IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

CHRISTOPHER RANDOLPH — PLAINTIFF

VERSUS — CAUSE NO. 20-118

THE CITY OF HATTIESBURG; TOBY BARKER, MAYOR OF THE CITY OF HATTIESBURG, WARREN PAVING, INC. AND JOHN DOES 1-10 — DEFENDANTS

MEMORANDUM OPINION

WHEREFORE, this cause having come on for trial before the court and a jury and the jury's having found the issues in favor of Defendant Warren Paving, this matter is now before the court on the Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial (Plaintiff's Motion). The court, having considered the submissions, the evidence and applicable law, finds as follows:

In 2018, the City of Hattiesburg contracted with Warren Paving to overlay portions of Richburg Road in conformity with the Mississippi State Highway Standard Specification for Road and Bridge Construction-also known as the Red Book-which was made a part of that contract. The work was performed in November of 2018. By December 14, 2018, the work had been inspected, accepted and paid for by the City. Less than six months later, Christopher Randolph was driving along Richburg Road in a pick-up truck hauling a loaded trailer, which was wider than the truck. He was driving at a speed of 45 mph in a 35 mph zone. As he came out of a curve near Richburg Road's intersection with Honeysuckly Drive, the right tires of the trailer went off the roadway into a steep drop-off. The truck did not leave the roadway. Steering the truck to the left, he was eventually successful in getting the trailer back upon the roadway but then crossed all the way over the road and struck a tree head-on, severely fracturing both his legs. The primary issue in Randolph's suit against Warren Paving was whether the drop-off either was

present at the time Warren Paving performed the overlay or was created by the overlay work.

As this court considers the plaintiff's motion for JNOV, it "*must* view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence. ... When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Poole v. Avara,* 908 So. 2d 716, 727 (¶ 24) (Miss. 2005) (first emphasis added) (citations omitted).[1] Attendant to this "critical inquiry" is "whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *Jones v. Phillips,* 992 So. 2d 1131, 1146 (¶ 38) (Miss. 2008) (quotation marks and citations omitted); *see also Solanki v. Ervin,* 21 So. 3d 552, 568 (¶¶ 41, 45) (Miss. 2009) (noting that "[t]he jury determines the weight and credibility of witnesses" and affirming denial of JNOV on the basis that the evidence was "of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions"). Upon the issues raised by the plaintiff's motions in this case, based upon the testimony and exhibits presented for the jury's consideration at trial, Plaintiff Randolph cannot meet the exacting standard for JNOV:

Plaintiff contends he offered undisputed testimony of witness ANQUIERRIA JONES that until after Warren completed the overlay work, there was no pavement edge drop-off. Ms. Jones lived on Richburg Road a short distance from its intersection with Honeysuckle Drive. She lived

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[1]In *Denbury Onshore, LLC v. Precision Welding, Inc.*, the Court stated that it will "affirm the denial of the JNOV only where substantial evidence supports the verdict." 98 So. 3d 449, 452 (¶ 10) (Miss. 2012) (citations omitted). It defined "substantial evidence" as evidence "of such quality and weight that reasonable fair-minded jurors in the exercise of impartial judgment might have reached different conclusions" and instructed that such evidence is to be viewed in a light most favorable to the verdict. *Id.* (internal quotation marks, citations omitted).

there from 2016 to 2021 and had driven along Richburg Road thousands of times. She described Richburg Road as curvy and hilly. She testified that before the paving, she was able to walk her dog along the shoulder of the road leading to the intersection but that after the paving, there was a dropoff. She also testified that after the paving but before the striping, as she was coming out of her driveway going toward Honeysuckle, her tire went off the edge into a dropoff that she had not been able to see. She was not sure exactly when that occurred, but she did say that she was able to get back on the roadway and that the dropoff was not as deep as at the time of the accident in May of 2019. She did not know what caused the low spot. Ms. Jones did not notify anyone of the condition she described.

The jury also heard the testimony of MONICA BELLAPANNI, who had lived with her family on Honeysuckle Drive in the second house on right off Richburg Road since 2004. Ms. Bellapanni described herself as being very familiar with Richburg Road–curvy, a lot of hills and a lot of traffic. Between November of 2018, when the overlay was done, and May of 2019, when the accident occurred, she had driven Richburg Road at least twice, and sometimes several times, a day and was very familiar with Richburg Road. During that time, she never drove off the road at Honeysuckle and Richburg; she never had trouble staying between the lines, and she never observed any low spot off Richburg Road around Honeysuckle.

ANN JONES, the chief administrator officer for the City of Hattiesburg, was familiar with Richburg Road and the traffic flow along it. She described it as one of the City's busier corridor roads with thousand of cars traveling back and forth along it on a daily basis. It is also one of the most curvy and hilly roads in Hattiesburg. She described the systems in place for receiving reports, complaints or notice of any potential hazard either on a road or off the pavement. According to Jones, although the City does not have inspectors whose job it is to identify dangerous conditions, it does have a "mandate" to the employees of all its departments,

such as police officers code enforcement officers and sanitation workers, to identify and notify the City of such conditions. Ms. Jones acknowledged that the City maintains and mows the grass along the side of the road. She explained that review of available documentation disclosed no information or report regarding any condition off the pavement of Richburg Road and Honeysuckle before Mr. Randolph's accident. Her research showed no report of a dangerous condition from any police officer either before or after the May 17, 2019 accident. Neither did she find any report from anyone who claimed that the shoulder on Richburg Road caused or contributed to their accident. She likewise was unable to find any evidence of when the dropoff first appeared but had absolutely no information that Warren Paving caused or created it. She did know that an inspection had been done multiple times prior to Warren Paving's work in order to select which section of roadway would be paved and to arrive at a cost estimate but knew of no photographs that had been taken before the work. Also according to Ms. Jones, Warren Paving's invoice for the Richburg Road overlay would not have been paid without the City's inspecting the job to make sure the purchase order had been completed. Lamar Rutland, the city engineer, would have done inspections and day-to-day checking of the job.

As the city engineer, LAMAR RUTLAND was over large construction projects for Hattiesburg, including Warren Paving's overlay on Richburg Road in November of 2018. Among his duties were overseeing those projects–including the payment progress–and performing visual inspections. According to Mr. Rutland, at the time Warren Paving was hired to do the overlay, shoulder work was not a part of its scope of work. He did agree he would have expected Warren to notify him of any hazard outside Warren's scope of work that needed repairs. Rutland acknowledged that if he in his drive-by "windshield" inspections or Warren Paving had seen a pavement edge dropoff like the one that existed on May 17, 2019, either the City would have repaired it or had Warren Paving repair it. Asked about Anquierria Jones' testimony that

before the paving, the shoulder and the road surface were roughly even, as a civil engineer, Rutland had no idea how such a dropoff could have been created. He testified that had it existed as Ms. Jones said it did, he would have seen it when he did his inspection. Instead, he saw nothing that raised any concern or that was out of compliance with his expectation on the part of Warren Paving. Nor was he ever contacted by Warren Paving that any shoulder work was needed on Richburg Road.

JOE AMACKER had worked for Warren Paving for twenty-nine years, twelve of them as a superintendent. He was not involved with the Richburg Road project in 2018 but had general knowledge of asphalt overlay work. Under a term bid with the City, Warren Paving would conduct the asphalt overlay subject to the specifications within the term bid and the purchase order. Amacker testified that typically he dealt with Lamar Rutland regarding when the City would hire Warren Paving and if there was an issue on a project. He did not remember any conversation with Mr. Rutland during the Richburg Road project. Although he was not the superintendent on that project, he testified that typically the superintendent and the foreman would inspect the project during its duration, but he did not know whether the City inspected anything on the project or what the condition of the shoulder was when the project was completed. He did feel as though the City was satisfied that it was completed because Warren Paving was paid for the job. Amacker had no knowledge of how the shoulder got in the condition depicted by photographs of the drop-off, but he did say that once the overlay job was complete it was the owner's responsibility to make sure the shoulder was level. He also testified that if Warren Paving identified a drop-off such as the one in the photographs shown to the jury, it would be reported to the City. The City would either take care of it or instruct Warren Paving to do so. According to Amacker, it was not typical for Warren to do work on shoulders after

doing an overlay project for the City. He could recall doing shoulder work as a separate job for the City only once in twenty-nine years but could not recall whether that was before or after the Richburg Road project.

The jury also heard from LEROY CARTER, who had done asphalt work with Warren Paving for thirty-three years, progressing from common laborer to asphalt foreman. On the Richburg Road overlay project, part of his job was to stand on the part of the asphalt spreader that was on the edge of the roadway. He was there the entire length of the Richburg Road job. His focus was on the roadway edge, including the shoulder. Asked about the dropoff as it was in May of 2019, according to Carter it was not like that when they were out there in November of 2018: someone like him who had been doing the work as long as he had wouldn't have let something like that get by him. Had it been there, he would have told a Warren supervisor or someone from the city.

SUFFICIENCY OF THE EVIDENCE:

Despite the plaintiff's urging of entitlement to JNOV on the basis that the jury's verdict was "contrary to the evidence in that no reasonable person could have reached the conclusion that the pavement edge drop-off was not present or created by Warren Paving" [2] this court cannot agree: "The jury, after being informed of all relevant law and facts, found that the defendant was not liable. The evidence did not overwhelmingly support either party. Because the jury did not return a verdict that was against the overwhelming weight of the evidence," the verdict in Warren Paving's favor will not be disturbed. *Morton v. Belk,* 297 So. 3d 245, 248 (¶10) (Miss. 2020).

Additionally, Plaintiff follows his assertion that "Defendants failed to offer any testimony or evidence to dispute Anquerria's testimony" with the statement that "Defendants merely

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[2]Plaintiff's Motion at 5.

offered testimony that workers for Warren Paving and the City did not see the pavement edge drop-off when they were out there at the site."[3] However, while Anquerria Jones did testify as to the presence of the drop-off, testimony from, among others, Ann Jones, Lamar Rutland, Joe Amacker, and Leroy Carter may have persuaded the jury to the contrary. Under these circumstances, the reasoning of the Court in *Richardson v. DeRouen* applies equally here:

> Which witnesses to believe is not for this Court to decide. This is a factual dispute as to what the jury should believe, which is decided by the jury. Mississippi has a long standing policy of trusting the jury's verdict. Jurors decide the credibility of the evidence and the witness's testimony, the court has no say with regard to this matter. ... [T]he key question here is whether the jury's finding...is against the overwhelming weight of the evidence. We hold that it is not.

920 So. 2d 1044, 1048 (¶8) (Miss. Ct. App. 2006). This court holds likewise.

SUBSEQUENT REMEDIAL MEASURES:

The plaintiff sought to introduce at trial a video of gray limestone on the shoulder of Richburg Road in July of 2019 and photographs in April of 2020 of asphalt in the same area. The defendants moved *in limine* to exclude the images as impermissible evidence of subsequent remedial measures. The plaintiff maintained that the images were to be used, not as proof of negligence or culpable conduct, but rather to identify the entity who put the limestone down despite the defendants' denials that it was either of them and despite there being no evidence that it was. The plaintiff further urged the propriety of the images' use to impeach defense witness testimony that shoulder work was not within the scope of the contract for the Richburg Road

[3]Plaintiff's Motion at 6.

overlay project and as to the process that would have been followed had shoulder work been a part of the project.[4] According to the plaintiff, that nearly a year after the accident Warren Paving did, at the request of Lamar Rutland, place asphalt on the shoulder [5] without a writing, a separate purchase order or additional payment opened the defendants' testimony to impeachment. This court was persuaded pre-trial-and remains so-that in this case either allowance would run counter to the purpose for the rule:

> [Rule 407] allows the exclusion of any action taken which would have made the event less likely to occur. The comments provide insight into the reason behind this rule. The rule encourages corrective measures to be taken, or at the very least prevents the discouragement of making such correction by preventing their adverse use in litigation. [I]n *Sawyer v. Illinois Cent. R.R.*,[6] [t]he supreme court stated that the main reason parties sought to introduce subsequent remedial measures was to show some after-the-fact 'guilty knowledge' that a dangerous condition existed. By excluding such measures, it will allow the defendant to correct any dangerous condition without creating such a 'guilty knowledge' inference. The same principle applies to the particular facts in the case before us.

Alexander v. Greer, 959 So. 2d 586, 590 (¶¶ 17-19) (Miss. Ct. App. 2007).[7] Under the

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[4]Plaintiff's Motion [244] at 8.

[5]Plaintiff's Motion [244] at 8-9; Warren Paving's Response in Opposition to Plaintiff's Motion [247] at 6.

[6] 606 So. 2d 1069 (Miss. 1992) (holding that evidence of repairs made six months after accident was inadmissible as subsequent remedial measures and affirming denial of plaintiff's motion for jnov or new trial).

[7] Although the *Alexander* Court held that subsequent-remedial-measures evidence was excludable as proof of negligence, it further held that evidence of the plaintiff's post-accident medical visit with an eye doctor was admissible "for the sole purpose of impeachment" where the

circumstances of this case, where no clear exception to MRE 407 applies, images of the limestone and asphalt placed at the site of the accident are "simply evidence of a subsequent remedial measure" properly excluded. *See Redhead v. Entergy Mississippi, Inc.*, 828 So. 2d 801, 811 (¶¶ 29-32) (Miss. Ct. App. 2001) (affirming verdict for defendant).

JURY INSTRUCTIONS:

Although a new trial may sometimes be warranted "when the jury has been confused by faulty jury instructions," [8] that consideration alone does not meet the "high standard" for setting aside a jury's verdict and granting a new trial. *See generally Richardson v. DeRouen,* 920 So. 2d 1044, 1047-48 (¶¶ 7-8) (Miss. Ct. App. 2006) ("The trial judge can only grant a motion for a new trial if the jury verdict is contrary to the overwhelming weight of the evidence or is contrary to the law.").

In this case, while the plaintiff's request for a new trial is not based primarily upon errors related to jury instructions, the plaintiff does claim that the court erred by use of the special interrogatory verdict form. He contends that instruction allowed the jury to find only that the photographs taken at the time of the accident in 2019 looked exactly the same as when Warren Paving completed the work in 2018 or to find for Warren Paving.[9] However, that position does not take into account that instruction D-6a, which does reference both the completion date and the accident date, further instructs the jury:

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defendant testified at trial "that he did not have any problems with his vision". *Id.* at ¶¶ 21-22.

[8] *Solanki v. Ervin,* 21 So. 3d 552, 569 (¶ 46) (Miss. 2009) (citation omitted) (affirming denial of motion for new trial).

[9] The plaintiff asserts that instead of "have[ing] to prove that the pavement edge drop-off was exactly how it appeared in the May 2019 photographs when Warren Paving performed the work", he just had to "show that there was a pavement edge drop-off that was at least 2 1/4 inches in depth pursuant to the requirements of the Red Book which were made a part of the contract by Defendants." Plaintiff's Motion at 14.

> [I]f you find that the shoulder condition depicted in the May 18, 2019 photographs either existed at the time that Warren Paving, Inc. had performed and completed the asphalt overlay work on Richburg Road [redaction], or that it was created by the asphalt overlay work, you should then decide whether Warren Paving, Inc. breached a duty in its performance of the asphalt overlay work. [Y]ou may consider the provisions of the 2004 Mississippi Standard Specifications for Road and Bridge Construction, also known as the 2004 Red Book, in determining whether Warren Paving, Inc. breached any duty to conform to a certain standard of conduct. [Y]ou may also consider whether the City of Hattiesburg inspected the completed Richburg Road overlay work by Warren Paving, Inc., whether any such inspection revealed any problems with the shoulder area of Richburg Road near the intersection with Honeysuckle Drive, and whether the overlay work was accepted and paid for by the City.

Additionally, the plaintiff requested and was granted three negligence instructions[10] that were not inconsistent with instruction D-6a. One of those instructions, P-11, instructs:

> In addition to the common law duties owed by Warren Paving through the contract with the City of Hattiesburg [ ] the Red Book and the Manual on Uniform Traffic Control Devices were required terms to be followed as part of the term bid and contract documents between the City of Hattiesburg and Warren Paving. Therefore, you may consider breaches, or violations, if any, of the regulations in the Red Book and the Manual on Uniform Traffic Control Devices for purposes of determining negligence.

Given that "[t]he law requires all instructions to be read together" and that "[d]efects in specific instructions do not require reversal where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law," that the jury did not find in favor of the plaintiff against Warren Paving does not now lead this court to the conclusion that the jury's failure to do so was the fault of the instructions. *Franklin Corp. v. Tedford,* 18 So. 3d 215, 240 (¶ 52) (Miss. 2009) (quotations and citations omitted).

Plaintiff's further charge that the court erred by instructing the jury not to consider the City as to a determination of liability does not compel a different result. While it was for the court, rather than for the jury, to decide the plaintiff's claims against the City, a number of jury

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[10] P-3, P-7 and P-11.

instructions refer to the relationship between Warren Paving and the City for purposes of the jury's findings relative to Warren Paving's liability for the plaintiff's injuries:

Instruction D-1 instructed that if the jury found that Warren Paving had completed the overlay project, the City had accepted it as satisfactory and paid for it "then the responsibility for maintenance and oversight over the area became the legal obligation of the City and not Warren Paving...".

Similarly, instruction D-6a instructed the jury that it "may also consider whether the City of Hattiesburg inspected the completed Richburg Road overlay work by Warren Paving, Inc., whether any such inspection revealed any problems with the shoulder area of Richburg Road near the intersection with Honeysuckle Drive, and whether the overlay work was accepted and paid for by the City."

Instruction D-7 defines the shifting of responsibility for maintaining the roadway:

> [A]fter a paving contractor, such as Warren Paving, has turned over its work on a roadway project to a public entity such as the City of Hattiesburg, and that the public entity has accepted that work as satisfactory, then the contractor incurs no further liability to third parties by reason of the condition of the work on or off of the roadway. Rather, the responsibility, if any, for maintaining the roadway, including a shoulder, whether allegedly defective or not, is shifted to the public entity, and the contractor is not liable.

Consistent with D-1 and D-6(a), D-7 further instructs that once the overlay was completed "and the City accepted its work as satisfactory, then any alleged defective condition of Richburg Road that may have existed at the time of the May 17, 2019 accident involving the Plaintiff was not the responsibility [of] Warren Paving, Inc."

D-12(a) instructs that should the jury find Warren Paving negligent but that its negligence caused only a portion of the plaintiff's damages, the jury could "find for the Plaintiff and determine the percentage of the damages to be allocated to the negligence, if any, of Warren Paving, Inc., the City of Hattiesburg, and others, including the Plaintiff for his own negligence or comparative

fault, if any, as defined to you in the Court's other instructions." Had the jury found Warren Paving at fault, D-12(a)'s references to "percentage of the damages" and "comparative fault" are reflected in Question No. 5 of the form of the verdict which allows attribution of fault among the City, Warren Paving and Plaintiff Randolph. The jury could have allocated fault, but it did not. *See generally Morton v. Belk,* 297 So. 3d 245, 248 (¶10) (Miss. 2020) (observing that "while a comparative-fault verdict could have been warranted, that is not what the jury decided" and holding trial judge's grant of new trial an abuse of discretion).

CONCLUSION

The circumstances requiring the "clean slate" of a new trial just are not present here. *White v. Stewman,* 932 So. 2d 27, 33 (¶¶ 17-18) (Miss. 2006) Consequently, the court cannot find that the plaintiff has met the high standard for setting aside the jury's verdict and granting a new trial such that this court's exercise of its discretion to that end is warranted. *See Richardson v. DeRouen,* 920 So. 2d 1044, 1047-48 (¶ 7) (Miss. Ct. App. 2006) (instructing, in part, that appellate court "will reverse only if convinced that the circuit court abused its discretion in not granting a new trial.").

ACCORDINGLY, for the reasons herein stated,

IT IS ORDERED AND ADJUDGED that the plaintiff's motion for judgment notwithstanding the verdict should be, and it is hereby, DENIED;

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff's alternative motion for new trial should be, and it is hereby, DENIED.

SO ORDERED this, the 6th day of December, 2024.

ROBERT B. HELFRICH
CIRCUIT COURT JUDGE