

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2333

MICHAEL GODFREY

VERSUS

CITY OF BATON ROUGE,  
PARISH OF EAST BATON ROUGE

Judgment Rendered: June 10, 2011

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On Appeal from the  
19th Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 550,146

Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

*TMH*  
*J. 2. 8*  
*J.E.K.*  
*by J. 2. 8*

## **HIGGINBOTHAM, J.**

The plaintiff, Michael Godfrey, appeals the judgment of the trial court granting an involuntary dismissal in favor of the defendant, the City of Baton Rouge/Parish of East Baton Rouge. For the following reasons, we reverse and remand for further proceedings.

### **FACTS AND PROCEDURAL BACKGROUND**

On December 21, 2005, eighteen-year-old Michael Godfrey was driving north on Sullivan Road in East Baton Rouge Parish. Godfrey was traveling at or near the posted speed limit of 45 miles per hour when, for some unknown reason, the right tires on his 1997 Ford Ranger pickup truck drifted off the roadway. While his left tires remained on the roadway surface, Godfrey traveled roughly 189 feet with his right tires approximately 3-to-4 feet off the roadway surface. At that point, Godfrey's right tires struck a driveway embankment and his vehicle became airborne, re-entered the roadway, flipped onto its driver's side, and slid across the roadway, where it collided with a southbound vehicle. As a result of the accident, Godfrey suffered a cervical fracture and was permanently paralyzed from his chest down. Godfrey has absolutely no recollection of the accident.

Godfrey filed this lawsuit against the City of Baton Rouge/Parish of East Baton Rouge, alleging the City/Parish had negligently maintained Sullivan Road with a defective shoulder and slope. A bifurcated bench trial on liability only was held on September 23, 2010. Godfrey's expert witness in road design, construction, maintenance, and safety, Vernon O'Dean Tekell, Jr., testified that the slope and width of the shoulder along Sullivan Road, which was maintained by the City/Parish, was defective. Tekell stated that the original design and construction of the road included two 10-foot lanes with 5-foot shoulders, and a fore-slope no greater than 3-to-1. Tekell further testified that his measurements of the accident site revealed the roadway actually had 12-foot lanes, with shoulders that ranged

from 0-to-14 inches in width. Tekell also stated that the slope had degraded to a steeper 2.25-to-1, with none of the slope measurements meeting the 3-to-1 maintenance standard. Further, Tekell found shoulder-edge drop-offs that averaged 3-to-4 inches deep, with one that was 5 ½ inches deep in the same area where Godfrey's vehicle had left the roadway and traveled along the shoulder. Tekell testified that regular inspections by the City/Parish would have revealed the roadway's deficient slope, excessive drop-offs, and areas where the shoulder width was non-existent. Tekell concluded that these improperly maintained/defective conditions were causative factors in Godfrey's accident.

Professor Andrew J. McPhate, Sr., an expert in accident reconstruction, testified that he reviewed the accident report measurements and his own measurements of the accident site. McPhate opined that Godfrey encountered a steep area after his right tires left the surface of the roadway, and that Godfrey was attempting to maintain control as evidenced by the fact that his left tires remained on the roadway surface at all times. McPhate stated that Godfrey was not in real trouble until he cleared the first driveway, where there was a bad slope, and when he hit the second driveway he "basically ran out of real estate." McPhate indicated that Godfrey did not have any other options to attempt to re-enter the road without running the risk of rolling his vehicle. According to McPhate, Godfrey's vehicle rolled onto its side after hitting the second driveway because the slope was "steeper than he could handle."

After Godfrey and the two expert witnesses testified, Godfrey rested his case. At that point, the City/Parish moved for involuntary dismissal on the basis that Godfrey had not met his burden of establishing the City/Parish's liability because Godfrey did not prove that any defective condition in the roadway was an actual cause-in-fact of the accident. The City/Parish argued that Godfrey's expert witnesses established that Godfrey maintained control of his vehicle for 189 feet

while driving partially on the roadway and partially on the shoulder, until he encountered a driveway elevation that caused him to suddenly veer across the roadway into the oncoming lane of travel. Thus, the City/Parish maintained that the slope or drop-off condition of the shoulder did not affect or cause Godfrey's accident.

After hearing argument on the motion for involuntary dismissal, the trial court granted the motion and dismissed Godfrey's claims against the City/Parish. The trial court concluded that while Godfrey proved an obvious defective shoulder with an improper slope existed along the roadway that was maintained by the City/Parish, Godfrey failed to prove that any defective condition actually caused the accident. The trial court found that Godfrey's encounter with the driveway is what caused him to veer into the oncoming traffic. Godfrey appeals.

#### **LAW AND ANALYSIS**

Louisiana Code of Civil Procedure article 1672B provides for a motion for involuntary dismissal of a plaintiff's action in the course of a bench trial, and states in pertinent part as follows:

In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

In determining whether involuntary dismissal should be granted, the appropriate standard is whether the plaintiff has presented sufficient evidence on his case-in-chief to establish his claim by a preponderance of the evidence. **Thornton ex rel. Laneco Const. Systems, Inc. v. Lanehart**, 97-2871 (La. App. 1st Cir. 12/28/98), 723 So.2d 1127, 1130, writ denied, 99-0177 (La. 3/19/99), 740 So.2d 115. The trial court is free to evaluate the evidence and render a decision

based upon a preponderance of the evidence, without any special inferences in favor of the party opposed to the motion. **Id.** Proof by a preponderance of the evidence simply means that, taking the evidence as a whole, the evidence shows the fact or cause sought to be proved is more probable than not. **Id.** Further, the effect and weight to be given expert testimony is within the broad discretion of the trial court. The importance placed upon such testimony is largely dependent upon the expert's qualifications and the facts that form the basis of his opinion. **Id.** While it may not be lightly disregarded, even uncontradicted expert testimony is not binding on the trial court. **Id.**, 723 So.2d at 1131. However, absent circumstances in the record casting suspicion on the reliability of the testimony and sound reasons for its rejection, uncontroverted evidence should be taken as true to establish a fact for which it is offered. **Jackson v. Capitol City Family Health Center**, 04-2671 (La. App. 1st Cir. 12/22/05), 928 So.2d 129, 131.

The trial court's grant of an involuntary dismissal is subject to the well-settled manifest error standard of review. **Broussard v. Voorhies**, 06-2306 (La. App. 1st Cir. 9/19/07), 970 So.2d 1038, 1041-42, writ denied, 07-2052 (La. 12/14/07), 970 So.2d 535. Accordingly, in order to reverse the trial court's grant of involuntary dismissal, we must find after reviewing the record, that there is no factual basis for the trial court's finding or that the finding is clearly wrong or manifestly erroneous. **Id.**, 970 So.2d at 1042. See also **Stobart v. State, through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993). The issue is not whether the trial court was right or wrong, but whether its conclusion was reasonable. **Id.** An appellate court must always keep in mind that if the trial court's findings are reasonable, it may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.**, 617 So.2d at 882-883. Further, an appellate court must do more than just simply review the record for some evidence that supports or controverts the trial

court's findings; it must review the entire record to determine whether the trial court's finding was clearly wrong or manifestly erroneous. **Id.**, 617 So.2d at 882.

The primary issue in this appeal is whether the defective condition of the roadway in this case was a cause-in-fact of Godfrey's accident.<sup>1</sup> A plaintiff's case must fail if there is only a possibility of or speculation as to a causative connection. **Dennis v. Wiley**, 09-0236 (La. 9/11/09), 22 So.3d 189, 196, writ denied, 09-2222 (La. 12/18/09), 23 So.3d 949. Cause-in-fact is generally a "but for" inquiry. If the plaintiff probably would not have been injured but for the defendant's substandard conduct, such conduct is a cause-in-fact. **Id.** Where there are concurrent causes of an injury, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the harm. **Id.** This is a factual question, and an appellate court may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. **Id.**

Our review of the record reveals that there was reasonable evidence that "but for" the defective condition of the practically non-existent shoulder with excessive drop-off areas and the steep slope, Godfrey could have avoided the accident. The expert testimony and physical evidence show that Godfrey's right tires were off the surface of the roadway by 3-to-4 feet. Given the physical evidence, it is likely that if the shoulder had been maintained as originally built at 3 feet without excessive drop-offs, Godfrey's right tires may not have dropped off the shoulder area at all. Further, the accident reconstruction expert testified that Godfrey had no other option than to attempt to maintain control and re-enter the roadway at the second driveway; however, the slope was too steep for Godfrey to handle.

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<sup>1</sup> Neither party questions the trial court's conclusion that "there was obvious proof, that there was a defective shoulder and an improper slope." We find that the record adequately supports the trial court's finding that the shoulder and slope were defective.

Given this evidence, we find that the trial court manifestly erred in disregarding the expert testimony and concluding that Godfrey failed to prove that the defective shoulder and excessive slope on Sullivan Road were substantial factors in bringing about the accident. That factual conclusion is simply not reasonably supported by the record. The City/Parish must maintain the shoulders and the area off the shoulders within its right-of-way in such a manner that there is no unreasonable risk of harm to motorists using the area in a reasonably prudent manner. See Lasyone v. Kansas City Southern R.R., 00-2628 (La. 4/3/01), 786 So.2d 682, 690. The 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. **Id.** The evidence in this case reasonably supports the conclusion that the defective condition of the shoulder area on Sullivan Road was at least partially a cause-in-fact of Godfrey's accident. However, the apportionment of fault between the City/Parish and Godfrey is for the trial court's determination after the trial on liability is complete.

### **CONCLUSION**

For the above-outlined reasons, we find that the trial court erred in granting the City/Parish's motion for involuntary dismissal. Thus, we hereby reverse the trial court's judgment of dismissal and remand this case for further proceedings. The City/Parish is assessed with all costs of this appeal in the amount of \$1,216.50.

**REVERSED AND REMANDED.**