THIRD CIRCUIT COURT OF APPEAL
CONTINUING LEGAL EDUCATION

RECENT DEVELOPMENTS

IN PROCEDURE AND PRACTICE IN THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL

Judge Tommy Duplantier
15th Judicial District Court

Judge John D. Trahan
15th Judicial District Court

Judge Phyllis M. Keaty
3rd Circuit Court of Appeal

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CASES

ACT 312

***State of Louisiana, et al. v. The Louisiana Land and Exploration Co., et al.,* 17-830 (La.App. 3 Cir. 3/14/18), __So.3d__, 2018 WL 1312208 (Panel: Conery, Judge writing; Thibodeaux, Chief Judge, Gremillion, Judge; Chief Judge Thibodeaux dissents and assigns written reasons).**

The Vermilion Parish School Board (VPSB) manages property owned by the State of Louisiana, including the marsh-land property at issue in this case, which has historically been leased to oil companies for oil and gas exploration and production and to individuals for use as hunting and fishing camps. In this case, VPSB filed suit against UNOCAL, a company that had previously but no longer held a lease for oil and gas exploration and production on the property. VPSB alleged UNOCAL caused environmental damages to the property and sought cleanup of the property pursuant to La.R.S. 30:29.[1] UNOCAL conceded that it had caused environmental damage to the property. After a public hearing. the Louisiana Department of Natural Resources (LDNR)

[1] Louisiana Revised Statutes 30:29 governs how monetary awards for environmental damages are spent. It requires a defendant to place the funds required for remediation into the registry of the court and requires judicial oversight and approval before those funds are spent. The purpose of the statue was to make sure that plaintiffs who were awarded money for environmental damage to their property actually spent those sums on remediating the property to statutory standards, since there is a public policy in favor of having clean land.

crafted a "most feasible plan" for the remediation of the property. Because it had questions about the LDNR plan, VPSB sent twenty-seven questions seeking clarification from LDNR. LDNR responded in writing.

The trial court adopted LDNR's plan as the court's "most feasible plan" and attached to its judgment the twenty-seven questions and answers resulting from VPSB and LDNR's post-plan communication for clarification purposes only. One provision of the judgment and LDNR's plan was that UNOCAL would be responsible for implementing the remediation and additional evaluation required by the plan.

VPSB appealed that judgment arguing that although UNOCAL should have to fund the remediation and additional evaluation set forth in the LDNR plan, it (VPSB) should be allowed to implement the plan. VPSB's argument centered around the premise that although La.R.S. 30:29 did not establish which party should be responsible for implementing the LDNR plan, it only determined how the monetary awards should be spent. However, VPSB's assertions that it should be allowed to perform the work is not supported by statutory law, jurisprudence, or the LDNR plan and VPSB did not present any evidence to rebut the presumption that the LDNR plan was the most feasible.

We affirmed the trial court's judgment in its entirety, finding it correctly applied the provisions of La.R.S. 30:29. Chief Judge Thibodeaux dissented. In his written reasons, he categorized three trial court errors requiring reversal of the trial court's judgment: the LDNR plan contained too many contingencies and no estimate for the cost of the contingencies; the trial court judgment contained ambiguities, particularly about sums placed in the registry of the court for remediation purposes, that would "propagate needless litigation in the future[;]" and the trial court judgment "accepted UNOCAL's interpretation of the statute requiring the responsible party to perform the actual remediation work, and [ ] the statute contains no such requirement. The VPSB has applied for writs before the Supreme Court of Louisiana.

***Shirlene Britt, et al. v. Riceland Petroleum Company, et al.*, 17-941 (La.App. 3 Cir. 3/7/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

In this legacy lawsuit governed by La.R.S. 30:29 (Act 312), several landowners (plaintiffs) sued Riceland Petroleum Company (Riceland) and BP America Production Company (BP), seeking remediation of their property contaminated by historical oil and gas operations conducted by the defendants. Riceland subsequently filed a third-party demand against several of its insurers (Certain Insurers), all of whom denied coverage. The plaintiffs eventually settled all their claims against Riceland and BP and provided notice to the Louisiana Department of Natural Resources (LDNR) and the Attorney General (AG) of the settlement, as required by La.R.S. 30:29(J)(1). Receiving no objection therefrom, the plaintiffs moved for the trial court's approval, which the court ultimately granted after a hearing.

Affirmed. Interpreting the provisions of La.R.S. 30:29(J), we first found that all settlements governed by Act 312 must be approved by the trial court, but only after the LDNR and AG have been provided with notice of the settlement and given thirty days to review and provide any comments to the trial court. When no objections are raised by the state actors or another party with a vested interest, the settlement is then ripe for court approval. Accordingly, we found no merit in the argument advanced by Certain Insurers that La.R.S. 30:29(J) requires: (1) a contradictory hearing; (2) a finding concerning remediation; and, (3) a deposit of necessary funds for court approval in all settlements under Act 312 as the need for a contradictory hearing is clearly conditioned upon an objection.

Applying the statutory requirements herein, we then found that the settling parties had to and did seek court approval after first providing the LDNR and the AG with notice and allowing thirty days for their review and comments on the proposed settlement. Because no one raised any objection to the settlement, all the mandatory requirements for approval were satisfied. We, therefore, found no error in the trial court's judgment approving the settlement.

ATTORNEY FEES

Camalo, et al. v. Estrada et al., **17-1184 (La.App. 3 Cir. _/_/18),___So.3d___, (Ezell, Judge).**

During the course of litigation involving a property dispute between three sets of neighbors, two of the parties, the Courtois and Giglios, stipulated to a preliminary injunction preventing either party from harassing the other or damaging the other's property. After Mr. Courtois deliberately violated this injunction by damaging drainage, trees, and shrubs on the Giglios' property, the Giglios filed a motion for contempt. The trial court found that Mr. Courtois "willfully disobeyed the order and judgment of the court," imposed a $500.00 fine, and later awarded the Giglios $11,587.50 in attorney fees, despite the fact that Mr. Giglio's father represented the couple free of charge.

Affirmed. *Goodrich v. Exxon Co., USA*, 608 So.2d 1019, 1034 (La.Ct.App. 3 Cir. 1992), *writ denied*, 614 So.2d 1241 (La.1993) and the line of older cases cited by the Courtois requiring an obligation to pay attorney fees be incurred in order to recover attorney fees did not deal with contempt of court, but rather contract disputes and various other civil matters designed to benefit a party to the suits pending in those specific cases. However, a proceeding for contempt for refusing to obey the court's orders is not designed for the benefit of the litigant, though infliction of a punishment may inure to the benefit of the mover in the rule. The object of a contempt proceeding is to vindicate the dignity of the court. *Howard v. Oden*, 44,191 (La.App. 2 Cir. 2/25/09), 5 So.3d 989, *writ denied*, 09-965 (La. 6/26/09), 11 So.3d 496. There was no abuse of discretion in the trial court's award of attorney fees related to the contempt of court proceeding below, even though the services had been volunteered. It is better in the eyes of the court that a generous attorney receive payment for work actually performed than to reward an intentional bad actor for openly defying a court order, especially when done in a willful and ongoing manner.

CIVIL SERVICE; PROCEDURE

***Dustin Bonial v. City of Alexandria*, 18-77 (La.App. 3 Cir. 6/27/18), __ So.3d __ (Panel: Amy, Judge writing; Thibodeaux, Chief Judge; Pickett, Judge).**

In a pre-disciplinary hearing, Dustin Bonial admitted using a racial epithet regarding a co-worker while in the employment of the City of Alexandria. The City terminated Mr. Bonial from his employment. Upon appeal to the Alexandria Civil Service Commission, the parties further stipulated during a hearing that Mr. Bonial called the co-worker by the epithet. When asked about the incident, the co-worker explained that he was walking in the breakroom when Mr. Bonial used the subject term. The co-worker stated that he felt disrespected and mad following the incident. The City also presented the testimony of the City's director of utilities, who explained that the use of racial epithets "destroys the morale" and "wedges the whole department." A majority of the Commission voted to affirm the termination. The Ninth Judicial District Court subsequently affirmed Commission's decision. Mr. Bonial then appealed to the Third Circuit, asserting that the Commission and the trial court erred in finding the termination of employment to be commensurate with the infraction and in failing to modify the disciplinary action.

Affirmed. The panel first noted that a reviewing court evaluates the imposition of a civil service disciplinary action to determine if it is both based on legal cause and commensurate with the infraction. As the panel explained, a commission's order should not be modified unless it is arbitrary, capricious, or characterized by an abuse of discretion. As to legal cause, the panel stated that such cause includes conduct prejudicial to the public service involved or detrimental to its efficient operation. The panel stated that, while the repugnant nature of the subject term required no further inquiry under this standard, the director of utilities also testified that the use of racial epithets destroys the morale within the department. As for whether the disciplinary action was commensurate with the offense, the panel noted that, by its termination letter, the City notified Mr. Bonial that his conduct violated civil service rules prohibiting "any [] act of omission or commission tending to injure the public service[,]" as well as "any act or failure to act that the Commission accepts as sufficient to show the offender is unfit or unsuitable for employment in the classified service." The termination letter further notified him that he had violated the City's Workplace Conduct policy, including various provisions from a section titled "Unacceptable Behavior," which lists "[t]ypes of job-related behavior . . . that may result in termination." The panel pointed out that the City also informed Mr. Bonial that his conduct violated the section of the policy addressing "Harassment." Considering those provisions, the panel found that the action of termination was commensurate with the offense. Accordingly, the panel determined that the Commission and the trial court had not acted arbitrarily, capriciously, or in abuse of discretion and upheld Mr. Bonial's termination.

***Foster v. City of Leesville*, 17-1106 (La.App. 3 Cir. 6/13/18), __ So.3d __ (Kyzar, J. writes):**

Plaintiffs, current and former firefighters for the City, filed suit seeking an accounting/payment for annual vacation time owed to them under the City's leave policy.

Plaintiffs further alleged that the City, after it changed its vacation policy to accrue vacation time weekly rather than annually, deleted their accrued vacation time in violation of La.R.S. 33:1996. The City then moved for summary judgment, arguing that La.R.S. 33:1996 did not apply to it because its population was less than 13,000. The trial court denied the City's motion, finding that La.R.S. 33:1996 did apply to the City. Thereafter, plaintiffs requested that the trial court order the City to provide them with an accounting of each plaintiff's vacation time.

Once the City provided the accounting, the plaintiffs moved for summary judgment arguing that the City's accounting was incorrect because it placed a ceiling on the vacation time that plaintiffs could carryover each year, in violation of La.R.S. 33:1996. The City responded with a cross-motion for summary judgment. In response to this motion, plaintiffs argued that because the City's vacation policy excluded firemen, there was no City policy that placed a ceiling or cap on the amount of vacation time firemen could accrue. They further argued that the exclusive authority for establishing vacation leave policy for firemen rested with the City's civil service board and that the Board had no rule placing such a cap on their accrued time.

In response to the plaintiffs' argument regarding the Board, the City filed an exception of nonjoinder of a party needed for just adjudication, seeking joinder of the Board to the litigation. Plaintiffs opposed this exception. Following a hearing on the exception, the trial court denied the City's exception. The matter then proceeded to a hearing on the motion for summary judgment, after which the trial court granted summary judgment in favor of plaintiffs, denied the City's cross-motion for summary judgment, adopted the accounting provided by plaintiffs, which provided for unlimited accrual of vacation time, and awarded judgment in favor of those plaintiffs no longer employed by the City. The City appealed.

Reversed; Vacated; And Remanded. On appeal, the court reaffirmed a prior supreme court holding that La.R.S. 33:1996 is silent on the issue of accrued vacation leave; it neither grants nor denies firemen the right to accrue vacation leave from year to year. It then held that the trial court abused its discretion by denying the City's exception of nonjoinder. The Board's vacation policy clearly conflicted with the statutorily mandated annual leave because it provided less vacation than that required by La.R.S. 33:1996. The court further noted that the Board's rules were silent on the issue of accrued vacation, but that this silence did not, as argued by plaintiffs, grant them the right to carryover unused leave time. Thus, the court held that joinder of the Board was necessary concerning the intent and interpretation of its own rules regarding unused vacation leave time. Based on this finding, the court vacated the trial court's later grant of summary judgment in favor of plaintiffs and remanded the matter for further proceedings.

***Hewitt v. Lafayette City-Parish Consolidated Govt.*, 17-45 (La.App. 3 Cir. 4/4/18), ___ So.3d ___, 2018 WL 1614258 (Gremillion, Judge, writing, with Cooks and Kyzar, Judges. Cooks, Judge, dissented):**

In this civil service appeal, a Lafayette police officer was terminated by the City-Parish. His termination was upheld by the Lafayette Municipal Fire and Police Civil Service Board and

by the district court on appeal. The actions for which he was terminated either occurred or were discovered while the officer was on administrative leave for other infractions. These included the discovery of at least eleven unprocessed citations, written reports, and evidence in his patrol cruiser; misuse of a department computer, on which was discovered a photo of a nude woman that had been emailed to him; failure to cooperate and untruthfulness with the examiner during a fitness-for-duty examination by a licensed psychologist; and violating department policy by engaging in outside employment as a "courtesy officer" at two apartment complexes in exchange for living accommodations.

We affirmed the trial court. Even if one did not consider the more minor infractions proven at the officer's hearing, his failure to process citations, reports, and evidence alone justified his termination.

COMMUNITY PROPERTY

***Carver v. Carver*, 17-1055 (La.App. 3 Cir. 4/18/18) ___ So.3d ___ (Saunders, J., writing; Thibodeaux, U.; Kyzar, V.)**

This case involves the partition of community property. The principal asset of the community is the former matrimonial domicile. The parties disagree as to its fair market value, and each retained an expert to determine its value. Defendant filed a motion to partition community property, followed by a Sworn Detailed Descriptive List of all Community Property. Plaintiff filed a separate Sworn Detailed Descriptive List of all Community Property to which Defendant filed a Traversal. Plaintiff responded by filing his own Traversal and finally, by filing a Traversal/Amended Sworn Detailed Descriptive List.

Following a trial on the traversals, the trial court found in favor of Plaintiff and (1) fixed the value of the community home; (2) denied Defendant retroactive rent; and (3) included as community property that which was inherited by and donated to Defendant from her ascendants. Defendant filed a Motion to Reconsider, to which Plaintiff filed a Peremptory Exception of No Cause of Action. The trial court denied Defendant's motion to reconsider.

Affirmed. The court found no abuse of discretion afforded the trial court in fixing a value for the community home, denying retroactive rent, and including property donated to Defendant as community. The court ruled that (1) pursuant to Louisiana Revised Statutes 9:2801 which sets forth the rules for partitioning community, when parties cannot agree to the value of a community asset, it is within the trial court's discretion to fix the value, which it did after weighing the two competing experts' opinions as to the value. The court ruled that (2) pursuant to Louisiana Revised Statutes 9:374(c) "[T]he retroactive assessment of rent is extremely prejudicial to the occupying spouse," and it is within trial court's discretion to deny retroactive rent, which it did after considering the needs and best interest of the child, who resided with Plaintiff in the home for a considerable time, and after considering Plaintiff's time, labor and expense in maintaining the

property. The court ruled that (3) pursuant to Louisiana Civil Code art. 2340 "Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property," and it is within the trial court's discretion to find that the items in the home were community property, which it did after reviewing the record and finding it devoid of any evidence that any of the items contained in the former matrimonial domicile at the time of separation were inherited by or donated to Defendant individually by her ascendants.

CRIMINAL LAW

***State v. Henry*, 17-1141 (La.App. 3 Cir. 10/3/18), __ So.3d __ (Panel: Gremillion, Judge writing: Ezell and Savoie, Judges.)**

Defendant was convicted of unauthorized entry of an inhabited dwelling. Defendant had resided in the trailer he entered without authorization before he was informally evicted by his parents, who owned the trailer. The parents returned all of the payments Defendant had made on the trailer and Defendant's brother moved in. Defendant's father had a restraining order taken out against Defendant. The home address listed on the restraining order prohibiting Defendant from harassing his family and the family's place of business was the address of the trailer.

Errors patent. On appeal we first noted an error patent: Defendant's sentence was indeterminate in that the trial court sentenced him to time served, but Defendant had been serving time for other charges and, therefore, the sentence for this crime was indeterminate. Accordingly, we vacated the sentence and remanded for sentencing of a specified term.

Conviction affirmed. We found no error in the jury's finding Defendant guilty of unauthorized entry of an uninhabited dwelling. The facts clearly indicated that Defendant no longer lived at the address and had been told on several occasions that he was not welcome there. Police found Defendant inside the dwelling without permission rolling around on an office chair and stating that he had nowhere else to go. Accordingly, Defendant's conviction was affirmed.

***State of Louisiana v. Dirk Thomas*, 17-959 (La.App. 3 Cir. 9/26/18), ___ So.3d ___, (Panel: Thibodeaux, Chief Judge writing; Keaty and Perret, Judges).**

The State charged Defendant Dirk Thomas with one count of sexual battery upon his biological adult daughter, D.T. At trial, D.T. testified that her father performed oral sex on her without her consent one evening, and Mr. Thomas maintained that D.T.'s story was a complete fabrication. The State presented evidence of phone call recordings and text message transcripts indicating that Mr. Thomas harbored an inappropriate sexual desire for D.T. The jury unanimously found Mr. Thomas guilty of the lesser and included offense of attempted sexual battery in violation

of La.R.S. 14:43.1 and La.R.S. 14:27, and he was sentenced to eighteen months at hard labor without the benefit of probation, parole, or suspension of sentence.

On appeal, Mr. Thomas was deemed indigent and appellate counsel was provided for him. In his pro se brief, Mr. Thomas asserted claims of insufficiency of the evidence and excessive sentencing, and further asked this court to "review any and all new evidence entered." Appellate counsel filed a brief requesting only a review for errors patent and moved to withdraw from the appeal after concluding that no non-frivolous issues exist upon which to base Mr. Thomas' appeal.

Affirmed; Motion to Withdraw Granted. We affirmed Mr. Thomas's conviction and sentence. We held that credibility determinations are within the jury's discretion and that we shall not impinge upon its discretion other than to ensure the sufficiency evaluation standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *State v. Mussall*, 523 So.2d 1305 (La.1988). We held that if believed by the trier of fact, "the testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even if there is no physical evidence." *State v. Simon*, 10-111, p. 7 (La.App. 3 Cir 4/13/11), 62 So.3d 318, 323; *State v. Robinson*, 02-1869 (La. 4/14/04), 874 So.2d 66, *cert. denied*, 543 U.S. 1023, 125 S.Ct. 658 (2004). We also found that Mr. Thomas's sentence was not unconstitutionally excessive, as the eighteen-month sentence he received was less than one-third of the maximum possible penalty of five years for attempted sexual battery. *See* La.R.S. 14:43.1(C)(1) and La.R.S. 14:27(D)(3). Further, we found that we are without jurisdiction to receive or review any new evidence not entered into the record on appeal. *See* La.Const. art. 5, § 10.

Our independent review of the record revealed no errors patent sufficient to reverse Mr. Thomas's conviction and sentence. Appellate counsel conceded that the trial court made some errors with regard to its *Batson* analysis, issuance of jury instructions, and rulings on evidentiary objections, but concluded that such errors were either harmless or inured to the benefit of Mr. Thomas. We agreed, finding that appellate counsel performed a thorough review of the record and correctly determined that no non-frivolous issues exist, and thereafter granted his Motion to Withdraw as directed by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241.

State of Louisiana v. Jackie Lynn Pruitt, **17-1113 (La.App. 3 Cir. 5/30/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Keaty and Savoie, Judges).**

Defendant Jackie Lynn Pruitt was convicted of first degree murder of Sonya Ortego in violation of La.R.S. 14:30(A)(1) and sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. Defendant was tried by a twelve-person jury and convicted with an eleven-to-one verdict. Defendant now appeals sufficiency of evidence.

Affirmed. Under *Jackson v. Virginia*, the Supreme Court considers "whether there was sufficient evidence to justify a rational trier of the facts to find guilty beyond a reasonable doubt." 443 U.S. 307, 313 (1979). An appellate court may impinge on the factfinder's discretion and credibility only to "guarantee . . . due process[.]" *State v. Mussall*, 523 So.2d 1305, 1310 (La.1988). Further, the Louisiana Supreme Court finds when a "jury reasonably rejects the hypothesis of innocence presented by the defendant[], that hypothesis fails[] . . . unless there is . . . reasonable doubt." *State v. Captville*, 448 So.2d 676, 680 (La.1984).

The victim's body was found face down, covered in blood and partially clothed in a motel room that she was renting with her fiancé. Defendant was renting the motel room next door and was in DeRidder for a court appearance for a DWI. Several witnesses had seen Defendant drinking heavily the night before the murder and saw Defendant leaving the motel the morning of the murder. As Defendant loaded his truck while shirtless, witnesses noticed scratches on his torso and that he seemed hurried. Blood was discovered in both the victim's and Defendant's rooms. Deputies took Defendant in for questioning and he denied knowing the victim. After his court appearance that day, he was held overnight for a probation violation. The sheriffs searched his truck and hotel room during this time and found a duffel bag in the cab of his truck containing debit cards and checks belonging to the victim and her fiancé, and the victim's cell phone with unread text messages from her fiancé.

The following day, Defendant told a detective that he had a sexual encounter with the victim and she was menstruating, which is why he had her blood on him and in his room. Defendant explained the scratches on his body were from his work with barbed wire fencing. Defendant testified before a grand jury and said he noticed the credit cards and phone in the bed of his truck while he was packing, but he was rushed so he placed them in his duffel. At trial, multiple witnesses testified that the victim's fiancé was at work and saw him leaving before the murder. The foreman of the fencing company that had previously employed Defendant testified that the company had not worked on jobs with barbed wire fencing in months. Further, forensic testing matched the victim's blood to a swab taken from a dried stain on Defendant's knee. Swabs taken from towels in Defendant's room matched the victim's DNA. The coroner and Sexual Assault Nurse Examiner testified that Defendant's scratches looked fresh and too thin to be from barbed wire. We conclude that the evidence is sufficient for a jury to have found Defendant guilty beyond a reasonable doubt of first degree murder.

***State v. Young*, 17-1108 (La.App. 3 Cir. 5/9/18), ___ So.3d ___, 2018WL2123867 (Gremillion, Judge, writing with Saunders and Pickett, Judges):**

The State appealed the sentence handed down for the Defendant, a third felony offender who pleaded guilty to two narcotics violations, despite the fact that at his *Boykin* hearing, the State announced its intention to bill Defendant as a habitual offender. The trial court originally sentenced Defendant to twenty years without benefit of probation, parole, or suspension of sentence. Defendant then moved for new trial and reconsideration of his sentence, which the trial court granted.

At the new trial on the habitual offender bill, the State introduced evidence to prove that Defendant had been convicted of previous offences. According to the testimony of Defendant's attorney at the time of his plea, the State regularly threatened defendants with being charged as habitual offenders if they rejected a plea offer, but Defendant's case was the first and only time he had actually seen the State carry through with such a threat following the entry of a guilty plea. Testimony was also adduced that Defendant had been charged with involvement in a homicide, but the State had dismissed the charges for lack of evidence. That attorney also testified that the State's offer of recommending a sentence of twenty years before the pleas were taken was so high because the State felt that Defendant "had beat a murder charge." Defendant also pointed out to the trial court that the relevant statute, La.R.S. 15:529.1, had been amended in 2017 to lessen the minimum sentence for a fourth and subsequent nonviolent offender from thirty years to twenty years. *See* 2017 La. Acts No. 82.

The minimum sentence before November 1, 2017, the trial court could have sentenced Defendant was twenty years. Defendant's adjudication hearing took place in September 2017. Nonetheless, the trial court sentenced Defendant to five years on each narcotics violation, to run concurrently. The trial court may have been swayed by the argument that the State was motivated by malice arising from Defendant's reputed involvement in a homicide. Other factors, such as the recent birth of Defendant's son and Defendant's father experiencing significant health issues may also have played a role in the trial court's downward departure. Because we could not determine from the record which factors the trial court considered in sentencing defendant to such lenient terms of imprisonment, though, we vacated the sentences and remanded for resentencing with instructions that the trial court articulate with specificity its findings supporting any downward departure from the statutory minimum term.

***State v. Eckert*, 17-848 (La.App. 3 Cir. 5/2/18), ___ So.3d ___, 2018 WL 2041881 (Gremillion, Judge writing, with Amy and Perret, Judges. Perret, Judge, dissented):**

Defendant was convicted of the second-degree murder of his wife in February 2016. The couple had a stormy history and had a physical altercation on the night of the wife's death. According to their six-year-old daughter, Defendant seized his wife in a choke hold and held her for a "really long" time, until she stopped moving. At one point, the daughter stated that her father held her mother in this choke hold for ten seconds; however, at trial she testified that when she made that statement she had no real good conception of time. At trial, Defendant sought to offer the expert testimony of Mr. Matthew Larsen, who had served as a hand-to-hand combat trainer for the U.S. Army Rangers and had re-written the U.S. Army Field Manual for hand-to-hand combat, who Defendant offered for the proposition that he had not improperly applied a "rear naked" choke hold, used to incapacitate. The trial court excluded Mr. Larsen's testimony. It also excluded the testimony of an emergency room physician from whom Defendant sought to elicit opinions regarding "positional asphyxia" based upon hypothetical questioning only. The trial court excluded this doctor's testimony on the basis that it felt it would confuse the jury.

On appeal, Defendant contended that he was denied a fair trial because of the exclusion of these two experts' testimonies. Regarding Mr. Larsen's testimony, we noted that the forensic examiner, Dr. Terry Welke, had already confirmed in his testimony that a ten-second rear naked choke hold would not be lethal. Whether it was applied correctly was not the issue; the length of time it was applied was, and there was conflicting evidence on this point. Thus, Mr. Larsen's testimony that the hold was not applied incorrectly was not helpful to the jury, and the exclusion of his testimony was at worst harmless error. Given the lack of other evidence regarding positional asphyxia as a likely cause of death, we found no abuse of the trial court's discretion in excluding the emergency room physician's testimony.

***State v. Eckert*, 17-848 (La.App. 3 Cir. 05/02/18), 244 So.3d 551. (Gremillion, J., writing) (Panel: Judges Gremillion, Amy, and Perret; Judge Perret dissented and assigned reasons.)**

Judge Perret's Dissent Summary Follows:

In this strangulation case, defendant, Daniel Jeremy Eckert ("Defendant") and his wife, Clarissa, were engaged in a physical altercation at their home in Anacoco, Louisiana. Defendant placed Clarissa in a choke hold, where he held her until she passed out. She was later found dead. Medical testimony indicated that the victim died of some form of asphyxia and that at the time of death, she had alcohol and Hydroxyzine in her system.

After a jury trial, Defendant was found guilty as charged to second-degree murder, a violation of La.R.S. 14:30.1. Defendant was sentenced to life imprisonment on May 9, 2017. On appeal, Defendant alleges the following three assignments of error: (1) the evidence is insufficient to demonstrate that he possessed the specific intent to kill or to inflict great bodily harm; (2) the trial judge erred in denying expert status to two proffered defense witnesses; and (3) the actions of the trial judge denied him his right to present a defense.

Affirmed. The majority opinion found that there was sufficient evidence presented at trial to show a history of abuse on the part of both Defendant and Clarissa, that Defendant applied a choke hold on Clarissa after she seemed to signal her intent to withdraw from the confrontation, and that Clarissa died following the choke hold. Thus, the majority concluded that a rational trier of fact could have found every element of second-degree murder proven beyond a reasonable doubt.

The majority opinion also found no merit in Defendant's second assignment of error that the trial judge erred in denying expert status to two of Defendant's proffered defense witnesses. Although the majority found that "[t]here is no question in our minds that [Matthew] Larsen is an expert in hand-to-hand combat[,]" it found that "even if we were to conclude that the trial court erred in not admitting Larsen's testimony, that error would be deemed harmless."

I dissented from the majority opinion and found that the exclusion of Mr. Larsen's testimony denied Defendant his constitutional right to present a defense, a defense that wanted to

explore potential causes of death other than strangulation**.** Defendant offered Mr. Larsen as "an expert in martial arts, specifically, the application of the rear naked choke hold" to support his theory that he countered his wife, Clarissa's, attack on him and their child, with non-lethal force, and that it was due to her drugged and intoxicated state that she fell to the floor where she died of positional asphyxia. At trial, the State also suggested an alternative theory that Clarissa died from positional asphyxia due to the way she was left by Defendant - in a seated position with her back against the bed. Thus, the defense in this case was based on showing that Defendant did not intend to kill his wife. Because the defense was not allowed to present Mr. Larsen's testimony, it was unable to address the weaknesses in the State's case.

Unlike the majority opinion, I found that Mr. Larsen's testimony was not being offered to show that the choke hold did not cause her death but rather was being offered to show that the choke hold, if administered properly and for the time both Belle [the daughter] and the Defendant stated, would only cause unconsciousness and not death. I found this evidence would have helped the trier of fact to better understand the evidence, especially considering Coroner Green's testimony that: (1) Clarissa's tongue had been bitten as though she had experienced a seizure; (2) Clarissa's death was due to asphyxia; and (3) Clarissa had no apparent damage to her esophagus as a result of the hold. I found that Mr. Larsen's opinion that if the choke hold had been administered for only 10-12 seconds, it would not have caused the death of Clarissa, but only unconsciousness, could have supported Defendant's theory that he did not intend to kill his wife. I also found that the use of a non-lethal choke hold is outside the knowledge of the average lay juror. Accordingly, I found the trial court clearly erred in denying Mr. Larsen's testimony and that Defendant was denied his constitutional right to present a defense to support his argument that he did not intend to kill his wife but only to subdue her.

***State v. Ficklen*, 17-995 (La.App. 3 Cir. 5/2/18), __ So.3d __ (Panel: Gremillion, Judge writing: Keaty and Savoie, Judges.)**

We affirmed the trial court's judgment denying Defendant's motion to quash the indictment in this writ opinion.

Writ denied. Defendant's claims center on whether a "criminal enterprise" existed and whether the bill on its face showed facts to show any claim that he was a member of a criminal enterprise was prescribed. The indictment alleged the enterprise commenced in March 2002 and remained active until the date of the indictment which listed 73 overt acts committed by 14 members with the last alleged overt act committed in January 2016. The indictment was sufficient to provide defendant adequate notice of the crime for which he is charged in order to prepare a defense. Further the crimes of racketeering and participating in a criminal street gang had not prescribed despite the last over act of March 2008 as the crimes were ongoing.

***State v. Dudley Melancon*, 17-943/944 (La.App. 3 Cir. 4/18/18). __ So.3d __ (Panel: Gremillion, Judge writing: Keaty and Savoie, Judges.)**

In this consolidated matter, Defendant appealed his current conviction for simple robbery (17-943) and his sentencing as a habitual offender (17-944).

Affirmed. Defendant was charged with first degree robbery but never contested the fact that he committed simple robbery when he robbed the victim of a bank bag. The trial centered around whether he led the victim to believe he was armed with a dangerous weapon thereby distinguishing the crime from first degree robbery. As no non-frivolous issues were presented for appeal, counsel's *Anders* motion to withdraw was granted.

In the companion case, we affirmed the trial court's sentencing of Defendant as third felony offender. He was convicted of three crimes of violence including the one above for simple robbery. He was sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence. Defendant's main argument was that his predicate offenses resulted in imposed sentences of no more than seven years at hard labor. He presented no witnesses at the hearing. La.R.S. 15:529.1 requires that defendant be sentenced to life imprisonment without benefits and Defendant, who had a long history of violent crimes, provided no reasons for downward departure from the mandatory life sentence for a third felony offender convicted of three crimes of violence.

***State of Louisiana v. Robbie Ray Frith*, 17-1004 (La.App. 3 Cir. 4/11/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Kyzar, Judges).**

Defendant Robbie Ray Frith appealed his sentences from his conviction of five counts of incest, in violation of La.R.S. 14:78.1. Defendant was sentenced to serve thirty-five years at hard labor with the first twenty-five years served without the benefit of probation, parole, or suspension of sentence on counts one and five; twenty-five years at hard labor without probation, parole, or suspension of sentence on counts two and three; and ten years and a $50,000 fine for count four. All sentences were to run concurrently. Defendant alleged that (1) the trial court erred in denying his motion to recuse without referring the motion to another judge; and (2) the sentences were unconstitutionally excessive. Defendant argued that the trial court committed reversible error when it denied his motion to recuse because (1) the trial court applied the Louisiana Code of Civil Procedure to a criminal proceeding; (2) the trial court's conduct demonstrated personal bias against Defendant; and (3) the trial court failed to follow proper procedure in addressing the motion to recuse.

In a previous appeal, Defendant alleged three assignments of error: (1) that the trial court committed reversible error in denying Defendant's challenge for cause of Gilbert Blanchard; (2) that Defendant was incompetent to stand trial; and (3) that the trial court improperly interjected its religious beliefs into Defendant's sentencing hearing. We found the first two assignments lacked merit. We remanded for resentencing, finding the court failed to observe the twenty-four-hour delay between ruling on a motion for new trial and sentencing or obtaining a waiver of the delay.

See State v. Frith, 15-630 (La.App. 3 Cir. 4/27/16) (unpublished opinion), *writ denied*, 16-1011 (La. 5/26/17), 221 So.3d 79. After remand, Defendant filed a "Motion to Recuse Trial Court Judge" under La.Code Crim.P. arts. 671(A)(1) and 671(A)(6), for when a trial judge is unable to conduct a fair and impartial trial. Defendant's motion alleged the trial judge repeatedly invoked God and Christian Scripture, revealing a personal, religious bias against Defendant. The bias was only made an issue at trial and, therefore, Defendant did not file the motion to recuse prior to trial pursuant to La.Code Crim.P art. 674. Defendant raised the issue on direct appeal. The supreme court denied Defendant's writ and Defendant immediately filed the motion to recuse. The trial court denied the motion and reinstated the exact same sentences. Defendant objected to excessiveness of sentence and filed a "Motion to Reconsider Sentence" because of his advanced age, and he suffered from physical and mental health issues. This motion was also denied.

Sentences Vacated and Case Remanded. This court vacated the Defendant's sentences and remanded the case to the trial court so that Defendant's motion to recuse may be heard by a randomly allotted judge pursuant to La.Code Crim.P. art. 675(B). We find Defendant's assignment of error has merit. "[T]he judge sought to be recused has a duty to stand aside and to appoint a judge ad hoc to pass upon the validity of the recusation." *Kidd v. Caldwell*, 371 So.2d 247, 252 (La.1979). At resentencing, the trial judge clearly and erroneously referenced La.Code Civ.P. art. 151 when discussing grounds for recusal in a criminal case. A judge is presumed impartial and a "party seeking the recusation must establish more than conclusory allegations." *State v. Anderson*, 96-1515, p. 4 (La.App. 3 Cir. 4/29/98), 714 So.2d 766, 768, *writ denied*, 98-1374 (La. 10/9/98), 726 So.2d 25. The trial judge repeatedly made religious references which is grounds for recusal. *See U.S. v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). This court need not address excessiveness of sentence because the sentences are vacated, and the case is remanded.

***State of Louisiana v. Tanya Buteaux*, 17-877 (La.App. 3 Cir. 3/14/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

Defendant, Tanya Buteaux, appealed her jury conviction of three counts of theft of $1,500.00 or more, violations of La.R.S. 14:67. The trial court sentenced Ms. Buteaux to five years at hard labor on each count, to be served concurrently, with all but two years suspended, and five years supervised probation upon release from incarceration. The court also ordered Ms. Buteaux to pay restitution to the victims in the amount of $89,186.63.

Affirmed and Remanded with Instructions. The State presented evidence of theft perpetrated through a scheme whereby Ms. Buteaux manipulated daily store statements to short the cash deposits. Viewing the evidence in a light most favorable to the prosecution, we found that, though circumstantial, the evidence was sufficient for the jury to find the essential elements of the crime of theft perpetrated by Ms. Buteaux and that the State negated all reasonable hypothesis of innocence. Accordingly, we concluded that the evidence was sufficient to support an ultimate finding by the jury that the reasonable findings and inferences permitted by the evidence exclude every reasonable hypothesis of innocence, and, therefore, the evidence was sufficient to sustain the verdict of three counts of theft beyond a reasonable doubt.

CUSTODY & PARENTAL RIGHTS

***Starks v. Starks.*, 17-1139 (La.App. 3 Cir. 6/27/18). __ So.3d __ (Panel: Gremillion, Judge writing: Saunders and Pickett, Judges.)**

The trial court granted interim custody to the paternal grandparents with supervised visitation by the mother and the mother appealed.

Affirmed. The parents of the two minor children, Danae and Brad, had an ongoing bitter custody dispute. In February 2015, Danae was shot in the head and arm. In March 2015, she filed a petition for divorce but did not allege Brad was the shooter. Brad answered and requested full custody due to Danae's severe mental illness. Numerous proceedings followed with accompanying salacious details. Following a July 2015 hearing, all parties agreed to have a separate hearing on the issue of who shot Danae.

Following five days of trial relating to the issue, the trial court found that Danae's wounds were self-inflicted and that Brad proved "beyond a reasonable doubt" that the gunshot wounds were self-inflicted. That trial court judge thereafter recused herself and another hearing was held regarding custody with a judge presiding ad hoc.

At the custody hearing, the trial court, after considering the findings of the shooting hearing and the extensive testimony of experts at the custody hearing, found that neither parent was capable of properly parenting the children and maintained interim custody with the paternal grandparents. Danae's visitation with the children was changed from unsupervised to supervised.

On appeal, we affirmed the trial court's findings. Although this was a civil matter and the "beyond a reasonable doubt" standard was above and beyond what Brad needed to prove, we found that burden was nonetheless met. Cell phone evidence and the 911 call placed Brad away from the scene of the shooting, a suicide note was found next to Danae, Danae had previous suicide attempts, the investigating officers found that she shot herself, and the testimony of the parties all proved that she shot herself. Danae admitted to a detective while in the hospital that she shot herself. Moreover, the fact that Danae and Brad had consensual sex while she was hospitalized also tended to disprove the fact that he shot her. We found no abuse of discretion in the trial court's finding that neither party was fit to parent the children as they both had drug problems, put their needs to be at war above their children's needs, behaved immaturely, and tended to deny the serious nature of their problems.

***Tracy Alexander v. State of Louisiana, Department of Children & Family Services,* 18-154 (La.App. 3 Cir. 6/6/18), __ So.3d __ (Panel: Amy, Judge writing; Thibodeaux, Chief Judge; Pickett, Judge).**

Tracy Alexander was not present at the trial on the State's "Petition for Termination of Parental Rights and Certification for Adoption" concerning two of her minor children, and neither

her counsel nor counsel for the Department of Children and Family Services (DCFS) had an explanation for her absence. The trial court ultimately rendered judgment terminating her parental rights. Ms. Alexander filed a motion for new trial based on her absence. At a hearing on the motion, the DCFS caseworker testified that, prior to the termination trial, she received a letter from Ms. Alexander's attorney requesting that DCFS provide transportation. The caseworker said that she was unable to reach Ms. Alexander despite calling the phone number on file, as well as the places she reported to be living and working. The caseworker confirmed that she did not alert Ms. Alexander's counsel of her inability to contact Ms. Alexander. Ms. Alexander also testified, stating that she was aware of the trial date but unaware that she needed to attend. She indicated that she called the caseworker and her attorney in the days leading up to the trial and left voicemail messages asking for them to return her calls but did not receive return calls and had no other means to attend the trial. In this regard, the caseworker testified that she neither heard from Ms. Alexander nor received messages prior to the trial. The trial court denied the motion for new trial. Ms. Alexander then filed a petition for nullity and motion for summary judgment, asserting that she was deprived of her right to testify because DCFS committed fraud and ill practices by failing to arrange transportation and/or by failing to notify her counsel or the trial court of the inability to arrange transportation. The trial court dismissed Ms. Alexander's petition for nullity and denied her motion for summary judgment. Ms. Alexander appealed.

Affirmed. The panel first addressed Ms. Alexander's contention that DCFS's failure to arrange for transportation constituted fraud and ill practices. The panel explained that, while La.Code Civ.P. art. 2004 provides that "[a] final judgment obtained by fraud or ill practices may be annulled[,]" jurisprudence interpreting that article has clarified that an action for nullity is not the proper remedy for a loss that occurs because of a party's negligence or failure to act on its own behalf. The panel found that Ms. Alexander failed to act on her own behalf in that she did not provide DCFS with current contact information and failed to notify anyone, including her attorney, that she had been unable to arrange transportation with DCFS. Next, the panel addressed Ms. Alexander's argument that DCFS committed fraud and ill practices by failing to notify her attorney or the trial court of the inability to arrange transportation. Finding no merit in the contention, the panel explained that a judgment is not fraudulent when a party fails to disclose facts within its knowledge if the other party, with reasonable diligence, could have ascertained those facts. The panel determined that Ms. Alexander could have, with reasonable diligence, ascertained both that she would not be present at the trial and the reasons that she would not be present. Namely, she testified that she had no independent means of transportation and had not arranged transportation with anyone at DCFS. Accordingly, the panel found no merit in Ms. Alexander's assertion that DCFS committed fraud and ill practices.

DAMAGES

***Kupke v. Shelter Ins. Co.*, 18-82 (La.App. 3 Cir. 7/11/18), 251 So.3d 471 (Keaty, J., writing; Cooks and Kyzar, JJ.)**

A motorist whose vehicle was rear-ended by a company's truck brought a negligence action against the company's insurer. The trial court entered judgment for the motorist in the amount of $79,455 plus interest and cost and denied the motorist's motion for additur and a new trial. The motorist appealed.

Affirmed. The third circuit held that the award of general and special damages was reasonable. Kupke was involved in two previous automobile accidents, one of which resulted in nasal surgery and the other which resulted in unconsciousness and amnesia. Kupke suffered from pre-existing back pain. Two weeks before the accident at issue, Kupke presented to his general physician with complaints of facial numbness and loss of sight in both eyes but failed to follow up with a neurologist. Kupke's right ear was muffled both before and after the subject accident. Prior to the accident at issue, Kupke underwent a CT scan due to complaints of memory loss and dizziness. He never lost consciousness after the instant accident, he continued to work with the same or increased salary and schedule, and he got married after the subject accident.

***Randall Vincent, et ux. v. City of Iowa,* 17-951 (La.App. 3 Cir. 4/11/18), __So.3d__ (Panel: Amy, Judge writing; Gremillion and Perret, Judges).**

The plaintiffs filed suit after a City sewerage line discharged into their home in 2014, causing damage both to the home as well and to personal property. The City provided payment for certain repairs to their home, as well as relocation and cost of living expenses. However, the City denied the remaining aspects of the plaintiffs' claim for damages. The trial court found in the plaintiffs' favor, awarding damages for home contents, mental anguish, and loss of use. The City appealed. In an answer to the appeal, the plaintiffs sought an additional award for costs of replacing flooring in the home, as well as for certain household items.

Affirmed. The panel first addressed the plaintiffs' contention that the trial court awarded excessive damages for mental anguish to Mr. and Mrs. Vincent ($35,000 and $40,000 respectively). Finding no merit in the contention, the panel observed that the plaintiffs presented testimony regarding their respective difficulties and the disruption in their life associated with addressing the situation and in the two-month relocation from the home. Each plaintiff suffered physical consequences associated with the sewage overflow, which they witnessed. They also personally attended to the initial removal of the material, which was described as an accumulation of up to two inches in some areas. The panel also found no merit in the contention that the trial court's award for loss of use should be reversed as the City compensated the plaintiffs for their hotel stay during their relocation. The record instead supported an award for an inability to use the home, not only during their period of relocation, but also for their ongoing diminished use of the home. Notably, Mrs. Vincent testified that the home had a lingering smell, that she no longer

enjoyed having guests, and that Mr. Vincent stayed outdoors more often. Addressing the final argument regarding contents damages, the panel maintained the trial court's award of $45,000.00. While the City asserted that the plaintiffs were entitled to receive only "restoration" of the contents, the trial court determined that the nature of the sewage undermined the contention that the items could, in fact, be repaired. The record supported the trial court's award of replacement costs as given the nature of the discharge and the fact that it was sufficiently damaging to warrant the removal of flooring, carpeting, and sheetrock. To the extent the City complained that the plaintiffs' valuation of the items was uncorroborated, the panel noted that they itemized spreadsheets of the subject property as well as photographic evidence.

By their answer, the plaintiffs sought an additional sum for replacement costs associated with wood flooring. However, the panel maintained the trial court's ruling upon a finding that the testimony lacked clarity on this point. Similarly, the panel rejected the plaintiffs' claim for additional damages for replacement of household items and noted that comparison of the receipts and the index for contents damages undermined the plaintiffs' contention that they were not compensated for those items.

EMBEZZELMENT

***Daigle Oil Distribs. v. Istre*, 17-1069 (La.App. 3 Cir. 4/11/18), __So.3d__ (Ezell, J.; Pickett and Perret, JJ.)**

While working for Daigle Oil Distributors as a bookkeeper, Elizabeth Istre embezzled $4,363,376.79 in funds during her ten years of employment. The embezzlement was discovered by one of the owner's daughters when she was training to take over the books. It was discovered that Elizabeth was coding checks in QuickBooks as payable to certain accounts and then actually printing the checks payable to either her or her husband. She was able to sign the checks with a rubber-stamped signature of Brian Daigle that was provided to her when she first started working at Daigle Oil. The checks were then deposited into her personal accounts, including a joint account with her husband at MidSouth Bank.

On April 17, 2014, Daigle Oil filed suit against Elizabeth and her husband, Burton, for return of the misappropriated funds. After the Defendants filed answers, Daigle Oil filed a motion for summary judgment. A hearing on the motion was held on June 1, 2017. Judgment was signed on July 6, 2017, finding that Elizabeth was liable to Daigle Oil in the amount of $4,363,376.79. Burton was found liable in solido with Elizabeth for this amount. Only Burton appealed the judgment.

Affirmed. Burton first claimed that the trial court erred in denying an exception of prescription. He claimed that Daigle Oil should be denied the right to pursue damages for the fraudulent checks written by Elizabeth prior to April 17, 2013, because the thefts should have been

discovered long before suit was filed on April 17, 2014. Elizabeth filed the exception of prescription. Burton never filed an exception of prescription.

Finding that prescription can only be claimed by the party raising it as a personal defense, we found that Burton could not raise a defense he did not claim.

We further found that the trial court correctly held that Burton was liable in solido with his wife for the funds she embezzled. This was an obligation incurred by Elizabeth during the community property regime. Daigle Oil established that the stolen funds were used for the common interest of the spouses over the years, so that even though it was an intentional tort it was for the benefit of the community. La.Civ.Code art. 2363.

EMERGENCY VEHICLES

***Gerald Janise v. Acadian Ambulance Service, Inc., et al*, 17-1100 (La.App. 3 Cir. 4/25/18), __ So.3d __ (Panel: Amy, Judge writing; Cooks and Conery, Judges).**

This dispute arose from an automobile accident between the plaintiff and William Gerard, an operations supervisor for Acadian Ambulance Service, Inc., who was driving a company vehicle. Following the accident, the plaintiff filed a petition for damages against Mr. Gerard, Acadian Ambulance, and their insurer, Liberty Mutual Insurance Company. The defendants answered, arguing that they were entitled to statutory immunity due to the use of the vehicle's lights and siren, as well as the absence of gross negligence. The jury ultimately found in favor of the defendants, and, in accordance with the jury's verdict, the trial court issued a judgment dismissing the plaintiff's claims with prejudice. The plaintiff appealed.

Affirmed. The panel first addressed the plaintiff's contentions that the jury was clearly wrong in finding that Mr. Gerard was responding to an emergency call and that Mr. Gerard proceeded through a red light but only after slowing down as necessary for safe operation. Finding no merit in the contentions, the panel observed that La.R.S. 32:24 provides that, if the driver of an authorized emergency vehicle is responding to an emergency call and using audible or visual signals sufficient to warn other motorists of his approach, then the driver may "[p]roceed past a red or stop signal but only after slowing down or stopping as may be necessary for safe operation." The panel explained that, if the emergency vehicle driver's conduct adheres to La.R.S. 32:24, then the driver will be held liable only for actions which constitute reckless disregard for the safety of others; however, if the emergency vehicle driver's conduct does not comply with La.R.S. 32:24, then the driver's actions will be gauged by a standard of due care.

The panel determined that the record supported a finding that Mr. Gerard's conduct adhered to La.R.S. 32:24, and thus should be analyzed under the reckless disregard standard. In particular, Mr. Gerard testified that his dispatch center determines and instructs him whether a call is considered an emergency or "lights and siren" situation. He stated that, prior to the accident, he

received such a call from dispatch and activated his vehicle's lights and siren. A witness testified that, as he approached the intersection, he could hear the vehicle's sirens about a block away and saw the lights on the vehicle. Mr. Gerard explained that, as he arrived at the three-lane intersection, he stopped; observed that traffic in the first and second lanes had stopped; noticed that there was no vehicle in the third lane; began "creeping" through the intersection at about five to ten miles per hour; and collided with the plaintiff's vehicle in the third lane. A witness testified that Mr. Gerard "crawled through the intersection, slowly." Thus, the panel concluded that the record supported the jury's finding that Mr. Gerard was responding to an emergency call; proceeded past a red light but only after slowing down or stopping as necessary for safe operation; and made use of the vehicle's lights and siren sufficient to warn other motorists. The panel further determined that Mr. Gerard's conduct did not constitute reckless disregard for the safety of others. Accordingly, the panel found no merit in the plaintiff's contentions that the jury erred in failing to determine the degree or percentage of negligence attributable to Mr. Gerard and that the jury erred in failing to award general and special damages to the plaintiff.

ENGINEERS & CONTRACTORS

***City of Youngsville v. C. H. Fenstermaker and Associates, LLC*, 17-1065 (La.App. 3 Cir. 4/18/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders and Kyzar, Judges).**

The defendant engineer, C. H. Fenstermaker & Associates, L.L.C. (Fenstermaker), provided engineering services for the construction of a roadway in the City of Youngsville. Youngsville sued Fenstermaker for deterioration of the roadway. Fenstermaker filed a third-party demand against the construction company, Glenn Lege Construction, Inc. (GLC). GLC filed an exception of peremption, which was granted by the trial court. Fenstermaker appealed the trial court's judgment in favor of GLC.

Affirmed. Finding no error or manifest error in the trial court's judgment, we affirmed.

Fenstermaker filed its third-party demand against GLC approximately four months after Fenstermaker was served with Youngsville's petition in the main demand. We found that the 2012 enactment of La.R.S. 9:2772(A)(1)(c) applied in this case; it gave Fenstermaker ninety days to file its third-party demand; thus Fenstermaker's action was perempted.

We further found that La.R.S. 9:2772(C) did not apply to Fenstermaker's third-party demand because Fenstermaker has not been cast in judgment on the main demand and therefore has not yet suffered damages.

EXPERT TESTIMONY

***Sonnier v. Louisiana, DOTD*, 18-0073, c/w 18-0074, c/w 18-0075 (La.App. 3 Cir. 6/6/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Amy and Pickett, Judges).**

The plaintiff, Gaynelwyn Sonnier, appealed interlocutory judgments limiting her experts' testimony, along with a final judgment memorializing the jury's verdict in favor of the defendant, State of Louisiana, Department of Transportation and Development (DOTD), involving a single vehicle accident caused by an allegedly defective highway.

In this case, two young women in their twenties were killed in 2006 when the driver failed to negotiate a curve at night on Highway 10, a two-lane roadway in Allen Parish near Oakdale. The eastbound vehicle crossed the center line, the opposing lane, and its shoulder, and crashed into the ditch of the westbound lane, striking a tree stump leaning toward the ditch from its backslope. The plaintiff's daughter was a passenger in the vehicle. The driver of the vehicle had a blood alcohol level of .10% at the time of her death. The plaintiff sued the DOTD for cutting the stump on the backslope of the ditch to three feet instead of five inches after hurricane Katrina, for failing to widen the two-foot shoulders to four-foot-wide shoulders in the area, and for failing to revise the ditch's foreslope from a 1:1 pitch to a 3:1 pitch. After hearing eight days of testimony and presentation of evidence by the plaintiff and the DOTD, the jury rendered a verdict in favor of the DOTD, finding no defect creating an unreasonable risk of harm to the driving public.

On appeal, the plaintiff asserted that the trial judge erred in not allowing the plaintiff's experts in traffic engineering and accident reconstruction to opine on "unreasonable risk of harm" and on whether the subject roadway underwent a "major reconstruction" when it was overlaid with asphalt in 1959. The plaintiff asserted that just because "unreasonable risk of harm" is an ultimate issue for the jury to decide, under La.Code Evid. art. 702, that cannot be the sole reason for preventing expert testimony on the issue. The plaintiff further asserted that the asphalt overlay in 1949 was a "major reconstruction" that required the application of 1946 standards calling for the above-discussed corrections to the roadway, shoulders, and ditches. The plaintiff further asserted that the jury erred in failing to find defects creating unreasonable risks of harm and in failing to allocate a portion of the fault to the DOTD and a portion of the fault to the driver.

Affirmed. Finding no abuse of discretion on the part of the trial judge and no manifest error on the part of the jury, we affirmed the judgments of the trial court.

We found no manifest error by the trial judge in preventing the plaintiff's experts, Mr. Evans and Mr. Robert, from giving opinions on "unreasonable risk of harm" because La.Code Evid. art. 702 states that an ultimate issue for the jury cannot be the "sole" reason for precluding the testimony, and here, the trial judge stated several other reasons for precluding the testimony. A very important and well-articulated reason was that the plaintiff's experts were not offered or accepted as experts in highway design, construction, or maintenance. This fact distinguished the plaintiff's case from *Rosen v. State ex rel. Dep't of Transp. & Dev.*, 01-499 (La.App. 4 Cir.

1/30/02), 809 So.2d 498, *writ denied*, 02-605 (La. 5/10/02), 815 So.2d 842, which she attempted to analogize. We also noted that the plaintiff's experts were allowed to testify extensively about what defects they found at the accident site and the DOTD's responsibility to correct them. Only a few pages of the 160-page deposition of the plaintiff's expert were redacted because of the legal term "unreasonable risk of harm." The jury also heard testimony that the National Guard was cutting trees after the hurricane, and the witness who saw some of the cutting admitted that he did not see the DOTD crew cut the tree stump in question.

We further found no manifest error in the trial court's precluding the testimony of the plaintiff's experts regarding what DOTD considers a "major reconstruction." As the judge pointed out, the plaintiff's experts were traffic engineers and accident reconstructionists, not highway design or highway construction engineers. We found that the present case was on point with *Forbes v. Cockerham*, 08-762 (La. 1/21/09), 5 So.3d 839, and that the trial judge had followed that precedent.

Finally, we found no abuse of discretion on the part of the jury in finding no defect creating an unreasonable risk of harm to the motoring public. Over eight days of trial, the jury heard and saw ample evidence to support its verdict, including testimony that the curve was not severe; that the driver used the road on a regular basis and was familiar with it; that the driver had a ten-foot-wide westbound lane and a two-foot-wide shoulder to correct her path and get back into her east-bound lane of travel; that the driver made no attempt to break or steer to avoid the accident; and that the driver was not a reasonably prudent driver who was momentarily distracted; rather she had an alcohol concentration in her blood that was above the legal limit and that impaired her ability to negotiate the curve and take corrective measures to avoid crashing into the ditch. We found that the record supported the trial court's and the jury's findings and cited numerous cases supporting the jury's verdict. Accordingly, we affirmed same.

IMMOVABLE PROPERTY

***Zaveri v. Husers*, 16-866 consol. with 16-867 (La.App. 3 Cir. 6/21/17), 224 So.3d 389, *writ denied*, 229 So.3d 475 (La. 11/6/17) (Panel: Keaty, Judge writing; Saunders and Conery, Judges)**

The matter at issue in these consolidated appeals arose after the Zaveris built a large retaining wall between their lot and the neighboring lot of the Husers in conjunction with the Zaveris' construction of a home on Prien Lake in Lake Charles, Louisiana. By the time the Zaveris purchased their lot in 2005, several hurricanes had struck the Lake Charles area and FEMA required that all new homes be constructed at least 10 feet above the base flood elevation. As originally designed, the retaining wall resembled an upside-down T, with "toes" on either side of the vertical wall; however, Zaveri altered the design to remove the toe on the Husers' side of the wall which allowed it to be installed closer to the property line. The parties filed competing petitions for declaratory relief regarding whether the wall violated any codes or zoning ordinances

of the City of Lake Charles. The Husers also filed third party demands against the City and Champion Custom Home Builders, a construction company from Texas that assisted with the project. The Husers later requested that the trial court overturn the City's denial of their appeal of the Zoning Commission's decision to issue a zoning certificate and building permit to the Zaveris. After a bifurcated trial, the jury found that the wall was structurally unsound and that the project violated the City zoning ordinance, and it awarded the Husers damages totaling $538,200 for loss of value of property/stigma, costs of past and future repairs and remedial work, and future loss of landscaping. The trial court granted the Husers' administrative appeal, finding that the City erred in not overturning the Zoning Commission's decision to issue a zoning certificate and building permit to the Zaveris. Judgment was rendered in favor of the Husers and against the defendants as apportioned by the jury as follows: 1) 93% to the Zaveris, 2) 5% to Champion, and 3) 2% to the City. The Zaveris, the Husers, and Champion filed Motions for JNOV, all of which were denied. The Zaveris appealed and the Husers answered the appeal.

Affirmed: After review, we found no manifest error in the jury's finding that the wall was structurally unsound due to the fault of the Zaveris. We further found that the evidence supported an award of damages to the Husers. Taking into consideration the totality of the evidence, we found no manifest error in the trial court's denial of the Zaveris' motion for JNOV because a reasonable juror could have determined that the Husers proved their entitlement to $125,000 in damages for the stigma and lost property value suffered at the hands of the Zaveris. We upheld the trial court's grant of the Husers' administrative appeal, finding the issue moot because the jury likewise determined that the project violated the City zoning ordinance and because the jury apportioned damages against the City for its fault. Finally, we found no merit to the Husers' assertion that the jury erred in failing to award them damages for loss of use and enjoyment of their property and/or for mental anguish given the great discretion afforded a jury in assessing the credibility of witnesses and in awarding damages. We rejected the Husers' claim that the trial court erred in denying their motion for JNOV regarding those items of damages, finding that it applied the proper standard when considering the Huser's motion. Thus, we affirmed the trial court's judgment in its entirety.

INMATE SUITS

***Alvin Pete v. State of Louisiana, Department of Corrections, et al.*, 17-1131 consolidated with 17-1132 (La.App. 3 Cir. 5/9/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Keaty and Savoie, Judges).**

Plaintiff, Alvin Pete, filed suit against Ronald J. Theriot, in his official capacity as the sheriff of St. Martin Parish (Sheriff), seeking damages for an injury he sustained to his left eye while incarcerated in the St. Martin Parish Jail, Breaux Bridge Substation 2 (jail). The trial court found in favor of Mr. Pete, awarding him $50,000.00 in general damages. Both parties appealed.

Amended in Part; Affirmed as Amended. After reviewing the record, we first found no manifest error in the trial court's denial of the Sheriff's exception of prematurity as the evidence submitted by the Sheriff at the hearing on the exception could not refute Mr. Pete's assertion that he had filed a grievance pursuant to the applicable administrative remedy procedure. We further found no manifest error in the trial court's finding that the Sheriff was liable for Mr. Pete's injury, which occurred when another inmate threw a rock that struck Mr. Pete's eye. At issue was the presence of limestone aggregate in the trustee yard and the lack of supervision by the guards. Based on the expert testimony and evidence, we found that the record reasonably supported the trial court's conclusion that the Sheriff either knew or should have known that a rock could be thrown and result in injury to a trustee or a guard. Moreover, we found the evidence, particularly as to the presence of the limestone aggregate and the failure of the guards in their duties to supervise, also more than adequately supported the trial court's finding that the Sheriff, on that day, through the inaction of his deputies, failed to take the steps necessary to prevent the reasonably foreseeable injury.

However, we did find that the trial court erred in failing to apportion comparative fault to the inmate who threw the rock. But while his action was a contributing factor, we concluded, based on the evidence, that the injury would not have occurred (1) if the limestone aggregate had not been present in the trustee yard, and (2) if reasonable supervision would have been provided by the deputies. Therefore, we apportioned 80% fault to the Sheriff and 20% fault to the inmate, amounts that we found were the highest and lowest amounts the trial court could have reasonably allocated to them. Finally, we found that the general damages award was abusively low. After comparing the facts of this case, particularly Mr. Pete's permanent loss of his eye, with jurisprudence involving similar injuries, mainly loss of eyesight, we found the sum of $150,000.00 to be the lowest amount of general damages the trial court could have reasonably awarded Mr. Pete. Accordingly, we amended the judgment to correct these errors and affirmed the judgment as amended.

INSURANCE

***Higginbotham v. USAgencies*, 17-491, 17-497 (La.App. 3 Cir. 6/13/18), 247 So.3d 916 (Panel: Keaty, J. writing; Cooks, and Perret, JJ.; Amy, J. dissented and assigned reasons; Gremillion, J. dissented for reasons assigned by Amy, J.)**

An employee of the insured transportation company was injured in an automobile accident and sought recovery under the uninsured/underinsured (UM) provisions of his employer's trucker's liability policy. The insurer denied the plaintiff's claims, alleging that its insured waived UM coverage. The plaintiff challenged the validity of the UM waiver. The issue of UM coverage was presented to the trial court in cross-motions for summary judgment. The trial court granted the motion for partial summary judgment filed by the plaintiff and denied the motion for summary

judgment filed by the insurer, finding that the policy provided UM coverage for the plaintiff's damages. The insurer filed an appeal and an application for supervisory writs challenging that judgment, which this court consolidated.

Affirmed. We concluded that the named insured's rejection of uninsured motorist (UM) benefits was facially defective, where, prior to execution of UM forms, the insurer inserted "N/A" on blanks corresponding to different types of UM coverage, contrary to statutory requirement that insured initial selection or rejection of each type of coverage. We noted that where a UM form is facially invalid, the insured's intent is irrelevant and cannot cure any defect in the UM form. Thus, we held that the insured's trucker liability policy provided coverage for injuries sustained by insured's employee in accident, regardless of whether insured clearly communicated to insurance agent or broker its intent to reject any form of UM coverage on trucks.

Advanced Radiographics, Inc. v. Colony Ins. Co. **(Saunders, J., writing: Conery, J.; Savoie, D.) (La.App. 3 Cir. ___/ ___/___) ___ So.3d ___.**

This case involves an insurance dispute over coverage after Plaintiff's property was damaged by fire. Following the loss, Plaintiff submitted a claim to its insurer, who denied the claim. As a result, Plaintiff sued its insurance for denying coverage. Plaintiff also sued the insurance brokerage, and the broker, through whom it had purchased the insurance for failing to inform the Plaintiff of the different coverage options available and failing to explain the costs and potential benefits of those coverages.

The insurance brokerage and the broker filed a peremptory exception of no cause of action, which the trial court granted pursuant to La.Code Civ.P. art. 854, which states "conclusions of the plaintiff unsupported by facts does not set forth a cause of action."

Affirmed. The court found no abuse of discretion afforded the trial court in granting the insurance brokerage and broker's peremptory exception of no cause of action, as Plaintiff's petition attempted to impose a duty upon the insurance brokerage and the broker to identify the type and amount of insurance coverage Plaintiff needed for their property. In Louisiana that duty is imposed upon the insured, rather than upon the insurance agent or broker.

JUVENILES

State in the Interest of G.P.**, 17-675 (La.App. 3 Cir. 9/20/18), ___ So.3d ___. (Pickett, J., writing.) Panel: Judges Pickett, Ezell, Perret.**

In this juvenile delinquency case, the trial court ordered the juvenile held in a secured facility because of his repeated escapes from non-secured facilities. As a result, the juvenile had been off his prescription medication for months and needed a thirty-day course of prescription

medication. The Office of Juvenile Justice filed a writ application arguing that the trial court's order exceeded its authority because the OJJ has exclusive authority to determine the placement of youths.

Writ Denied. The trial court did not err in mandating secure confinement for the juvenile. The writ was denied.

LAND RESTORATION

Grace Ranch, LLC v. BP America Production Company **(La. App. 3 Cir. 7/18/18), __So.3d __ (Panel: Keaty, Judge writing; Savoie, Judge, and Thibodeaux, Chief Judge)**

Grace Ranch filed suit in contract and tort for contamination of its property resulting from the gas exploration and production by multiple defendants. Grace Ranch sought and obtained assignment of rights from prior surface and mineral owners of property, General Mills and Leblancs, their heirs and assigns. Grace Ranch then filed an amended petition to assert its assigned claims. Defendants filed motions for summary judgment and an exception of no right of action. The trial court granted the motions. This court affirmed.

Grace Ranch contends that *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp*., 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 (La. 10/25/11), 79 So.3d 246, is inapplicable because it involved a surface lease whereas the present matter involves a mineral lease. We agreed that the subsequent purchaser rule does apply to mineral leases. Subsequent purchaser rule is a jurisprudential rule which provides that the property owner "has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted." *Id*.

Grace Ranch alleged that a mineral lease creates a real right by the landowner to sue for property damage that runs with the land. This court determined that a mineral lease creates a real right in favor of the mineral lessee rather than the lessor. (*Bundrick v. Anadarko Petroleum Corp.*, 14-993 (La.App. 3 Cir. 3/4/15) 159 So.3d 1137, *writ denied*, 15-557 (La. 11/16/15), 184 So.3d 24, *Minvielle v. IMC Global Operations, Inc.*, 380 F.Supp.2d 755 (W.D. La. 2004).

Grace Ranch contended that the mineral lessee owes an end of the lease restoration obligation to both the mineral lessor and surface owner, which could be enforced by any subsequent owner. Unlike in *Duck v. Hunt Oil Co.,*13-628 (La.App. 3 Cir.3/5/14), 134 So.3d 114, *writs denied*, 14-703, 14-709, 14-715, 14-735 (La. 6/13/14), 140 So.3d 1189, 1190, where there was a *stipulation pour autrui*, there is no implied duty to restore the surface. Grace Ranch does not have a right of action to sue for pre-acquisition damages based upon the legal principles governing limited personal servitudes and usufructs.

General Farms, the immediate past land and lease owner was a dissolved corporation at the time of the request for assignment of rights and incapable of assigning claims to Grace Ranch. And other previous owners did not assign rights until 2013, two years after original petition. Therefore, not exigible at the time of the original petition and cannot relate back.

Affirmed. The trial court's judgment granting the motions for summary judgment in favor of defendants and the exception of no right of action in favor of one of the defendants is affirmed.

LEGAL INTEREST

***Williams v. SIF Consultants of La., Inc.*, 17-694 (La.App. 3 Cir. 4/4/18), ___ So.3d ___ (Panel: Conery, Judge writing; Cooks, Amy, dissents and assigns reasons, Gremillion, dissents for reasons by Amy, and writes separately, and Keaty, Judges).**

Homeland Insurance Company of New York (Homeland) appealed the judgment of the trial court awarding legal interest to a plaintiff class, represented by George Raymond Williams, M.D., Orthopaedic Surgery, A Professional Medical L.L.C. in an action against, among other defendants, its insured CorVel Corporation (CorVel). The trial court's judgment awarded legal interest from December 22, 2006, the date the plaintiff class demanded arbitration in federal court against CorVel. Homeland claimed that legal interest was only owed from March 21, 2011, the date suit was filed in state court by the plaintiff class naming CorVel as a defendant and its insurer, Homeland, as a direct-action defendant.

Affirmed. The majority of the panel found that it was undisputed that the plaintiff class in both its demand for arbitration filed in federal court in 2006, and its state court suit, filed in 2009, amended in 2011, sought and prayed for legal interest. A prior opinion of this court in *Williams v. SIF Consultants of La. Inc*, 16-343 (La.App 3 Cir 12/29/16), 209 So.3d 903, *writ denied*, 17-39 (La. 4/13/17), 218 So.3d 629 (*Williams II*), specifically found that the December 22, 2006 arbitration claim constituted the first filed claim against CorVel. CorVel timely and properly reported the arbitration claim to its insurer Homeland, which triggered Homeland's 2006-2007 claims-made policy coverage of ten-million dollars on behalf of CorVel. Thus, pursuant to La.Civ.Code art. 2000 the maximum amount owed in legal interest on Homeland's ten-million-dollar policy was ascertainable in 2006, and therefore could be recovered by the plaintiff class "without having to prove any loss." The majority panel further found the 2007-2008 claims- made policy issued to CorVel by Homeland contained policy provisions that required Homeland to pay "prejudgment interest" as a "Loss." Therefore, Homeland was contractually bound to pay any prejudgment interest owed by CorVel regardless of whether it was required or allowed by law. Accordingly, Homeland was required to pay the plaintiff class the additional amount of legal interest which began to accrue on December 22, 2006, when the plaintiff class demanded arbitration in federal court against CorVel.

LEGAL MALPRACTICE

***Cupit v. Twin City Fire Ins. Co.*, 17-918 (La.App. 3 Cir. 3/14/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

In this legal malpractice case, the plaintiff, Shawn M. Cupit, appealed the trial court's granting of summary judgment in favor of the defendants, Roger G. Burgess and Baggett, McCall, Burgess, Watson & Gaughan, LLC (Baggett McCall), and attorney Joseph B. Moffett and his insurer, Twin City Fire Insurance Company.

The underlying case arose when Mr. Cupit's mother climbed out of a window at night while a patient at Professional Rehabilitation Hospital, LLC (PRH) in Concordia Parish, where she was hospitalized for wound care of a burned foot that had become gangrenous. Outside the facility, Ms. Cupit was struck and killed by a drunk driver on a nearby highway.

As Mississippi residents, Mr. Cupit and his father[2] hired Mr. Moffett, a Mississippi attorney, to bring wrongful death claims against the driver and the hospital. Mr. Moffett associated Roger Burgess and Baggett McCall to handle the Louisiana claims. The suit was ultimately abandoned and dismissed by the trial court. Following the dismissal, Mr. Cupit sued the attorneys for legal malpractice.

Affirmed. After a de novo review, finding no issue of material fact or law, we affirmed the trial court's grant of summary judgment in favor of the defendant attorneys.

The evidence revealed that the attorneys had investigated the case and obtained an expert medical opinion from Dr. Richard Williams, in addition to the medical review conducted by three panel physicians, all finding that the hospital had not breached the standard of care by failing to secure Ms. Cupit with a bed/chair alarm. Mr. Cupit's expert, a nurse-practitioner, opined that Ms. Cupit was at a high risk for falls, but Ms. Cupit did not fall. She climbed out of a window and was struck on the highway. Under the circumstances we found no duty on the part of PRH to protect Ms. Cupit against the risk involved. S*ee Smith v. State, through Dep't of Health & Human Res. Admin.*, 523 So.2d 815 (La.1988).

The record further revealed that Mr. Cupit's expert worked at an outpatient facility for homeless veterans, and she did not have any training or experience at a long-term, acute-care facility such as PRH. Nor did the expert give an opinion on causation. We found that the trial court did not err in finding that the nurse-practitioner in this case did not qualify as an expert on causation under La.Code Evid. art. 702.

Regarding other arguments of Mr. Cupit, we further found that Dr. Williams's opinion, attached to the affidavit of the attorney, was not an unsworn or unverified document under *Bunge*

[2]The claims of Mr. James Cupit were subsequently dismissed from the suit.

North America, Inc. v. Bd. of Com. & Ind. and La. Dept. of Eco. Dev., 07-1746, p. 24 (La.App. 1 Cir. 5/2/08), 991 So.2d 511, 527, *writ denied*, 08-1594 (La. 11/21/08), 996 So.2d 1106. We also found that the doctor's opinion letter fell under the hearsay exception of La.Code Evid. art. 804(B)(6). It was trustworthy, as it had been written in 2010, and Dr. Williams was unavailable, having passed away in 2016, a year before the motion for summary judgment was filed.

LOUISIANA ANTI-DRAM SHOP STATUTE

***Zaunbrecher v. Martin*, 17-932 (La.App. 3 Cir. 03/21/18), ___ So.3d ___ (Panel: Conery, Judge writing; Cooks, concurs and assigns reasons, and Kyzar, Judges).**

Supervisory writs were sought by Marissa Martin, Jeremy Ponthier and Nathan Ponthieux from the denial of their summary judgment based on the statutory immunity provided by La.R.S. 9:2800.1, the Louisiana Anti-Dram Shop Statute. The three individuals were employed by the Tunica-Biloxi Gaming Authority, d/b/a/ Paragon Casino Resort (Paragon). Ms. Martin, a bartender, and Mr. Ponthier and Mr. Ponthieux, security guards, were working at the Paragon the evening Mr. Leo J. David was a patron. After spending approximately twelve hours at the Paragon, in the early morning hours of the following morning, Mr. David was involved in a head on collision with plaintiff, Zachary Zaunbrecher's father, Michael. Both Mr. Zaunbrecher and Mr. David were killed in the accident. Plaintiff claimed that Ms. Martin negligently overserved an already intoxicated Mr. David, and that Mr. Ponthier and Mr. Ponthieux failed to take steps to prevent Mr. David from leaving the Paragon in an obviously intoxicated condition. Prior to the filing of the employee defendants' summary judgment, Paragon had been dismissed from the litigation based on the sovereign immunity of the Tunica-Biloxi tribe.

Writs Granted and Made Peremptory. We found that La.R.S. 9:2800.1(A) clearly provided that the "consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person." We further found that La.R.S. 9:2800.1(B) also provided that "no person holding a permit," in this case Paragon, "nor any agent, servant, or employee of such person, who sells intoxicating beverages … to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served." Therefore, Ms. Martin, as a bartender and an employee of Paragon, the holder of the permit under La.R.S. 9:2800.1(B) clearly had statutory immunity. Although the two security guards, Mr. Ponthier and Mr. Ponthieux, did not directly serve alcohol to Mr. David, as "agent[s], servant[s], or employee[s]" of the permit holder Paragon, they were also entitled to statutory immunity provided under the Louisiana Anti-Dram Shop Statute. The opinion provides an analysis of the legislative history and jurisprudence interpreting La.R.S. 9:2800.1.

MEDICAL MALPRACTICE

***Ogbebor v. Lafayette Gen Med. Ctr.* 18-296 (La.App. 3 Cir. 8/1/18), ___ So.3d ___ (Gremillion, Judge, writing, with Judges Conery and Kyzar):**

In this medical malpractice case, two doctors sought supervisory writs from the trial court's decision to grant a new trial to the plaintiff, whose wife succumbed to a heart condition the day after undergoing a procedure to place an aortic balloon pump. Plaintiff first retained one expert but came to believe that her testimony would not be admitted under *Daubert*. He then sought another expert. After the medical review panel found that the defendants did not breach the standard of care, the doctors filed motions for summary judgment. In his opposition, plaintiff sought to introduce a letter from his new expert, which the trial court did not consider. Following the trial court's grant of summary judgment, plaintiff filed a motion for new trial, in which he asserted that he was unable to procure an affidavit from his new expert because there "was a national disaster," "so much of [a] national event, everyone in the country knows about it." This was the only identification of this unprecedented natural disaster given by the plaintiff in brief or at the hearing. The trial court granted the new trial, finding Dr. Korn's affidavit "to be new evidence and that it was beyond [Mr. Ogbebor's] control . . . to provide that." Given that the plaintiff in no way explained what disaster prevented him from obtaining his affidavit nor how such a disaster prevented him from obtaining the affidavit, we granted writs and reversed the trial court. The burden of proving that one is entitled to a new trial firmly rests with the mover.

***Hanagriff v. Preferred Professional Ins. Co.*, 17-1039 (La.App. 3 Cir. 4/18/18) ___ So.3d ___(Saunders, J., writing; Thibodeaux, U.; Kyzar, V.)**

This is a case involving a medical malpractice action. Plaintiff instituted an action against her physician and the physician's professional liability insurance carrier (collectively "Defendants"), alleging that Defendants breached the applicable standard of care in the care and treatment of Plaintiff.

This case came before a jury, which rendered a verdict adverse to Plaintiff. Plaintiff filed a Motion for Judgment Notwithstanding the Verdict, Or in the Alternative, Motion for New Trial pursuant to La.Code Civ.P. art. 1811. The trial court denied Plaintiff's motion, as Plaintiff failed to carry the three-prong burden of proof to establish that Defendant violated the applicable standard of care pursuant to La.R.S. 9:2794.

Affirmed. The court found that pursuant to Louisiana Revised Statutes 9:2794, the jury correctly concluded that Plaintiff failed to carry the three-prong burden of proof: (1) to establish the standard of care ordinarily practiced by physicians within the specialty of dermatology; (2) a violation by the physician of that standard of care; and (3) a causal connection between the physician's negligence and Plaintiff's alleged injuries. The court ruled that "The rigorous standard for granting a motion for JNOV is based on the principle that "[w]hen there is a jury, the jury is the trier of fact." A motion for JNOV should be granted only when the evidence points so strongly

in favor of the moving party such that reasonable men could not reach different conclusions. The jury was reasonable in its determination as the contemporaneous medical charting and witness testimonies reveal that Defendant did not violate the applicable standard of care.

***Thomas v. Drew*, 17-818 (La.App. 3 Cir. 3/7/18), __So.3d__(Ezell, J.; Savoie, J., Cooks, J., concurs and assigns written reasons)**

Dr. Otis Drew performed an outpatient procedure on Justin Thomas's right shoulder at Lafayette Surgicare. Mr. Thomas was eighteen years old at the time. Following the procedure, Mr. Thomas was released into the care of his parents.

Later that evening at 7:48 p.m., an ambulance was called to the Thomas home because Mr. Thomas was unconscious. The ambulance records indicate that Mr. Thomas's mom had given one Oxycodone. He was given Narcan but did not respond. He was intubated through his nose and transferred to the emergency room. According to the petition, Mr. Thomas fell into a coma for five days following his release and lost the use of his left side. A medical review panel opinion rendered on May 26, 2016, found that "[a]ll parties involved met the standard of care."

On August 26, 2016, Mr. Thomas filed suit against Dr. Drew. He also sued the anesthesiologist, Lafayette Surgicare, Lafayette Surgery Center, and The Regions Health System of Acadiana. Mr. Thomas claims the surgery and post-surgical care required extensive anesthesia and heavy narcotic medication. He claims that he was released too early following his surgery and went into a coma for five days causing a brain injury.

Dr. Drew filed a motion for summary judgment on February 15, 2017. A hearing on the motion was held on May 15, 2017. The trial court granted Dr. Drew's motion and dismissed all of Mr. Thomas's claims against Dr. Drew. Mr. Thomas then filed the present appeal.

Affirmed. Mr. Thomas claims that Dr. Drew failed to follow the proper procedural requirements for objecting to the admissibility of the opinion of his expert, Dr. Albert Gros, an anesthesiologist and pain management physician. Dr. Gros opined that "[t]he patient was not monitored long enough prior to discharge from the Recovery Room at Lafayette Surgery Center." Dr. Drew argued that Dr. Gros was not qualified to render an opinion on whether or not Dr. Drew breached the standard of care of an orthopedic surgeon in his treatment of Mr. Thomas.

Dr. Drew did challenge the qualification of Dr. Gros in objection to the affidavit in his reply memorandum as required by La.Code Civ.P. art. 966(D)(2) which provides that "[a]ny objection to a document shall be raised in a timely filed opposition or reply memorandum."

We did agree with Mr. Thomas that the *Daubert* standards should be considered by the trial court in determining whether the expert is qualified to render an opinion. However, the record indicated that the trial court conducted a *Daubert* analysis regarding Dr. Gros's qualifications "as

an expert witness on the issue of whether the physician departed from accepted standards of medical care." La.R.S. 9:2794(D)(1).

We also agreed with Mr. Thomas that an expert in orthopedic surgery was not required because Mr. Thomas argued that the malpractice occurred in his post-operative care and release and the alleged malpractice did not involve any issue peculiar to orthopedic surgery. However, summary judgment was appropriate because affidavits that are conclusory with no supporting underlying facts are legally insufficient to defeat a motion for summary judgment. Dr. Gros never stated what standard of care was owed to Mr. Thomas by Dr. Drew post-operatively or that Dr. Drew breached any standard of care at all in his care of Mr. Thomas.

***Brenner v. Lewis*, (Saunders, J., writing: Cooks, S.; Perret, C.) 17-585 (La.App. 3 Cir. ___/___/___) ___ So.3d ___.**

This case involves a medical malpractice action. Plaintiffs instituted action against a family member's primary care physician, his insurance carrier, the hospital, its insurance carrier, and the Louisiana Patient's Compensation funds for various acts of negligence arising out of the failure to treat an alleged diagnosis of "sepsis" that resulted in their family member's death shortly after her discharge.

The defendants moved for summary judgment pursuant to La.Code Civ. P. art. 966, seeking to have the plaintiffs' petition against them dismissed. The trial court granted the Defendant's motion noting that the evidence presented by plaintiffs was insufficient to prove medical malpractice by a preponderance of the evidence, pursuant to La.R.S. 9:2794(A).

Affirmed. The court found no abuse of discretion afforded the trial court in granting Defendant's motion for summary judgment, as Plaintiffs failed to establish that the primary care physician breached the standard of care in diagnosing the patient with "sepsis" and failing to treat her accordingly. The court found that the evidence confirmed that the primary care physician made a differential diagnosis in which sepsis was one of several possible diagnoses that was subsequently ruled out when the patient displayed no signs of being septic during admit, throughout her hospital stay, or upon discharge.

NEGLIGENCE

***Billeaudeau v. Opelousas General Hospital Authority*, 17-893 (La.App. 3 Cir. 4/11/18), __ So.3d __ (Kyzar, J writes):**

Following a prior decision holding that a negligent credentialing claim sounded in general negligence rather than medical malpractice, the insurance company filed a motion for summary judgment, arguing that its general liability policy did not provide coverage for losses sustained as a result of the negligent credentialing claims against the hospital based on the actions of the nurse

practitioner at the center of this suit. The trial court granted the insurance company's motion, after which the plaintiffs and the hospital both appealed.

Affirmed. On appeal, the court affirmed the trial court's judgment granting summary judgment in favor of the insurance company, finding that the insurance company's general liability policy clearly excluded from coverage any action of the hospital's formal accreditation, credentialing, and standards review board or committee for negligently credentialing a physician for privileges at the hospital. This was based on a policy exclusion, which excluded coverage for bodily injury resulting from the performance or failure to perform healthcare professional services, which included the work of the hospital's formal accreditation board or committee while evaluating the professional qualifications of a provider of health care professional services. The court found no merit in the plaintiffs' claim that other employees of the hospital, who were not members of the Credentials Committee, were negligent in the information gathering, background, and discovery process that took place prior to the Credentials Committee's approval of the nurse practitioner's request for privileges in the hospital's emergency department. The court held that although these employees may have been responsible for gathering information in regards to the applicant's request for privileges, it was clearly the responsibility of the Credentials Committee to review the application, reports, and all materials and to make a recommendation to the hospital's board as to whether privileges should be granted to her.

With regards to the hospital's appeal, the court found no merit in its argument that trial court's grant of summary judgment in favor of the insurance company violated public policy because it "would not only deprive the insured of the coverage it believe was procured, but it would also deprive the allegedly injured party of a means by which to recover on any negligent acts or omissions." The court stated that while not unmindful of the dilemma created by the change in the law pertaining to negligent credentialing during the pendency of this suit, that did not alter the analysis controlling its determination of whether the insurance company covered negligent credentialing.

***Billeaudeau v. Opelousas General Hospital Authority*, 17-894 (La.App. 3 Cir. 4/18/18), __ So.3d __ (Kyzar, J. writes):**

Following a prior decision holding that a negligent credentialing claim sounded in general negligence rather than medical malpractice, an insurance company moved for summary judgment, arguing that the insurance policy it issued to the hospital did not provide coverage for negligent credentialing because it was not provided timely notice of the plaintiffs' claims, that the insurance policy excluded coverage for incidents arising from bodily injury, and because it did not provide coverage for any claim covered by and noticed under any policy that its policy succeeded in time. The trial court granted summary judgment in favor of the insurance company. Thereafter, appeals were filed by the plaintiffs, the hospital, and a second insurance company.

Reversed; Rendered; And Remanded. On appeal, the court held that as the insurance policy at issue was a claims-made and reported policy, it is the claim first made against the hospital

and then reported to the insurance company that determines whether it received timely notice of the claim for coverage purposes. Here, based on the prior ruling that negligent credentialing claims sounded in general negligence, rather than medical malpractice, the general negligence claim was not cognizable by the hospital until the ruling holding as such was rendered. Here, the claim was reported to the insurance company by the hospital within eight days of it learning of the claim. Thus, the claim was first made and then reported to the insurance company within the time provided by the insurance company's policy. Thus, the judgment of the trial court was reversed on this issue.

With regard to the exclusion for bodily injury, which was defined as "physical injury, sickness or disease (other than emotional distress or mental anguish), including death resulting therefrom[,]" the court held that the insurance policy excluded coverage for damages resulting from physical injuries or illness, including death, but did not provide coverage for mental anguish and emotional distress arising from the actions of the hospital and its employees. Thus the court reversed the judgment with regard to the exclusion of coverage for claims arising from mental anguish and emotional distress, but rendered judgment, in part, finding that the policy excluded coverage from damages arising from the physical injuries suffered by the plaintiff.

The court further held that coverage under the insurance policy was not excluded because this policy was not a successor policy to the policy issued by another insurance company, since its policy did not and was not intended to cover the same liability as the other insurance company's policy.

***Billeaudeau v. Opelousas General Hospital Authority*, 17-895 (La.App. 3 Cir. 4/18/18), __ So.3d __ (Kyzar, J. writes):**

Following a prior decision holding that a negligent credentialing claim sounded in general negligence rather than medical malpractice, the hospital moved for a partial summary judgment, asking the trial court to require the jury to allocate the percentage of fault of each party and to further assign a particular percentage of fault for both theories of liability asserted against the hospital: medical malpractice and negligent credentialing. Following a hearing on the matter, the trial court granted partial summary judgment in favor of the hospital. The plaintiffs appealed from this judgment.

Affirmed. On appeal, the court affirmed the trial court's judgment. It stated that in most cases, the breakdown of a particular actor's fault by percentage, based upon the asserted theories of liability against that party is unimportant to the overall recovery of the injured or damaged party. Here, it is extremely important given that the damages recoverable for one theory of liability, medical malpractice, is subject to a certain damage cap imposed by the MMA, while the other theory of recovery, negligent credentialing, is subject to either a different damage cap or no cap at all, depending on whether the hospital is a private or public healthcare provider. The court held that the comparative fault statute does not provide the method for which liability is to be apportioned, but that this does not render the law invalid or unenforceable. It further held that

while it provides for the apportionment of fault by percentage among the parties, it does not prohibit the further breakdown of a percentage of fault of one party to account for different theories of liability. The court further stated that factfinders often review and determine multiple theories of liability in rendering verdicts against liable parties and that the logical extension of this function is to assess the percentage of fault assigned to a single tortfeasor as per each theory of fault in appropriate cases. The court held that it was within the wide discretion afforded trial courts "in determining and framing questions to be posed as special jury interrogatories."

PRESCRIPTION

***Randy LeBlanc v. Fred Thibodeaux, et al.,* 18-96 (La.App. 3 Cir. 9/26/18**), **___So.3d ___, (Panel: Thibodeaux, Chief Judge writing; Keaty and Perret, Judges).**

The plaintiff, Randy LeBlanc, appeals the judgment of the trial court granting an exception of prescription in favor of the defendants, Fred and Virginia Thibodeaux (Thibodeaux), in a dispute over an aborted business deal. Mr. LeBlanc alleges a ten-year prescription based on breach of contract, detrimental reliance, and unjust enrichment, while Thibodeaux asserts a liberative prescription of three years arguing a claim for money owed.

Affirmed. Finding no manifest error in the trial court's judgment, we affirmed.

Between February and May 2009, LeBlanc and Thibodeaux discussed the sale of Thibodeaux's windshield business to LeBlanc. No contract was ever written or signed by the parties. During that three-month period, however, LeBlanc asked and was given permission to build offices in Thibodeaux's building. Ultimately, the negotiations on the sale of the business fell through. Thibodeaux said he would pay the expenses that LeBlanc incurred in remodeling the building, which LeBlanc invoiced at roughly $14,000. The parties fell into a dispute, and the money never changed hands. Over five years later, LeBlanc sued Thibodeaux on the invoice.

We found that no contract existed under La.Civ.Code arts. 1906, 1927, 1832, or 2440, regarding the sale of the building because contracts to purchase immovable property must be in writing.

We further found that LeBlanc's action was an action for money owed prescribing in three years under La.Civ.Code art. 3494, which is an exception to the residual rule of ten years prescription under La.Civ.Code art. 3499.

We also found that LeBlanc did not prove a claim for detrimental reliance under La.Civ.Code art. 1967 because he did not prove a promise to sell the property; and because reliance upon a gratuitous promise without required formalities is not reasonable.

Finally, we found that LeBlanc did not have a claim for unjust enrichment under La.Civ.Code art. 2298 because this remedy is subsidiary in nature and not available where the law provides another remedy. A plaintiff's failure to timely pursue another remedy does not entitle the plaintiff to recover under the theory of unjust enrichment. *See Walters v. MedSouth Record Mgmt.*, 10-353 (La. 6/4/10), 38 So.3d 243.

***Baxter v. Lewis*, 18-72 (La.App. 3 Cir. 6/6/18). __ So.3d __ (Panel: Gremillion, Judge writing: Saunders and Ezell, Judges.)**

The independent administrator of a succession appealed the trial court's judgment sustaining an exception of prescription and dismissing its petition.

Affirmed. The deceased's third wife obtained power of attorney over his affairs. However, one day prior to her death, her son, the defendant and the deceased's step-son, obtained power of attorney over the deceased's affairs. Defendant had the deceased interdicted. The sons of the deceased file a petition to annul the deceased's testament arguing that he lacked testamentary capacity. The trial court agreed and declared the will and codicils null. The plaintiff was appointed independent administrator in April 2014. In April 2017, plaintiff file a petition against defendant for breach of fiduciary duty arguing that a prescriptive period of ten years applied and that contra non valentem applied to suspend prescription until April 2020. Defendant's exception of prescription was granted.

We affirmed the trial court's judgment. The ten-year prescriptive period applied as the claims asserted were not mere negligence but breach of the duty of loyalty and trust. Plaintiff's petition alleged breaches as early as 2002, but plaintiff argued that under contra non valentem he could not bring suit because he was not appointed administrator until April 2010.

We disagreed. The deceased died in 2005 and plaintiff was well aware of the claims existing at that time. He had recourse against defendant for breaches of fiduciary duty regardless of whether he was appointed succession administrator because he was a legal heir and a relative of the interdict with standing to petition the court for removal of a curator for breach of a fiduciary duty. *See* La.Civ.Code art. 1926; La.R.S. 9:1025.

***Nickel v. Ford Motor Co.*, 17-978 (La.App. 3 Cir. 5/23/18), __ So.3d __ (Panel: Gremillion, Judge writing: Keaty and Savoie, Judges.)**

Ford Motor Company and Bolton Ford appealed the trial court's judgment awarding the plaintiff, an attorney, over $140,000 for claims in redhibition relating to the purchase of a $37,000 Ford Flex.

Reversed. Plaintiff's claim was prescribed. Pursuant to La.Civ.Code art. 2534, plaintiff had one year to file a claim unless prescription was interrupted by the tender of the vehicle for repair. The trial court erred in finding that reasonable people could conclude that plaintiff tendered

his vehicle for repair during a two-year period when no records were generated by any dealership and no other evidence proving that fact was admitted. Plaintiff, who was friends with the car dealership owner, claimed that he brought the car in several times but because he was friends with the owner, no records were generated. However, the dealership owner/friend sold the dealership a few months after the purchase and did not testify that plaintiff brought the vehicle to any other dealership he owned. Moreover, the times he did bring the vehicle in before the sale, records were generated regardless of the friendship.

Additionally, the trial court found a local dealership, Bolton Ford, negligently repaired the vehicle. This was manifest error as well considering that the dealership provided no repair because plaintiff refused to pay for it and plaintiff effectively abandoned his vehicle at the dealership.

On a side note, this Ford Flex was the debut model and it did experience problems syncing Apple devices and Microsoft software. Also, plaintiff incurred over $9,000 worth of damage to the car about a month after he purchased it which Ford's expert believed to be the cause of its ongoing problems because of a wiring harness problem. During the two-year period during which no records were generated plaintiff drove the vehicle nearly 70,000 miles.

PROCEDURE

***J. Boone Development, LLC v. Milton Water System, Inc., et al.*, 18-0099 (La.App. 3 Cir. 6/6/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Amy and Pickett, Judges).**

Plaintiff, J. Boone Development, LLC (Boone), brought suit against Milton Water System, Inc. (MWS), Lafayette City-Parish Consolidated Government (LCG), and William Theriot (Theriot), alleging multiple causes of action in response to a dispute involving a Wholesale Water Agreement between LCG and MWS. LCG filed its peremptory exception of no cause of action or, in the alternative, no right of action. Boone subsequently amended its petition to further allege its causes of action against LCG, prompting LCG to amend its exception in response thereto. After a hearing, the trial court granted the exception, dismissing Boone's claims against LCG with prejudice.

Affirmed. Reviewing the petitions and the exhibits attached thereto in a light most favorable to the plaintiff and resolving every doubt in its favor to determine whether the petitions state any valid cause of action for relief against LCG, we found no valid cause of action had been pled against LCG as the petitions failed to allege facts sufficient to (1) connect any alleged actions taken by LCG to the damages or takings allegedly sustained by Boone, or (2) bind LCG for the alleged omissions or actions taken by MWS and/or Theriot. We further found that the facts alleged and the contracts incorporated into the petitions did not demonstrate any contractual obligations owed by LCG to Boone under any theory advanced by Boone. Although Boone challenged the trial court's refusal to allow further amendment to the petition, we noted that Boone had already filed an eighty-two-page amended petition to his original sixty-two-page petition and yet had still

failed to plead sufficient facts to state a cause of action against LCG. Concluding that the grounds of the objection raised through the exception could not be removed by further amendment, we affirmed the trial court's judgment granting the exception and dismissing Boone's claims against LCG with prejudice.

***Palermo v. Century Indemnity Co., et al*, 17-825 (La.App. 3 Cir. 5/23/18), __ So.3d __ (Panel: Kyzar, Judge writing; Keaty and Conery, Judges).**

Certain Underwriters at Lloyd's, London (Certain Underwriters) appealed the granting of peremptory exceptions of res judicata dismissing its third-party demands seeking contribution against a number of entities, all collectively referred to as Appellees. The issue on appeal was whether the trial court erred in granting Appellees' exceptions of res judicata, based upon a finding that La.R.S. 13:4231, et seq., barred Certain Underwriters from filing a second third-party demand in the same proceeding where the court had previously entered a final judgment dismissing Certain Underwriters' third-party action without prejudice.

Reversed. After a de novo review of the res judicata effect of a prior judgment, we found the trial court erred in finding that a dismissal without prejudice barred Certain Underwriters from re-filing its third-party demands in the same proceeding when the underlying matter was still ongoing. After being sued, Certain Underwriters filed third-party demands, asserting incidental actions seeking contribution against Appellees. A number of Appellees filed exceptions of improper service of process, insufficiency of citation, and lack of jurisdiction to Certain Underwriters' original petition, which were sustained by the trial court. After Certain Underwriters failed to re-serve the parties within the time specified by the trial court, it ordered the dismissal of Certain Underwriters' third-party demands without prejudice, pursuant to La.Code Civ.P. art. 932(B). Five months later, Certain Underwriters filed a second third-party demand naming Appellees, among others, to which the trial court maintained the Appellees' exceptions of res judicata.

We found that Certain Underwriters substantive rights had not actually been previously addressed or resolved, and as such, the concept of res judicata should have been rejected. The trial court and Appellees relied on the holding in *Johnson v. University Medical Center in Lafayette*, 13-40 (La. 3/15/13), 109 So.3d 347, for the proposition that the dismissal of the third-party demands of Certain Underwriters, without prejudice and designated as a final judgment, has res judicata effect barring the refiling of the demands. We found the trial court misconstrued the holding in *Johnson*, which dealt with a claim that was dismissed without prejudice that was then re-filed in the same suit even though the main demand had already been dismissed, and found the facts of *Johnson* dramatically different than the facts at hand, where the plaintiff's main demand is still pending.

We found that the dismissal without prejudice of Certain Underwriters' third-party demands was based on procedural grounds rather than substantive ones. Therefore, we found no legal impediment to the re-filing of the third-party demands in the still pending main demand of

the plaintiffs at hand. Where the main demand in the suit is still pending, a judgment of dismissal without prejudice does not preclude the re-filing of the dismissed claims in the original suit. Therefore, we found it would constitute an unnecessary and useless act to require Certain Underwriters to file a new, separate suit to assert its still viable third-party demands, and we, accordingly, reversed the rulings of the trial court.

***Jacueline Gaspard v. Horace Mann Insurance Company*, 17-1140 (La.App. 3 Cir. 5/9/18), __ So.3d ___. (Pickett, J.) Panel: Pickett, Saunders, Gremillion.**

In August 2012, the plaintiff was involved in a rear-end collision. She had been in a prior automobile accident in May 2008. After settling her claims with the tortfeasor and his insurer, the plaintiff filed a claim against her uninsured/underinsured insurer. The matter proceeded to trial, and the trial court determined that the 2012 accident aggravated injuries she suffered in the 2008 accident, that the aggravation resolved in February 2013, and that the damages she suffered from the aggravation were less than the limits of the tortfeasor's insurance policy. She appealed and assigned numerous errors with the trial court proceeding: the grant of a motion to strike her request for a jury trial, the trial judge's failure to self-recuse; the denial of a motion for new trial without holding a hearing; the finding that most of the damages she proved were not caused by the accident; the awards for general damages and lost earning capacity were too low, and the denial of her claims for penalties and attorney fee.

Affirmed. The plaintiff waived her right to a jury trial when she failed to timely post a jury bond after her insurer failed to post a jury bond in accordance with the trial court's order on its motion for a jury trial, La.Code Civ.P. art. 1734.1(A), and proceeded to trial without seeking review of the trial court's recission of its order allowing her to post a bond. The plaintiff's complaint that the trial judge should have self-recused himself came too late because it was raised in her motion for new trial. Moreover, the record contains no objective evidence that the trial court was biased or impartial against her. After her 2008 accident, the plaintiff regularly sought treatment for complaints with pain in her neck left shoulder, and left arm. After the 2012 accident, she complained of increased pain in those same areas. Review of her treating chiropractor's records showed that as of February 2013, her complaints were essentially the same as they were in June 2012. The trial court did not err in finding that the plaintiff proved only a six-month aggravation of her pre-existing condition, in not awarding more general and special damages, in not awarding damages for lost earning capacity, and in dismissing the plaintiff's claim for penalties and attorney fees.

***Michael Neal Rollins v. State, Dep't of Public Safety and Corrections, et al.*, 17-901 (La.App. 3 Cir. 02/28/18), ___ So.3d ___ (Panel: Perret, Judge writing; Amy and Gremillion, Judges).**

The plaintiff filed this matter in September 2009, alleging that he sustained injury while in custody at the Iberia Parish Jail. The State filed an ex parte motion to dismiss on grounds of abandonment on January 25, 2017, alleging that the last step in the prosecution of the matter was a January 14, 2014 memo in opposition to the plaintiff's motion to compel. The trial court granted

the motion, dismissing the matter and, subsequently, denied the plaintiff's motion to set aside the dismissal. By that latter ruling, the trial court observed that, although the plaintiff promulgated discovery requests within the subject time period, it did not serve those requests on one of the parties. Therefore, the trial court maintained the dismissal, citing La.Code Civ.P. art. 561(B). The plaintiff appealed.

Affirmed. We affirmed the trial court's ruling finding that La.Code Civ.P. art. 561(B), specifically provides formal discovery authorized by the Code of Civil Procedure, "and served on all parties whether or not filed of record," constitutes a step in the prosecution of an action citing jurisprudence explaining both the self-operative nature of Article 561 and the necessity of service of discovery on all parties, not only the party that is the subject of the discovery request.

The issue before this court in *Giglio* was whether plaintiffs' request for the issuance of a subpoena duces tecum on a third party constituted a step in the prosecution to interrupt the running of abandonment when it was filed in the record but not served on opposing counsel. This court ruled that the matter was abandoned based on the fact that the letter requesting the issuance of a subpoena was properly classified as a discovery request and that "Article 561(B) requires that for a discovery request to interrupt prescription, it must be served on all parties." *Giglio*, 227 So.3d 856.

The Louisiana Supreme Court in Guillory v. Pelican Real Estate, Inc., 14-1539, 14-1593, 14-1624 (La. 3/17/15), 165 So.3d 875, also cited to La.Code Civ.P. art. 561(B) for its holding that discovery not served on all parties failed to constitute a step sufficient to interrupt the abandonment period. Specifically, the supreme court stated: "[t]he record . . . indicates that on December 17, 2012, plaintiffs sent discovery to Pelican only. It is undisputed this discovery was not served on all parties. Therefore, under the plain language of La.Code Civ. P. art. 561(B), this discovery does not constitute a step in the prosecution of the action." *Id*. at 877.

Although Plaintiff argues that the Motion to Set Aside the Dismissal should have been granted once the State of Louisiana withdrew the affidavit of Julius Grubbs, Jr., that supported its Motion to Dismiss on Grounds of Abandonment, we find no merit to this argument. The Louisiana Supreme Court in *Clark v. State Farm Mut. Auto. Ins. Co*., 00-3010, p. 6 (La. 5/15/01), 785 So.2d 779, 784 specifically held that "[a]rticle 561 provides that abandonment is self-executing; it occurs automatically upon the passing of three-years without a step being taken by either party, and it is effective without court order." Therefore, we find that abandonment occurred automatically in January 2017, when no steps had been taken in the prosecution of this matter in over three years.

***A.M.C., et al v. James D. Caldwell, et al,* 17-628 (La. App. 3 Cir. 02/15/18), __ So.3d __ (Panel: Ezell, Judge writing, Kyzar and Perret, Judges).**

The essential issue in this same-sex, intrafamily adoption case is whether attorney fees and costs were properly awarded following remand of the case to the district court from the supreme court. On appeal, Defendants ask for judgments rendered on July 10, 2015 and July 25, 2016 to

be annulled and for a reversal of the award of attorney fees and costs, and also claim the district court erred in failing to grant the Attorney General's exception of no cause of action.

We vacated and set aside both the July 10, 2015 and the July 25, 2015 judgments and sustained exceptions of res judicata and no cause of action.

The same-sex couple in the case were validly married in California in 2008. In 2013, Plaintiffs filed a petition for intrafamily adoption in juvenile court, asking that the child's stepmother be allowed to adopt. The adoption was granted on January 27, 2014, though the case was remanded since the Attorney General was not notified of the hearing after appearing and requesting notice. Following remand, Plaintiffs added the Attorney General, the Governor, the Secretary of the Louisiana Department of Revenue, and the Louisiana State Registrar as defendants in supplemental and amending petitions, and added a claim pursuant to 42 U.S.C. § 1983. The Governor and Attorney General both filed exceptions of no cause of action, though only the Governor's was granted.

A judgment was signed on September 24, 2012, declaring Louisiana Constitution Article XII, § 15, the Defense of Marriage Act, and La.Civ.Code arts. 86, 89, and 3520(B) unconstitutional, finding these laws violated the Due Process and Equal Protection Clauses of U.S. Const. amend. XIV and the Full Faith and Credit provision found in U.S. Const. art. IV, § 1. The district court further ruled that Louisiana's Revenue Bulletin No. 13-024 (9/13/13) was unconstitutional and ordered the Secretary of the Department of Revenue to allow the Plaintiffs to file their state tax returns as a couple whose marriage is valid and recognized in Louisiana. The adoption was reaffirmed in a separate judgment. Defendants appealed to the Louisiana Supreme Court, which ruled that the Plaintiffs had received all the relief they requested based upon recent supreme court rulings, and dismissed the Defendants' appeal as moot, remanding the case for further proceedings.

A judgment was prepared by Plaintiffs reiterating the provisions from the previous two judgments, but also awarding costs, expenses, and reasonable attorney fees, which was signed on July 10, 2015 following a hearing on the amount of attorney fees. Defendants filed a motion to annul and another hearing was held on May 9, 2016 before a pro tem judge, who denied Plaintiffs' request for attorney fees and costs and affirmed the remainder of the July 10, 2015 judgment. The same month, the district judge originally assigned the case signed a judgment dismissing Plaintiffs' claims as moot, reinstating the previous order of September 24, 2012, and ordered the parties to file motions regarding attorney fees.

Plaintiffs filed a motion to amend this judgment on July 7, 2016. The district court then entered judgment on July 25, 2016, denying Plaintiffs' request for attorney fees and costs pursuant to the minute entry of the pro tem judge and vacated the judgment rendered on May 25, 2016. On July 26, 2016, Plaintiffs filed a motion for new trial. Defendants filed a petition to annul and vacate the July 25, 2016 judgment or in the alternative for a new trial. On March 20, 2017, the district court held a hearing on both of Defendants' motions to annul and vacate or for a new trial

of the July 10, 2015 and July 25, 2016 judgments. The court also considered Plaintiffs' motion for attorney fees and costs. The district court denied both of Defendants' motions and granted Plaintiffs' motion, leading to this appeal.

Defendants argued that as the case was instituted as an adoption proceeding, the district court was acting as a juvenile court and lacked jurisdiction to rule on Plaintiffs claims for declaratory and injunctive relief and for a violation of 42 U.S.C. § 1983. We found that the district court's jurisdiction was not limited even though the court was acting as a juvenile court. We found that in the absence of a specialized juvenile or family court or a statute which limits jurisdiction of district courts acting as juvenile courts, the district court had jurisdiction to decide both the adoption matter and constitutionality claims.

Defendants argued that it was procedurally improper for the district court to enter the July 25, 2016 judgment, which vacated the May 25, 2016 judgment, and therefore, it should be annulled or vacated. Defendants claimed that the Plaintiffs did not file a petition for nullity, a motion for new trial, or an appeal challenging the judgment, but simply filed a motion to amend the judgment. However, we found that the characterization of a pleading is not controlling, and courts should look to the substance of the pleadings. We further concluded that Plaintiffs' motion was actually a motion for new trial, the proper procedural vehicle. A motion for new trial, however, requires a contradictory hearing to be held, which was not done in this case. Therefore, we vacated and set aside the July 25, 2016 judgment.

Defendants claim that the July 10, 2015 judgment should be annulled because it was unnecessary for Plaintiffs to submit another judgment on remand because they received the relief they requested when the supreme court dismissed Defendants' appeal as moot. Defendants further argued that any judgment rendered subsequent to the supreme court's ruling should not have included an award for attorney fees and costs because the September 24, 2014 judgment granting Plaintiffs' motion for summary judgment awarded no such relief. Plaintiffs' motion for summary judgment filed on August 4, 2015, requested summary judgment on all issues in addition to specifically requesting attorney fees and costs. A judgment was signed by the district court on September 24, 2014, granting Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment. A number of other specific rulings were issued. No mention of attorney fees was made at the hearing, and the judgment made no mention of attorney fees. We applied the legal principle "that a demand not granted or reserved in the judgment must be considered as rejected." We found that the July 10, 2015 judgment was an attempt by the Plaintiffs to get attorney fees and costs and was unnecessary. Once the supreme court dismissed the appeal as moot, the September 24, 2014 judgment was effective and final. Therefore, we found the district court had no jurisdiction to render the July 10, 2015 judgment which awarded attorney fees and costs. We vacated and set aside the July 10, 2015 judgment.

The Defendants claimed that the trial court erred in awarding attorney fees and costs. We agreed and found that Plaintiffs' claims for attorney fees and costs are barred by res judicata under La.R.S. 13:4231. The Plaintiffs raised the issue of attorney fees and costs in their motion for

summary judgment, though no mention of this issue was raised at the hearing on the matter. The judgment did not include a reservation of the right to address the issue later, and the Plaintiffs did not appeal the failure of the trial court to address the issue when the case was appealed to the supreme court. Therefore, we sustained the peremptory exception of res judicata on the court's own motion pursuant to La.Code Civ.P. art. 927(B), and reversing the trial court judgment awarding attorney fees to the Plaintiffs.

We also sustained the Attorney General's exception of no cause of action. He was involved in this case due to challenge regarding the constitutionality of several state laws. The Attorney General is specifically granted the discretion whether to appear in a suit questioning the constitutionality of a statute. Allowing the office to be named as a party divests the Attorney General of this discretion. We reversed the district court judgment denying the Attorney General's exception of no cause of action.

PRODUCTS LIABILITY

***Matthew M. Walker v. The Manitowoc Company, Inc., et al.*, c/w *Jim Lee Hankins v. The Manitowoc Company, Inc., et al.*, 16-897, 16-898, 18-221 & 18-223 (La.App. 3 Cir. 10/10/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Keaty and Perret, Judges).**

Plaintiffs, Matthew M. Walker and Jim Lee Hankins, filed separate suits seeking damages for personal injuries they sustained as a result of a worksite accident involving the alleged failure of a Manitowoc model 888 crane (crane) to hold the load upon which Plaintiffs stood, causing Plaintiffs to drop to the ground. Through multiple amended petitions, Plaintiffs sued several defendants, including the manufacturer of the crane, the Manitowoc Company, Inc., Manitowoc Cranes, LLC, and their insurer Westchester Fire Insurance Company (collectively Manitowoc). With respect to their claims against Manitowoc, Plaintiffs alleged the crane was unreasonably dangerous because of an inadequate warning and/or defect in design or construction/composition as defined by the Louisiana Products Liability Act. Plaintiffs' employer, Bayou Welding Works, LLC, and its insurer, Allianz Global Corporate and Specialty Company (collectively Intervenors), intervened in the suit, seeking property damages and consequential losses arising from the same accident.

After the suits were consolidated, the parties filed opposing motions for summary judgment. The trial court denied Manitowoc's motion for summary judgment in which Manitowoc sought to have Plaintiffs'/Intervenors' claims dismissed on the grounds that the crane was not being used in a reasonably anticipated manner when the accident occurred or, alternatively, that Plaintiffs/Intervenors could not prove the existence of a defect that caused their damages. The trial court granted partial summary judgment in favor of Plaintiffs/Intervenors, finding that Manitowoc, as manufacturer of the crane, had breached its non-delegable duty to warn of defects in the crane. The trial court also denied Manitowoc's motion to dismiss and for sanctions due to spoliation of evidence.

Manitowoc sought supervisory writs from the judgment denying its motion for summary judgment, in docket number CW 16-897, and the judgment denying its motion for dismissal and spoliation sanctions, in docket number CW 16-898. It also appealed the judgment granting Plaintiffs'/Intervenors' motion for partial summary judgment in docket numbers CA 18-221 and CA 18-223. Upon Manitowoc's motion, we consolidated the appeals with its writs.

Reversed; Writs Denied. In light of the complex factual issues, we found that, on the record, this matter was not ripe for summary judgment on any of the claims made by the parties, namely on: (1) reasonably anticipated use; (2) unreasonably dangerous in construction or composition; (3) unreasonably dangerous due to an inadequate warning; and (4) unreasonably dangerous in design. We further found that the trial court did not abuse its vast discretion in refusing to impose spoliation sanctions as Manitowoc has not established that Plaintiffs/Intervenors intentionally destroyed the drum adaptor, which Manitowoc even conceded it inspected, at least visually, on a previous occasion. Accordingly, we reversed the trial court's judgment granting partial summary judgment on Manitowoc's duty to warn and rendered judgment denying both writs.

***Matthew M. Walker v. The Manitowoc Company, Inc., et al.*, c/w *Jim Lee Hankins v. The Manitowoc Company, Inc., et al.*, 17-1014 & 18-186 (La.App. 3 Cir. 10/10/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Keaty and Perret, Judges).**

Plaintiffs, Matthew M. Walker and Jim Lee Hankins, filed separate suits seeking damages for personal injuries they sustained as a result of a worksite accident involving the alleged failure of a Manitowoc model 888 crane (crane) to hold the load upon which Plaintiffs stood, causing Plaintiffs to drop to the ground. Through multiple amended petitions, Plaintiffs sued the manufacturer of the crane, the Manitowoc Company, Inc., Manitowoc Cranes, LLC, and their insurer, Westchester Fire Insurance Company (collectively Manitowoc), alleging the crane was unreasonably dangerous because of an inadequate warning and/or defect in design or construction/composition as defined by the Louisiana Products Liability Act (LPLA). Plaintiffs also sued H&E Equipment Services, Inc., and its insurer, Travelers Property and Casualty Company of America (collectively H&E), among other various owners, custodians, servicers, and inspectors of the crane, alleging that H&E failed to properly service or inspect the crane and that H&E either knew or should have known of the defect in the crane by receipt of Service Bulletin 90 and failed to exercise reasonable care in preventing the accident. Plaintiffs' employer, Bayou Welding Works, LLC, and its insurer, Allianz Global Corporate and Specialty Company (collectively Intervenors), intervened in the suit, seeking property damages and consequential losses arising from the same accident. After the suits were consolidated, H&E moved for summary judgment, which the trial court granted.

Plaintiffs/Intervenors filed this "protective appeal" to reverse the trial court's judgment granting H&E's motion for summary judgment, but only if this court reverses the partial summary judgment granted to Plaintiffs/Intervenors on their failure to warn claim against Manitowoc in the companion case, *Matthew M. Walker v. The Manitowoc Company, Inc., et al.*, consolidated with

Jim Lee Hankins v. The Manitowoc Company, Inc., et al., 16-897, 16-898, 18-221 & 18-223 (La.App. 3 Cir. 10/10/18), ___ So.3d ___ (companion case). Having found genuine issues of material fact exist on the record as to whether Manitowoc breached its duty to warn of post-manufacturing defects under the LPLA, we reversed the partial summary judgment granted in favor of Plaintiffs/Intervenors in the companion case. Therefore, we then entertained Plaintiffs'/Intervenors' appeal in this matter.

Affirmed. Reviewing the record, we found it was undisputed that H&E never owned, sold, or inspected the crane. There was also no dispute that H&E performed only one repair on the crane, fifteen months before the accident, involving an unrelated electrical issue in the cab. While it is further undisputed that H&E was both a distributor and service provider for Manitowoc and its cranes, we found that fact did not, in and of itself, prove the existence of the duty advanced by Plaintiffs/Intervenors. Rather, the evidence demonstrated that, pursuant to Manitowoc's historical practice as testified to by several witnesses, the Coast Crane Company, the original distributor of the crane, had the duty to warn the owner of the crane, not H&E. The crane was not even in H&E's territory when Service Bulletin 90, which advised the distributors of a potential defect in the freefall mechanism of the model 888 cranes, was issued.

Moreover, we found the evidence further revealed that H&E did not breach any obligation under its distributorship agreement in relation to its one interaction with the crane—the diagnosing and repair of the unrelated electrical issue in the cab. H&E was never advised of a problem with the freefall mechanism in this crane and was never asked to inspect the crane regardless. Significantly, its one service call was performed eight years after the issuance of Bulletin 90.

As the trial court found, the evidence, rather than supporting Plaintiffs'/Intervenors' allegations, demonstrated no ease of association between the collapse of the crane and resulting damages and H&E's alleged failure to warn of or perform the Service Bulletin 90 inspection some eight years after its issuance. In light of the record evidence, we concluded that H&E did not owe Plaintiffs/Intervenors a legal duty under the circumstances of this case. Accordingly, we found that H&E was entitled to judgment as a matter of law, and we affirmed the trial court's judgment.

PUBLIC ENTITY LIABILITY

***Minix v. City of Rayne*, 17-93 (La.App. 3 Cir. 4/4/18), ___ So.3d ___. (Five-judge -- Pickett, J., writing; Amy, J. dissents with reasons.)**

In this sidewalk fall case, the trial court found the city was not liable because the defect in the sidewalk was open and obvious and the city did not have notice of the defect. On appeal, the court found that the sidewalk was on a list of sidewalks to be repaired, therefore the city had notice of the condition of the sidewalk. Further, the minor child testified that the broken concrete shifted when she stepped on it, and "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."

REAL ESTATE PURCHASE & GOOD FAITH DEPOSIT

***Noles-Frye Realty (NAI Latter & Blum) v. Holly Dixon*, 17-965 (La.App. 3 Cir. 5/9/18), __ So.3d __ (Panel: Amy, Judge writing; Cooks and Conery, Judges).**

After the failure of a purchase agreement related to a residential property, a realty company commenced a concursus proceeding so that the Sellers and the Buyer could advance their respective claims of entitlement to the underlying deposit. Following a hearing, the trial court ruled in favor of the Sellers after observing that, although the Buyer was credible in explaining that she could not obtain financing, she failed to produce corroborating documentary or testimonial evidence in that regard. The Buyer appealed.

Reversed and Rendered. The panel first addressed the Buyer's contention that the trial court erred in requiring her to demonstrate her good faith in acquiring financing rather than requiring the Sellers to prove that she breached the purchase agreement in bad faith. The panel noted that claimants in a concursus proceeding appear as both plaintiffs and defendants and each must lodge his or her respective claim against all other parties. In this proceeding, each party claimed the deposit by adverse provisions of the purchase agreement, with the Buyer initiating her claim under the provision requiring the return of the deposit to her if she "made good faith efforts to obtain the loan." Thus, the trial court did not err in articulating that it was the Seller's burden of proving the condition upon which she sought relief. On the merits, the panel found that the record supported the trial court's credibility determination in favor of the Buyer given her testimony that she applied to various lending institutions and even performed repairs to the property to facilitate the financing application in one instance. However, the panel concluded that the trial court was manifestly erroneous in its following determination that she ultimately failed in her burden of proving her good faith effort regarding financing. Rather, the trial court's suggestion that the claimant was required to produce corroborating evidence from the lending institutions as to the reason her applications were rejected imposed a requirement outside of the confines of the purchase agreement. It instead required only that the Buyer make a timely application for a loan and that she make good faith efforts in obtaining the loan. It did not qualify the return of the deposit to her based upon a "reason" the loan could not be obtained. Finding that the record did not otherwise question the trial court's credibility determination in favor of the claimant, the panel concluded that the record dictated a finding that the Buyer satisfied her burden of proof and was entitled to the return of the deposit pursuant to the purchase agreement. The panel entered judgment in that regard.

SUCCESSIONS

***Succession of Eugene D. Lanier*, 17-540 (La.App. 3 Cir. 5/30/18), 249 So.3d 1059, *writ denied,* 18-1091 (La. 10/15/18), __ So.3d __. (Perret, J., writing) (Panel: Judges Cooks, Saunders, Ezell, Savoie, and Perret; Judge Cooks dissents for the reasons assigned by Judge Saunders and Judge Saunders dissents with reasons).**

In this succession proceeding, St. Jude Children's Hospital ("St. Jude"), appealed a trial court judgment that denied its Motion to Traverse the Detailed Descriptive List and Opposition to the First Annual Account. The trial court found "the Co-Executors are not required to list any immovable and movable property located at 1829 Guillot Road, Youngsville, Lafayette Parish, Louisiana . . . as an asset of Eugene D. Lanier's estate" because it was property placed in a Trust in 2004, and was not an asset of the succession.

In May 2004, Eugene and Erie Lanier, as co-settlors and co-trustees, established a revocable *inter vivos* trust ("Trust"). Schedule "A" of the Trust transfers to the Trust "[a]ll personal items, clothing, furniture and movables of any type, belonging to the Settlors and located within the family home, or on the grounds, occupied by Settlors located at 1829 Guillot Road in Youngsville, Louisiana." At that time, Mr. and Mrs. Lanier filed an Act of Donation to the Trust in which they donated all their immovable property located at their home at 1829 Guillot Road, Youngsville, Louisiana, to the Trust. The Act of Donation was filed with the Lafayette Parish Clerk of Court on November 23, 2004. Also on that date, Mr. Lanier executed a Last Will and Testament ("2004 Will") in statutory form that "bequeathed all of my [Mr. Lanier's] remaining property, including property that may constitute the legitime of a forced heir, to the Trust which is identified above." The 2004 Will provided for the Lanier's three children, Vicci L. Guillet, Vance E. Lanier, and Dayle C. Guillory, to serve as co-executors of the succession if Ms. Lanier was unable to do so.

On October 11, 2011, Ms. Lanier died. On February 13, 2014, Mr. Lanier executed a new Last Will and Testament ("2014 Will") that provided in pertinent part:

> I direct my Executor to sell all of my real and moveable property located at 1829 Guillot Road, Youngsville, Lafayette Parish, Louisiana, including my residence and its amenities and furnishings (after the removal of my personal possessions), and I give and bequeath to St. Jude Children's Research Hospital, located in Memphis, Tennessee, Tax ID 62-0646012, the sum of one hundred thousand dollars ($100,000.00) from the proceeds of such sale or sales.

Mr. Lanier died on December 5, 2015.

The succession of Mr. Lanier was opened on December 21, 2015, at which time the court appointed Vance Lanier and Dayle Guillory as the Independent Co-Executors ("Co-Executors") and the 2004 Will was duly probated. On December 21, 2016, the Co-Executors filed a "First Annual Account" and "Sworn Detailed Descriptive List" for the period of December 21, 2015 through December 21, 2016. The descriptive list provided that the sole asset of the succession was a 2007 Chevrolet pickup truck.

On January 4, 2017, St. Jude filed a Motion to Traverse the Detailed Descriptive List and Opposition to the First Annual Account Motion, seeking to have the Guillot Road property, valued at $600,000.00, added to the detailed descriptive list.

After a hearing, the trial court denied St. Jude's Motion to Traverse the Detailed Descriptive List and Opposition to the First Annual Account. St. Jude appealed the judgment after the trial court designated it as a final judgment under La.Code. Civ.P. art. 1915(B).

Affirmed. We found the issue before the court involved Mr. Lanier's succession, what assets are included in his estate, and whether the 2014 Will, if probated, would revoke the Trust and undo the 2004 donation of the property to the Trust. We cited to La.R.S. 9:2051(B), and the revision comment (2003) to La.R.S. 9:2051, which states that "Subsection B allows the settlor of an *inter vivos* trust, who has reserved the power to modify, divide, terminate, or revoke the trust, to do so by testament. The testament must clearly identify the trust in order to have any effect on it." Further, we cited to Louisiana jurisprudence that supported the 2003 Revision Comment to La.R.S. 9:2051 that a last will and testament must at least mention the trust or the revocation of the trust in order for a last will and testament to constitute a revocation of the *inter vivos* trust.

Based on these legal principles, we found that Mr. Lanier's 2014 Will lacked the necessary intent to revoke the Trust because it failed to mention the Trust, state an intent to revoke the Trust, or state an intent to revoke the donation *inter vivos* of the Guillot Road property to the Trust. Rather, the 2014 Will directed the executor of the estate to sell the Guillot Road property, (property that does not belong to the estate), and then to distribute $100,000.00 of sale proceeds to St. Jude. Accordingly, we agreed with the trust court's factual finding that the 2014 Will did not revoke the 2004 Trust or transfer the Guillot Property to the estate and we affirmed the trial court judgment that denied St. Jude's Motion to Traverse the Detailed Descriptive List and Opposition of the First Annual Account.

***Succession of William Dalton Pelt*, 17-860 (La.App. 3 Cir. 4/11/18) __ So.3d __ (Panel: Kyzar, Judge writing; Keaty and Conery, Judges).**

Kristina Wright (Kristina), the appellant, intervened in the Succession of William D. Pelt, claiming to be his illegitimate, biological child. The appellees were the brothers and sisters of the deceased. Kristina appealed the granting of an exception of prescription dismissing her petition to establish filiation with her deceased alleged father, William Pelt. The issues on appeal were whether the trial court committed legal error by: not applying La.Civ.Code art. 197 as the law in

effect on the date of decedent's death; failing to acknowledge the supreme court's interpretation of language included in La.Civ.Code art. 197 regarding legislative intent and retroactivity; and granting the exception on the notion that retroactive application of La.Civ.Code art. 197 would revive a prescribed claim.

Reversed and Remanded. We found the trial court did not correctly apply the provisions of La.Civ.Code art. 197 and, further, that it failed to interpret La.Civ.Code art. 197 in conjunction with La.Civ.Code art. 870. Kristina was born in Lake Charles on September 28, 1973. At the time of her birth, La.Civ.Code art. 197 had not yet been enacted, but rather filiation was based upon former article 209. Former article 209 contained two prescriptive periods for the filing of filiation actions: one year from the date of the alleged father's death or when the child turns nineteen years of age, whichever came first. Louisiana Civil Code article 197 replaced former article 209 and only contains one prescriptive period: any action to establish filiation must be filed within one year of the alleged father's death. The trial court found that the appellees acquired a vested right, the right to claim peremption, when Kristina reached nineteen years of age, as that occurred while former article 209 was still in effect.

We disagreed and found that a succession cannot exist before the death of the deceased, and, therefore, a potential heir cannot have a right or vested claim before that time. After review, we noted the wording of La.Civ.Code art. 197, which provides that "[f]or purposes of succession only," a child's action to establish paternity "is subject to a peremptive period of one year" and that the "peremptive period commences to run from the day of the death of the alleged father." We next noted La.Civ.Code art. 870, which states that "succession rights . . . are governed by the law in effect on the date of the decedent's death." Based on this and the fact that Kristina filed her petition for filiation within one year of her alleged father's death, we reversed the ruling of the trial court and remanded for further proceedings consistent therewith.

We further found the language in La.Civ.Code 197, "For purposes of succession only", shows clear intent that a succession proceeding is governed by its own rules, even in filiation actions, and, as such, the statute cannot be read without La.Civ.Code art. 870. Therefore, all filiation actions raised pursuant to a succession proceeding brought after the legislature passed 2005 La. Acts. No. 192, § 1, must be governed by the provisions of La.Civ.Code art. 197. We also specifically found that the second clause of La.Civ.Code 197 allows a child not yet filiated, who was born and turned nineteen while the repealed former article 209 was still in effect, to bring an action to be recognized as an heir in a succession proceeding within one year of the death of the alleged father.

***Succession of Keffer Thomas Delino, II v. The Jake Delino Trust*, 17-1053 (La.App. 3 Cir. 4/4/18), __So.3d__ (Panel: Thibodeaux, Chief Judge writing; Saunders and Kyzar, Judges).**

Plaintiff, the succession representative of the Succession of Keffer Thomas Delino, II, filed suit against the defendants, The Jake Delino Trust (Trust), Carole Delino Niebler (Carole), and

James D. Delino, Jr. (Jimmy), seeking to annul a transfer of trust interest. Created in the testament of James D. Delino, Sr. (James), the Trust named both Jimmy and his brother, Keffer Thomas Delino, II (Keffer), income beneficiaries for life and directed the trustee, upon their deaths, to distribute the corpus of the trust to their "legal heirs." After Keffer's passing, a one-half interest in the corpus was transferred to Jimmy subject to a lifetime usufruct in favor of their mother, Carole, as directed by our law on intestacy. The trial court, however, found that Keffer's universal legatee was his only legal heir and granted the motion to annul the transfer.

Reversed. Interpreting the Trust in accordance with the law in effect at the time of its creation, we found that the term "legal heir" was, in 1990, a codified, as well as jurisprudentially recognized, reference to heirs of the blood and of the nearest relation to the deceased that were called by our law to inherit. We further found that, through his use of this term, the settlor clearly intended for his property to be distributed to those persons called by law to inherit the property attributable to his sons' proportionate roots, *i.e.*, their heirs of the blood of nearest relation. Under the law in effect at the time of the Trust's creation, as well as to time of the transfer, Keffer's legal heirs were his mother and his brother. Because the transfer of trust interest at issue herein clearly comported with the intent of the settlor, as well as the law, we concluded that the trial court legally erred in nullifying the transfer and reversed the trial court's judgment in its entirety.

SUMMARY JUDGMENT

***Bernard v. Ace Property & Casualty Ins. Co.*, 18-42 (La.App. 3 Cir. 10/3/18), __ So.3d __ (Panel: Gremillion, Judge writing: Ezell and Savoie, Judges.)**

The trial court granted summary judgment in favor of the installer of revolving doors at the Lafayette Airport finding it owed no duty to the plaintiff. Plaintiff, an elderly woman, fell at the airport.

Affirmed. Summary judgment in favor of the door installer was properly granted. Although Bernard made numerous allegations against the revolving door installer, she provided absolutely no evidence that the door malfunctioned, was incorrectly installed, or that the door installer had a daily duty to inspect the doors. The door installer on the other hand produced evidence that the door had been installed correctly and functioned properly. Further, it produced evidence that the airport had the duty to notify the door installer if the doors malfunctioned.

Bernard also argued that there were insufficient warning labels on the revolving doors at the time of the fall because subsequent to the accident opaque round labels were placed on the doors. Again, this argument failed because there was no evidence that the door labeling was

inadequate. In fact, the doors had huge signs on it indicating "CAUTION," "AUTOMATIC DOOR," and "KEEP RIGHT."

***Collins v. Great Lakes Dredge and Dock Co.*, 18-168 (La.App. 3 Cir. 10/3/18), ___ So.3 ___, 2018WL4763151 (Gremillion, Judge, writing, with Ezell and Savoie, Judges):**

Plaintiff claimed he was injured while attempting to buckle a chain binder that would attach a portable ring stopper used to hoist pipe so it could be connected to another pipe. He was employed on a dredge near the mouth of the Mississippi River, but was working onshore on a jetty. After discovery, plaintiff moved for summary judgment. The trial court granted summary judgment on the issue of "liability." The employer appealed arguing that for the court to determine liability, it must determine not only fault but establish a causal relationship between the incident and the plaintiff's injuries. Because the employer had affidavits from two doctors who conducted IMEs of the plaintiff, a genuine issue of material fact existed on the issue of causation. We agreed that there were genuine issues of fact regarding causation, but not as to the employer's negligence. We therefore amended the judgment to find 100% fault on the employer's part and reserved all other issues, including causation, for trial.

***Barton v. Wal-Mart Stores, Inc.*, 18-146 (La.App. 3 Cir. 9/26/18), ___ So.3d ___, 2018 WL 4611121 (Gremillion, Judge, writing, with Ezell and Savoie, Judges):**

Plaintiff allegedly sustained injuries while entering a Wal-Mart store in Alexandria. The incident was captured on surveillance cameras. The plaintiff asserted in his deposition testimony that he slipped on moisture that he opined was condensation. An employee posted to the area testified that he never saw moisture on the floor and opined that the moisture in which plaintiff slipped was blow in as plaintiff entered the store. The surveillance video was of poor quality, and it was not easily discernable whether moisture was on the floor for any time prior to plaintiff entering the store. After plaintiff fell, though, there were impressions on the floor that appeared moist. Before plaintiff fell, several customers entered and left the store and did not appear to leave any such impressions. No other customer, including an elderly woman ambulating with the aid of a walker, negotiated the area with no apparent difficulty. Nonetheless, the differing opinions of the plaintiff and employee established the existence of a genuine issue of material fact.

***Dufour v. The Schumacher Group of Louisiana, Inc., et al*, 18-20 (La.App. 3 Cir. 8/1/18), ___ So.3d ___. (Panel: Kyzar, Judge writing; Cooks and Keaty, Judges)**

Plaintiffs, Beth and Drew Dufour, wife and husband, filed a petition for damages for alleged medical malpractice against defendants: Rapides Regional Medical Center (RMC); Dr. Ross Fremin, an emergency room physician working at RMC on the day of the alleged incident giving rise to the claim; and Schumacher Group of Louisiana, LLC, the alleged direct employer of Dr. Fremin. The Dufours appealed the trial court's granting of summary judgment in favor of defendant, RMC, dismissing plaintiffs' claims against the hospital with prejudice, as well as the trial court's denial of plaintiffs' motion for a new trial thereafter. The issues on appeal were

whether the trial court erred in striking the Dufours' opposition and granting the hospital's motion for summary judgment; whether the trial court abused its discretion in granting the hospital's motion to quash discovery; and whether the trial court was manifestly erroneous or abused its discretion in denying the Dufours' motion for new trial.

Reversed and Vacated. We found the trial court abused its discretion in striking the Dufours' supplemental opposition to the hospital's motion for summary judgment. Louisiana Code of Civil Procedure Article 966(B)(2) clearly states that a non-moving party must file "[a]ny opposition . . . and all documents . . . not less than fifteen days prior to the hearing on the motion." We found that the rescheduling of the hearing reset the time for the filing of opposition documents. Therefore, we found when a motion for summary judgment is continued by a trial court, the time limitations found in La.Code Civ.P. art. 966 are in relation to the newly set hearing date, not the original one.

After concluding that the trial court abused its discretion in striking the Dufours' opposition, and considering the summary judgment evidence in light of that conclusion, we found that the trial court erred in granting the hospital's motion for summary judgment as there remained genuine issues of material fact. Finally, we noted that our finding that the trial court erred in granting summary judgment required us to vacate the trial court's decision to grant the hospital's motion to quash as moot. Also rendered moot was the Dufours' allegation of error in the denial of their motion for new trial.

***Duhon v. Petro "E" LLC,* 18-57 (La.App. 3 Cir. 7/11/18), ___So.3d ___ (Saunders, J., writing; Ezell, B.; Gremillion, S.)**

This case involves a dispute between Plaintiff, who farmed out property to Cross-Plaintiff, for various oil and gas exploration and production operations. Subsequently, Cross-Plaintiff leased the property to Defendant, who hired an oilfield service company to perform plug and abandon work on Plaintiff's property. During the operations, a saltwater spill occurred that damaged Plaintiff's property. As a result, Plaintiff sued several companies, including Cross-Plaintiff, Defendant, and the oilfield service company hired by Defendant. Plaintiff maintained that Defendant was an "alter ego" of the oilfield service company or was engaged in a single business enterprise ("SBE"), such that the oilfield service company should be held liable for the obligations of Defendant.

The oilfield service company filed a motion for summary judgment on Plaintiff's SBE claim, which concerned Plaintiff's claim only. The motion was granted - finding that the oilfield service company and Defendant are separate corporations. Plaintiff did not appeal that judgment. Subsequently, Cross-Plaintiff filed a cross-claim against Defendant, which it later amended to assert the identical SBE claim against the oilfield service company that had been previously asserted by Plaintiff. Again, the oilfield service company moved for summary judgment, citing the same reasons which supported its motion for summary judgment granted by the trial court on

the Plaintiff's SBE claims. The trial court granted summary judgment pursuant to La.Code Civ.P. art. 966.

Reversed and remanded. The court found that a group of affiliated corporations constitutes a single business enterprise, such that "[w]hen a group of corporations integrate their resources to achieve a common business purpose and do not operate as separate entities, each affiliated corporation may be held liable for debts incurred in pursuit of the general business purpose." The court ruled that Cross-Plaintiff presented sufficient evidence to establish the existence of an SBE for purposes of satisfying its summary judgment burden. Specifically, the evidence submitted by Cross-Plaintiff in support of its SBE claim includes, but is not limited to, the following: (1) Defendant and the oilfield service company had common ownership, which was relevant to the operations conducted by Defendant and the oilfield service company, as it permitted the transfer of funds between the companies without any documentation, interest charges or efforts made to collect unpaid loans; (2) the loans between Defendant and the oilfield service company clearly did not result from any arms-length transactions; (3) Defendant used the oilfield service company's office space to store its files, but did not pay rent for the use of this space; and (4) Defendant did not have a separate phone number and fax, but used the oilfield service company's phone number and fax.

***Baheth v. Lafayette Parish Sch. Sys.*, 17-821 (La.App. 3 Cir. 4/25/18), 245 So.3d 1252 (Keaty, J., writing; Conery and Kyzar, JJ.)**

The mother of a public middle school student who had autism and attention deficit hyperactivity disorder (ADHD) brought a personal injury action against the school board after teachers placed the student in a two-person restraint during a school-sponsored field trip to prevent the student from physically injuring himself or others. The trial court entered summary judgment for school board. The mother appealed.

Affirmed. The third circuit held that the trial court properly considered the entire record before ruling on the summary judgment motion. The third circuit further held that the board had immunity under the Educational Opportunities for Students with Exceptionalities (EOSE) from liability. The teachers did not act with intent to harm or with gross negligence in ensuring the safety of the student, who allegedly tripped out of a two-person restraint at a time when his medicine was overdue. The student was noncompliant with the teachers' request to hold hands while crossing the street as safety precaution. The teacher caught the student's hand to prevent injury. The student attempted to break loose and became violent leading the teachers to restrain him while his medicine was administered. His medicine was administered around lunchtime as required by his physician. Finally, the third circuit found that there was no evidence that student's alleged head and foot injuries were causally related to the field trip incident.

***Barber v. Louisiana Municipal Risk Management Agency*, 17-800 (La.App. 3 Cir. 4/18/18), ___ So.3d ___, 2018 WL 1833382 (Gremillion, Judge, writing, with Keaty and Savoie, Judges):**

This case arises from the motor vehicle accident involving then-Pineville City Marshal, Larry Jeane, and a vehicle occupied by the plaintiffs. The plaintiffs filed a motion for summary judgment on the issue of liability, in which they argued that because the accident occurred in the lane opposing Marshal Jeane's, he was presumed at fault. Further, relying upon *Brannon v. Shelter Mutual Insurance Company,* 507 So.2d 194 (La.1987), the defendants, who claimed that Marshal Jeane was rendered unconscious before the accident, were required to prove that Marshal Jeane was free from all fault by clear and convincing evidence. In opposition, the defendants relied upon the affidavit of an eyewitness, who saw marshal Jeane slumped over in his truck before the collision. Further, they submitted the affidavit of Dr. Brabson Lutz, and internal medicine physician, who attested that his review of the medical records and other evidence convinced him that, more probably than not, Marshal Jeane had been rendered unconscious before the accident by a cardia arrhythmia. Plaintiffs filed a memorandum in which they objected to Dr. Lutz's affidavit. The trial court granted plaintiffs' motion for summary judgment, and defendants appealed.

On appeal, we noted that the burden of proof of an affirmative defense is irrelevant. The Code of Civil Procedure places the burden in summary judgment on the mover. Once the mover has carried its burden in a motion for summary judgment, the burden then shifts to the defendant to produce evidence sufficient to demonstrate a genuine issue of material fact. The affidavit of the eyewitness and that of Dr. Lutz raised an issue of material fact regarding sudden unconsciousness. Plaintiffs also urged that we disregard Dr. Lutz's affidavit because they had objected to his affidavit, and the trial court "implicitly' granted their motion under *Daubert* to exclude it. We rejected this argument, noting that a trial court's silence on a party's request for relief generally signals its denial of such relief. We then analyzed Dr. Lutz's affidavit and considered it in our de novo review. We also rejected the plaintiffs' contention that, given Marshal Jeane's medical history, it was negligent for him to operate a motor vehicle, even though he had no prior indications of impairment.

***Colson v. Colfax Treating Co., LLC,* 17-912, 17-913 (La.App. 3 Cir. 4/18/18), ___ So.3d ___, 2018 WL 1835405 (Gremillion, Judge, writing, with Amy and Perret, Judges):**

This matter involves the damage claims of Pineville residents whose properties were contaminated by effluent from the creosote plant during Hurricane Gustav. The city moved for summary judgment based on the Louisiana Homeland Security and Emergency and Disaster Assistance Act, La.R.S. 29:721-39, and that the Red River, Atchafalaya, and Bayou Boeuf Levee District was tasked with flood control in the area that included the city, pursuant to La.R.S. 38:291(M). The trial court granted the City's motion in part, holding that the City was not responsible for flooding under La.R.S. 38:291(M), but denied it relief regarding contamination from the City's sewer system. In opposition to the motion, plaintiffs had attached the deposition of a Ph.D. chemical engineer who reviewed a copious volume of documents and concluded that

the creosote plant had violated the terms of its agreement with the City under which it was allowed to dump into the City's sewer system. Further, there was testimony from one of the plaintiffs that the contaminants were being discharged from the City sewer line before the hurricane flooding began; thus, there was a genuine issue of material fact as to whether the emergency preparedness act applied. While we found no authority for the proposition that the City was absolved of responsibility by creation of the levee district for alleged problems with the city's own sewer system, we affirmed the trial court's grant of summary judgment on the issue of "damages related to flooding" on the basis that the allegations of their petition and the evidence submitted in opposition to the city's motion regarded damages from chemical contamination and not from flood waters.

***Guillory v. Broussard*, 17-931 (La.App. 3 Cir. 3/28/18), ___ So.3d ___. (Pickett, J., writing)**

When a stock recission agreement is rescinded as null for lack of consent, the appropriate remedy is to return the number of shares rescinded by the nullified agreement, not the percentage of stock owned by the parties at the time the nullified agreement was entered into.

***State of Louisiana v. Tanya Buteaux*, 17-877 (La.App. 3 Cir. 3/14/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges).**

Defendant, Tanya Buteaux, appealed her jury conviction of three counts of theft of $1,500.00 or more, violations of La.R.S. 14:67. The trial court sentenced Ms. Buteaux to five years at hard labor on each count, to be served concurrently, with all but two years suspended, and five years supervised probation upon release from incarceration. The court also ordered Ms. Buteaux to pay restitution to the victims in the amount of $89,186.63.

Affirmed and Remanded with Instructions. The State presented evidence of theft perpetrated through a scheme whereby Ms. Buteaux manipulated daily store statements to short the cash deposits. Viewing the evidence in a light most favorable to the prosecution, we found that, though circumstantial, the evidence was sufficient for the jury to find the essential elements of the crime of theft perpetrated by Ms. Buteaux and that the State negated all reasonable hypothesis of innocence. Accordingly, we concluded that the evidence was sufficient to support an ultimate finding by the jury that the reasonable findings and inferences permitted by the evidence exclude every reasonable hypothesis of innocence, and, therefore, the evidence was sufficient to sustain the verdict of three counts of theft beyond a reasonable doubt.

***Shannon James Suarez v. John DeRosier, Individ. et al.*, 17-770 (La.App. 3 Cir. 3/7/18), ___ So.3d ___ (Panel: Thibodeaux, Chief Judge writing; Saunders, and Pickett, Judges.)**

Shannon James Suarez (Suarez) appealed a summary judgment granted on the grounds of absolute immunity in favor of Calcasieu Parish District Attorney John DeRosier (DeRosier) and Investigator Bill Pousson (Pousson) for malicious prosecution and investigative misconduct. Suarez alleged that the trial court erred in granting the motion when he was not allowed adequate

discovery, which would determine whether qualified or absolute immunity applied. Suarez also alleged that the trial court erred when it failed to deem his request for admission of fact as admitted because DeRosier failed to answer within the specified fifteen days under La.Code Civ.P. art. 1467(A).

The suit arose after Suarez was arrested, and the District Attorney filed formal charges of stalking, and later added simple battery to the Bill of Information. Suarez filed a motion to quash, asserting the battery charge prescribed. When Suarez went to appeal the adverse decision on his motion to quash, he discovered that a subsequent version of the Bill of Information was stamped "Sex Offender." Suarez then filed a malicious prosecution claim against DeRosier. Suarez added Pousson as a defendant for investigative misconduct. The Defendants responded with affidavits of employees of the District Attorney's Office, which shifted the burden to Suarez after he failed to object to the affidavits.

Reversed and remanded. We found that the trial court erred in granting summary judgment because Suarez was not allowed adequate discovery. Plaintiff's counsel repeatedly attempted to propound discovery for seven months and to schedule depositions, but defense counsel was not cooperative, requested several extensions, and ultimately filed a motion for summary judgment rather than answering discovery. Under La.Code Civ.P. art. 966(C)(1), a mover is entitled to judgment after adequate discovery when a genuine issue as to material fact remains. Until Suarez could propound discovery, a genuine issue as to material fact remained because Suarez could not establish the applicable immunity which is determinative of the case, nor could he meet his burden of proof to oppose the summary judgment. *See Broussard v. Winters*, 13-300 (La.App. 3 Cir. 10/9/13), 123 So.3d 902. Additionally, this court was unable to consider the request for admissions because the summary judgment does not encompass a ruling on the merits or an interlocutory ruling on the request for admissions. The trial court's judgment was reversed and remanded to allow for the opportunity to propound discovery.

Bowdoin v. WHC Maintenance Services, Inc. **(Saunders, J., writing; Conery, J.; Savoie, D.) 17-150 (La.App. 3 Cir. ___/___/___) ___ So.3d ___**

This case involves a motor vehicle accident in which Plaintiff sustained serious injuries. Plaintiff, who resides in Louisiana, was recruited by a pipeline employee to work with him at a pipeline construction and maintenance company performing work in Florida. Prior to arriving in Florida, the employee's personal vehicle in which they were traveling, broke down, and Plaintiff was injured when he attempted to assist employee in towing the vehicle. Following the accident, Plaintiff sued the employee's employer and its insured claiming that employee was in the course and scope of his employment at the time of the accident which rendered his employer vicariously liable for Plaintiff's injuries.

The employer and its insures filed a motion for summary judgment alleging that employer's employee was not in the course and scope of his employment at the time of the accident. In response, Plaintiff filed a motion for summary judgment that the employee was in the course and

scope of his employment at the time of the accident. The trial court granted Plaintiff's motion and denied the employer and its insureds' motion pursuant to La.Code Civ.P. art. 966.

Affirmed in part, reversed in part, and remanded. The court found that the trial court erred in granting Plaintiff's motion for summary judgment based on the factual question of whether Plaintiff was in the course and scope of his employment at the time of the accident. The matter was remanded for further proceedings consistent with this opinion.

TAKINGS

***Ryan v. Calcasieu Parish Police Jury*, 17-16 (La.App. 3 Cir. 9/26/18), __ So.3d __ (Panel: Keaty, J. writing; Thibodeaux and Perret, JJ.)**

The Lake Charles Harbor and Terminal District (the District) appeals a judgment granting a preliminary injunction in favor of Vernon Christopher Meyer and Carla Michelle Meyer (the Meyers) and barring the District from expropriating a tract of their property in Westlake, Louisiana. In November 2014, the District unanimously passed Resolution 2014-056 authorizing the District to take all steps necessary to acquire ownership of, by voluntary purchase or quick-take expropriation, twenty-four tracts of land and any improvements that were needed for construction and development of additional operations to be conducted at Sasol Energy's facilities in Calcasieu Parish. Sasol is a South African company currently constructing and developing facilities known as the Sasol Megaproject in Calcasieu Parish. Plaintiffs/Intervenors, the Meyers, own more than five acres of property in the heart of the site where Sasol's ethylene complex is being constructed. Although Sasol and the District made offers to purchase the Meyers' property, those offers were for a price per square foot significantly less than what other landowners in the area were offered or paid. In January 2015, the Meyers intervened in this matter seeking a preliminary and permanent injunction to enjoin the District from expropriating their property. Following a hearing, the trial court granted the Meyers' request for injunctive relief and enjoined the District from expropriating the Meyers' property. The District appealed alleging that the trial court abused its discretion enjoining it from its constitutional right to file suit to expropriate the Meyers' property.

Affirmed. We found that the Meyers satisfied their burden of making "a prima facie showing" that the Resolution authorizing the taking of their property is unconstitutional. We concluded that "the Meyers' right to own private property must prevail over those of the District." Accordingly, we found no abuse of discretion by the trial court and thus affirmed the judgment of the trial court and remanded the matter to the trial court to determine the constitutionality of the Resolution authorizing the District to expropriate the Meyers' property.

Note: In our opinion, we referred to a recent supreme court decision that discusses the limits of a public port's expropriation power. *See St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 17-434 (La. 1/30/18), 239 So.3d 243. In *Violet Dock*, the St. Bernard Port

filed a quick-take expropriation suit seeking to acquire a nearby privately-owned dock facility to expand its own cargo facilities. Testimony was presented in the trial court that "there was no other space in St. Bernard Parish where a bulk terminal facility could be constructed on the river." *Id.* at 247. The trial court found that the taking served a valid public purpose, which finding was affirmed by the fourth circuit and a divided supreme court. On June 11, 2018, the United States Supreme Court docketed a petition for certiorari filed by the defendant/owner of the private dock in *Violet Dock*.

***Biglane v. Bd. Of Comm'rs, Fifth Louisiana Levee Dist., et al*, 18-100, 18-101 (La.App. 3 Cir. 4/11/18) (Ezell, J.; Pickett and Perret, JJ.)**

James Biglane and his sister, Charlotte Biglane Nobile, (collectively referred to as the Biglanes) co-owned approximately 3,000 acres of land in Concordia Parish next to the Mississippi River. The property is known as the Scotland and Genevieve Plantations. A levee existed on the property. The Fifth Louisiana Levee District Board of Commissioners (FLD) needed at approximately eighty acres of the property for a project to raise and strengthen the levee. On February 27, 2009, the FLD sent a letter making an offer to the Biglanes for Parcels 3-2 and 3-3 for $335,287.00 for the property for the Mississippi River Levee Raising Project Item 361-R based on their expert's measurements and calculations of batture and an existing right-of-way.

Unsatisfied with the determinations of batture and prior takings, the Biglanes filed suit on July 2, 2009, seeking compensation and damages for the taking of their property. After a five-day trial in November 2016, the trial court rendered judgment dismissing the DOTD. Having deferred its ruling on existence of batture or of a pre-existing servitude until the end of trial, the trial court stated in reasons for judgment that it was not allowing any evidence as to these issues, ruling that they were affirmative defenses that had not been pled. The trial court further stated that, even if the evidence had been admissible, the FLD failed to meet its burden of proof regarding the issues of batture or a pre-existing servitude. Judgment was rendered on April 24, 2017, in favor of the Biglanes and against the FLD in the amount of $1,397,500.00, subject to a credit of $335,287.00, which was paid on June 25, 2013. At the request of the parties, attorney fees, expert fees, and costs were to be determined later. A judgment was rendered pursuant to La.R.S. 38:301(C)(2)(f) on June 15, 2017, awarding $265,553.25 in attorney fees based on a calculation of 25% of the net amount of judgment, which was $1,062,213.00 after the credit. An amended judgment was signed on June 19, 2017, to correct a clerical error. The FLD appealed the judgment of the trial court, and the Biglanes answered the appeal.

April 24, 2017 Judgment Reversed and Rendered; June 19, 2017 Judgment Reversed. The FLD first claimed that the trial court erred in finding that batture is an affirmative defense that must be raised in the pleadings and excluding evidence on this issue. The FLD argued that batture is a criterion used to calculate just compensation for a riparian levee appropriation. Fourteen exhibits pertaining to batture were excluded from the evidence but were admitted as proffered evidence during the presentation of evidence and again, by the FLD, at the close of trial. Of the

fourteen exhibits, the FLD argued that seven of them were improperly excluded as to the issue of batture.

We held that La.R.S. 38:301(C)(1)(a) specifically excludes compensation for batture taken for levee purposes so that is simply part of a mandatory statutory framework that determines compensation for land taken or destroyed for levee purposes. The trial court erred in finding that the FLD had to plead the issue of batture as an affirmative defense and in excluding evidence on that issue.

The trial court stated in written reasons for judgment that even if it considered the excluded evidence, it would find that the FLD failed to meet its burden of proof regarding batture. The trial court had the benefit of viewing the proffered evidence and hearing the testimony in this case. Therefore, we applied the manifest error standard of review to the trial court's findings as the trial court allowed FLD to put forth evidence regarding batture, deferring ruling on its admissibility until after the trial.

Based on the evidence in the record, we found that the trial court erred in concluding that the FLD failed to establish that there was non-compensable batture on the Biglane property that was used for levee purposes. Under the guidelines of *DeSambourg v. Bd. of Com'rs for the Grand Prairie Levee Dist.*, 621 So.2d 602, 603 (La.1993), *cert. denied*, 510 U.S. 1093, 114 S.Ct. 925, (1994), the FLD established that the ordinary high-water mark is 62 feet based upon the testimonies of its experts. Only 13.992 acres on the alluvial ridge were not batture in Parcel 3-3. The rest of the acreage in Parcel 3-3 was non-compensable batture.

In making its award to the Biglanes, the trial court relied on their expert, Charles Wilkes. He testified that he was asked to make two extraordinary assumptions when appraising the property: (1) There was no existing right-of-way on the east levee toe on the river side, and (2) There was no non-compensable batture. Mr. Wilkes calculated that the FLD owed the Biglanes $1,215,880.00 for 226 acres in Parcel 3-3, $162,757.00 for 17.223 acres in Parcel 3-2, and $18,752.00 for fences and gates, totaling $1,397,389.00. Mr. Wilkes rounded this number to $1,397,500.00, which is what the trial court awarded.

Finding that only 13.992 acres were compensable in Parcel 3-3, we found that the amount owed to the Biglanes for Parcel 3-3 based on Mr. Wilkes' appraisal would be $75,276.96. (($1,215,880.00 ÷ 226 acres = $5,380 per acre) ($5,380 x 13.992 acres = $75,276.96)). The new total would be $256,785.96. The FLD already tendered $385,287.00. The trial court erred in awarding the Biglanes any additional compensation.

Finding no additional compensation was due the Biglanes, we also found that they were not entitled attorney fees and costs pursuant to La.R.S. 38:301(C)(2)(f), which provides for the award of attorney fees when additional compensation is awarded. We also reversed the assessment of costs against the FLD.

TOXIC TORT

Robert J. Broussard, et al. v. Multi-Chem Group, LLC, **17-985 (La.App. 3 Cir. 7/11/18), __So.3d__ (Panel: Amy, Judge writing; Kyzar and Perret, Judges).**

The plaintiffs in the consolidated cases (represented on appeal by docket numbers 17-985 through 17-922) sought personal injury damages associated with alleged exposure to chemicals following an explosion at the defendant chemical facility. Liability was established in pre-trial proceedings with consideration of the claims of twelve bellwether plaintiffs proceeding to a bench trial. The trial court awarded each plaintiff general damages, including those for mental anguish due to fear of developing cancer. The trial court also awarded medical expenses for some of the plaintiffs. The defendants appealed.

Affirmed (17-985; 17-986; 17-987; 17-989; 17-990; 17-991; 17-992)**.** ***Reversed in Part; Affirmed as Amended and Rendered*** (17-988). The panel first rejected the assertion that the trial court erred in finding that materials from the explosion travelled in multiple directions, as testified to by the plaintiffs' meteorology expert, and in its corresponding rejection of the defendants' expert's opinion that the materials moved away from the plaintiffs' locations due to prevailing winds. The trial court assessed the experts' credentials in favor of the plaintiffs' expert, concluded that the defendants' expert's opinion was contrary to photographic evidence, and questioned the reliability of that opinion given the use of proprietary methods. The panel further found no error in the reliance on the plaintiffs' expert in pharmacology and toxicology who testified as to the site's chemicals and who further testified regarding consistency between the plaintiffs' complaints and exposure to such substances. The expert's academic and professional experience supported her qualification in the tendered fields. Neither did the trial court abuse its discretion in accepting the testimony of an otolaryngologist, who opined that the symptoms of those he examined were more likely than not caused by the explosion. The physician testified that the symptoms as reported by the plaintiffs did not require more extensive testing as suggested by the defendants.

The defendants further questioned the finding of both general and specific causation. Insofar as general causation requires proof that the complained of substance is capable of causing particular injury, the plaintiffs' toxicologist reviewed the site's chemicals, explaining that they could cause acute effects and that some had potential for future injury. To the extent that the testimony was not more detailed, the trial court remarked that the available data was generated under the defendants' direction. That limitation also related to the burden of proving specific causation, which the defendants contended required proof of the dose and duration of exposure. However, jurisprudence indicates that such proof is not required. Instead, surrounding evidence may support a finding that symptoms are consistent with chemical exposure. The trial court accepted testimony regarding the direction of the smoke plum, the possible effects of such exposure, and the plaintiffs' testimony regarding their experiences following the explosion. Such evidence supported the trial court's finding.

Finally, the panel reviewed the damages awarded, affirming the awards and the quantum thereof for seven of the plaintiffs. *See* 17-985; 17-986; 17-987; 17-989; 17-990; 17-991; and 17-992. However, the panel reversed the damages awarded to five plaintiffs for fear of developing cancer due to a lack of questioning and/or testimony regarding such fear. *See* 17-988.

VICARIOUS LIABILITY

***Thibodeaux v. GEICO Cas. Co.,* 17-853, (La.App. 3 Cir. 6/13/18), 249 So.3d 114 (Panel: Keaty, J. writing; Pickett, Ezell, and Kyzar, JJ.; Conery, J. concurred in part and dissented in part and assigned reasons)**

Injured motorist brought a personal injury action against the driver of the vehicle that struck her, the driver's insurer, and the driver's employer, Walgreens. The trial court granted in part injured motorist's summary judgment and denied in part Walgreens' motion for summary judgment based upon it finding that Walgreens was vicariously liable for any damages plaintiff sustained as a result of an accident that occurred as the result of the fault of the defendant driver, a pharmacist employed by Walgreens. Walgreens appealed.

Affirmed. After noting that an employer is not generally liable for acts committed by its employee while going to or coming from work, we held that pharmacist was in the course and scope of her employment when car accident occurred on her way home from a training seminar in a different city than where she worked and which she was unfamiliar with, thus making Walgreens vicariously liable for her fault. The facts showed that the pharmacist had been asked by her supervisor to attend the training, a Walgreens' scheduler made arrangements for the training, the training was related to the service Walgreens provided, the act of attending the training for cholesterol testing bore a strong relationship to Walgreens' business, the pharmacist's motivation for completing the training was to follow her supervisor's directions, and it was reasonable for Walgreens to expect that the pharmacist would complete the training her supervisor requested that she take.

WORKERS' COMPENSATION

***Bea Angelle v. City of Kaplan-Kaplan Police Department*, 18-108 (La.App. 3 Cir. 09/26/18), __ So.3d __. (Perret, J., writing) (Panel: Chief Judge Thibodeaux, Judges Keaty and Perret).**

Bea Angelle sustained a back injury while in the course and scope of her employment with defendant, the City of Kaplan Police Department. Ms. Angelle filed a Disputed Claim for Compensation Form 1008 disputing the City of Kaplan's decision to terminate her Supplemental Earnings Benefits ("SEBs") because of her ability to earn ninety percent of her pre-injury wages.

Ms. Angelle argued that she has a psychological condition caused by the underlying work-related back injury. She relied primarily on her treating psychologist who says she has chronic pain which causes depression. Further, her treating psychologist was never contacted by the vocational rehabilitation person to determine if Ms. Angelle was psychologically fit to perform a job. She argued that her expert psychologist's testimony is unrefuted, and no treating physician found her to be a malingerer.

The City of Kaplan, on the other hand, argued that Ms. Angelle was released to perform light duty work and that her vocational rehabilitation expert was not aware of her psychological treatment. (Ms. Angelle was paying privately).

The workers' compensation judge ("WCJ") denied Ms. Angelle SEB's and dismissed her claim with prejudice. Ms. Angelle appealed arguing that the WCJ ignored the uncontradicted testimony of her treating psychologist that the work-related accident caused her to have a psychological condition that prevented her from returning to work.

Affirmed. We discussed La.R.S. 23:1021(8)(c)(d), which lists the factors that must be proven for indemnity benefits to be awarded for a mental injury and found no error in the WCJ's conclusion that Ms. Angelle failed to carry her burden of proving by clear and convincing evidence that she suffered a mental injury caused by the work-related injury. Although the psychologist's medical records indicate that Ms. Angelle suffered from anxiety and depression before and after the work-related accident, we found that she ultimately chose to pay for her psychological counseling and failed to share her psychological medical records with the City of Kaplan. Moreover, Ms. Angelle's psychologist diagnosed her with a major depressive disorder using the criteria established in the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") rather than with the more current revised fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-V"). Therefore, in consideration of the heightened burden placed on a claimant seeking compensation benefits for a mental injury caused by a physical injury, we affirmed the WCJ's judgment that denied Ms. Angelle SEBs and dismissed her claim with prejudice.

***Green v. Town of Lake Arthur*, 18-202 (La.App. 3 Cir. 9/26/18), __So.3d__ (Panel: Conery, writing; Amy, concurs in the result and assigns reasons, and Kyzar, Judges).**

The plaintiff, Michael Green, appealed the December 14, 2017 judgment of the workers' compensation judge (WCJ) dismissing without prejudice Mr. Green's fully adjudicated workers' compensation claim that was reduced to final judgment on October 14, 2009. Counsel executed a joint motion and order to stay the case which was signed by the previous WCJ on April 14, 2015. On June 26, 2017, the new WCJ, on her own initiative, and without explanation, sent counsel for both parties a notice of a telephone status conference to discuss Mr. Green's original case, under docket number 08-22034. During the conference, the WCJ concluded that "there were no pending issues in this case," and ordered that counsel for the Town of Lake Arthur draft a judgment, lifting the stay, dismissing Mr. Green's original Form 1008 claim under docket number 08-22034.

Counsel for Mr. Green objected, and a hearing was held which resulted in the WCJ's December 14, 2017 judgment which lifted the stay, dismissed Mr. Green's Form 1008 claim under docket number 08-22034 without prejudice, and allowed the parties the right to file a new Form LDPL-WC-1008 claim under the original docket number if any further action was required in the case.

Judgment Dated December 14, 2017 Reversed and Vacated. Judgment Dated October 14, 2009 Reinstated. The panel found, with one member concurring in the result, that the WCJ, could not dismiss a fully adjudicated workers' compensation claim that had been reduced to a final judgment. Further, there was no legal basis for the WCJ, pursuant to La. Admin. Code tit. 40, Pt. I § 5705, to dismiss the case and order the parties to institute a new Form 1008 claim, as La.R.S. 23:1310.8 and La.R.S. 23:1209 already provide the proper procedure and prescriptive period for modifying a final judgment.

***Joseph Adams v. Georgia Gulf Lake Charles, LLC, et al.*, 17-723 (La.App. 3 Cir. 06/27/18) 249 So.3d 1066 (Perret, J. writing) (Panel: Judges Saunders, Ezell, Conery, Kyzar, and Perret; Judge Ezell dissented and assigned reasons.)**

In this workers' compensation case, the workers' compensation judge ("WCJ") found that claimant, Joseph Adams, satisfied his burden of proving that his occupational hearing loss resulted from the noise he was exposed to during his forty-year employment with Georgia Gulf Lake Charles, LLC ("Georgia Gulf"). Georgia Gulf appealed asserting the following four assignments of error: (1) the WCJ erred in determining that Mr. Adams' claim had not prescribed; (2) the WCJ erred in concluding that Mr. Adams established a causal connection between his hearing loss and employment at Georgia Gulf, and the corresponding entitlement to medical and indemnity benefits; (3) the WCJ erred in determining that Mr. Adams was entitled to Supplemental Earnings Benefits ("SEBs"); and (4) the WCJ erred in awarding penalties and attorney fees. Mr. Adams answered Georgia Gulf's appeal, seeking additional attorney fees for work done on appeal.

Judgment Amended and, as Amended, Affirmed. We found no merit to Georgia Gulf's prescription argument and found that because Mr. Adams' tort suit against Georgia Gulf was filed in a court of competent jurisdiction and proper venue within one year of his termination of employment, his timely-filed tort action interrupted prescription as to his subsequent workers' compensation claim against Georgia Gulf. Further, we found no error in the WCJ's finding that Mr. Adams' type of hearing pattern was often seen with noise exposure in the industrial environment and that he had objective indications of sensorineural hearing loss due to acoustic trauma and chronic tinnitus. Moreover, we found no manifest error in the WCJ's decision to credit the testimony of Mr. Adams' expert over Georgia Gulf's experts, especially because Mr. Adams' expert was the only one who performed a physical assessment of him.

In conclusion, we found that the record supported the WCJ's finding that Mr. Adams established a *prima facie* case for entitlement to SEBs for his occupational hearing loss because Mr. Adams only had a high school diploma, had been working at the plant for the past forty years, was sixty-five years old, had a work restriction that prevented him from working in most work

environments at Georgia Gulf, and was making four times minimum wage at the time of his occupational illness. Further, the record was void of any evidence by Georgia Gulf establishing the availability of any job for Mr. Adams other than the job he had held for the last thirty-five years, which he was now medically restricted from performing. However, per the provisions of La.R.S. 23:1221(3)(d)(iii), we amended the WCJ's judgment to limit Mr. Adams' SEBs payments to 104 weeks because the record supports the fact that Mr. Adams had not sought employment since his retirement in June 2011, and that he now considers himself retired.

In response to Mr. Adams' answer to the appeal seeking additional attorney fees for the appeal work, we concluded that he was entitled to an award of $5,000.00 in attorney fees considering the fact that he was awarded attorney fees in the trial court and that he presented two oral arguments before this court and filed several briefs on the issues.

***Mouton v. Walgreen Co*., 17-1025 (La.App. 3 Cir. 5/2/18), 24 So.3d 590, *writ denied* (10/15/18), __ So.3d __(Panel: Keaty, J. writing; Gremillion and Savoie, JJ.)**

In an August 2017 judgment, the Workers' Compensation Judge (WCJ) ordered the employer to pay the claimant $429.00 in weekly temporary total disability benefits (TTDs). In December 2016, the employer filed a Motion to Modify Judgment and Suspend Indemnity Benefits, alleging that there had been a change in condition and that the original judgment should be modified, pursuant to La.R.S. 23:1310.8(B), to convert the claimant's benefits from TTDs to supplemental earnings benefits (SEBs), pursuant to La.R.S. 23:1221. The basis of the employer's motion to modify was a July 2015 report issued by its Independent Medical Examiner (IME) wherein she found, for the first time, that the claimant had reached maximum medical improvement (MMI). After a hearing, the WCJ granted the employer's motion and rendered judgment modifying the original judgment to convert the claimant's TTDs to SEBs and suspending and terminating the claimant's entitlement to indemnity benefits "as more than five hundred twenty (520) weeks of indemnity has been paid." The claimant appealed.

Affirmed. We found that the medical evidence revealed that although the claimant continued to receive pain management, her condition had stabilized, which was not the case when the original judgment was rendered in 2007. Thus, we concluded that the WCJ did not manifestly err in terminating the claimant's indemnity benefits as she had already collected them for the maximum time allowed by law.

***Jeansonne v. La. Dep't. of Public Safety and Corrections Youth Services, Office of Juvenile Justice*, 17-635 (La.App. 3 Cir. 6/6/18), ___ So.3d ___ 2018WL2715416 (Gremillion, Judge, writing, with Chief Judge Thibodeaux, and Judges Amy, Keaty, ad Conery. Amy and Conery, Judges, concurred in part and dissented in part):**

The claimant in this workers' compensation case worked as a maintenance man at the Cecil Picard Youth Center in Bunkie. He claimed to have been involved in two separate accidents in the course and scope of his employment in June 2015 and March 2016. Mr. Jeansonne did not tell

anyone of his first accident until after his second. The Workers' Compensation Judge (WCJ) found that Mr. Jeansonne had been involved in the June 2015 accident but failed to prove an accident in March 2016. Mr. Jeansonne had been given a return-to-work clearance from his surgeon only nine days before his second accident. Because of inconsistencies—some admittedly rather glaring—the WCJ found Mr. Jeansonne lacked credibility regarding the second accident and denied benefits.

On appeal, we examined the entirety of the record. Every witness testified that Mr. Jeansonne was a diligent, conscientious worker. When asked why Mr. Jeansonne failed to notify the employer of his first accident, his doctor replied that he probably wanted to proceed with a claim under his health insurance to avoid the hassle of a workers' compensation claim and because he wanted to return to work as soon as possible. This testified was echoed by Mr. Jeansonne and corroborated by the notes of the center's human resources director that were taken at the time Mr. Jeansonne reported the accidents. When asked whether there was a specific task that caused him to feel pain, Mr. Jeansonne said, that at midday on March 17, he had been changing out a faucet in one of the facility's cabins and, "I felt that something was broken again....That's the way it felt when I come out from under that lavatory. I said 'Well, something—something's not right.'" There was a definite change in the findings of MRI studies taken between the two accidents compared to those after the second accident. Based upon these factors, we reversed the WCJ on his finding regarding the March 2016 accident but affirmed the WCJ's finding that the State controverted Mr. Jeansonne's claim as to negate any penalties or attorney fees.

***Cumins v. R.A.H. Homes, LLC,* 17-905 (La.App. 3 Cir. 5/2/18) ___ So.3d ___ (Saunders, J., writing; Pickett, E.; Gremillion, S.)**

This is a Workers Compensation case in which we must decide whether the Defendant/Principal is entitled to summary judgment based on tort immunity under the two-contract theory as provided in La.R.S. 23:1061(A)(2). Defendant entered into a contract with homeowners to build a single-family residence, which contemplated or included the installation of an HVAC system in the attic of the residence. Defendant subcontracted the installation of the HVAC system. Subcontractor hired Plaintiff as a laborer to fulfill its contract with Defendant. Plaintiff was injured while performing the tasks required by Defendant's contract with the Homeowners. As a result, Plaintiff sued several defendants, including this Defendant in tort.

The Louisiana Workers' Compensation Act provides that, generally, workers' compensation is the exclusive remedy for work-related injuries. See La. R.S. 23:1032. The exclusive remedy provision of the workers' compensation statute precludes an employee from filing a lawsuit for damages against his employer or any principal. See La.R.S. 23:1032(A).

Defendant filed responsive pleadings generally denying the claims and allegations of Plaintiff and asserting various affirmative defenses, including the defense of statutory employer immunity pursuant to La.R.S. 23:1061(A)(2).

After written discovery was exchanged between the parties, Defendant filed a Motion for Summary Judgment pursuant to La.Code Civ.P. art. 966, requesting that Plaintiff's claims against it be dismissed. The trial court granted Defendant's motion and dismissed Plaintiff's claim with prejudice.

Affirmed. The court found no abuse of the discretion afforded the trial court in granting of Defendant's Motion for Summary Judgment as Defendant established that it is entitled to statutory immunity from a tort suit by virtue of the two-contract theory. The court ruled that Defendant's motion for summary judgment correctly set forth that there are two basis for finding statutory employment: (1) pursuant to Louisiana Revised Statutes 23:1061(A)(2), being a principal in the middle of two contracts referred to as the "two-contract theory," or (2) pursuant to Louisiana Revised Statutes 23:1061(A)(3), the existence of a written contract recognizing the principal as the statutory employer. Defendant's evidence is sufficient to prove that a statutory relationship was conferred upon Defendant, as Principal, when it entered into two separate two contracts, one with the Homeowners, and one with the subcontractor, in which the work or services provided by the immediate employer, i.e., the subcontractor, was contemplated by or included in the contract between Defendant and the Homeowner. Moreover, contrary to Plaintiff's argument, Section 23:1061(A)(3) does not apply to Section 23:1061(A)(2), therefore, a written contract is neither necessary nor required for a statutory employee relationship to exist under the two-contract theory.

***Verret v. Tyson Foods, Inc.*, 17-1068 (La.App. 3 Cir. 4/18/18), __ So.3d ___. (Pickett, J., writing)**

The claimant, a Louisiana resident, was injured while driving a truck in Oklahoma for a company headquartered in Arkansas. He filed a workers' compensation claim in Louisiana, alleging the contract for hire was made in Louisiana. The employer filed an exception of lack of subject matter jurisdiction, which was overruled by the WCJ. The WCJ awarded benefits. The employer appealed.

Reversed. The OWC did not have subject matter jurisdiction to hear a claim made by a long-haul driver from Louisiana against his employer, who did not operate principally in Louisiana, when the contract of hire was not made in Louisiana. A contract of hire was not formed during single phone call made by the claimant from Louisiana to the employer's facility in Texas when the evidence shows the employer did not actually hire the claimant until he returned to Texas to complete certain requirements for employment.

***Guillory v. R&R Construction, Inc.* 17-935 (La.App. 3 Cir. 3/14/18) __ So.3d __ (Saunders, J., writing; Thibodeaux, U.; Pickett, E.)**

This case involves a compromise entered into between Employer and Employee after Employee was injured during the course and scope of his employment. Subsequently, the parties entered into a settlement agreement wherein Employer stipulated to the unconditional tender of a

lump sum settlement to Employee on or before a specified date. Thereafter, Employer failed to properly tender settlement funds to Employee pursuant to the terms of their settlement agreement.

Employee filed for a new trial seeking penalties and attorney fees for Employer's failure to tender settlement funds pursuant to the terms of their settlement agreement, and for including certain statutory language on the settlement checks that imposed impermissible conditions on Employee's receipt of the settlement funds, contrary to the settlement agreement between the parties pursuant to La.R.S. 23:1201(G). Following a hearing, the workers' compensation judge found in Employee's favor.

Affirmed. The court found no abuse of the discretion afforded the workers' compensation judge in finding that the imposition of penalties and attorney fees was warranted for Employer's failure to properly tender settlement funds to Employee pursuant to the terms of their settlement agreement. The court ruled that pursuant to Louisiana Civil Code Article 3071 "[a] compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship", and Louisiana Revised Statutes 23:1201(G) is penal in nature, and concerns an obligation that arises because of Employer's conduct after a final judgment. Here, the parties agreed to a deadline upon which settlement funds were payable, effectively amending the provisions of Louisiana Revised Statutes 23:1201(G). If there was no penalty or ramification for not complying with the agreement, that portion of the settlement agreement would be meaningless and unenforceable. The court ruled that the workers' compensation judge did not err in imposing penalties and attorney fees for Employer's untimely tender of settlement funds, as the parties contractually agreed to shorten the time in which settlement funds were due, the agreement was not against public policy, the agreement was approved by the workers' compensation judge, was placed on the record, and became final. Further, Employer was aware of the ramifications for failure to timely tender settlement funds prior to agreeing on a specified date to do so, and the failure to do so was not the result of a condition Employer had no control over. Additionally, the settlement checks imposed an impermissible condition on Employee's receipt of the settlement funds, contrary to the settlement agreement between Employer and Employee.

***Katina Hodges v. Golden Nugget Lake Charles, LLC*., 17-936 (La.App. 3 Cir. 3/7/18), 242 So.3d 654 (Pickett, J., writing.) Panel: Judges, Pickett, Thibodeaux, Saunders.**

The workers' compensation claimant sought workers' compensation benefits after she suffered a subarachnoid hemorrhage in her brain while in the course and scope of her employment as a security guard for her employer. The employer denied her claim for benefits on the basis that her alleged injury was not a compensable workers' compensation claim and that she had forfeited benefits because she misrepresented working for pay while receiving compensation benefits. The workers' compensation judge held that the fall cause by the hemorrhage was a compensable accident and awarded the claimant total temporary disability benefits, supplemental earnings benefits, medical benefits, penalties and attorney fees.

***Amended and Affirmed as Amend*ed.** Resolution of the compensable claim issue centered on the divergent opinions of the claimant's treating physicians and the defendant's expert. The WCJ did not err in accepting the treating physician's testimony, which was corroborated by two other physicians, over that of the consulting expert. The WCJ's determination that the accident caused an exacerbation of the claimant's pre-existing shoulder injury and pre-existing depression which was based in large part on his assessment of the claimant's credibility and substantiated by her treating physicians. The employer's failure to pay the claimant workers' compensation benefits when supported by her treating physicians warranted penalties and attorney fees because the employer did not reconsider its initial denial although the claimant continued to seek treatment and it did not consult an expert to substantiate its position for almost a year after the accident. Contrary to her arguments, the evidence established that as of August 15, 2016, the claimant was no longer entitled to SEBs because she regularly worked part-time from October 2015 until June 2016 when she began receiving Social Security disability benefits. Additionally, the employer established that jobs satisfying her physicians' restrictions to accommodate her physical limitations were available to her.

***Jackson v. Anamark Healthcare Services,* (Saunders, J., writing; Cooks, S.; Perret, C.) 17-503 (La.App. 3 Cir. ___/___/___) ___ So.3d ___.**

This case involves an Employee's worker's compensation claim filed against Employer. Employee disputes the rate of worker's compensation benefits paid and the suspension of medical and indemnity benefits, for which she seeks penalties, attorney fees, and legal interest.

The workers' compensation judge failed to rule as to the proper weekly wage and workers' compensation rate pursuant to La.R.S. 23:1221; failed to award penalties and attorney fees pursuant to La.R.S. 23:1201(F) for the alleged failure to properly calculate and pay Employee at the correct workers' compensation rate; and failed to award legal interest on all amounts owed pursuant to La.R.S. 23:1201.3. The workers' compensation judge denied Employee's claim that Employee's medical benefits were improperly suspended when Employee refused to submit to an additional medical examination pursuant to La. R..S. 23:1124. The workers' compensation judge denied Employee's claim that Employee's indemnity benefits were improperly suspended pursuant when an independent medical examiner's report admitted into evidence that indicated that Employee had reached maximum medical improvement and was able to return to work pursuant to La.R.S. 23:1317(A).

Reversed in part; affirmed in part; and rendered. The court found that the workers' compensation judge erred in failing to find that Employee was entitled to penalties and attorney fees for Employer's failure to properly calculate Employee's average weekly wage and to properly pay Employee's workers' compensation rate. The court ruled that Louisiana Revised Statutes 23:1201(F) authorizes the payment of penalties and attorney fees for failure to correctly calculate and pay Employee's workers' compensation rate. The court ruled that Louisiana Revised Statutes 23:1201.3 provides for the payment of judicial interest on any compensation awarded. The court ruled that Louisiana Revised Statutes 23:1124 authorizes the suspension of medical and indemnity

benefits for failure to submit to an additional medical opinion regarding an examination. The court ruled that Louisiana Revised Statutes 23:1317(A) states that workers' compensation judges are not strictly bound by the technical rules of evidence.