TOM & BILL ON TORTS

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Selected Developments in Louisiana Tort Law for 2015-2016

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I. Louisiana Supreme Court Decisions

A. Collateral Source Rule

Hoffman v. 21st Century North America Ins. Co., No. 2014–C–2279 (La. 10/2/15), 2015 WL 5776131, reh'g denied.
Issue: "[W]hether a write-off from a medical provider, negotiated by the plaintiff's attorney, may be considered a collateral source from which the tortfeasor receives no set-off."
Holding: No. "Applying Louisiana law and the principles set forth in our Civil Code, we find that such a write-off does not fall within the scope of the collateral source rule."
After rear-end automobile collision, plaintiff sued following motorist. The jury found the following motorist 100% at fault. Regarding special medical damages, plaintiff presented two medical bills. One indicated a reduction in the charge for two MRIs. The trial court noted that plaintiff's attorney had an arrangement with the medical services provider for the reduction.
The Court stated the collateral source rule as follows: "[A] tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution." The Court drew upon prior case law for the fundamental principle in application of the collateral source rule--whether the victim paid for the benefit or suffered some diminution in his or her patrimony in order to make the benefit available. Citing *Bellard v. American Cent. Ins. Co.*, 07–1335, p. 19, 980 So. 2d 654, 668, and *Bozeman v. State*, 03–1016 p. 9 (La.7/2/04), 879 So. 2d 692, 698. Permitting a double recovery or windfall is tantamount to awarding exemplary or punitive damages, which cannot be awarded in Louisiana unless specifically authorized by statute. The Court reasoned that the collateral source rule does not apply to an attorney-negotiated medical write-off because the

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plaintiff suffered no diminution of his patrimony to obtain the write-off. Thus, to permit a recovery would be a windfall to the plaintiff.

B. Medical Malpractice

Dupuy v. NMC Operating Co., LLC, 2015-CC-1754 (La. 3/15/16), 187 So. 3d 436.
Plaintiff alleged that defendant hospital failed to properly maintain and service equipment used in sterilization of surgical equipment, and he developed a post-operative infection following spine surgery.
Issue: Whether claim based on alleged failure to properly maintain and service surgical equipment falls within the Louisiana Medical Malpractice Act (MMA).
Holding: Yes, such a claim does come within the MMA. To begin with, the parties agreed that the hospital was a "qualified health care provider." The Court then applied four of the six factors from *Coleman v. Deno*, 01-1517 (La. 1/25/02), 813 So. 2d 303. First, the Court found the alleged wrong to be treatment-related or caused by dereliction of professional skill. "Ensuring the proper maintenance or functioning of sterilization equipment is tied directly to the surgical treatment . . . ." Additionally, the court concluded that the alleged misconduct involved a "clear utilization of professional medical skill." Turning to the second factor, the Court determined that deciding whether the instruments were properly sterilized would require expert medical evidence. Under the fourth *Coleman* factor, the Court found that the allegations fell within the scope of activities the hospital was licensed to perform. The Court looked to the requirement under the Hospital Licensing Law that directs the Department of Health and Hospitals to adopt standards, including regarding sanitary conditions and sterilization. Looking to the fifth factor, the Court concluded that the plaintiff's injury would not have occurred if he had not sought treatment at the hospital. Factors three (whether the act or omission involved assessment of the patient's condition) and six (whether the alleged tort was intentional) were not satisfied, but four of six *Coleman* factors were.

In Re Tillman, 2015-CC-1114 (La. 3/15/16), 187 So. 3d 445.
Pursuant to La. R.S. 40:1231.8(A)(2)(b), a request for review of a malpractice claim shall be deemed filed "on the date of receipt of the request stamped and certified by the division of administration [DOA]." In several consolidated cases, the Supreme Court addressed instances in which the plaintiffs' requests for review were denied because the requests were sent via facsimile on the last date of the prescriptive period, but the requests were not stamped received by the DOA until the following day.

Holding: When R.S. 40:1231.8(A)(2)(b) is read in conjunction with Louisiana's Uniform Electronic Transmission Act ("UETA"), La. R.S. 9:2601 et seq., "it is clear" that the plaintiffs' facsimile-transmitted requests for review were "received" by the DOA when transmitted into the DOA's facsimile transmission system on the last day of the prescriptive period, and the plaintiffs' requests for review were not prescribed. "The task of stamping and certifying required of the DOA by LSA–R.S. 40:1231.8(A)(2)(b) is ministerial, such that the DOA is only authorized to ascertain from the facsimile machine-generated records the actual date and time that the request for review entered the DOA's fax machine system and to record that information on the face of the request." *Tillman*, 187 So. 3d at 456.

Montz v. Williams, 2016-C-145 (La. 4/8/16), 188 So. 3d 1050.
In a case of informed consent, the plaintiffs bore the burden of proving what steps and information were required of the physician to obtain valid consent for the particular procedure at issue. Where the experts all agreed that informed consent was mandated, but the issue of what requirements constituted the standard of informed consent under the circumstances was reasonably contested, the jury could not have been manifestly erroneous in accepting the testimony of the defendant's experts and finding that the plaintiffs failed to carry their burden of proof on the issue.

C. Negligence

Thompson v. Winn-Dixie Montgomery, Inc., 2015-0477 (La. 10/14/15), 181 So. 3d 656, reh'g denied.
Plaintiff slipped and fell in defendant Winn-Dixie's store and sued. Winn-Dixie asserted a third-party demand against contractor that provided floor care and janitorial services, and contractor asserted third-party demand against subcontractor. Jury found liability and found subcontractor 70% at fault and Winn-Dixie 30%. On appeal, the appellate court amended the judgment, holding Winn-Dixie 100% at fault by statute. The appellate court reasoned that the slip-and-fall statute, La. R.S. 9:2800.6, imposes liability on the "merchant," and the law does not make any provision for the delegation of the statutorily imposed duty.
Issue: Whether the slip-and-fall statute imposes a duty on a merchant that precludes a comparative fault analysis that allocates fault to another party or person.
Holding: No. The slip-and-fall statute does impose a duty of reasonable care on merchants, but nothing in the statute precludes application of comparative fault to third parties that contribute to the injuries. The appellate court's imposition of solidary liability on the merchant rejects the requirements of CC Articles 2323 and

2324. Under those articles, comparative fault applies in "any action for damages," and "any claim" asserted under "any law or legal doctrine or theory of liability." There is no conflict between those articles and R.S. 9:2800.6. Allocation of fault does not abrogate the statutorily imposed duty on the merchant, and imposition of a statutory duty on the merchant does not abrogate the duty of care owed by the subcontractor. The Court also went on to reject the appellate court's conclusion that Winn-Dixie exercised operational control over the subcontractor's work. Applying the comparative fault factors from *Watson v. State Farm Fire and Casualty Ins. Co.*, 469 So. 2d 967 (La. 1985), the Supreme Court found no error in the jury's allocation of fault.

Toups v. Dantin, 2015–C–1635 (La. 11/6/15), 182 So. 3d 36, *rev'g*, 2014 CA 1754, 2014 CA 1755 (1st Cir. 8/3/15), 181 So. 3d 33.
Husband of defendant had long history of driving under the influence of drugs and alcohol. He was prohibited from driving a vehicle not equipped with an ignition interlock device. At the time of the accident at issue, he had drugs and alcohol in his bloodstream, and the vehicle that he was driving was not equipped with an ignition interlock. Plaintiff sued the driver's wife for negligence, essentially negligent entrustment, asserting that wife knew that husband occasionally operated one or more of their vehicles that was not equipped with ignition interlock. The trial court granted summary judgment for the defendant wife of the driver because there was not sufficient evidence that the wife entrusted the car to her husband or that she had knowledge of his impairment on the day of the accident. The First Circuit affirmed. The Louisiana Supreme Court reversed, holding that there was a genuine issue of material fact as to whether the wife knew or should have known that her husband was likely to drive in an impaired, negligent, or intoxicated state.

D. Spoliation

Reynolds v. Bordelon, 2014-2362 (La. 6/30/15), 172 So. 3d 589.
The Louisiana Supreme Court held that Louisiana does not recognize a cause of action for negligent spoliation of evidence. Plaintiff, involved in automobile accident, sued other driver and manufacturer of his car. Plaintiff's insurance company, which was custodian of his vehicle after the accident, did not preserve the vehicle for inspection. Plaintiff sued his insurance company for tort of negligent spoliation. Public policy of this state does not permit recognition of a duty to preserve evidence; thus, there is no such tort. However, there are other means of redress, including state law on evidence, discovery, and contracts. The Court explained its holding of no duty in terms of policies: recognition of the tort of negligent spoliation 1) would not help deter undesirable conduct; 2) would raise

numerous problems with compensation of the victim; 3) would place restrictions on people's property rights, adversely affecting societal justice, without predictability regarding potential liability; 4) would adversely affect allocation of resources, including judicial resources, opening the floodgates for endless lawsuits where the underlying suit was lost; and 5) would not be necessary based on deference owed to the legislature. The Court also considered that California experimented with the tort of negligent spoliation but abandoned it. The Court considered the availability of other redress. Regarding first-party spoliators, there are discovery sanctions, criminal sanctions, and an evidentiary adverse presumption. For third-party spoliators, plaintiffs who anticipate litigation can enter into contracts to preserve evidence and obtain court orders. In the case before the Court, the plaintiff could have retained control of his wrecked vehicle or bought it back from the insurer for a nominal fee. "Our review of the policy considerations leads us to conclude that Louisiana law does not recognize a duty to preserve evidence in the context of negligent spoliation. In the absence of a duty owed, we find there is no fault under La.Civ.Code art. 2315 or under any other delictual theory in Louisiana. Furthermore, the presence of alternate remedies supports our holding that there is no tort of negligent spoliation of evidence." *Reynolds*, 172 So. 3d at 600.

II. Courts of Appeal Decisions

A. Workplace Torts

Carr v. Sanderson Farm, Inc., 2015-CA-0953 (3d Cir. 2/17/16), 189 So. 3d 450. A plaintiff alleged that her co-worker threatened her with bodily harm outside the workplace. The plaintiff told her supervisors, who informed her that they could not do anything because the threats were made off work property. Subsequently, while at work, the co-worker deliberately struck the plaintiff twice with a piece of equipment (a pallet jack). The plaintiff sued, contending that her employer was vicariously liable (respondeat superior) for her co-worker's intentional tort and negligent in failing to protect her. The district court dismissed plaintiff's claims on peremptory exception of no cause of action.

Issues:

1) Whether plaintiff stated a cause of action for vicarious liability.

2) Whether plaintiff stated a cause of action for negligence.

Holdings:

1) No. The plaintiff's petition failed to state a claim against the employer for vicarious liability. The court applied the four factors from *Baumeister v. Plunkett*, 95–2270 (La.5/21/96), 673 So. 2d 994, 996. Because the plaintiff did not allege

facts supporting a finding that the intentional act was primarily rooted or reasonably incidental to the performance of the coworker's duties notwithstanding that the alleged act occurred at the workplace during working hours. "An employer is not vicariously liable, however, merely because his employee commits an intentional tort on the business premises during working hours." *Carr*, 189 So. 3d at 454.
2) No. The court also considered the viability of a negligence claim. The employer did not enjoy workers' compensation immunity because plaintiff's workers' comp claim was dismissed because the injury arose out of a non-work-related dispute. The negligence claim was based on allegations that the employer failed to heed the warning of plaintiff and take steps to protect her. An employer has a duty to exercise reasonable care for the safety of employees. "If an employer knows or should know of a dangerous condition or person on his premises, the employer is obligated to take reasonable steps to protect its employees." *Id.* at 456. Looking to the test developed for third-party criminal activity in *Posecai v. Wal–Mart Stores, Inc.*, 99–1222 (La.11/30/99), 752 So. 2d 762, 768, the court evaluated the foreseeability of harm and the gravity of the harm. The court concluded that the allegation that the employee informed the employer that her co-employee threatened her outside the workplace was insufficient by itself to find that the employer should have foreseen the commission on an intentional tort at work and acted to prevent it. The dismissal on the exception of no cause of action was affirmed, but the case was remanded with an instruction to the trial court to grant plaintiff an opportunity to amend.

Winzer v. Richards, 50,330–CA (2d Cir. 1/13/16), 185 So. 3d 876.
Plaintiff was a passenger in a car rear-ended by defendant, an employee of a construction company. The employee was driving from a job site in Texas to his home in Florida, and the employer paid him a per diem and travel expenses to and from these two sites. Plaintiff contended that the employee was in the course and scope of his employment at the time of the accident, making the employer vicariously liable for his negligence. The trial court granted the employer's motion for summary judgment.
Issue: Whether employee returning home from a worksite and who is paid a per diem and travel expenses is within the course and scope of employment.
Holding: No. The court began with the rule that in most cases an employee is not considered in the course and scope of employment when coming to or going from work. An exception is recognized when "expenses or wages for the time spent traveling in the vehicle, or the operation of the vehicle is incidental to the performance of some employment responsibility." *Winzer*, 185 So. 3d. at 881. In this case, however, the court found the payment of expenses to be of no moment

given that the driver no longer was an employee, he was driving his own vehicle home, his duties as a boilermaker did not involve use of a vehicle, at the time of the collision he was 600 miles from the worksite and the employer had no right or exercise of control over him, and he was not performing any mission or work for the employer's benefit. The employee could go home or anywhere else he chose by any route he chose. The risk of the employee's alleged negligent driving was not a risk fairly attributable to the employer's business. Summary judgment for the employer was properly granted.

Ledet v. Robinson Helicopter Co., 15-CA-1218 (1st Cir. 4/15/16), 2016 WL 1545153.

An employee is acting within the "course and scope" of his employment when the employee's action is (1) of the kind that he is employed to perform, (2) occurs substantially within the authorized limits of time and space, and (3) is activated at least in part by a purpose to serve his employer. The pilot involved in the accident was the chief pilot for the defendant/employer and received a salary regardless of how many hours he was required to fly for the employer, but the pilot was permitted to fly as a contract pilot for other companies and permitted to fly for pleasure, and was not scheduled to fly for the employer on the day of the accident. Here, the circumstantial evidence failed to support that the pilot was flying in furtherance of any business of defendant/employer.

Sutherland v. Alma Plantation, LLC, 15-CA-1136 (4th Cir. 5/4/16), 2016 WL 2586379.

Employers may owe a duty to members of employees' households "resulting from exposure to asbestos fibers carried home on its employee's clothing, person, or personal effects." "Although duty is a question of law, summary judgment on the issue of duty is proper 'only where no duty exists as a matter of law and no factual or credibility disputes exist.'" quoting *Teter v. Apollo Marine Specialities, Inc.*, 12–1525, pp. 14–15 (La. App. 4 Cir. 4/10/13), 115 So. 3d 590, 598, quoting *Parish v. L.M. Daigle Oil Co.*, 98–1716, pp. 11–12 (La. App. 3 Cir. 6/23/99), 742 So. 2d 18, 25. The Fourth Circuit concluded that the case before it was not one of the exceptional cases in which there is no duty as a matter of law. The court then analyzed foreseeability as a measure of whether the harm that occurred was within the duty. Where the husband came home from work covered in asbestos dust during his employment and his wife washed his clothes, genuine issues of material fact remained that would assist in determining whether the company owed a duty to the wife. Plaintiffs presented evidence of industrial knowledge of the dangers of asbestos and take-home exposure. Summary judgment in favor of defendant reversed.

B. Comparative Fault

Prejean v. State Farm Mut. Auto. Ins. Co., 15–499 (3d Cir. 1/6/16), 183 So. 3d 823, *writ denied*, 2016–C–0255 (La. 4/4/16), 2016 WL 1554790.
Plaintiffs were man and woman riding a horse named Mississippi on a road at dusk. Vehicle hit horse, injuring plaintiffs and resulting in horse being euthanized. Trial court found defendant driver 100% at fault. Defendant argued that horse should have been outfitted with lights as required by statutes for vehicles. The Third Circuit rejected that argument. Relying on the 1933 case *Meredith v. Kidd*, 147 So. 539 (2d Cir. 1933), the court held that a person riding a horse without an attached vehicle is not required to have lights after dark to avoid being negligent. No statute provides to the contrary. However, fault could be allocated to the horse rider. Applying the *Watson* factors, the court allocated 50% to each the driver and the horse rider. The "passenger" on the horse was not allocated fault.

Schexnayder v. Bridges, 2015-CA-0786 c/w 2015-CA-0787 (1st Cir. 2/26/16), 2016 WL 759889.
Jury did not abuse its discretion in finding logging truck driver who made illegal left turn across a gravel crossover area 65% at fault and 35% for oncoming driver where there was conflicting evidence regarding whether the illegal turn had been completed at the time of collision and conflicting evidence regarding the speed of the oncoming car. Another driver was able to change lanes and avoid the truck, but the driver allocated 35% of the fault did not. The appellate court rejected defendant's argument that the oncoming driver should have been allocated 100% of the fault.

C. Waivers

Fecke v. Board of Supervisors of LSU, 2015 CA 0017 (1st Cir. 7/7/15), 180 So. 3d 326, *writ granted*, 2015–C–1806 &-1807 (La. 2/19/16), 186 So. 3d 1175 & 1177.
Plaintiff was injured on the indoor rock climbing facility at the LSU recreational center. Plaintiff signed a one-page document ("Rock Climbing Wall Participation Agreement") with eight paragraphs before participating. After an injury occurred, plaintiff sued LSU. The jury returned a verdict in favor of plaintiff, allocating 75% of the fault to LSU and 25% to the plaintiff. On a motion in limine, the trial court excluded the document from evidence. One paragraph provided as follows:

> Further, I hereby RELEASE AND HOLD HARMLESS, the State of Louisiana, the Board of Supervisors of Louisiana State University and

> Agricultural & Mechanical College, and its respective members, officers, employees, student workers, student interns, volunteers, agents, representatives, institutions, and/or departments from any and all liability, claims, damages, costs, expenses, personal injuries, illnesses, death or loss of personal property resulting, in whole or in part, from my participation in, or use of, any facility, equipment, and/or programs of Louisiana State University.

The First Circuit held that the paragraph was rendered null by CC Art. 2004, which provides as follows:

> Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

However, the First Circuit held that the redacted document (with that paragraph deleted) should have been admitted. Defendant LSU argued that had the document been admitted so that it could have used it on cross-examination of plaintiff's expert, his testimony would have been less effective, and that may have reduced the allocation of fault. The First Circuit found that the error was not prejudicial, as it would not have changed the jury's verdict.

D. Medical Malpractice

Correro v. Ferrer, No. 50,476-CA (2d Cir. 3/2/16), 188 So. 3d 316, reh'g denied. The plaintiff in a medical malpractice suit requested a medical review panel against her surgeon and the hospital where her surgery was performed for the surgeon's negligence in making an incision on the wrong hip. The surgeon waived the panel proceeding and was dismissed from the suit. Plaintiff's counsel then brought proceedings against two individuals identified as non-employees of the hospital involved in the surgery (a physician's assistant and a certified registered anesthetist). The first panel subsequently found that the hospital breached its standard of care. Over one year after the dismissal of the surgeon from the suit and eight months after the panel decision regarding the hospital, the plaintiff filed suit against the surgeon and the hospital. After the timeliness of the claim was challenged, the plaintiff alleged that prescription had been interrupted or suspended as to the hospital and the surgeon by the continuing pendency of the medical review panel against the other joint and solidary obligors, i.e., the two nonemployees.

Issue: Whether the prescriptive period remains suspended after a medical review panel decision regarding a health care provider while medical review proceedings remain pending against alleged joint and solidary obligors.
Holding: No. The plaintiff's claims against the hospital and the surgeon were prescribed. La. R.S. 40:1231.8(A)(2)(a) is clear that once the medical review panel rendered its opinion against the hospital after having already dismissed the surgeon, the plaintiff had 90 days plus whatever remained in the original prescriptive period in which to file suit against the surgeon and the hospital.

White v. Glen Retirement System, 50,508-CA (1st Cir. 4/27/16), 2016 WL 1664502.
The Medical Malpractice Act (MMA) and its limitations on tort liability apply only to claims arising from medical malpractice; all other tort liability on the part of the qualified health care provider is governed by tort law. The plaintiff alleged that she fell after the certified nursing assistant placed her bed in the highest position, causing her to suffer fractures to her leg, which required the amputation of one of the legs. Plaintiff sued for an intentional tort, thus attempting to circumvent the requirements of the MMA.
Issue: Whether plaintiff alleged intentional tort.
Holding: No. The conduct did not rise to the level of an intentional tort which would preclude the application of the MMA. The court discussed the two-pronged definition of intent and the principle that intent refers to the consequences of the act, not the act. Thus, the lawsuit was premature.

Perkins v. Guidry, 15-1177 (3d Cir. 5/4/16), 2016 WL 2342682.
A physician does not have a duty to inform her patients about medical conditions and options outside the physician's specialty and about which the patients have consulted other specialists because of their knowledge of the relevant area of practice.

Billeaudeau v. Opelousas General Hospital Authority, 15-1034 (La. App. 3 Cir. 4/6/16), 189 So. 3d 561.
Applying the *Coleman* factors, the court held that a claim for "negligent credentialing" of a physician by a hospital does not constitute medical malpractice subject to the terms of the MMA.

Benson v. Rapides Healthcare System, L.L.C., 15-1083 (La. App. 3 Cir. 4/6/16), 188 So. 3d 1139, reh'g denied.
The diagnosis and emergency treatment of acute heart attacks is an area of practice in which the disciplines of cardiology and emergency room medicine overlap to

such a degree that the emergency room physician would have known and understood the importance of following the cardiologist's treatment instructions and the potential damage to the patient if he did not follow those instructions. Therefore, it was reasonable for the jury to accept that the testimony of three cardiologists established the standard of care applicable to the emergency room physician. However, trial court's award of $175,000 for loss of earning capacity was reversed because plaintiff did not request such an award.

E. Negligence

Moore v. Murphy Oil USA, Inc., 2015-CA-0096 (1st Cir. 12/23/15), 186 So. 3d 135, *writ denied*, 2016–00444 (La. 5/20/16), 2016 WL 3136855.
Plaintiff drove to a gas station/convenience store, parked car at a pump, and entered the store. After making a purchase and while he was exiting, plaintiff turned back to speak to the store manager. Plaintiff's foot made contact with a pallet containing a display of bottled water outside the door. If stacked full, the display would have been even with the door handle. Some gallon jugs on the bottom tier of the display were missing, exposing the black plastic corner of the pallet. The corner of the pallet protruded over a yellow line perpendicular to the door frame. Defendant moved for summary judgment on the ground that the risk of harm was open and obvious. The trial court denied the motion for summary judgment and held after trial that the pallet encroaching into the walkway created an unreasonably dangerous condition. The Third Circuit affirmed, finding that plaintiff raised several questions of fact regarding whether the display may have been unreasonably dangerous: 1) was the display unreasonably close to the door; 2) although the display was large and obvious, the protruding corner of the pallet may not have been; and 3) the exit was partially obscured from the inside of the store by merchandise and advertising information placed in front of the window.

Ducote v. Boleware, 2015-CA-0764 (4th Cir. 2/17/16), 2016 WL 659022, *writ denied*, 2016–C–0636 (La. 5/20/16), 2016 WL 3148487.
Under the "first bite" rule, embodied in CC Art. 2321, there is no general duty to guard against harm to third persons until the animal has displayed dangerous propensities. Where the defendant presented uncontroverted proof that the cat that allegedly bit the plaintiff had never previously displayed dangerous propensities, the district court did not err in granting summary judgment in favor of the defendant. Further, the plaintiff could not prevail on her theory that the defendant's failure to timely maintain the cat's rabies vaccinations, which caused the plaintiff to undergo precautionary rabies treatment, defeats the first bite rule. Defendant maintained that his cat had been vaccinated; he was cited for failure to

provide proof of current vaccination status. Plaintiff's theory regarding defendant's alleged failure to comply with a vaccination ordinance amounted to a negligence per se argument, and Louisiana does not recognize the negligence per se doctrine. Rather, in Louisiana proof of violation of a statute or ordinance is not necessarily tantamount to a failure to exercise reasonable care, and a plaintiff must establish all elements of negligence. "[E]ven assuming the violation of the ordinance requiring an owner to provide proof of current rabies vaccination status supports a duty on the part of the owner to a plaintiff …, the record does not support a finding that the [defendant's] violation of that ordinance was the legal cause of [plaintiff's] undergoing the anti-rabies treatment."

McCoy v. Town of Rosepine, 15-898 (3d Cir. 3/9/16), 187 So. 3d 562, reh'g denied.
The plaintiff, an electric utility employee, was injured when he tripped on an open water meter at the rear of a house; he admitted he saw the open water meter, and it was his eleventh employment accident. The defendants moved for summary judgment which the trial court granted, concluding the open water meter was open and obvious.
Issue: Whether open water meter, which plaintiff saw, was open and obvious risk of harm, supporting granting of summary judgment for defendant.
Holding: No. Although the plaintiff may have been aware of the open water meter, there was no evidence that it was open and obvious to all. "As noted in *Broussard*, [*Broussard v. State ex rel. Office of State Buildings*, 12–1238, pp. 17–18 (La.4/5/13)], 113 So.3d 175, 188–89, the question is not whether the defect was open and obvious to [this plaintiff], but whether it is open and obvious to all who might encounter it." *McCoy*, 187 So. 3d at 569. According to the court, it would undermine comparative fault principles if the law permitted characterization of a risk as open and obvious based solely on a plaintiff's awareness of the risk.

Boyd v. Cebalo, 2015-CA-1085 (4th Cir. 3/16/16), 2016 WL 1061064.
University student, who resided in a campus dormitory, alleged that she was touched inappropriately by the guest of her suitemate while sleeping in her bed. Her bedroom was separated from her suitemate's bedroom by a bathroom, which locked only from the inside. The student sued the accoster and the university, claiming that the university failed to properly secure the premises and to provide a safe housing environment.
Issue: Whether university had duty to student regarding third-party criminal activity.
Holding: Perhaps. A third-party's criminal activity does not grant the university absolute immunity from liability. If the facts of a case prove the criminal activity

was foreseeable, the university may have a duty to protect or warn students. The analysis appropriate to such a determination is that articulated in *Posecai v. Wal–Mart Stores, Inc*., 99–1222 (La.11/30/99), 752 So. 2d 762. The court considered the analysis from *Posecai* applicable beyond the business setting: "Although the *Posecai* case involved a business owner rather than a university, the principles can easily be applied to a university setting."

American Rebel Arms, LLC v. New Orleans Hamburger & Seafood Co., 5-CA-599 C/W15-CA-600 (5th Cir. 2/24/16), 186 So. 3d 1220.
The sole member of an LLC, preparing to open a store to sell firearms, slipped and fell in the bathroom at a restaurant. The LLC did not open, allegedly as a result of injuries sole member suffered in the fall. The LLC sued restaurant for the resulting economic losses.
Issue: Whether the slip-and-fall statute imposes a duty on merchants to an LLC, a juridical person.
Holding: No. The slip-and-fall statute, La. R.S. 9:2800.6, imposes a duty upon a merchant to only a natural person. Furthermore, economic injury to a juridical person is not a reasonably foreseeable result of an unsafe floor, and is not easily associated with the merchant's statutory duty.

Nearhood v. Anytime Fitness, et al., 15-1142 (3d Cir. 5/4/16), 2016 WL 2342676, *writ denied*, 2016–C–0211 (La. 4/15/16), 2016 WL 1719354.
Plaintiff sued the franchisor of a fitness facility under a premises liability theory after a weight fell on him. Where a franchisor does not exert day-to-day control over its franchisee's management procedures, courts have found that the franchisor did not have custody or garde of the alleged defective premises. The franchisor established that it did not have day-to-day control over its franchisee's management procedures nor did it require its franchisee to purchase the specific equipment at issue. Summary judgment in favor of franchisor affirmed.

Burch v. SMG*, *Schindler Elevator Corp.,14-CA-1356 (4th Cir. 4/7/16), 2016 WL 1377123.
Trial court found that SMG's duty to Superdome patrons included the specific duty to properly control the operations of its elevators and control the number of persons accessing the elevators after events. Overcrowding of Superdome elevators after an event was a known problem. In the 2 ½ year period prior to this incident, there were at least two other incidents of Superdome elevators being overcrowded and malfunctioning. Because plaintiffs carried their burden of proving each element of the duty-risk analysis as to their negligence claims against SMG, the trial court did not err in finding SMG liable to plaintiffs for injuries

suffered in the elevator accident, nor did it err in finding no comparative fault on behalf of plaintiffs. Judgment awarding damages affirmed, with slight amendments to damage amounts.

F. Defamation and Related Torts

Ahearn v. City of Alexandria, 15-1014 c/w 15-1189 (3d Cir. 5/4/16), 2016 WL 2342634.
A special motion to strike under La. C.C.P. art. 971(A)(1) requires a two-part burden of proof. The moving party must first prove that the subject cause of action arises from an act in the exercise of his right of free speech regarding a public issue. If the moving party satisfies this initial burden of proof, then the burden shifts to the plaintiff to show a probability of success on his claim. A defamation claim arising from allegations in a judicial petition satisfies the first part of this test. The plaintiff did not show a probability of success on her defamation claim based solely on the parties' adverse pleadings, as they offered no insight into the elements of falsity, unprivileged publication to another, fault, and injury. Trial court's denial of the special motion to strike reversed and the defamation claim was dismissed.

Danna v. Ritz-Carlton Hotel Co., LLC, et al., 15-CA-0651 (4th Cir. 5/11/16), 2016 WL 2736162.
Defamation claim was based on discussion of allegedly disciplinary-worthy actions of plaintiff employee between Ritz–Carlton employees within the course and scope of their employment. Intra-corporate statements are not considered published to satisfy the publication requirement of defamation.

Bohn v. Miller, 15-1089 (3d Cir. 4/6/16), 189 So. 3d 592.
The plaintiff alleged that the defendant maliciously filed a report with the Lafayette Police Department accusing the plaintiff of unauthorized use of an access card. The defendant moved to strike pursuant to La. C.C.P. art. 971, which provides relief from a cause of action arising from a person's exercise of his or her constitutional rights of petition or free speech in connection with a public issue. The trial court granted the motion to strike and dismissed the plaintiff's claims with prejudice.
Holding: Good-faith reporting of criminal activity to the police is protected speech. The plaintiff did not prove malice, which is required for both defamation and malicious prosecution.

G. Spoliation

Sayre v. PNK (Lake Charles), LLC, 15-859 (3d Cir. 3/23/16), 188 So. 3d 428.
The plaintiff tripped and fell at the defendant's place of business. The plaintiff claimed that the defendant, in violation of its own policies, neither preserved videotape of its inspection of the area nor obtained witness statements from witnesses at the scene. As a result, the plaintiff claimed that the trial court should have given an adverse presumption charge to the jury requiring the defendant to rebut the presumption that the evidence would have been unfavorable to it. The trial court refused to give the requested instruction and the jury found for the defendant. The Third Circuit reversed.
The court noted that the Supreme Court in *Reynolds v Bordelon*, 172 So. 3d 589 (La. 2015), rejected the tort of negligent spoliation but recognized that Louisiana recognizes the adverse presumption against litigants who had access to evidence and did not make it available or destroyed it. In this case, the defendant had a policy in place to gather and maintain control of the evidence and thus the defendant assumed the duty to gather and control evidence; the defendant had knowledge of the potential litigation, and managed to preserve four minutes of surveillance tape showing the fall and the immediate time thereafter, but deleted the thirty minutes before and most of the thirty minutes after the fall. Under the circumstances, the plaintiff was entitled to the adverse presumption that the missing evidence would have been unfavorable to the defendant.

Tomlinson v. Landmark American Ins. Co., 15-CA-0276 (La. App. 4 Cir. 3/23/16), 2016 WL 1165434.
Spoliation of evidence refers to the intentional destruction of evidence for the purpose of depriving the opposing party of its use at trial. An essential element of a spoliation claim is the intent of the party alleged to be a spoliator, which after *Reynolds* must be greater than the general negligence standard. Here, regardless of whether the defendant's surveillance system preserved videos for three days or two weeks, the surveillance video was erased pursuant to a routine business practice. Summary judgment in favor of defendant on the spoliation claim affirmed. Summary judgment in favor of defendant on issue of liability reversed because the plaintiff submitted sufficient evidence from which a trier of fact may reasonably infer that the restaurant's failure to routinely and properly maintain the floors in a safe condition caused her to slip and fall.

H. Dogs and Trees

Coburn v. Dixon, 15-1095 (3d Cir. 4/27/16), 2016 WL 1660487.
The mere presence of dogs belonging to a tenant does not constitute "vices and defects" of the leased premises so as to make the owner liable under CC Art. 2321 to others for injuries caused by the tenant's dogs. Strict liability of a dog owner cannot be imputed to a nonowner, such as a landlord. The nonowner of the dog could be liable, however, for negligence. To successfully make a claim against a landlord for damages caused by a tenant's dog, the plaintiff must show that the landlord had actual knowledge of the dog's vicious propensities. Summary judgment in favor of landlord affirmed.

I. Children

Rhodus v. Lewis, 15-CA-1454 (1st Cir. 4/15/16), 2016 WL 1534237.
Two men, ages 22 and 23, were arrested and charged with burglary and criminal damage to property. Plaintiff sued the parents of the men, alleging that they failed to properly monitor their sons, both as minors and adults, and knew their sons conducted criminal activity from the parents' home. "Generally, a father and a mother are responsible for damage caused by their minor child who lives with them. LSA–C.C. arts. 2317 and 2318." The strict liability of parents for children ends when a minor child reaches 18 years old, the age of majority, because the parents then no longer have the legal right to control the child. To state a cause of action against the parents of an adult tortfeasor, a plaintiff must allege some act of negligence by the parents themselves, i.e., some breach of a duty the parents owe to the plaintiff. Plaintiff alleged the parents were the children's custodians and knew they engaged in criminal activities while living in their home and thus had a duty to reasonably monitor them and their failure to do so resulted in plaintiff's damages. However, even assuming such awareness, no controlling law imposes a duty on parents to monitor an adult child, control his actions, or exclude him from their home.

J. Intentional Torts and Comparative Fault

Dileo v. Horn, 15–CA–684 (5th Cir. 3/16/16), 189 So. 3d 1189.
Plaintiff alleged that his sister and his former girlfriend converted his rugs and furniture. In rendering judgment in favor of plaintiff, the trial court held that comparative fault could be applied to reduce his recovery for his negligence

because conversion is not an intentional tort invoking CC Art. 2323(C).[1] Thus, no fault was allocated to plaintiff. The Fifth Circuit reversed, holding that "[i]t is undisputed an act of conversion is an intentional tort in Louisiana." The trial court also held that fault should not be allocated between the defendants because under CC Art. 2324(A)[2] they conspired to commit an intentional tort. The Fifth Circuit disagreed, concluding that

> La. C.C. arts. 2323, 1917 and 1812 do not set forth an exception for solidary obligors with respect to the trial court's obligation to assign fault. Furthermore, while a solidary obligor is fully liable for the entire amount of damages awarded to the plaintiff, La. C.C. art. 1804 permits a solidary obligor who pays the entire award to seek contribution in the amount of the virile portion owed by each obligor. La. C.C. art. 1804 provides that the virile portion is determined from the fault assigned to each solidary obligor.

Accordingly, the appellate court assigned 70% fault to one defendant and 30% to the other.

[1] "Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced."

[2] "He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act."