# RECENT DEVELOPMENTS IN LOUISIANA TORT LAW 2017-18

# For the

# 2019 LADC Winter Meeting

# Steamboat Springs, Colorado

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## I. LEGISLATION

**Act N0. 481, enacting CC Art. 2315.10**
**Art. 2315.10. Liability for death caused by hazing; additional damages**
**In addition to general and special damages, exemplary damages may be awarded upon proof that the death on which the action is based was caused by a wanton and reckless disregard for the rights and safety of the victim through an act of hazing, as defined by R.S. 17:1801, regardless of whether the defendant was prosecuted for his acts.**

## II. CASE LAW

### *A. Prescription*

***Eaglin v. Eunice Police Dept.,* No. 2017-1875 (La. 6/27/18), 2018 WL 3154744 (per curiam).**
**Issues:**
**(1) Whether the prescriptive period on a claim for false arrest and false imprisonment begins to run from the date of arrest or the date of release.**
**(2) Whether a later-added plaintiff's claim related back to a timely filed action.**
**Holdings and Rationales:**
**(1) The Court held that prescription begins to run when the plaintiff is arrested rather than when he is released because injury or damages are first sustained when arrested. The Court rejected common law authority regarding the statute of limitations for false imprisonment, explaining that common law statutes of limitation are merely procedural, but civilian prescriptive periods extinguish obligations. Regarding the concern that a potential plaintiff might not be able to file while incarcerated, the Court explained that the doctrine of *contra non valentem* could be invoked to address the matter in an appropriate case, although the facts of the case before the court did not make *contra non* applicable.**
**(2) No. Plaintiff sought to have his later-filed petition relate back to the timely filed petition of a man who was incarcerated with him. The plaintiffs asserted claims for false arrest and false imprisonment. The Court considered the *Giroir***

**factors.[1] *Giroir v. South Louisiana Medical Center, Div. of Hospitals*, 475 So. 2d 1040, 1044 (La. 1985). The Court held that the third factor was not satisfied because the plaintiff did not allege a close familial[2] or legal relationship between the two plaintiffs. The claims of one plaintiff were not derivative of the claims of the other, and they were not related in any legal sense, as each cause of action was separate and distinct—based on each man's separate injuries stemming from his arrest.**

### *B. Defamation and Special Motion to Strike*

***Shelton v. Pavon*, 2017-0482 (La. 10/18/17), 236 So. 3d 1233.**
**<u>Facts</u>: After wife died, plaintiff husband learned that wife had changed beneficiary on her life insurance policy from husband to her former paralegal and friend. Husband filed petition to annul the change of beneficiary, alleging it was obtained through fraud, forgery, and undue influence. Defendant and new beneficiary filed answer and reconventional demand claiming that husband's petition was defamatory. Plaintiff husband filed a special motion to strike pursuant to La. CCP art. 971. The trial court granted the motion to strike. The Second Circuit reversed, holding that Art. 971(F)(1)(a)[3] requires that statements**

[1] (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; (4) the defendant will not be prejudiced in preparing and conducting his defense.

[2] The court noted that plaintiff's counsel at the hearing on the exception of prescription asserted that the men were cousins. The Court noted both that no evidence of that relationship was introduced and that the jurisprudence has declined to construe "close familial relationships" broadly. *Eaglin,* ___ So. 3d at___n.1.

[3] A. (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.
(2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
(3) If the court determines that the plaintiff has established a probability of success on the claim, that determination shall be admissible in evidence at any later stage of the proceeding.
B. In any action subject to Paragraph A of this Article, a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs.
C. (1) The special motion may be filed within ninety days of service of the petition, or in the court's discretion, at any later time upon terms the court deems proper.
(2) If the plaintiff voluntarily dismisses the action prior to the running of the delays for filing an answer, the defendant shall retain the right to file a special motion to strike within the delays provided by Subparagraph (1) of this Paragraph, and the motion shall be heard pursuant to the provisions of this Article.

**made in a judicial proceeding must be about a public issue, and the petition at issue did not involve a public issue.**

**<u>Issue</u>: Whether Art. 971(F) motion to strike requires that a matter involve a public issue.**

**<u>Holding and Rationale</u>: Yes. The Court resolved a 3-2 circuit split. The Court held that Art. 971(F)(1)(a) also requires satisfaction of the 971(A)(1) requirement that such statements be made in connection with a public issue. The Fourth and Fifth Circuits had observed that the language of 971(F)(1)(b) can be read as providing that a special motion to strike will apply to any issue in a judicial proceeding. However, 971(F)(1)(a) can be read to require that it applies to only statements or writings in a judicial proceeding about a public issue. Resorting to rules of statutory construction, the Fourth and Fifth Circuits held that the motion applies to only matters of public concern. Given the ambiguity in the statutory language, the Court explained that reading the statute as applying to any issue in a judicial proceeding could lead to absurd results. *Shelton*, 236 So. 3d at 1238. That interpretation would insulate from legal repercussion defamation or invasion of privacy in judicial proceedings. The Court followed La. Civ. Code Art. 10, which instructs that when statutory language is susceptible of different interpretations, it must be interpreted to**

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(3) The motion shall be noticed for hearing not more than thirty days after service unless the docket conditions of the court require a later hearing.

D. All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this Article. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. Notwithstanding the provisions of this Paragraph, the court, on noticed motion and for good cause shown, may order that specified discovery be conducted.

E. This Article shall not apply to any enforcement action brought on behalf of the state of Louisiana by the attorney general, district attorney, or city attorney acting as a public prosecutor.

F. As used in this Article, the following terms shall have the meanings ascribed to them below, unless the context clearly indicates otherwise:

(1) “Act in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue” includes but is not limited to:

(a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.

(b) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official body authorized by law.

(c) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(2) “Petition” includes either a petition or a reconventional demand.

(3) “Plaintiff” includes either a plaintiff or petitioner in a principal action or a plaintiff or petitioner in reconvention.

(4) “Defendant” includes either a defendant or respondent in a principal action or a defendant or respondent in reconvention.

**have the meaning that best conforms to the purpose of the law. Examining the legislative history, the Court concluded that Art. 971 was intended to quell the increasing use of lawsuits to chill valid exercise of constitutional rights of free speech and petition for redress of grievances. The purpose of Art. 971 thus had to do with encouraging participation in matters of public significance. Thus, the Court held that 971(F)(1)(a) must also satisfy the public issue requirement of 971(A)(1).**
**Dissenting, Justice Weimer found that the language of Art. 971 is clear and unambiguous and does not lead to an absurd result. Justice Weimer arrived at the contrary result, that Art. 971(F)(1)(a) does not require an issue of public significance by evaluating the plain language, using rules of statutory construction, and legislative intent.**

**Justices Clark and Hughes also dissented, and Justice Crichton concurred with reasons.**

### *C. Medical Malpractice*

***Burchfield v. Wright,* 2017-C-1488 (La. 6/27/18), 2018 WL 3150182, *rev'g* No. 51,459 (La. App. 2d Cir. 6/28/17), 224 So. 3d 1170.**
**available at http://www.lasc.org/opinions/2018/17-1488.C.OPN.pdf**
**Doctor failed to read chest x-ray prior to surgery, which would have shown that plaintiff suffered from congestive heart failure. A gallbladder surgery was performed because the x-ray was unread. Plaintiff was released but returned to the hospital within a day and a half. He had suffered a heart attack, and because the damage to his heart was so great, he had to undergo a heart transplant. Plaintiff recovered for lost chance of a better outcome (better outcome would have been just a heart bypass rather than heart transplant).**
**<u>District Court</u>: Jury awarded $680,000 in damages for his lost chance of a better outcome, but did not indicate if the damages were general or special. Recognizing the medical malpractice statutory cap of $500,000, the court reduced the jury verdict from $680,000 to $400,000 (doctor had settled for $100,000).**
**<u>Second Circuit</u>: Plaintiffs argued on appeal that the trial court erred in concluding that a lost chance of a better outcome could consist of only general damages. The Second Circuit agreed, primarily because the answers to jury**

**interrogatories were patently inconsistent, leading to an inability of the jury to consider all of the damages suffered by the plaintiff as a result of the heart transplant. Thus, jury verdict form was flawed, leading to the confusing lump sum awarded by the jury. If the damages for lost chance are a "lump" (meaning a number of items of damage taken together), then such an award may include special damages to adequately compensate a patient, and "lump sum" damages should not be limited to the cap for general damages established by the MMA. It was error for the trial court to assume the lump sum award was simply general in nature. The court affirmed the award of $400,000 in general damages but also awarded special damages as follows: $692,850.64 in past medical bills; future medicals to be awarded pursuant to La. Rev. Stat. 40:1231.3; and lost wages in the amount of $493,020.**

**<u>Supreme Court</u>: The Court reversed and reinstated the jury verdict. The Court first explained that the Second Circuit misconstrued the theory of lost chance of a better outcome in a med/mal case. The Court reaffirmed that Louisiana does recognize lost chance of a better outcome (*see Graham v. Willis-Knighton Med. Ctr.*, 97-0188 (La. 9/9/97), 699 So. 2d 365) under lost chance of survival, stating that lost chance of a better outcome was recognized in *Hastings v. Baton Rouge Gen. Hosp.*, 498 So. 2d 713 (La. 1986). The Court also stated that lost chance is not a distinct cause of action from medical malpractice. "Under this theory of recovery, a plaintiff may carry his burden of proof by showing that the defendant's negligence was a substantial factor in depriving the patient of some chance of life, recovery, or, as in the instant case, a better outcome." *Burchfield*, __ So. 3d at ___. The Court found that the Second Circuit committed several errors, including finding the jury's answers to interrogatories inconsistent. The crucial error was the Second Circuit's conclusion that the lump sum award for lost chance may include special damages and that the lump sum award for lost chance is not subject to the Medical Malpractice Act's cap for general damages. The jury was properly instructed that it could consider all factors of damages in arriving at a lump sum award, including past and future medical expenses and general damages. The Court found the jury's award of $680,000 as a lump sum for the lost chance to be within the jury's discretion. Thus, the Court reinstated the jury verdict and applied the MMA cap of $500,000, plus interest and costs, subject to a $100,000 credit paid by the defendant doctor.**

***Guffey v. Lexington House, LLC*, 18-475 (La. App. 3d Cir. 8/22/18), 254 So. 3d 1.**
**Facts: After death of woman in defendant nursing home, her granddaughter filed a request for a medical review panel. She then attempted to supplement the request with a son of the decedent, and she stated that she was the representative of the decedent's estate. The defendant nursing home filed the exception of no right of action based on the granddaughter's not being a proper party claimant under the survival and wrongful death articles. The trial court denied the exception, reasoning that "claimant" under La. R.S. 40:1231.1(A)(4) is not limited to those who will be permitted to assert survival or wrongful death claims after the medical review panel proceeding. After the decision of the panel, two of the decedent's children filed suit. Defendant nursing home filed the exception of prescription. Defendant argued that the granddaughter had no right of action to file the request for medical review panel, which would suspend the prescriptive period under La. R.S. 40:1231.8(A)(2)(a). The exception was denied, and defendant filed a writ application.**
**Issue: Whether a claimant entitled to file a request for medical review panel is limited to persons who may assert wrongful death and survival actions.**
**Holding and Rationale: No. The Third Circuit already had ruled that the granddaughter had a right of action to file the request for medical review panel, but it reconsidered its decision in light of the First Circuit's decision in *Rickerson v. Audubon Health & Rehabilitation Ctr.*, 17-629 (La. App. 1st Cir. 3/23/18), 239 So. 3d 292 (holding that children's wrongful death and survival claims prescribed because request for panel by decedent's parents did not suspend the running of prescription). The Third Circuit noted that "Claimant" is defined as "a patient or representative or any person, including a decedent's estate." La. R.S. 40:1231.1(A)(4). In turn, "representative" is defined as "the spouse, parent, guardian, trustee, attorney or other legal agent of the patient." La. R.S. 40:1231.1(A)(4). In this case, the granddaughter had a power of attorney, and she amended the request to indicate that she was the representative of the estate. The court reasoned as follows:**

> **There is a difference between having a right of action to bring a complaint before the medical review panel and having a right of action to file suit in the district court once the panel proceedings are concluded. There must be a difference because there is the possibility that the patient will die after the conclusion of the panel proceedings but before the conclusion of any following litigation.**

> **Thus, a distinction between who can bring a claim before the panel and who can sue for damages after the conclusion of the panel proceedings is both reasonable and logical. The determination of who can bring a claim for damages is irrelevant to the definition of "claimant."**

***Guffey*, 254 So. 3d at ___. Accordingly, the Third Circuit found that the granddaughter was a proper claimant, and her filing of the request for a medical review panel suspended prescription as to all plaintiffs.**

***Cooley v. Kufoy*, 18-375 (La. App. 3d Cir. 12/6/18), 2018 WL 6378287.**
**Plaintiffs sued internal medicine doctor for alleged excessive psychotropic drug treatment of one of the plaintiffs. Plaintiffs offered no expert testimony in support of their malpractice claim in response to defendant's affidavit by a member of the medical review panel, which found no breach. The trial court granted summary judgment for the defendant. On appeal, a Third Circuit panel affirmed. Usually, plaintiffs are required to offer expert testimony of a breach in medical malpractice claims. There is an exception when a breach is so obvious that a lay jury can perceive the breach as well as an expert can, established in *Pfiffner v. Correa*, 643 So. 2d 1228 (La. 1994). The Third Circuit held that the claim before it did not present such an obvious breach, as it would "turn on complex medical issues involving internal medicine, psychiatric, and pharmaceutical protocols which, by their very nature, are not within the purview of the average layperson." Without expert testimony on breach and causation, plaintiffs' claim was susceptible to summary judgment. The court also rejected the plaintiffs' argument that they had not been able to conduct adequate discovery, noting that the motion for summary judgment was heard five years after the initial complaint was filed and after the trial court granted two continuances to permit discovery.**

***In re Anderson*, 2017-1576 (La. App. 1st Cir. 11/14/18), 2018 WL 6579553.**
**La. R.S. 40:1231.8(A)(1)(c) provides as follows:**

> **A claimant shall have forty-five days from the date of receipt by the claimant of the confirmation of receipt of the request for review in accordance with Subparagraph (3)(a) of this Subsection to pay to**

**the board a filing fee in the amount of one hundred dollars per named defendant qualified under this Part.**

**The First Circuit held that the mailbox rule applies to the provision. "To hold otherwise would mean that, in determining the timeliness of payment, if sent by the claimant via ordinary mail or certified mail to the PCF Board within the 45-day period, as opposed to the claimant appearing and paying in person, could render meaningless and circumvent the 45-day statutory period for payment and render a payment untimely if the Board simply failed to claim or retrieve its mail until after the time period for paying had elapsed."**

***D. Burning***

***Lowe v. Noble*, 2017-1948 (La. 2/9/18), 235 So. 3d 1095 (per curiam).**
**Facts: Plaintiff was involved in a multi-car collision on I-10 south of New Orleans when a dense cloud of smoke and/or fog caused zero-visibility conditions. A fire had been burning for months on marsh land owned by defendants. Defendants had reported the fire to the New Orleans Fire Department, which tried to put out the fire but could not get heavy equipment in to put it out. Plaintiff argued that if defendants, as responsible marsh land managers, had conducted controlled burns once ever one to five years, abnormal fuel buildup would have been avoided and a "hot fire" (will not burn out on its own and can continue for months) would not have occurred. The First Circuit held there was a genuine issue of material fact precluding summary judgment.**
**Issue: Whether the marsh owner had a duty to conduct periodic controlled burns.**
**Holding and Rationale: No. There is no duty on the part of the owners to conduct controlled burns. The only duty of the owner was to contact the fire department. The zero-visibility event resulted from an Act of God.**

***E. Animals***

***Holmes v. Lea*, 2017-1268 (La. App. 1st Cir. 5/18/18), 250 So. 3d 1004.**
**In an epic story of loss and recovery, defendant's Boerboel Mastiff went missing. The dog was found by plaintiff's girlfriend at plaintiff's house. She**

**could not determine who was the owner of the dog, so she posted a notice on Facebook, asking if anyone wanted the dog. A former high school classmate of hers (Williams) responded that she would take the dog. Plaintiff (Kyle) left on a six-day hunting trip. While gone, he was contacted by a neighbor who told him he believed defendant (Tommy, a state trooper) to be the owner and provided contact information for Tommy. Kyle did not try to contact Tommy until three days after he returned from his hunting trip. In the meantime, Tommy (dog owner) contacted a deputy with the sheriff's office. The deputy contacted Kyle, who told the deputy that he had given the dog to Williams and provided contact information. When the deputy contacted Williams, she told him that the dog had run away. Because of discrepancies in the stories and delay by Kyle in communicating with Tommy, the deputy filed an affidavit for warrant for arrest of Kyle for theft of the dog under (now-repealed) La. R.S. 14:67.2. Investigation revealed that Williams had lied; she had given the dog away. Finally, the dog was recovered and returned to Tommy. Nonetheless, the DA prosecuted Kyle for the theft. Kyle was found not guilty. Kyle sued Tommy and the deputy for defamation, libel, slander, intentional infliction of emotional distress, and negligent infliction of emotional distress, alleging that the defendants made false statements about him and colluded to have him arrested. Defendant Tommy filed a motion for summary judgment, which the trial court granted, dismissing all of plaintiff's claims against him.**

**On appeal, the First Circuit affirmed. Regarding defamation, the court held that the conditional or qualified privilege applied to bar recovery for defamation. Under the first step of the privilege, it applied because the public has an interest in possible criminal activity being reported to proper authorities. Under the second step, the court determined that defendant Tommy acted in good faith in reporting what he reasonably believed to be the theft of his dog. On his IIED claim, plaintiff asserted that Tommy used his position as a state trooper to persuade the deputy that charges should be filed. Plaintiff also argued that a voicemail message left by Tommy was intended to cause him emotional distress.[4] The First Circuit held that the words and actions of the defendant were not outrageous. There was no evidence that he attempted to use his position as a state trooper to influence the proceedings. Although his voicemail message was threatening, "mere threats are insufficient" to satisfy the element**

4 "Hey Kyle, this is Tommy Lea[.] [L]ook[,] I finally got [a hold] of Lori [.] [S]he tells me that my dog got out of the fence[,] and she has no idea where he's at now[.] [Y]ou have until Sunday, Sunday to give me my dog or your ass is going to jail, for felony theft and you can kiss your Exxon job good bye."

**of outrage. Moreover, a single crude and offensive text or voicemail message does not rise to the level of outrageous. The claim for NIED was properly dismissed on summary judgment because there was no special likelihood of genuine and serious mental distress (*Moresi v. State, Dept. of Wildlife & Fisheries*, 567 So. 2d 1081, 1096 (La. 1990)), no evidence that plaintiff suffered severe emotional distress, and no evidence that the defendant breached a duty not to make baseless or unfounded reports of criminal activity. Although defendant violated La. R.S. 3:2771 by letting his dog run free, the harm suffered by plaintiff was beyond the scope of the statute's intended protection (to protect people from being tangibly harmed by unrestrained animals).**

### *F. Bystander Recovery*

***Cosey v. Flight Academy of New Orleans, LLC*, No. 17-0364 (La. App. 4th Cir. 10/25/17), 2017 WL 4803829.**

**Following the death of the decedent in an airplane crash, decedent's relatives filed suit against various defendants pursuant to La. C.C. Art. 2315.6, commonly referred to as bystander damages. The relatives alleged that they came upon the crash scene and witnessed retrieval of the plane and the decedent. The appellants' petition was silent as to their awareness of the decedent's condition during and/or immediately following the crash, which would give rise to a reasonable expectation of serious mental anguish from the experience, and that the sustained mental anguish is reasonably foreseeable. As a result, the court was unable to determine whether appellants had established a cause of action for bystander damages. The petition, as it stood, did not assert a cause of action for bystander damages. Because the petition did not negate the possibility of a viable bystander claim, but rather lacked certain relevant facts, the court allowed appellants to amend their petition to remedy the factual deficiencies.**

### *G. Negligence*

***Sepulvado v. Travelers Ins.*, 52,415 (La. App. 2d Cir. 11/8/18), 2018 WL 5932843.**

**<u>Facts</u>: Plaintiff was injured when he took his truck into a car dealership in Shreveport for service. Conditions that day were icy, and schools were closed due to those conditions. An employee of the dealership directed plaintiff where**

**to park and exit his vehicle. When he exited, plaintiff took three steps and slipped on ice, apparently, and injured his back and neck. Plaintiff's wife claimed that while she was waiting in the emergency room, she talked with two employees of the car dealership who said they slipped on the same ice patch earlier in the morning. In his deposition, plaintiff stated that the weather was bad and icy on the day of his accident. He also said that he did not see ice on the pavement of the parking lot until after he fell when he saw people sliding around as they ran to help him. He did not see any ice on the ground where he fell, but he assumed that he slid on ice because of how his feet slid from underneath him. He also said that his wife did not fall when she checked on him, and his truck did not slide while he was driving on the lot. Plaintiff's wife agreed that the truck did not slide around on the lot, and she did not see any ice while helping her husband. An employee of the dealership stated that the back parking lot where the employees park was covered in ice and "pretty slick." That employee did not see plaintiff fall, but he saw him lying beside his truck and helped him to his feet because conditions were slick. Plaintiff sued for damages, and his wife added a loss of consortium claim. The dealership and its insurer moved for summary judgment, arguing that plaintiffs could not prove an "unreasonable risk of harm." The district court granted summary judgment in favor of defendants, reasoning that plaintiff knew the weather was bad, and he had observed ice on the side of the road; it was open and obvious that the weather conditions were bad, and that was why schools were closed.**

**<u>Issue</u>: Whether summary judgment was appropriate because the icy condition causing plaintiff's fall was open and obvious.**

**<u>Holding and Rationale</u>: Yes. The Second Circuit evaluated the case under the Louisiana slip-and-fall statute, La. R.S. 9:2800.6. Under the statute, a plaintiff must prove that the condition presented an unreasonable risk of harm and the risk of harm was reasonably foreseeable. The court stated that "[a] merchant generally does not have a duty to protect against an open and obvious hazard." *Sepulvado*, ___ So. 3d at ___. In order for a hazard to be open and obvious, it must be open and obvious to all—"everyone who may potentially encounter it." *Id.* at __. The appellate court affirmed the granting of summary judgment on the ground that the ice was open and obvious:**

> **The existence of ice may not always be an open and obvious hazard in Louisiana. However, on this day, when it is undisputed**

**that the weather produced icy conditions, the risks associated with the presence of ice is obvious.**

***Id.* at ___.**

***Lafaye v. SES Enters., LLC*, 2018-0905 (La. App. 4th Cir. 12/26/18), 2018 WL 6797293.**

**Plaintiff sued for injuries from a fall when she was walking her dog and attempted to step over a sanitation hose suspended over a sidewalk. The hose, about three inches in diameter, was connected to a sanitation truck and was servicing a portable toilet on a construction site. Plaintiff alleged that she got one foot over the part of the hose suspended about four inches above the ground but that her other foot did not clear a part of the hose suspended about eight inches above the ground. Defendants filed a motion for summary judgment, contending that the hose was an open and obvious hazard and thus defendants owed no duty. The trial court denied the motion for summary judgment on the rationale that defendant had a statutory duty to keep the sidewalk free of obstructions under Orleans Municipal Code 54-101. On appeal, a Fourth Circuit five-judge panel reversed. The court stated that violation of a criminal statute (the ordinance was modeled on a state criminal statute) does not automatically create liability in a civil case; the statute merely provides "some guidance in assessing liability." The court held that the hose was open and obvious based on plaintiff's deposition testimony that she observed the suspended hose and could have avoided it by taking alternate routes but made a decision to step over it. The court explained that the ordinance was not intended to prevent injuries such as this—"an injury or injuries sustained by an individual who observes a hazard yet actively engages with it based on a perceived ability to avoid any harm."**

***LeBlanc v. City of Abbeville*, 18-206 (La. App. 3d Cir. 10/17/18), 2018 WL 5020154.**

**Plaintiff and a neighbor were talking while the neighbor's daughter fell into a rose bush and cried out for help. As both men rushed to help the girl, plaintiff stepped on a metal storm grate above a catch basin that was partially covered with grass. The grate broke, and plaintiff's leg slipped through the opening, resulting in a severe laceration that rendered plaintiff unable to continue working as a carpenter. Plaintiff sued the City of Abbeville, alleging that the**

**storm grate, which the City maintains as part of the sewage, water, and wastewater systems, was deteriorated and riddled with rust. The City filed a motion for summary judgment, contending that it owed no duty to plaintiff because the storm grate was open and obvious and that the grate was not in unreasonably dangerous condition. The court denied the motion, and after trial, the City was found liable. On appeal, the Third Circuit affirmed. The court considered whether the condition of the grate was open and obvious under its analysis of likelihood and magnitude of harm (in evaluating unreasonable risk of harm). The court explained that the fact of plaintiff's knowledge of the existence of the storm grate was not enough to classify it as open and obvious. Rather, the defective condition of the storm grate must be obvious to all who encounter it, and this was not true. The grass that grew into and around the grate disguised its deteriorated condition.**

***Robinette v. Old Republic Ins. Co.*, 17-79 (La. App. 3d Cir. 10/4/17), 229 So. 3d 61, *writ denied*, 2017–C–1871 (La. 1/9/18), 231 So. 3d 648.**

**Defendant picked plaintiff up at school to take her to lunch. Shortly after plaintiff became a guest passenger in the car, a heated argument ensued between plaintiff and defendant. Defendant asserted that plaintiff became verbally abusive, screaming and cursing at him as he drove from the parking lot of the school. Defendant decided to return plaintiff to the school, placed the vehicle in reverse and hit the gas and collided with another vehicle. Plaintiff sued for injury, alleging the accident was caused solely by the negligence of defendant. Defendant argued that the accident was caused solely or in part by the negligence of plaintiff in distracting defendant as he drove. The trial court granted plaintiff's motion for summary judgment, and defendant appealed. The Third Circuit affirmed.**

**"Louisiana's case law has consistently held that a driver's negligence is not imputed to a guest passenger. [citations] A driver's negligence is not imputable because it is unrealistic to hold that a guest passenger factually has any control or right of control over the motorist with whom he rides." The court explained that Louisiana does recognize that a passenger can have fault imposed when there is a joint venture, an independent negligent act by the passenger, or a showing that the rider had actual or constructive knowledge of a driver's incompetence or impaired ability to operate the vehicle. No Louisiana case has**

**found a guest passenger contributorily negligent under facts like those presented in this case.**

> **Acceptance of defendants' assertion that [plaintiff's] actions of screaming and yelling breached a duty and place her at fault for causing the accident would require the adoption of a cause of action for comparative fault of a guest passenger more expansive than any recognized in any jurisdiction in this country.**

***Robinette,* 17-79, at 5.**

***Barber v. Louisiana Mun. Risk Management Agency Group Self-Insured Fund*, No. 17-1005 (La. App. 3d Cir. 4/18/18), 244 So. 3d 56.**

**Occupants of a vehicle filed petition for damages concerning a motor vehicle accident that occurred when truck driven by city marshal crossed the center line and collided with occupants' vehicle. The occupants request summary judgment concerning the fault of the city marshal; however, a genuine issue of material fact exists as to whether the city marshal was rendered unconscious while operating the truck that struck the occupants' vehicle. Although the city marshal had a long history of heart disease and type-II diabetes, several facts create genuine issues of material fact regarding the foreseeability of unconsciousness resulting from either of these medical or health problems. Because there is no jurisprudential support for holding a driver negligent solely because of medical or health problems without prior indications of impairment, summary judgment is inappropriate.**

***Carr v. Louisiana Farm Bureau Casualty Ins. Co.,* No. 17-0589 (La. App. 1st Cir. 3/14/18), 244 So. 3d 823.**

**Plaintiff brought action against a car wash operator alleging that while his vehicle was traveling through the car wash, another vehicle backed into third vehicle, causing the third vehicle to strike the front of the plaintiff's vehicle. Plaintiff claims the collision was caused by defendant's numerous acts of fault, gross and wanton negligence and lack of skill: "failing to properly maintain the car wash; careless operation of the car wash and its mechanical systems; and inadequate supervision, training, and management of the car wash and its employees." The issue in the case deals with a dispute regarding a material issue of fact with respect to the defendant's fault for the accident. Any doubt as**

**to a dispute regarding a material issue of fact must be resolved against granting a motion for summary judgment and in favor of a trial on the merits. Both parties presented evidence, demonstrating a genuine issue of material fact. Because a court cannot make credibility determinations, evaluate testimony, or weigh evidence, the existence of evidence creating a genuine issue of material facts makes summary judgment inappropriate.**

***James v. Eldorado Shreveport Joint Venture*, No. 51,707 (La. App. 2d Cir. 11/16/17), 245 So. 3d 264, *writ denied*, 2017–C–209 (La. 2/19/18), 236 So. 3d 1266.**

**Hotel kicked patron out, and he was subsequently injured when he had an accident on an icy road—the very reason he was staying at the hotel, an imminent ice storm. The duty imposed on a business is to exercise at least ordinary or reasonable care in maintaining the premises in a reasonably safe and suitable condition to keep guests from injury. This duty applies to the premises of the business, but not to adjacent property unless the business created the hazard which caused the injury. In this case, the plaintiff included no allegations in the petition that the injury he suffered was caused by the hotel's failure to exercise reasonable car in maintaining the premises. The court determined that the damage sustained by the plaintiff occurred off the business premises and resulted from the plaintiff's impulse to drive under unreasonably safe and icy conditions. Because the plaintiff's damages occurred off the premises and as a result of his decision to drive in dangerous conditions, the exception of no cause of action granted by the trial court was affirmed.**

> **Plaintiff's petition contains no allegations that the injury he suffered was caused by the Eldorado's failure to exercise reasonable care in maintaining the premises in a reasonably safe and suitable condition. In fact, any damage sustained by Plaintiff occurred off the premises of the casino and hotel and on the state highway when he lost control of his vehicle and left the roadway. Once Plaintiff left the Eldorado casino and hotel, it had no duty to protect him from himself or from his impulse to drive under unreasonably dangerous and icy conditions. It was Plaintiff's responsibility to maintain control of his own motor vehicle, and it was his decision to undertake the risky drive home.**

***James*, 236 So. 3d at 268.**

***Leonard v. Torres,* No. 16-1484 (La. App. 1st Cir. 9/26/17), 2017 WL 4301898.**
**Pretrial detainee committed suicide in detention center by hanging himself with his shoelaces, and his wife brought an action for damages alleging that the defendant had a duty to provide reasonable care necessary to prevent pretrial detainee from committing suicide. Prison officials must exercise reasonable care to prevent a pretrial detainee from harm, including suicide or other self-inflicted injury. This duty applies only to harm that was reasonably foreseeable. Absent evidence establishing that the prison officials knew, or should have known of pretrial detainee's suicidal tendencies, the harm that occurred cannot be considered reasonably foreseeable. "Given the fact that there was no evidence that anyone at the detention center was or should have been aware of Mr. Campbell's suicidal tendencies, and that Mr. Campbell's act was one of deliberately inflicting harm upon himself, Mr. Campbell's suicide was neither foreseeable nor easily associated with any duty that was allegedly breached." Because the pretrial detainee's suicide was not reasonably foreseeable, the defendant did not owe a duty to protect him from this type of harm and summary judgment in favor of the defendant is appropriate.**
**Concurring, J. Chutz wrote that plaintiff did not prove a breach of the duty owed.**

***Chanthasalo v. Deshotel*, No. 2017-CA-0521 (La. App. 4th Cir. 12/27/17), 234 So. 3d 1103.**
**Defendant 1 rear-ended Plaintiff on the interstate; the parties subsequently pulled over to inspect the damage and to report the accident to the police. Approximately five to fifteen minutes later, Defendant 2 rear-ended another car; which struck both Defendant 1 and Plaintiff. Plaintiff sustained serious injuries as a result of Accident No. 2. Plaintiff sued Defendant 1 and Defendant 2 for the injuries he sustained; as to Defendant 1, he contended that her alleged substandard conduct was the cause of the injuries he suffered as a result of Accident No. 2. The insurer for Defendant 1 filed a motion for summary judgment in which it contended that the scope of duty owed by Defendant 1 to Plaintiff did not extend to the remote possibility that Plaintiff might be struck by a vehicle in a separate, unrelated accident.**
**The trial court granted the motion, and the Fourth Circuit affirmed. "We find no ease of association between Accident No. 1 and Accident No. 2 . . . .The duty**

**[Defendant 1] owed to [Plaintiff] from the first accident—not to follow too closely and drive at a safe speed—did not extend to cover him for the risk of injury from an unrelated second accident." *Chanthasalo*, 234 So. 3d at 1110.**

***Perkins v. Air U Shreveport, LLC,* 52,093 (La. App. 2d Cir. 5/23/18), 249 So. 3d 187.**

**Plaintiff, age 24, and his wife were patrons of an indoor trampoline park in Shreveport, when he was injured as he jumped on a trampoline and his knee gave out. Plaintiff sued the trampoline park. Plaintiff and his wife testified that they saw no defects in the trampoline. Plaintiff alleged that the defect was in the design of the trampoline park itself because it was not compliant with national standards and it was inherently dangerous to have trampolines mounted at an angle on the walls. Defendant moved for summary judgment. The trial court granted summary judgment, finding no genuine issue of material fact regarding defects in the trampoline park. On appeal, the Second Circuit declined to find that the trampoline park as a whole posed an unreasonable risk of harm. The court considered that in the nine months since it opened in 2014, the trampoline park had about 90,000 patrons. It had 88 documented injuries in that nine-month period, with only a few leaving by ambulance. The industry standard for number of injuries is three times greater than that of defendant. Accordingly, the Second Circuit found that the societal value of the trampoline park outweighed its potential for harm. Thus, plaintiff could not prove a defect. The court further found *res ipsa loquitur* inapplicable because "[j]umping straight up and down on a single trampoline before one's knee gives out does not warrant an inference of negligence."**

***Foto v. Rouse's Enters., LLC*, No. 2017-1601 (La. App. 1st Cir. 8/6/18), 256 So. 3d 386.**

**Plaintiff brought action against store owner for negligence, stemming from customer's slip and fall in store. The issue in the case was whether the clear liquid that caused the plaintiff's fall was on the floor for "such a period of time that it would have been discovered if the merchant had exercised reasonable care." The period of time that is sufficiently lengthy is necessarily an issue of fact, but the plaintiff must still show that the liquid was on the floor for some period of time before the fall. In this case, the plaintiff presented evidence that she was on the aisle for ten minutes prior to her fall and no one else was on the aisle with her and that the liquid that caused the fall was not found on a section**

**of the aisle where similar products were located, supporting an inference that the spill did not occur while the customer was on the aisle and creating a genuine issue of material fact as to the period of time the liquid was on the floor prior to her fall. The appellate court reversed the trial court's decision and remanded the case for further proceedings concerning whether the time period was sufficiently lengthy to constitute constructive notice.**

***Queen v. Woman's Hospital Found.*, 2018-0222 (La. App. 1st Cir. 10/31/18), 2018 WL 5668625.**

**In a slip-and-fall case against a hospital, La. R.S. 9:2800.6 does not apply. Rather, once a plaintiff established that she slipped and fell because of a foreign substance on the floor, the burden shifts to the defendant hospital to exculpate itself from the presumption of negligence. To satisfy that burden, the hospital must prove that it acted reasonably to discover and correct the dangerous condition. The court must consider the relationship between the risk of a fall and the reasonableness of measures taken to eliminate the risk. In this case, a five-judge panel of the First Circuit reversed the trial court's finding that the measures taken by a hospital when a woman slipped in a mopped area while stepping off an elevator was manifestly erroneous. The person who mopped the floor was standing outside the elevator door with a mop still in his hand. He had used a mop and a wringer and placed two "wet floor" signs at the scene, including one in front of the elevator door. Surveillance video showed the plaintiff walk directly past the sign prior to her fall. Finally, another person was able to walk safely from the elevator after plaintiff's fall. The court summarized as follows:**

> **Given the signage, the small area, [the custodian's] presence in the area with the mop and mop bucket when [plaintiff] exits the elevator, evidence that [custodian] wrung the mop multiple times before its use, and no evidence that [custodian] failed to follow proper procedures, we find that measures taken by the hospital were reasonable.**

***Queen*, ___ at ___. Chief Judge Whipple dissented in part, concluding that the finding of the trial court that the hospital did not exercise reasonable care was not manifestly erroneous.**

***Guillory v. Chimes*, No. 17-0479 (La. App. 1st Cir. 12/21/17), 240 So. 3d 193.**
**Plaintiff filed a personal injury claim against restaurant after she slipped and fell when returning to her table from the restroom. Under La. Rev. Statute 9:2800.6, the Merchant Liability Statute, merchants have a "duty to exercise reasonable care to keep its aisles, passageways, and floors in a reasonably safe condition and to keep its establishment free of hazardous conditions." The plaintiff bears the burden of proving each element of a claim under La. Rev. Statute 9:2800.6. In this case, the plaintiff provided no evidence to establish the nature of the substance, if any, on the floor, how it came to be on the floor, or how long it was on the floor prior to the accident. Because of the plaintiff's failure to come forward with evidence, summary judgment in favor of the defendant was appropriate.**

***Toussaint v. Baton Rouge Gen. Med. Ctr.*, 2018-0029 (La. App. 1st Cir. 6/4/18), 251 So. 3d 1151, *writ denied*, 2018-C-1107 (La. 10/15/18), 253 So. 3d 1301.**
**Plaintiff slipped and fell on floor where there was an excessive amount of water, and she sued hospital and recovered after trial. On appeal, the First Circuit noted that the legislature has not specifically addressed the burden of proof applicable to hospitals in slip-and-fall cases. Hospitals are not merchants and thus are not governed by La. R.S. 9:2800.6. The court evaluated the claim under the typical negligence analysis. Once a plaintiff proves that she slipped and fell due to a foreign substance on the hospital's floors, the burden shifts to the defendant hospital to exculpate itself from the presumption of negligence by proving that it acted reasonably to discover and correct the dangerous condition. The court must consider the relationship between the risk of a fall and the reasonableness of measures taken by the hospital to eliminate the risk. The appellate court concluded that it could not find that the trial court erred in finding the cleanup and warning procedures to be unreasonable. Placement of a single "wet floor" sign in the center of a large mopped area was not the exercise of reasonable care. The housekeeeper who mopped the area did not have her housekeeping cart with her, which would have provided her with access to a mop wringer and additional "wet floor" signs.**

***Falcon v. Surcouf*, 17-212 (La. App. 5th Cir. 12/27/17), 236 So. 3d 716.**
**The defendant was building a home and the plumber on the project fell from the landing leading to the second floor. The plumber sued, alleging that the**

**home owner and others were negligent because there was no temporary stair railing. The trial court granted the defendant's motion for summary judgment, finding that the homeowner did not exercise control over the work and that the lack of a handrail was an open and obvious condition. Held: Reversed. Whether the condition of the premises presented an unreasonable risk of harm presented factual questions; the mere fact that the plaintiff was aware there was no handrail was not determinative. Additionally, the plaintiff raised questions of fact regarding whether defendant, by allowing sub-contractors to come and go throughout the property without proper scheduling or supervision, engaged in an "unsafe practice."**

***Minix v. City of Rayne*, No. 17-93 (La. App. 3d Cir. 4/4/18), 243 So. 3d 67, *writ denied*, 2018-C-0722 (La. 10/15/18), 254 So. 3d 1201.**
**Plaintiffs brought suit on behalf of their minor child after she fell on a sidewalk and was injured. Plaintiffs alleged that the sidewalk was unreasonably dangerous as it was cracked and shifted underneath the child as she walked causing her to lose her balance. "Under Louisiana law, a defendant generally does not have a duty to protect against that which is obvious and apparent." To be considered obvious and apparent a risk should be, as assessed by global knowledge, open and obvious to those who may encounter it. The critical issue in this case concerned whether the pieced of sidewalk that shifted when stepped on was open and obvious. The court found that "a defect in the sidewalk that does not manifest itself until the pedestrian actually steps on the defective spot cannot be held to be open, obvious, or apparent." *Minix*, 243 So. 3d at 74. The city was held 100% at fault for the injuries.**

### *H. Employer Negligence/Vicarious Liability*

***Thibodeaux v. Geico Cas. Co.*, 17–853 (La. App. 3d Cir. 6/13/18), 249 So. 3d 114, *writ denied*, 2018-C-1218 (La. 10/29/18), 255 So. 3d 573.**
**Walgreens employee who was involved in vehicular collision while traveling back home after attending a training course recommended by her boss was in the course and scope of her employment. Employee drove her personal vehicle to another city to attend the training and submitted her mileage to employer for reimbursement. Walgreens argued that the employee was not in the course and scope of her employment because she was not required to attend the**

**training to keep her job, the training was not indicated in her personnel file, and the motivation for the training was "entirely person" to enhance her performance as a pharmacist, not to benefit Walgreens. The Third Circuit stated that Walgreens' argument that the employee's attendance of the training was for "entirely personal" reasons "border[ed] on the absurd." The court found that a majority of the eight factors from *Orgeron v. McDonald*, 93-1353 (La. 7/5/94), 639 So. 2d 224, preponderated in favor of finding the employee in the course and scope of employment.**

***Johnson v. Transit Management of Southeast La.*, No. 17-0793 (La. App. 4th Cir. 2/28/18), 239 So. 3d 973.**

**Bus passenger brought personal injury action against employer of motorist in connection with a bus collision that occurred while motorist was on his way to work. An employer is liable for the tortious acts of his employee if the tort by the employee was committed within the course and scope of his employment. The issue of whether the motorist was acting in the course and scope of employment is subject to the coming and going rule that states an employee commuting to work is generally outside the course and scope of employment. Plaintiff argued that the coming and going rule does not apply to the motorist because he was responding to a call by his employer. Plaintiff also argued that the special mission exception to the coming and going rule applied in this case. Because the employee was not responding to an emergency situation with a time constraint on travel, was not paid for his travel time, and thus was not being paid at the time of the accident, and his job did not intrinsically involve travel, he was not acting within the course and scope of his employment because when the accident occurred he was going and coming. Further, the special mission exception to 'going and coming' rule does not apply because nothing about the employee's trip was onerous or unusual, and he left his house only fifteen minutes earlier than usual and thus was not required to "drop everything and travel to the workplace."**

***Carter v. Pointe Coupee Parish School Bd.*, 2018-1035 (La. App. 1st Cir. 12/21/18), 2018 WL 6718530.**

**Defendant police officer was employed by the city of New Roads and used by defendant school board at an elementary school as a resource officer pursuant to a contract between the City and the school board. Police officer took 26 children identified as bullies out of the school and directed them to kneel in**

**gravel for between ten and twenty minutes. Some testified that the officer yelled at them and that when some refused to continue kneeling because of the pain, he threatened to keep them kneeling for a longer time period. Some testified that as they attempted to rise, the officer made physical contact and pushed them back to the ground. Some testified that the officer ordered them to put mud on their faces or to go into a muddy ditch, but he did not enforce those orders. During this episode, the officer wore his police uniform and had his gun and handcuffs on him. Eventually, the officer permitted the children to stand and leave. The mothers of 15 of the children sued the school board, its insurer, the officer, and the City of New Roads. The trial court awarded $5,000 in damages to each child. On appeal, the City argued that the school board was solely liable for the officer's actions. The First Circuit disagreed, holding that the City was his general employer and the school board was his special employer for which he was a borrowed employee. Both the general employer and the special employer may be solidarily liable for the torts of the borrowed employee—the two-master rule. The general employer has a heavy burden to overcome the presumption that it retained control of the employee and proving that the prior employment relationship was suspended and a new relationship was created between the borrowing employer and employee. "The two-master rule is the more sensible rule in cases where the general employer is at least sometimes engaged in the business of lending out people and equipment." Considering course and scope, the court looked at the officer's attire and use of his police car and his duties that he was performing, maintaining safety and order on campus, which are regular duties of police officers. The City could not overcome the presumption attached to the general employer.**

### *I. Torts and Workers Compensation Exclusivity*

***Griggs v. Bounce N' Around Inflatables, LLC*, 2017-1448 (La. App. 1st Cir. 4/6/18), 248 So. 3d 563, *writ granted*, 2018-C-0726 (La. 10/8/18), 253 So. 3d 802.**
**<u>Facts</u>: A 15-year-old boy was employed by a company that rented inflatables for social events. He was injured when he fell off an inflatable that he was trying to steady on a forklift or pallet-jack onto which it had been loaded. The inflatable (350 pounds) fell on his foot. A surgical procedure placed hardware in his foot to repair breaks. The company's workers compensation insurer paid benefits. The boy then sued his employer in tort and his mother added a loss of**

**consortium claim. The company filed the exception of no cause of action and a motion for summary judgment, arguing that workers compensation provided the exclusive remedy. The trial court denied the exception and the motion and after trial, the court entered judgment in favor of the boy (but denied the mother's loss of consortium claim), reasoning that because the boy was illegally employed (no certificate on file with employer, as required for each minor employed and minor under 16 working around power-driven machinery) and he was performing an illegal task (minor under 16 working directly with power-driven machinery), he was not subject to the exclusivity of workers compensation and could proceed in tort. He recovered $125,000 in general damages and $24,517.93 in special damages.**

**Issue: Whether a worker who is illegally employed and is injured while performing an illegal task is limited to the workers compensation remedy.**

**Holding and Rationale: Yes. Adhering to First Circuit precedent, and disagreeing with the Second and Third Circuits, the five-judge panel reversed the trial court and held that workers compensation is the exclusive remedy. Prior to 1948, the Workers Comp Act expressly excluded from coverage minors who were employed in jobs for which they were below the minimum age. In 1948 the legislature amended the law to remove the express exclusion. After that amendment, the Louisiana Supreme Court held that workers compensation was the exclusive remedy for a plaintiff who was legally employed but who was performing an illegal task when he was injured in *Mott v. River Parish Maintenance, Inc.*, 432 So. 2d 827 (La. 1983). In a footnote, however, the Court observed that there may be a reason to distinguish between a case in which a minor is legally employed and performing an illegal task (the case before the Court) and a case in which a minor is illegally employed (not the case before the Court). The Court stated that it would express no view on the matter. *Mott*, 432 So. 2d at 832 n.5. The Third Circuit seized upon that distinction in *Ewert v. Georgia Casualty & Surety Co.*, 548 So. 2d 358 (La. App. 3 Cir 1989), *writ denied*, 551 So. 2d 1339 (La. 1989), holding that the illegal employment contract was relatively null, and the minor could opt out of workers comp and proceed in tort. The Second Circuit followed the Third in *Patterson v. Martin Forest Products, Inc.*, 34,258 (La. App. 2d Cir. 12/15/00), 774 So. 2d 1148, *writ denied*, 2000-3559(La. 3/16/01), 787 So. 2d 311. The First Circuit, on the other hand, did not follow *Ewert* in *Noble v. Blume Tree Servs., Inc.*, 94-0589 (La. App. 1 Cir. 11/10/94), 646 So. 2d 441, *writ denied*, 94-29999 (La. 2/17/95), 650 So. 2d 252. The First Circuit in *Noble* interpreted the legislature's 1948 amendment as**

**extending workers compensation coverage to all minors, whether legally employed or not. The five-judge panel in *Griggs* adhered to the *Noble* holding, reasoning that the 1948 amendments make coverage applicable to "every person," including minors legally employed or not. Violation of the Child Labor Law does not remove a plaintiff from workers comp exclusivity.**

***Holden v. Mike's Catfish Inn, Inc.*, 2017-CA-1056 (La. App. 1st Cir. 2/27/18), 243 So. 3d 588.**

**The plaintiff worked at a restaurant. Another employee told the claimant that her daughter was waiting outside for her. The plaintiff took a break, as she was allowed to do, exited the back door of the restaurant, and fell on a concrete slope adjacent to the door. She broke her kneecap as a result of the fall. The plaintiff sued her employer in tort. Held: The employer was immune from suit. The plaintiff was in the course and scope of her employment at the time of the fall; the fall occurred on her employer's premises while the plaintiff was on the time clock and on a work break.**

***Higgins v. Williams Energy Partner, L.P.*, 17-1662 through 17-1666 (La. App. 1st Cir. 12/12/18), 2018 WL 6570801.**

**Plaintiff was injured in the chemical explosion at the Williams Olefins plant near Geismar in June 2013. Plaintiff attempted to avoid the exclusive remedy rule of workers' compensation by pleading an intentional tort. In his amended petition, plaintiff alleged that defendant had known for years that the pipeline that leaked "was substantially certain and likely to over pressurize," repeatedly ignored the risk, and as a result, the pipe did over pressurize and explode. Defendant moved for summary judgment, contending that plaintiff had not created a genuine issue of material fact regarding commission of an intentional tort. The trial court granted summary judgment in favor of the defendant. On appeal, a First Circuit panel explained that intentional torts require either consciously desiring the result or knowing to a substantial certainty that it will follow from the conduct. The court noted that plaintiff was relying on only knowledge to a substantial certainty. The First Circuit affirmed, reasoning that defendant's awareness of a hazardous condition with the pipeline did not constitute knowledge to a substantial certainty and thus did not rise to the level of an intentional tort. "[B]elieving that someone may, or even probably will eventually get hurt if a workplace practice is continued does not rise to the level**

**of an intentional act, but instead falls within the range of negligent acts that are covered by workers' compensation."**

### *J. Malicious Prosecution*

***James v. Woods*, 899 F.3d 404 (5th Cir. 2018).**
**Facts: Stepfather brought action asserting claims for malicious prosecution, intentional infliction of emotional distress, and alienation of affection based on allegation that child's father and his wife instigated his prosecution for aggravated incest solely for purpose of gaining leverage in ongoing custody dispute.**
**Issue: The central issue in the present case is whether the defendants "have caused the prosecution" of the plaintiff.**
**Holding and Rationale: No. Where an independent law-enforcement investigation follows the original instigation, the chain of causation between that initial report and the ultimate prosecution may be broken. Merely reporting a crime may not satisfy the requirement that the defendant caused the prosecution. Here the independent investigation conducted by the STPSO broke the chain of causation, and the defendants cannot be said to have caused the prosecution of the plaintiff.**

### *K. Defamation*

***Brunner v. Holloway*, No. 17-0674 (La. App. 1st Cir. 11/2/17), 235 So. 3d 1153.**
**Students who were expelled from a fraternity at a university due to violation of fraternity's rules brought suit against the director of chapter services for the fraternity and against the fraternity alleging that the director had defamed the students in an online social media posting. The alleged defamatory post stated: "Up way to[o] early. En route [to] Baton Rouge. The fraternity world of old is dead; beer monkeys and dope heads are extinct. THAT's THE DEAL." To be actionable, a defamatory statement must be an assertion of fact and not a mere assertion of opinion. Further, a defamatory statement must "refer to some ascertainable person, and that person must be the plaintiff." Because the facts of the current case indicate that the defendant's post contained his subjective**

**opinion and did not refer to any ascertainable person the plaintiffs failed to state a claim for defamation.**

***Barber v. Willis Communications, Inc.*, No. 17-0658 (La. App. 1st Cir. 12/29/17), 241 So. 3d 471.**

**Former employee filed defamation action against former employer, alleging that employer accused him of theft in statements to local police department, former co-workers, and Louisiana Workforce Commission (LWC). In Louisiana, privilege is a defense to a defamation action. Privilege can be conditional or qualified, and if a privilege is presented then the plaintiff must provide evidence that the defendant was highly aware the statements made were probably false. Here the LWC is protected by a qualified or conditional privilege, and the plaintiff failed to meet his burden of proving that the defendant was highly aware of probable falsity of the statements. Because the plaintiff failed to meet this burden the defendant's communication was protected by privilege.**

***Harvey v. Krouse,* No. 17-0937 (La. App. 4th Cir. 4/18/18), 244 So. 3d 533, *writ denied*, 2018-C-0823 (La. 9/21/18), 252 So. 3d 907.**

**A personal injury attorney brought a defamation action against an insurance defense attorney arising from a defense attorney's statements made in answer in underlying litigation that suggested an intent to defraud insurer on an uninsured motorist claim. The court found that the alleged defamatory statements made by the defendant were privileged, and thus the plaintiff has failed to establish the second requirement for a defamation claim—unprivileged communication. Further, although a privilege can be rebutted by the plaintiff's showing the defendant made the statement with actual malice, in the present case the defendant has made a showing that the statement was made with a reasonable belief in their truth. Because the statement made by the defendant was privileged and the plaintiff failed to overcome that privilege summary judgment dismissing the claim is appropriate.**

### *L. Damages*

***Vincent v. City of Iowa*, No. 17-951 (La. App. 3d Cir. 4/11/18), 244 So. 3d 22, *writ denied*, 2018-C-0750 (La. 9/21/18), 252 So. 3d 912.**

**Plaintiffs filed suit after a City sewerage line discharged into their home causing damage to their home and personal property. The trial court found in the plaintiffs' favor and awarded damages. Among other damages, the plaintiff's received an award of $75,000.00 for mental anguish arising from property damage. "On appeal, the defendants claimed that the amount awarded for mental anguish was an abuse of discretion. An award of damages for mental anguish arising from property damage is limited to situations in which property is damaged: 1) by a tortfeasor's 'intentional or illegal act'; 2) by an act 'for which the tortfeasor will be strictly or absolutely liable'; 3) by an act 'constituting a continuing nuisance'; or 4) 'when the owner is either present or nearby and suffered a psychic trauma as a direct result.'" In the present case, the plaintiffs were in their home when the offending overflow occurred. On review, the court, upheld the award of damages for mental anguish finding that a review of the record substantiated actual mental injury. Because the court found actual mental injury and not mere worry associated with consequences of property damage, the court upheld the $75,000.00 aware for mental anguish.**

### *M. Dram Shop Immunity*

***Tregre v. Champagne*, No. 16-681 (La. App. 5th Cir. 7/26/17), 224 So. 3d 1234, *writ denied*, 2017–C–1477 (La. 11/13/17), 230 So. 3d 208.**

**Plaintiff, who was seriously injured when vehicle ahead of him hit a police cruiser causing the police cruiser to hit the plaintiff's vehicle head on, brought action against bar where the vehicle that caused the accident had been prior to driving. The bar filed for summary judgment arguing that the actions of the bar were not the proximate or legal cause of the accident or resultant injuries. The trial court granted summary judgment. On appeal, the court reviewed Louisiana's Anti-Dram Shop Act, La. R.S. 9:2800.1, which provides immunity to bar owners and their agents, servants, or employees if certain requirements are met, namely: (1) the bar owner holds a permit to sell alcoholic beverages; (2) the bar owner or its personnel served alcoholic beverages to a person over the lawful drinking age; (3) the purchaser suffered and/or caused another to suffer**

**an injury off the bar premises; and (4) the injury was caused by the purchaser's intoxication. The court found, because the motorist was not a minor and the bar did not cause or contribute to the motorist's consumption of alcoholic beverages by force or falsely representing that the beverage had no alcohol, that the bar was covered by La. R.S. 9:2800.1. The appellants also argued that the statutory immunity did not apply because there is an issue of fact as to whether the bartender was licensed when serving the motorist. The court found no requirement under La. R.S. 9:2800.1 that a bartender be licensed for the statute to apply.**
**The court also rejected a claim for intentional spoliation of evidence based on the alleged destruction of video surveillance. "In this case, because there is statutory immunity from liability for any injuries caused by an intoxicated person, there is no merit to any claim that the immune party intentionally destroyed evidence detrimental to that party." *Tregre*, 224 So. 3d at 1241.**

***Zaunbrecher v. Martin*, No. 17-932 (La. App. 3d Cir. 3/21/18), 242 So. 3d 712, *writ not considered*, 2018-CC-0639 (La. 8/31/18), 250 So. 3d 891.**
**Casino bartender and security guards were entitled to statutory immunity under Louisiana's Anti-Dram Shop Act from liability for death of motorist, who was killed when intoxicated casino patron lost control of his vehicle and ran head on into motorist's vehicle. As required for immunity under La. R.s. 9:2800.1, the casino held a permit to serve alcohol, the bartender was "agent, servant, or employee" of casino who sold or served "intoxicating beverages" to patron. Although the security guards did not directly serve alcohol to the patron, the security guards constitute "any agent[s], servant[s], or employee[s]" of casino, and thus were encompassed in the statutory immunity. The court rejected the argument for an affirmative acts exception to the statutory immunity: "The statute was enacted for the express purpose of making it clear that the only exceptions to the statutory immunity provided in La.R.S. 9:2800.1 are those mentioned in the statute itself, i.e. serving someone alcohol when they are underage, or by force, or by "falsely representing that a beverage contains no alcohol." La.R.S. 9:2800.1(E)." *Zaunbrecher*, 242 So. 3d at 724.**

### *N. Recreational Land Immunity*

***Doyle v. Lonesome Development, LLC*, No. 17-0787 (La. App. 1st Cir. 7/18/18), 254 So. 3d 714, *writ denied*, 2018-C-1369 (La. 11/14/18), 256 So. 3d 291.**
**Under Louisiana's Recreational Use Immunity Statutes, La. R.S. 9:2791 and 9:2795, owners and operators of property that is used for recreational purposes are entitled to immunity from tortious liability. In the present case, the court reemphasized that "the plain language of both statutes does not restrict immunity only to situations where there is evidence of an intent to permit the entire public to use the land." Even when in compliance with the statute, property owners may be held liable if one of the exceptions applies. Under the commercial enterprise exception, "the fact that an activity generates income does not prevent the owner from enjoying the benefit of [La.] R.S. 9:2795," and intention to derive profit must be present. In the present case, although the land in question was subject to homeowners paying dues to use it, there was nothing establishing an intent to derive a profit from these dues. Instead, the dues were used for "promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the owners and occupants . . . .and thus did not fall under the commercial enterprise exception. There is also a willful or malice exception to La. R.S. 9:2791 where there is no immunity for "deliberate and willful or malicious injury to the persons or property" or "willful or malicious failure to warn against a dangerous condition, use, structure, or activity." Property owners generally owe a duty to discover any unreasonably dangerous condition on the premises and either correct it or warn potential victims; however, this duty does not extend to potentially dangerous conditions which should have been observed by an individual in the exercise of reasonable care. The burden of proving a malicious or willful failure to warn of a dangerous condition is on the plaintiff. In the present case, the plaintiffs failed to provide evidence that the defendants desired or thought that there was a risk that would cause this particular result.**

### *O. Intentional Infliction of Emotional Distress*

***Perrone v. Rogers*, 2017 CA 0509 (La. App. 1 Cir. 12/18/17), 234 So. 3d 153.**
**Brother of deceased man, who was executor of his succession, hired a lawyer to advise him regarding the validity of the dead twin brother's will. The lawyer**

**advised him of legal defects in the will. The will had been drafted by a lawyer who was a close friend of both brothers. Learning of the challenge to the validity of the will, the lawyer who had drafted the will sent the surviving brother the following text message:**

> **Thanks for putting my law license in jeopardy! Real f-ckin friend. I think you are a piece of sh-t your every breath is an embarrassment to your brothers memory it should have been you and not him. Don't ever contact me again and when it is proven the Will is written correctly I will spend the rest of my life suing you for professional defamation until you don't have a pot to p-ss in, I am also going to let Logan know that per the will she is entitled to 50% of Randy's interest in the business. I hope you rot in h-ll while your brother you never cared about flourishes in heaven.**

**Later, the two men exchanged messages that were somewhat conciliatory.**

**The family filed lawsuits against the drafting attorney for legal malpractice, and the executor brother sued the lawyer for intentional infliction of emotional distress. The defendant attorney filed a motion for partial summary judgment, arguing that the text did not rise to the level of extreme and outrageous conduct. The trial court granted the motion. The First Circuit affirmed, concluding that "while considering that [plaintiff] had just lost his identical twin brother, the one text message, sent by a good friend who obviously lost his temper, was not such that no reasonable person could endure it."**
**Judge Welch dissented, stating that the text message "contained an overt threat of abuse of process, i.e., 'I will spend the rest of my life suing you for professional defamation until you don't have a pot to p-ss in,' could be construed by a trier of fact as 'extreme and outrageous.'"**

***Dragna v. New Orleans Saints, LLC*, 18-514 (La. App. 5th Cir. 10/15/18), 2018 WL 4997670.**
**Exception of no cause of action granted by trial court and affirmed by Fifth Circuit on plaintiff's claim seeking rescission of season ticket purchase and IIED, failure to warn, and violation of right as a member of a captive audience to be protected from unwanted protest speech. The claims were based on some Saints players not taking the field until after the National Anthem was played.**

**The court found that the elements of IIED were not satisfied by the allegations in the petition; nor were the elements of a negligent failure to warn or violation of captive audience rights claims.**

### *P. Food*

***Landry v. Joey's, Inc.*, 18-441 (La. App. 3d Cir. 12/12/18), 2018 WL 6521565.**
**Plaintiff ordered and ate what was purported to be a shrimp po-boy, although she said it contained no shrimp—only mayonnaise mixture and a leafy vegetable. Nonetheless, she ate the whole sandwich. She later went to the emergency room with nausea, vomiting, and diarrhea. Plaintiff was diagnosed with Campylobacter bacterium, but the diagnosing doctor could not state that it was more probable than not that the po-boy sandwich was the cause. Defendant moved for summary judgment supported by the affidavit of the owner, stating that his store had not been cited for any violations of the health code and that no other customer had alleged food poisoning based on food from his store. The trial court, finding that plaintiff had not presented evidence to refute the only medical opinion offered on causation, granted summary judgment for the defendant. On appeal, the Third Circuit affirmed, finding no genuine issue of material fact regarding both the deleteriousness (she did not try to correct the allegedly erroneous order, and she ate the whole sandwich) of the food purchased and consumed and the causal connection between the food consumption and the illness.**

### *Q. Toxic Torts*

***Bowling v. CITGO Petroleum Corp.*, 18-169, et al. (La. App. 3d Cir. 11/28/18), 2018 WL 6199877.**
**Twenty-six plaintiffs sought damages for injuries allegedly caused by defendant's negligent release of slop oil into waterways and air release of hydrogen sulfide. Following trial, the court awarded damages to all plaintiffs. On appeal, defendant argued that expert testimony was required as to both general causation and specific causation. The Third Circuit rejected the argument: "[T]his court has determined that while expert testimony is required**

**to prove causation, it is sufficient that there is expert testimony to prove general causation and medical testimony to establish specific causation." The Third Circuit had previously so held in *Bradford v. CITGO Petroleum Corp*., 17–296 (La. App. 3d 1/10, 18), 237 So. 3d 648, *writ denied*, 18-272 (La. 5/11/18), 241 So. 3d 314.**

### *R. Federal Tort Claims Act*

***Bone v. Otis Elevator Co*., 2018-0745 (La. App. 4th Cir. 12/12/18), 2018 WL 6536995.**

**Plaintiff sued multiple defendants for injuries she suffered during an elevator ride in the Hale Boggs Federal Building in New Orleans. Defendant Otis manufactured and maintained the elevator. Plaintiff used under Louisiana negligence law and under the Federal Tort Claims Act ("FTCA"). Plaintiff sued in both state district court and federal district court, but she voluntarily dismissed the action in federal court because it was not timely. Defendant Otis filed a declinatory exception of lack of subject matter jurisdiction and a dilatory exception of improper cumulation and/or misjoinder in the state court action, seeking dismissal of all of plaintiff's claims. The court denied both exceptions, reasoning that Otis lacked standing. The Fourth Circuit reversed as to claims against Otis. The FTCA vests exclusive jurisdiction over claims under the FTCA in the federal courts. The Fourth Circuit affirmed the denial of the exceptions, however, regarding claims against other defendants.**

### *S. Force Majeure*

***Guy v. Howard Hughes Corp*., 2018-0413 (La. App. 4th Cir. 12/19/18), 2018 WL 6683274.**

**Plaintiffs were injured at the Spanish Plaza near the New Orleans Riverwalk when it began to rain and they took refuge under a kiosk/display cart. A tent collapsed onto the kiosk and pinned Ms. Guy, causing significant injuries. Plaintiffs sued multiple defendants for negligence. A defendant insurer filed a motion for summary judgment on the basis of the doctrine of force majeure. Plaintiffs opposed the motion with the affidavits of a meteorologist and an engineer. The trial court granted the insurer's motion for summary judgment.**

**On appeal, the Fourth Circuit reversed. The court explained that for the affirmative defense of force majeure to apply, two circumstances must exist: "1) the accident is directly and exclusively due to natural causes without human intervention; and (2) no negligent behavior by the defendant(s) has contributed to the accident." The meteorologist stated that he had reviewed the data and the rainstorm was both expected and a "typical summer rainstorm." As to the first factor, both the meteorologist and the engineer rejected the characterization of the weather as "a severe thunderstorm." As to the second, the engineer explained the occurrence as being based on the kiosk and the tent not being properly anchored.**

### *T. Immunities*

***Washington v. Onebeacon Am. Ins. Co*., 2018-0248 (La. App. 1st Cir. 11/2/18), 2018 WL 5732437.**

**Deputy's driving (speeding, not being able to see in front of him clearly, rear ending vehicle) when reporting to emergency call constituted "reckless disregard" within the meaning of La. R.S. 32:24, such that he was not immune from liability.**