SUPREME COURT OF LOUISIANA

No. 97-C-1174

JUNE REED

versus

WAL-MART STORES, INC. AND ABC INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF AVOYELLES

KIMBALL, Justice, concurring.

I concur with the holding that the proper standard for reviewing a finding of an unreasonable risk of harm is the manifest error standard. Furthermore, I concur in the result agreeing that the uneven expansion joint in this case did not present an unreasonable risk of harm. However, I disagree with the conclusion the lower courts failed to consider the risk-utility balance in its determination of whether the variance in question presented an unreasonable risk of harm.

In his three page "Reasons for Ruling," the trial judge specifically stated the condition could have been corrected with a minor repair and concluded, "The magnitude and risk of harm posed by this defect in the walkway certainly outweighs the feasibility and cost utility of minor repair as stated by the expert." The majority opinion, at footnote 3, recognized the trial judge made this statement, but noted that he did not address or consider any of the other aspects of the risk-utility balance. The majority opinion then concluded that this statement indicated he only considered one factor in the risk-utility balance. I disagree with this conclusion. The trial judge in this case very well may have considered the other aspects of the risk-utility balance in his determination of the unreasonable risk of harm, but only mentioned the cost of repair vis-a-vis the magnitude of the risk because that was the only aspect of the balancing test in question. This is especially true in this case where there was undisputed evidence concerning the size and location of the variance, the history of the defect and parking lot in general, and the obvious social utility of paved walkways and parking facilities. I feel that if we were to require the trial court to provide a "mantra" of the steps in reaching their conclusions we would certainly be engaged in micro-management of the lower courts, a truly undesirable result.

While I disagree with the opinion's conclusion the trial judge did not properly apply the risk-utility test, I agree with its ultimate conclusion, the expansion joint did not present an unreasonable risk of harm. As noted, the trial judge stated the cost of repairing this expansion joint was minimal. Based on the testimony of the plaintiff's expert and the evidence presented, the trial judge's conclusion was manifestly erroneous.

During his presentation, plaintiff's counsel called Mr. Gene Moody who was accepted by the trial judge as an expert in civil and safety engineering. Mr. Moody testified the expansion joint in question could be repaired two ways: by filling the uneven expansion joints with "some asphalted concrete" or by overlaying the entire parking lot with an inch of asphalt. Mr. Moody also testified that in between the time of the accident and his inspection of the lot, "there had been some patching . . . [which] would have made the area safer." Furthermore, the patching which had been done was "very similar" to the first solution he proposed. However, Mr. Moody conceded, and the photographs of the scene he took on April 15, 1996, reveal, the patching done by the defendant did not repair the problem. Mr. Moody stated when he went to the parking lot to make his inspection, there was, despite the patching, a ¼ to ½ inch difference in elevation at the expansion joint. In his opinion, it would have been "wise" to overlay the entire lot and while overlaying the lot was expensive, it was a long term solution to the problem.

Mr. John Robert Reed, the plaintiff's son, also testified on Ms. Reed's behalf. Mr. Reed stated that in May of 1995, he and his mother returned to the scene and took a Polaroid photograph of the area where Ms. Reed fell. This photograph was admitted into evidence as plaintiff's exhibit-3. The Polaroid taken by Mr. Reed in May of 1995, is dissimilar from the photographs taken by Mr. Moody, eleven months later, in that the earlier photograph reveals the expansion joints without any patching. Whereas, the later photographs reveal the same area, eleven months later, patched, the curative recommendation made by Mr. Moody at trial was ineffective. Significantly, a cursory comparison of the two photographs in conjunction with a review of Mr. Moody's testimony reveal that one of Mr. Moody's solutions to the problem at issue, patching, was no solution at all. In the eleven months between the taking of the two sets of photographs, the expansion joint in question had been "repaired" and reverted to its original state. The minimal cost of repair, as opined by the trial judge, was no repair at all. Mr. Moody stated that in making the repair, there were two possible choices: patching, which was "cheap" in terms

of cost, but would present only a short term solution, or overlaying the entire parking surface with ½ inch of asphalt, which was more expensive, but a long term solution. Patching, as a method of "repair" proved to be a short term solution indeed.

Therefore, it is my opinion that the trial judge properly addressed all of the factors to be considered in the risk-utility balance, yet did so in a manifestly erroneous manner. The evidence presented and the testimony reveal the cost of repair was not minimal. Therefore, I concur in the result that the expansion joint at issue did not present an unreasonable risk of harm.