

**STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY AS SUBROGEE
OF YVETTE NORMAN**

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**NO. 2007-CA-0918

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA**

VERSUS

**GREGORY R. LEROUGE,
MARY J. LEROUGE,
HARTFORD INSURANCE
COMPANY, DONNELL L.
DUCRE, SEWERAGE AND
WATER BOARD OF NEW
ORLEANS, AND NATIONAL
UNION FIRE INSURANCE
COMPANY**

*

CONSOLIDATED WITH:

**MARY JANE LEROUGE AND
SHIRLEY LEROUGE**

VERSUS

**NEW ORLEANS SEWERAGE AND
WATER BOARD, NATIONAL
UNION FIRE INSURANCE
COMPANY, DONNELL L. DUCRE,
HARTFORD INSURANCE
COMPANY OF THE MIDWEST
AND GREGORY R. LEROUGE,
YVETTE NORMAN AND STATE
FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

CONSOLIDATED WITH:

NO. 2007-CA-0919

CONSOLIDATED WITH:

GREGORY R. LEROUGE

VERSUS

**NEW ORLEANS SEWERAGE AND
WATER BOARD, NATIONAL
UNION FIRE INSURANCE
COMPANY, DONNELL L. DUCRE,
HARTFORD INSURANCE
COMPANY OF THE MIDWEST,
YVETTE NORMAN AND STATE
FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

CONSOLIDATED WITH:

NO. 2007-CA-0920

TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.

I respectfully concur in the result. I write separately because, in my view, I find that the majority and dissent either incorrectly state the law of this circuit or misapply it.

The merits trial was bifurcated: the liability of everyone, save the Sewerage and Water Board and Mr. Ducre, was tried by the jury¹ and the liability of the Sewerage and Water Board and Mr. Ducre was tried by the judge. The jury found Mr. Ducre and ergo the Sewerage and Water Board to be 65% at fault for the accident, and the judge found the Sewerage & Water Board and Mr. Ducre free from fault

Unlike other circuit courts of appeal, this circuit requires an independent review without according any weight to the factual findings of the jury or judge. Other circuits merely decide whether the judge or jury made a more reasonable finding. *Boutee v. Kelly*, 02-2451, 02-2452, 02-2453, 03-0426, pp. 5-6 (La. App. 4 Cir. 9/17/03), 863 So. 2d 530, 538. *Cf. Thornton v. Moran*, 348 So. 2d 79 (La. App. 1 Cir.), *writ denied*, 350 So. 2d 897 (La. 1977); *Eppinette v. City of Monroe*, 29,366 (La. App. 2 Cir. 6/20/97), 698 So. 2d 658; *Davis v. Witt*, 01-894 (La. App. 3 Cir. 11/13/02), 831 So. 2d 1075; *Felice v. Valleylab, Inc.*, 520 So. 2d 920 (La. App. 3 Cir. 1987), *writs denied* 522 So. 2d 562, 563 (La. 1988). The Louisiana Supreme Court has yet to resolve the conflict between the circuits. However, whether I decide this case under either the fourth circuit's rule or that of the first, second, or third circuits, I reach the same conclusion, to-wit, the jury got the result correct insofar as the fault of Mr. Ducre and the Sewerage and Water Board.

¹ In a bifurcated trial such as the present one, the question of fault of the public entity is put to the jury although, in actuality, the jury is not determining the public body's fault. *Boutee v. Kelly*, 02-2451, 02-2452, 02-2453, 03-0426, p. 2 n.2 (La. App. 4 Cir. 9/17/03), 863 So. 2d 530, 537

I am most impressed with Mr. Ducre's testimony that he was driving a Sewerage and Water Board trash truck (which I understand to be a rather large vehicle) in the middle lane of the Westbank Expressway at a speed of 35 or 40 miles per hour approximately 15 feet behind Mr. LeRouge's van. Putting aside the fact that Mr. Ducre did not contest the traffic ticket that he received for a violation of La. R.S. 32:81A, even though such is a *de facto* admission that he was following the LeRouge vehicle too closely, I find that under the circumstances Mr. Ducre was much too close behind Mr. LeRouge given the speed of his vehicle. He cannot claim the benefit of a sudden emergency because he himself was partially at fault for creating the sudden emergency for following too closely. That Mr. LeRouge collided into the rear of Ms. Norman's vehicle caused him to "stop" more suddenly; but that "stop" was only partially the cause of the total accident and resulting injuries. But for Mr. Ducre being only 15 feet behind a vehicle going at least 35 miles per hour, he would have been able to control his vehicle and either avoid the accident or strike the rear of the LeRouge van with less force. The rule of thumb is that one should be at least one vehicle's length behind a preceding vehicle for each ten miles per hour one is traveling. Thus, Mr. Ducre should have been *at least* three and one-half times the length of his vehicle when going down the Westbank Expressway at 35 miles per hour. (Although the record on appeal does not reflect the length of the Sewerage and Water Board truck, I think it safe to say that it was longer than 4.28 feet in length [15 feet divided by 3.5]).

Sixty-five percent is a reasonable, fair, and correct apportionment of fault to the Sewerage and Water Board.