NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0324

KAYLA SCHEXNAYDER AND EMILY LAGARDE

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Judgment Rendered: NOV 0 8 2012

* * * * * * * *

Appealed from the
23rd Judicial District Court
In and for the Parish of Assumption
State of Louisiana
Case No. 31,002

The Honorable Thomas J. Kliebert, Jr., Judge Presiding

* * * * * * * *

Brenda H. Verbois **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellant** **State of Louisiana, through the Department of Transportation and Development**
Martin S. Triche **Sarah A. Legendre** **Napoleonville, Louisiana**	**Counsel for Plaintiffs/Appellees** **Kayla Schexnayder and** **Emily Lagarde**

* * * * * * * *

BEFORE: CARTER, C.J., GUIDRY, AND GAIDRY, JJ.

Guidry, J. concurs in the result and assigns reasons.

GAIDRY, J.

This is an appeal of a judgment rendered by the Twenty-Third Judicial District Court, Parish of Assumption, in accordance with the jury verdict on allocation of fault rendered in the trial of the foregoing matter.[1] Specifically, the Appellant, the State of Louisiana, through the Department of Transportation and Development (hereinafter "DOTD"), seeks reversal of an evidentiary ruling made by the court, as well as the factual findings of the jury. For the following reasons, we affirm the trial court's ruling and the jury's verdict.

FACTS AND PROCEDURAL HISTORY

The Appellees, Kayla Schexnayder and Emily Lagarde, filed a petition for damages on May 29, 2008, alleging that they were injured in an automobile accident caused by a defect in Highway 308, which is under the care, maintenance, and control of DOTD.

Specifically, Ms. Schexnayder and Ms. Lagarde allege that on or about October 4, 2007, they were guest passengers in an automobile driven by Kristen Cedotal, traveling south on Hwy. 308 approximately three-tenths of a mile north of its intersection with Hwy. 70.[2] At that time, Ms. Cedotal encountered a curve where she veered off of the road, causing the right tires of the vehicle to leave the roadway. Upon attempting to bring the vehicle back upon the roadway, Ms. Cedotal lost control of the vehicle, crossed the centerline, and collided with a vehicle in the oncoming lane. Ms. Schexnayder and Ms. Lagarde sustained injuries in the accident, which required medical care. They also claim future medical expenses, pain and

---

[1] The trial was bifurcated so that the issue of damages was neither heard nor considered by the jury.

[2] At trial, Trooper Kirk Foret, Louisiana State Police, testified that the accident occurred approximately three-tenths of a mile south of the intersection of Hwy. 308 and Hwy. 70 in the Paincourtville community.

suffering, mental anguish, loss of enjoyment of life, and loss of earning capacity. Ms. Schexnayder and Ms. Lagarde claim their injuries are the fault of DOTD, who should have remedied the defects in Hwy. 308 at the point of the accident.

This matter was tried before a jury on September 20 and 21, 2011.[3] In the trial, counsel for Ms. Schexnayder and Ms. Lagarde introduced a letter dated November 17, 1977, from DOTD to Mr. Roger Bourg, then Secretary-Treasurer of the Assumption Parish Police Jury. The letter is in response to another letter sent to DOTD by Mr. Bourg on October 28, 1977 "[c]oncerning traffic controls on a horizontal curve of La 308 in the Community of Paincourtville."[4] The letter describes this curve as "quite severe" with "very small to nonexistent shoulders." The recommendation of DOTD in this letter was to replace deteriorating warning signs and to install 90 degree bent delineators along the outer edge of the curve.

DOTD objected to the admissibility of the letter into evidence, citing Title 23, Section 409 of the United States Code as barring the discovery or admissibility of such a document prepared for the purpose of enhancing the safety of a potential accident site. Over DOTD's objection, the trial court admitted the letter into evidence. Subsequently, the jury rendered a verdict finding Ms. Cedotal 50% at fault and DOTD 50% at fault for the injuries of Ms. Schexnayder and Ms. Lagarde stemming from the October 4, 2007 accident. As a result, DOTD filed this motion for appeal on December 7, 2011.

---

[3] Ms. Lagarde did not testify at trial. Ms. Schexnayder testified at trial, but her testimony was minimal. She testified that due to her injuries she had no memory of the accident. Location and details of the accident were related in the testimony of Tpr. Foret, who had conducted the crash scene investigation.

[4] Attached to the DOTD letter is a map prepared by DOTD, showing the "study location" to be a curved portion of Hwy. 308 near Paincourtville, just south of Hwy. 70 but north of Spur 70.

ASSIGNMENTS OF ERROR

DOTD contends in this appeal that the admission of the 1977 letter violated 23 U.S.C. § 409. DOTD also contends that the jury erred in its allocation of fault to DOTD and Ms. Cedotal, and that it was error to find that the alleged defects in the roadway caused the accident.

DISCUSSION

Admissibility of 1977 DOTD letter

Section 409 of Title 23 of the United States Code states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

This statute became effective in 1987 and would apply retroactively to the 1977 letter, should the letter meet the statute's requirements. See *Martinolich v. Southern Pacific Transp. Co.,* 532 So.2d 435, 440 (La. App. 1 Cir. 1988) writ denied, 535 So.2d 745 (La. 1989), cert. denied, 490 U.S. 1109, 109 S.Ct. 3164, 104 L.Ed.2d 1027 (1989). Retroactive application of a law is required in the absence of legislative mandate to the contrary or unless such application would cause manifest injustice. *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

While § 409 would retroactively apply to the letter at issue in this case, it would only apply if the letter: 1. contained some kind of report,

survey, schedule, list, or compilation of data; 2. to enhance the safety of a potential accident site; 3. by utilizing Federal-aid highway funds.

The letter presented in evidence was a response by DOTD to an earlier letter authored by the Assumption Parish Police Jury concerning a hazardous section of roadway at the intersection of Hwy. 70 with Hwy. 308 and the Hwy. 403 bridge. The car accident at issue occurred on this span of roadway. DOTD explained that the section of highway was investigated. The speed limit and warning signs were assessed, and the curve itself was tested to determine the safest curve negotiation speed. DOTD ends the letter with its findings that deteriorating road signs needed to be replaced, that the speed limit should be changed, that a road sign should be moved to another location, and that delineators should be installed along the edge of the curve.

The letter clearly shows that tests and evaluations were done to the curve for the purpose of improving the safety for that stretch of road; what is not so clear is the manner in which these improvements were to be made. The letter, in fact, says nothing of budgeting funds, Federal or otherwise, for the purpose of making these improvements. The letter describes action to be taken by DOTD to change and install road signs, but does not say that Federal roadway funds will be needed or used to make these changes. Without this utilization of Federal funding being made apparent in the letter, we cannot say that § 409 applies and would render the letter inadmissible as evidence.

In contrast, *Long v. State ex rel Dept. of Transp. and Development,* 2004-0485 (La. 6/29/05), 916 So.2d 87, deals with an exchange of letters similar to the one letter used in the instant case, with one major difference. The first letter was written by the mayor of Bonita in Moorehouse Parish, where he advised DOTD of two accidents at a railroad crossing within eight

years of one another. In response, DOTD wrote a second letter advising the mayor of their plan to add signals to the crossing *from funds available through a Federal safety program*, and requested a commitment from the mayor to maintain the proposed improvements. The mayor agreed to the commitment in the third letter. The Supreme Court found the series of letters "were compiled and collected by the DOTD for purposes related to funding through... a federal safety program." *Id.,* at 100. The letters were therefore protected from discovery and were inadmissible under § 409. Since the letter of the instant case does not address in any way the obtaining of Federal funds to make DOTD's recommended improvements, it is distinguishable from the letters in *Long.*

Courts throughout the nation have surmised that § 409 was enacted to encourage active evaluation of highway and railway safety hazards and "[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions." *Palacios v. Louisiana Delta Railroad Inc.,* 98-2932 (La. 7/2/99), 740 So.2d 95, 98; see also *Reichert v. State ex rel Department of Transportation and Development,* 96-1419, 96-1460 (La. 5/20/97), 694 So.2d 193, 197. The policy and purpose of § 409, however, is not to rule out every document prepared by DOTD related to the furtherance of roadway safety. There must be a showing that Federal funding is involved in improving roadway safety. There is no exception to § 409 pertaining to the funding issue. *Ducote v. Union Pacific Railroad Company,* 08-1208, 08-1208 (La. App. 3 Cir. 2/4/09), 4 So.3d 240, 245, writ denied, 09-0940 (La. 6/5/09), 9 So.3d 877. Since DOTD's 1977 letter to the Assumption Parish Police Jury in does not

address the use of Federal funding to improve or enhance the safety of the roadway in question, it does not fall within the criteria of § 409 and is admissible.

Manifest Error Review of Jury Verdict

> A court of appeal may not set aside a trial court's finding of fact in the absence of manifest error unless it is clearly wrong... Under the manifest error standard, in order to reverse a trial court's determination of a fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. On review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently. *Ryan v. Zurich American Ins. Co.*, 2007-2312 (La. 7/1/08), 988 So.2d 214, 219.

At the trial in this matter, the jury was able to see various photographs and diagrams presented by both plaintiffs and the defendant of the highway curve before and after the accident. The jury viewed photographs of the accident scene. The jury also viewed photographs of the highway shoulder at the point where Ms. Cedotal went off the road. These photographs do show that the asphalt shoulder dips several inches, and a rut appears alongside of the shoulder for several yards, then sharply turns back onto the road near the site of the collision. The jury also viewed the 1977 DOTD letter, which describes the curve as unsafe and needing proper signage and delineation.

The jury heard the testimony of Tpr. Foret, the crash scene investigator, who related the events leading up to the collision, the drivers of the vehicles involved, and the cause of the collision. Specifically, he stated that Ms. Cedotal went off the shoulder, began to lose control of her vehicle, overcorrected upon re-entry, traversed the oncoming lane of traffic and collided with the second vehicle. Tpr. Foret cited Ms. Cedotal with careless

operation of a motor vehicle. He observed that there was very little shoulder on that section of roadway, which borders a mixture of gravel and vegetation.

The jury also heard from Donald Frick, an eyewitness to the accident. While a passenger in another vehicle approximately 100 feet away, he saw a white vehicle from the oncoming lane swerve off the road, then return to the road "fishtailing" and finally striking the second vehicle which was then behind the vehicle in which Mr. Frick traveled. Mr. Frick also noted there is hardly any shoulder to the road in that area.

Ms. Cedotal confirmed that Ms. Schexnayder and Ms. Lagarde were passengers in her vehicle at the time of the accident, and that she drove a white two-door Mercury Cougar. Ms. Cedotal admitted that she knew the curve in question was "pretty dangerous" and remembered going off the road. She then recalled making a "fishtail" motion with her vehicle, but did not specifically recall the collision. She did not recall seeing a warning sign for the curve or a lower speed limit sign, but did remember a 45 mph speed limit sign near the curve.[5]

The jury heard the testimony of Ronnie Robinson, a civil engineer employed by DOTD, who discussed the work done over the years on the section of road in question and that it is possible that the curve in question did not have the proper slope. Another civil engineer employed by DOTD, Herbert Moore, who had been in possession of the 1977 letter, testified that there was an insufficient number of "chevron" signs posted at the curve.[6] Patrick Lawless, Assumption Parish Police Juror for the ward in which the curve is located, testified that he had witnessed other accidents on that same

[5] The 1977 DOTD letter stated the safe turn negotiation speed for the curve to be 25 mph.
[6] Mr. Moore defines a chevron sign as a supplemental warning sign utilized at the site of the curve to aid in a motorist's negotiation of the turn.

curve and had reported to DOTD that the curve required maintenance. He specifically noted the small shoulder along the curve.

Other witnesses were called in this trial, but with the evidence and testimony described above, there was sufficient evidence for the jury to find Ms. Cedotal 50% liable and DOTD 50% liable. The evidence and testimony corroborated each other enough for a rational fact finder to reach the jury's conclusion. We cannot say that the jury was clearly wrong in their allocation of fault, because the evidence and testimony as a whole provides a rational basis for concluding that the fault must be shared jointly by Ms. Cedotal and DOTD. We therefore will not disturb the percentages of fault determined by the jury.

CONCLUSION

The 1977 DOTD letter cannot be excluded under § 409, since it is not the kind of document that is to be excluded by the statute, and with all the evidence and testimony considered as a whole, the jury's allocation of fault is not manifestly erroneous.

DECREE

The trial court's evidentiary ruling and the jury's verdict on allocation of fault is affirmed. Costs pursuant to this appeal in the amount of $5,792.00 are assessed to the Appellant, the State of Louisiana through the Department of Transportation and Development.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0324

KAYLA SCHEXNAYDER AND EMILY LAGARDE

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

GUIDRY, J., concurs in the result and assigns reasons.

GUIDRY, J., concurring.

I respectfully disagree with the majority's finding that the 1977 letter and attached study from the DOTD Chief Engineer to the Assumption Parish Police Jury is admissible. While the DOTD did not offer any evidence to definitively establish that federal funds were used to implement the traffic control changes discussed in the 1977 letter, I observe that 23 U.S.C. § 409 does not mandate such a showing. Instead, the pertinent language of the statute provides:

> reports, surveys, schedules, lists, or data compiled or collected ... for the purpose of developing any highway safety construction improvement project which ***may*** be implemented using Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. [Emphasis added.]

The majority acknowledges that "[t]he letter clearly shows that tests and evaluations were done to the curve for the purpose of improving the safety for that stretch of road." Thus, the letter can be said to be for the purpose of developing a highway safety construction project, which may be implemented using federal aid

highway funds. As such, the letter should have been deemed inadmissible. This conclusion is supported by the Louisiana Supreme Court's holding in Reichert v. State, Dept. of Transp. and Development, 96-1419 (La. 5/20/97), 694 So. 2d 193.

In Reichert, the Court reviewed four letters discussing studies that were conducted on the particular roadway at issue in that case and concluded that "[t]he aforementioned exhibits were erroneously admitted by the trial judge as each of them reflects information collected and compiled by the DOTD in furtherance of ***potential*** highway safety projects ***that may*** have been supported by federal funds." Reichert, 96-1419 at 5, 694 So. 2d at 198 (emphasis added). Notably absent from the Court's reasoning is any discussion regarding DOTD's failure to show that federal funds were used or sought for the information collected and compiled.

In the matter before us, in support of its motion in limine to exclude the 1977 letter, the DOTD referred to the affidavit of Hadi Shirazi that it had submitted to the trial court in opposition to the plaintiffs' motion to compel production of the 1977 letter. In his affidavit, Mr. Shirazi, the Hazard Elimination Funds Coordinator with the Highway Safety Improvement Program for the DOTD, stated, "[i]f there is a condition best handled at the state level, it is considered for possible improvement using the federal aid funds made available through various federal programs, specifically including the Hazard Elimination Program administered by this office pursuant to 23 U.S.C. § 152. The majority of [DOTD] projects are funded in part by federal funds."[1] Therefore, based on the Reichert case, Mr. Shirazi's affidavit, and the plain wording of 23 U.S.C. § 409, I find that the trial court erred in deeming the 1977 letter admissible.

However, to the extent that the only evidentiary use of the letter was for the purpose of establishing DOTD's knowledge or notice of the defective condition of

---

[1] It is observed that 23 U.S.C. § 130 was enacted in 1958, 23 U.S.C. § 144 was enacted in 1970, and 23 U.S.C. § 152 was enacted in 1973, so federal funding would have been available at the time of the issuance of the 1977 letter.

Highway 308,[2] I find the admission of the letter to be harmless, as there was other evidence presented at trial to establish that the DOTD had notice of the defect; particularly the testimony of Ronnie Robinson, a DOTD employee, and Patrick Lawless, the Assumption Parish Police Juror for the ward in which the accident occurred.

Accordingly, I concur in the result of the majority opinion.

[2] See La. R.S. 9:2800(C) & (D).