NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 1953

VELMA A. VAN DUREN

VERSUS

STATE OF LOUISIANA, THROUGH THE LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Judgment rendered May 2, 2008.

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Appealed from the
21st Judicial District Court
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 2002-003663
Honorable Brenda Bedsole Ricks, Judge

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THE LOUISIANA DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

Pettigrew, J. dissents with reasons.

PETTIGREW, J.

Defendant-appellant, State of Louisiana, through the Louisiana Department of Transportation and Development ("DOTD"), appeals from the trial court's judgment in favor of plaintiff-appellee, Velma A. Van Duren, that awarded damages to Ms. Van Duren for personal injuries that she sustained in a single vehicle traffic accident on February 14, 2002.[1] For the reasons that follow, we hereby affirm.

According to the record, Ms. Van Duren, an 85-year-old motorist, was driving westbound on La. Hwy. 10, west of the town of Wilmer, in Tangipahoa Parish, at approximately 5:30 p.m. Just prior to the accident site, La. Hwy. 10 crests a low hill before descending into a sharp curve to the left. As Ms. Van Duren negotiated the curve, her vehicle inexplicably left the roadway and travelled onto the unimproved right shoulder where she hit three metal drainage culverts before coming to rest upside down near the intersection of Oak Ridge Church Road. Suspended upside down from the seatbelt and shoulder harness, Ms. Van Duren had to be freed from her vehicle by emergency personnel.

As a result of this accident, Ms. Van Duren sustained numerous injuries including a fractured jaw, a compression fracture of her thoracic vertebra, several broken ribs, a lacerated wrist, and multiple bruises for which she was hospitalized for six days. After being released from North Oaks Medical Center, Ms. Van Duren was transferred to North Oaks Rehabilitation Center for two weeks of intensive therapy followed by home care and physical therapy. Seeking compensation for the injuries she sustained in this accident, Ms. Van Duren filed the present suit against DOTD in the 21st Judicial District Court.

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[1] Approximately three months after the trial of this matter, Ms. Van Duren died in Tangipahoa Parish, Louisiana, on April 19, 2007. Pursuant to the valid last will and testament left by Ms. Van Duren, and subject to two special bequests, Charles T. Hudspeth, Jr. was recognized and placed into possession of the entire estate of Ms. Van Duren by virtue of a Judgment of Possession, rendered and signed by the 21st Judicial District Court on August 6, 2007, in the **Succession of Velma Van Duren**, Probate No. 2007-0030288. On October 5, 2007, pleadings were filed in the record of this court requesting that Mr. Hudspeth be substituted in this action for the deceased plaintiff-appellee, Ms. Van Duren.

The Ex Parte Motion to Substitute for a Deceased Party filed in the record of this court on behalf of Mr. Hudspeth had exhibits attached to it. This court is not a court of original jurisdiction; therefore, we must remand this matter to the trial court for further proceedings with respect to this motion.

This matter proceeded to a bench trial on January 19, 2007. At the conclusion of the evidence, both parties submitted post-trial briefs as well as proposed findings of fact and conclusions of law. The trial court ultimately ruled in favor of Ms. Van Duren, assessing DOTD with 100 percent fault for the accident. The court awarded damages in favor of Ms. Van Duren as follows: general damages for pain and suffering in the amount of $300,000.00; and medical expenses in the amount of $41,596.00. The trial court signed a judgment in accordance with these findings on May 31, 2007. It is from this judgment that DOTD has appealed.

On appeal, DOTD first challenges the trial court's finding of fact that the roadway was defective and had conditions that posed an unreasonable risk of harm to motorists. DOTD contends the record does not support a finding that La. Hwy. 10 was defective or created an unreasonable risk of harm for: (a) being sharply curved; (b) not having a shoulder; (c) having a culvert with a washout that prevented safe travelling for vehicles that veered out of the curve; and (d) having warning signs too far away from the curve. DOTD further argues that the record does not support a finding that DOTD had actual or constructive notice of the alleged condition of La. Hwy. 10 or that the condition was the cause of the injuries sustained by Ms. Van Duren. DOTD claims that the trial court was clearly wrong in finding it to be 100 percent at fault in connection with the subject accident. A manifest error review is applicable to these fact-based determinations.

It is well settled in Louisiana law that a trial court's findings of fact may not be reversed absent manifest error or unless clearly wrong. **Stobart v. State of Louisiana, Through Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). The reviewing court must do more than simply review the record for some evidence that supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's findings were clearly wrong or manifestly erroneous. **Id.** The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. **Id.** If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been

sitting as the trier of fact, it would have weighed the evidence differently. **Id.**, at 882-883. The manifest error standard demands great deference to the trier of fact's findings; for only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Id.**

In the instant case, Mr. James R. Clary testified on behalf of Ms. Van Duren and was accepted by the court as an expert civil engineer with expertise in highway design, safety, signing, and maintenance. Mr. Clary testified that in his professional opinion the design of the roadway was the cause of Ms. Van Duren's accident. Mr. Clary opined that although it was possible to negotiate the curve safely, the prohibitively sharp horizontal curve (greater than 11 degrees) immediately following the crest of a hill, the narrow width of the travel lanes, the lack of proper signage, and the poorly maintained shoulder did not allow for a "forgiving road" that would accommodate a driver who was momentarily distracted or inattentive.

According to the testimony of Mr. N. Kent Isreal, a retired DOTD engineer who was qualified as an expert in civil engineering and road design, La. Hwy. 10 in the area of Ms. Van Duren's accident was constructed as a gravel road in the 1930s. At the time of the construction of La. Hwy. 10, there were no design standards for highway construction. Based upon his review of a partial set of plans, Mr. Isreal testified that in 1955, the gravel surface of the highway was paved, and in connection with this project, DOTD reworked the adjacent ditches, raised the grade or elevation of the roadway in certain places, and applied a hard surface to the roadway. Mr. Isreal further testified that the existing roadway was resurfaced in 1987.

Upon cross-examination, Mr. Isreal admitted that he could not explain why DOTD failed to place chevron signs warning of the sharp curve, and admitted that he could not refute the testimony of Mr. Clary. Mr. Isreal further admitted that despite testifying

previously in a case involving double fatalities at this exact location several years earlier[2], he had never performed an on-site inspection of the accident location.

Based upon the evidence presented, the trial court concluded that La. Hwy. 10 in the area where the accident occurred was defective, had conditions that posed an unreasonable risk of harm to motorists, that DOTD had knowledge of the condition that caused Ms. Van Duren's injuries, and that DOTD was 100 percent at fault for the injuries sustained by Ms. Van Duren. Following a thorough review of the record, we find that the trial court's conclusions in this regard are reasonable and that its findings are not manifestly erroneous. Thus we are precluded from disturbing the trial court's findings with respect to liability and causation.

DOTD also challenges the trial court's damage award. Specifically, DOTD attacks the trial court's $300,000.00 general damage award to Ms. Van Duren. DOTD contends that it is undisputed that Ms. Van Duren suffered from arthritis, vertigo, and dizziness prior to the accident, and that Ms. Van Duren testified that there was nothing that she was unable to do following the accident that she could do before the accident. DOTD argues that given the injuries sustained by Ms. Van Duren, a general damage award of $75,000.00 is appropriate.

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion is left to the trier of fact. La. Civ. Code art. 2324.1. The standard for appellate review of general damages is set forth in **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994), wherein the Louisiana Supreme Court stated that "the discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." The appellate court's initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. **Youn**, 623 So.2d at 1260. The role of the appellate court

[2] **Bourgeois v. DOTD**, 21st Judicial District Court Docket No. 02-002563.

in reviewing general damage awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. **Millican v. Ponds**, 99-1052, p. 6 (La. App. 1 Cir. 6/23/00), 762 So.2d 1188, 1192.

Based upon our review of the evidence before us, we find no abuse of discretion by the trial court in the damages awarded. While the damage awards in this case may be on the high side, they are not so high as to constitute an abuse of the trial court's vast discretion. Given the "particular injuries and their effects under the particular circumstances" on Ms. Van Duren, the trial court's damage awards are not beyond that which a reasonable trier of fact could assess. See **Youn**, 623 So.2d at 1260.

For the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against defendant-appellant, DOTD. We issue this memorandum opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1B.

AFFIRMED; EX PARTE MOTION TO SUBSTITUTE REMANDED FOR FURTHER CONSIDERATION.

VELMA A. VAN DUREN **NUMBER 2007 CA 1953**

VERSUS

FIRST CICRUIT

STATE OF LOUISIANA,
THROUGH THE LOUISIANA **COURT OF APPEAL**
DEPARTMENT OF TRANSPORTATION
AND DEVELOPEMENT **STATE OF LOUISIANA**

WELCH, J., DISSENTS IN PART.

I respectfully dissent from that portion of the judgment affirming the allocation of 100 percent fault to DOTD. Since the advent of comparative negligence, drivers straying off of the roadway have been found comparatively at fault. See **Gibson v. State, Department of Transportation and Development**, 95-1418 (La. App. 1st Cir. 4/4/96), 674 So.2d 996, writs denied, 96-1862, 96-1895, 96-1902 (La. 10/25/96), 681 So.2d 373, 374 and cases cited therein. In **Gibson**, this court upheld an assessment of 33 1/3 percent fault to a driver who left the roadway and struck a bridge cap. This court found that the driver breached his duty to maintain control of his vehicle, observing that there was no evidence in the record indicating why the driver left the roadway. See also **Bennett v. Parish of Washington**, 2004-1286 (La. App. 1st Cir. 6/29/05) (unpublished), wherein this court reversed a trial court's finding of 100 percent fault on the part of the parish for failing to install handrails on a bridge where the driver left the roadway shortly before the bridge. This court concluded that the lowest percentage of fault that could have been assessed to the inattentive driver was 25 percent.

Similarly, in this case, there is no evidence in the record as to why Ms. Van Duren drove off the roadway. The evidence showed that the 85-year-old was familiar with the roadway in question and had driven thereon every one or two months for the past five years. Ms. Van Duren could not explain why she left the roadway. Under these circumstances, I believe that Ms. Van Duren breached her duty to maintain control of her vehicle and was comparatively at fault.

Furthermore, I believe the lowest percentage of fault the trial court could have reasonably allocated to Ms. Van Duren was 25 percent. Accordingly, I would reverse that portion of the judgment finding DOTD 100 percent at fault and reduce the damage awards by the percentage of fault attributable to Ms. Van Duren.