allowing the trial to go forward when the Lees struck potential jurors, John H. Stroebell and Dennis Pixton, but allowed Lezlie Rodivich showing an intent to strike male jurors proving gender discrimination.

The district court addressed the challenges of the jurors as follows:

> THE COURT:
>
> …I find that five out of six challenges that were made by the plaintiff in this case were striking males, specifically I don't have the order, but Mr. Pixton, Mr. Fabra, Mr. Lala, Mr. Poche, Mr. Stroebel and Ms. Gilmore, being female, were challenges. That would establish that I believe to be a prima facie cast that would apply under the law requiring explanation for Batson challenge.

As to Mr. Pixton, counsel for Lee replied:

> The problem that plaintiffs had with Mr. Pixton was that he had a problem with the no loss of wages.
> Based on the denial of my challenge for cause, I had no option but to exercise one of my preemptory challenges.
>
> Had Mr. Pixton been a female, I would have done the same thing. I have a problem with a juror sitting on the jury that he initially tells me he has a problem with one of the elements of damages.

THE COURT

> …your reason that you had recited was certainly correct reasoning under the law to allow it. It is certainly absent Batson, has nothing to do with Batson. So I find no violation of Batson in that challenge.

As to Mr. Stroebel, counsel for Lee explained:

> The reason why I struck - - I issued a challenge on him is because I saw the lesser of two evils. I was at the end of the jury panel at that part. It's a strategy that I have when picking the jury, number 13 or number 14 out there, I may strike a juror, which this would be - - let's say it was

> number 12 or number 13.
>
> I can analogize it to if I was in a fishing tournament and I had a five-pound bass in the live well and threw him back in the water, people say well, did you do that, Vidrine, because I had a six-pounder that I put back into the live well.
>
> And also, I think he had a daughter that worked for the insurance company. Or insurance industry. That was the reason. It was more strategy for the reason why I struck that juror as opposed to anything to do with gender, Your Honor. It was strictly a strategy to get - - in fact, it was a strategy to get Ms. Serpas, a female, on the jury.

The district court also concluded, as it did with Mr. Pixton, that there was an articulated reason beyond *Batson* why Mr. Stroebel was struck. Further, prior to bringing in the jury, the district court asked the DOTD if there was anything it wished to put on record, clearly referring to the strategy articulated by Lee's counsel, the DOTD replied, "No, sir. Thank you."

"*Batson* made it clear the neutral explanation must be one which is clear, reasonably specific, legitimate and related to the particular case at bar." *Alex v. Rayne Concrete Services*, 05-1457, 05-2344, 05-2520 (La. 1/26/07), 951 So.2d 138, 153. "First, the party asserting the *Batson/Edmonson* challenge must be afforded a full and fair opportunity to demonstrate pretext in the explanation of the proponent of the peremptory strike. Secondly, for the trial judge to fulfill its duty under

Batson/Edmonson 'to assess the plausibility' of the proffered reason for striking a potential juror 'in light of all evidence with a bearing on it,' it is essential that the proponent of the peremptory strike fully articulate his reasons as best he can so that a proper assessment can be made." *Id.* at 153.

In the instant matter, the Lees were given the opportunity to explain their preemptory strikes and the district court reasoned that the strikes were proper and did not invoke a change in the jury selection. We find no error by the district court.

Assignment of Error #3

In its third assignment of error, the DOTD argues that the district court erred in granting the Lee's Motion for Judgment Notwithstanding the Verdict. In its final judgment dated October 6, 2004, the district court decreed:

> IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's request for a Judgment Notwithstanding the Verdict shall be granted on some issues of damages and denied on others all as set forth below:
>
> **James Lee, Jr.**
>
> Past Medical Expenses $851,172.15
> Future Medical Expenses $6,500,000.00
> Loss of Earning Capacity $498,292.00
> General Damages $3,000,000.00

James Lee, Sr.

Loss of Consortium, Love and Affection
$150,000.00

Glenda Lee

Loss of Consortium, Love and Affection
$150,000.00

"In reviewing a JNOV, the appellate court must first determine if the trial judge erred in granting the JNOV. This is done by using the criteria set forth in *Scott v. Hospital Serv. Dist. No. 1,* 496 So.2d 270 (LA. 1986), just as the trial judge does in deciding whether to grant the motion or not, i.e. do the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict? If the answer to that question is in the affirmative, then the trial judge was correct in granting the motion. If, however, reasonable persons in the exercise of impartial judgment might reach a different conclusion, then it was error to grant the motion and the jury verdict should be reinstated." *Citations omitted; Adams v. Voyager Indemn. Ins. Co*. 2002-1333, p.4 (La. 10/1/03) 858 So.2d 681, 684.

In its Reasons for Judgment, the district court concluded that there was no basis for granting a JNOV on any issues of liability but that the damage awards presented different issues which the court took time to

address individually. As for past medical expenses, the district court awarded the stipulated figure of $851,172.15 stating, “quite simply the jury could not enter a figure for past medical expenses other than $851,172.15.” The district court explained that the jury’s award for future medical expenses reflected that the jury accepted the plan using certified nursing assistants, however, the district court still found that reasonable jurors could not have found below the low range in accordance with the defense plan and increased the award to $6,500,000. The district court applied the same analysis to the loss of earning capacity finding that the plaintiff’s experts set forth $653,035 while the defense set forth $498,292. The award after the granting of the JNOV by the district court was increased to $498,292; an accurate figure in accordance with the defense plan.

Lastly, the district court examined the area of general damages taking into consideration that James Lee, Jr. is now a quadriplegic and that this drastically changed the lives of Mr. and Mrs. Lee resulting in the constant care and attention for their son. The district court relied on *Boutte v. Kelly*, 2002-2451, (La. App. 4 Cir. 9/17/03) 863 So.2d 530, and increased the total award for damages to the Lees from $350,000 to $3,000,000.

We are of the opinion that the district court took the jury verdict into consideration and in light of the law and evidence presented at trial, the

district court did not err in granting the JNOV in some respects and increasing the Lee's award where it deemed appropriate.

Assignment of Error #4

In its fourth assignment of error, the DOTD maintains that the district court erred in relieving James Lee, Jr. of any liability. Specifically, the DOTD argues that the jury initially found James Lee, Jr. liable, but failed to assess any percentage of liability. The DOTD opines that James Lee, Jr. should be allocated at least 10 percent fault.

The DOTD relies on *Vantrige v. Lloyd's of Louisiana Ins. Co*., 543 So.2d 603 (La. App. Cir. 4th 4/12/89) wherein this court found that "another issue on appeal is whether or not the plaintiff, Vantrige, assumed the risk of injury by riding in a vehicle with a driver **he knew** had been drinking." *Id*. at 607. (emphasis added)

The DOTD also relies on the language in *Bouley v. Guidry*, 2004-469, p.7 (La.App. 3 Cir., 9/29/04), 883 So.2d 1099, 1105, stating: "[a] guest passenger in an automobile has no duty to supervise the driver. However, if alcohol-induced impairment of the driver is a substantial cause of the driver's negligence and if the guest passenger **knows or should have known** of the driver's impaired condition and, nevertheless, voluntarily rides with him, the guest passenger may be found comparatively negligent or at

fault." (emphasis added)

There is no question that Mr. Vickers was intoxicated at the time of the accident. However, there *is* a question as to whether James Lee. Jr., witnessed or knew that Mr. Vickers was intoxicated. No evidence was offered at trial to support the contention that James Lee, Jr., knew or should have known or was in a position to witness Mr. Vickers' sobriety and because of that we cannot conclude that the jury erred in its finding of fault when the record fails to support the assertion.

Assignment of Error #5

In its last assignment of error, the DOTD claims that the district court erred in limiting the testimony of Richard Savoie, its expert in highway design. The Lees are of the opinion that the DOTD failed to brief this issue, therefore causing this issue to be vacated. In a Reply Brief by the DOTD, it is explained that the argument regarding the limitation of Richard Savoie's testimony appears in a footnote. Specifically, the footnote references that Mr. Savoie would have testified that the "Class-5 highway guidelines require 10-foot travel lanes, 4-foot shoulders and 3 to 1 foreslopes…" and that the district court erred in not allowing his testimony at trial when the Lees had previously deposed him.

Uniform Rules, Courts of Appeal, Rule 2-12.4, 8 LSA-R.S states:

The argument on a specification or assignment of

> error in a brief shall include a suitable reference by volume and page to the place in the record which contains the basis for the alleged error. The court may disregard the argument on that error in the event suitable reference to the record is not made.
>
> All specifications or assignments of error **must be briefed**. The court may consider as abandoned any specification or assignment of error which has not been briefed. (emphasis added).

Straightforwardly, a footnote fails to give this Court a reasonable argument to follow concerning how the district court erred in failing to include the testimony of Mr. Savoie and how this affected the jury verdict. This assignment of error lacks merit.

Decree

For the reasons set forth herein, and after thorough review of the testimony and evidence presented at trial, we affirm the judgment of the district court on all issues presented in this appeal.

AFFIRMED