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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2015:08 August 1, 2015

UPCOMING MEETINGS

Aug. 27, 2015	**LADC and Young Lawyers Awards Dinner, Hotel Monteleone, New Orleans**	
Aug. 28, 2015	**Sizzlin' Summer Seminar, Hotel Monteleone, New Orleans**	**7.0*#**

* - includes one credit for professional responsibility (ethics)
# - includes one credit for professionalism

BULLETIN BOARD

LADC BOARD AND YOUNG LAWYERS AWARDS DINNER, THURSDAY, AUG. 27: Remember how much we enjoyed the LADC's 50th Anniversary Dinner in 2013? So, we thought we should get together more often. For 2015, the LADC launches this dinner to bring together members of the LADC the evening before the Sizzlin' Summer Seminar and to recognize the recipients of two inaugural awards initiated by the LADC's Young Lawyers Committee: the Frank L. Maraist Award and the Young Lawyers Committee Member of the Year Award. The finalists for the Frank L. Maraist Award are Laura Beth "L.B." Graham (Gold, Weems, Bruser, Sues & Rundell); Thomas "Tommy" M. Hayes IV (Hayes, Harkey, Smith & Cascio); Courtney Nicholson (Entergy Services Inc.); Mary Jo Roberts (Phelps Dunbar); Erin B. Sayes (Taylor Porter Brooks & Phillips); and Scott L. Sternberg (Baldwin Haspel Burke & Mayer). Congratulations to each of the finalists. Come see what the Young Lawyers Committee has been doing to reinvigorate the LADC. Register now to join us for a fine dinner and awards presentation and stay for the big seminar the next day. This should be the beginning of a great new LADC tradition. Individual tickets and tables are available for purchase on the LADC website. Firms may buy tables for their LADC members. Aug. 14 is the last day to make reservations for the dinner.

SIZZLIN' SUMMER: The 2015 Sizzlin' Summer Seminar moves to a later date in August (Aug. 28) and a new venue—the beautiful Hotel Monteleone. This is not Labor Day weekend, which falls in September this year. So, for this year's seminar, no more worries about end-of-summer vacations or the beginning of the school year. The CLE program will feature the following speakers and presentations: Louisiana Supreme Court Justice Scott Crichton, *Fifty Shades of Writs—and Beyond*; Dr. Ryan Malphurs of Courtroom Sciences, Inc., *Defusing Reptile Tactics with Witness Preparation*; and ABA Presidential Commission on the Future of the Legal Profession Chair Judy Perry Martinez, *The Future of Legal Services*. The seven hours of CLE will include Ethics and Professionalism and presentations by each the LADC's new practice groups—Employment Law, Medical Malpractice, and Construction and Commercial Litigation. A new feature of the seminar is a two-hour side seminar planned by the Young Lawyers Committee. The Young Lawyers Seminar at 2:30-4:30 p.m. will be on fact and expert

depositions, and U.S. District Judge John deGravelles of the Middle District and LADC President-Elect Phelps Gay will participate. Make plans now to join us at the Monteleone for our annual end-of-summer seminar. Please note that our room block has sold out at the Hotel Monteleone and the hotel has no vacancies. We have made arrangements at a nearby hotel so please contact Kimberly Zibilich, our event planner, @ 504-208-5510 and she will help you in making reservations.

LADC PRACTICE GROUPS FORMED: The LADC has launched three new practice groups in Employment Law, Medical Malpractice, and Construction and Commercial Litigation. The plan for these groups is for each to be active in the CLE seminars, the newsletter, and on the website. The practice groups provide a vehicle for more members to be active in the organization and a way to enhance our legal education function. We are proud to announce the initial leaders for each group. We encourage members to become involved in the practice groups. You may join the groups on the LADC website.

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TRIAL ACADEMY 2015 CANCELED: The LADC is disappointed to announce that the Trial Academy has been canceled for this year. With very low registration at the beginning of July, the Board did not deem it prudent to proceed with a program that requires a three-day commitment of our faculty consisting of attorneys, judges, and experts. The Trial Academy has been canceled only one other time—in 2010—for low registration. Just as in 2010, the Trial Academy Committee plans to bring back a revamped Trial Academy with substantive changes and an aggressive marketing strategy.

SPECIAL FEATURE: The LADC is pleased to feature in this edition of the newsletter an essay written by Professor John M. Church, the Harry S. Redmon and Allen L. Smith, Jr. Professor of Law at the Paul M. Hebert Law Center of Louisiana State University. Professor Church has been doing work on the Louisiana Supreme Court's recent decisions addressing the open-and-obvious risk doctrine, and he wrote an essay on the topic for the LADC newsletter. We thank Prof. Church.

QUESTIONS REGARDING SEMINARS OR TRIPS: We are working with Kimberly Zibilich at Event Resources New Orleans: phone 504-208-5510; email Kimberly@eventresourcesnola

NEW MEMBERS

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Attorney Discipline

Attorney disbarred for defying numerous court orders, converting $7,000 in third-party funds to her own use, failing to adequately communicate with a client, engaging in conflicts of interest by (1) entering into a business transaction with a client without advising the client to seek independent counsel and (2) entering into a quitclaim deed transaction with a client without advising the client to seek independent counsel, engaging in deceitful conduct, being ineligible to practice law for failing to fulfill her professional obligations, failing to refund an unearned fee, failing to return a client's file despite numerous requests, and failing to cooperate with the ODC in its investigation. In re: Rejohnna Brown-Mitchell, 14-B-2544 (La. 5/5/15) (Crichton, J., concurring in part and dissenting in part), found at www.lasc.org/opinions/2015/14B2544.opn.pdf

Attorney disbarred for social media postings which amounted to a viral campaign to influence and intimidate the judiciary in pending, sealed domestic matters by means prohibited by law and through the actions of others, along with ex parte communications to various judges that were intended to threaten and harass them. The attorney used the internet and social media to elicit

outrage in the general public and to encourage others to make direct contact with judges in an effort to influence their handling of pending cases. In re: Joyce Nanine McCool, 15-B-0284 (La. 6/30/15) (Weimer, J., concurring in part and dissenting in part, finding some of the conduct was constitutionally protected speech and would not have imposed disbarment; Guidry, J., concurring in part and dissenting in part and would have imposed suspension of 3 years; Crichton, J., concurring; Canella, J. ad hoc, concurring in part and dissenting in part, would have imposed suspension of 3 years), found at www.lasc.org/opinions/2015/15B0284.opn.pdf

Civil Procedure

Where plaintiff stipulated that the value of her claim against her UM insurer did not exceed $30,000 and where the plaintiff settled with the tortfeasor and the tortfeasor's liability insurer for $25,000 after filing suit, the settlement amount no longer constitutes part of the "amount in dispute" and therefore, the city court had jurisdiction over plaintiff's claim against her UM carrier to the full extent of that court's $30,000 jurisdictional limit. Swayze v. State Farm Mutual Automobile Ins. Co., 14-C-1899 (La. 6/30/15), found at www.lasc.org/opinions/2015/14C1899.opn.pdf

Code of Civil Procedure Article 971 is Louisiana's Anti-SLAPP statute. "SLAPP" is an acronym for Strategic Lawsuit Against Public Participation to describe generally meritless suits brought by large private interests to deter common citizens from exercising their constitutional right to petition or to punish them for doing so. Art. 971 is an extraordinary procedural remedy that limits discovery, dismisses meritless claims quickly, and awards attorney's fees to the prevailing party, all with the intent to protect comments made in connection with public rather than private issues under consideration by our governmental bodies. Publication of a pornographic drawing and evidence under seal from private divorce proceedings made on the website "www.slabbed.org" is not protected by an Article 971 motion because the divorce proceeding is a private domestic matter, and not a matter of public significance. Yount v. Handshoe, 14-CA-919 (La. App. 5 Cir. 5/28/15), found at www.fifthcircuit.org/dmzdocs/OI/PO/2015/9549B7D0-1D13-486F-B980-67D59690A71A.pdf

"Law of the case" doctrine allows reconsideration of a prior ruling when, in light of a subsequent trial record, it is apparent that the determination was patently erroneous and produced unjust results. A prior denial of supervisory writs does not preclude reconsideration of an issue on appeal, nor does it prevent the appellate court from reaching a different conclusion. Hernandez v. Louisiana Workers' Compensation Corp., 15-118 (La. App. 3 Cir. 6/3/15) found at http://la3circuit.org/Opinions/2015/06/060315/15-0118opi.pdf

In two separate lawsuits, 160 plaintiffs claimed that a company sold them timeshares after a group sales presentation as a result of unfair, deceptive and misleading advertising and asked for nullity of the sales and damages. In the first suit, defendants' exception of improper cumulation of actions and/or improper joinder of parties was granted and in the second suit it was denied.

Under La C.C.P. 463, two parties may be joined in the same suit if (1) there is a community of interest between the parties joined; (2) each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and (3) all of the actions cumulated are mutually consistent and employ the same form of procedure. To satisfy La. C.C.P. art. 463(1), the parties must share a community of interest such that the cumulated actions arise out of the same facts or present the same factual and legal issues. A community of interest is present when there is enough factual overlap between the cases to make it "commonsensical to litigate them together." This requirement is met because all plaintiffs attended a ninety-minute sales presentation, experienced a sales pitch, paid the defendant for what they understood to be a timeshare, signed contracts with defendant, and experienced not being able to use what they purchased. While the trial court has discretion to manage its cases under La. C.C.P. art. 465, it may only dismiss the action under La. C.C.P. art. 464 when jurisdiction or venue is improper. When cumulation is deemed improper for other reasons, the court may order separate trials of the actions or order the plaintiff to elect which actions he shall proceed with, and to amend his petition so as to delete therefrom all allegations relating to the action which he elects to continue--which is what the court that dismissed the action should have done. Cooper v. Festiva Resorts, et al, 14-CA-1327 c/w 15-CA-0159 (La. App. 4 Cir. 6/3/15), found at la4th.org/opinion/2014/380177.pdf

Parties signed an agreement whereby the general provisions provided that the parties were to choose between 2 options -- one compelling arbitration and the other proclaiming that the agreement shall be governed and construed by the laws of Louisiana. The agreement was signed without either party choosing an option. After two unsuccessful mediations, one party filed an arbitration demand with the AAA and the other party filed a petition for declaratory judgment, preliminary injunction and permanent injunction, which was denied with the trial court dismissing the action based on a finding that the parties had consented to arbitration by signature and performance. Court of appeal affirmed. Despite the strong presumption in favor of arbitration, the arbitration clause sought to be enforced must have a "reasonably clear and ascertainable meaning" in order to enforce arbitration. The arbitration clause at issue in this case was rendered ambiguous because of the inclusion of both provisions. The three factors to consider in resolving an ambiguity created by an agreement containing conflicting provisions regarding arbitration are (1) extrinsic evidence of intent, (2) contract interpretation principles, and (3) the presumption favoring arbitration. Here, based on the extrinsic evidence presented, the pertinent Civil Code articles, and the policy favoring arbitration, the trial court's finding that the parties consented by performance to arbitrate was not error. Delta Administrative Services, L.L.C. v. Limousine Livery, Ltd., et al, 15-CA-0110 (La. App. 4 Cir. 6/17/15), found at la4th.org/opinion/2015/380676.pdf

The OWCA is granted exclusive jurisdiction over concursus proceedings for entitlement to attorney's fees arising out of the workers' compensation law. Wegman & Babst v. Feingerts, et al, 14-CA-1185 (La. App. 4 Cir. 6/24/15), found at la4th.org/opinion/2014/381075.pdf

Appellate court lacks appellate jurisdiction over the denial of an exception of *forum non conveniens*, the granting of a motion in limine, and the denial of an exception of prematurity and/or motion to stay pending arbitration. However, issues were also presented by writ application which was consolidated with appeal. The agreement between the parties to supply fuel did not contain an arbitration clause but a later signed promissory note did. While an appellate court rarely finds it appropriate to intervene in court rulings on motions in limine, here the trial court abused its discretion by granting the motion to exclude the promissory note without at least having an evidentiary hearing on the matter because the arbitration clause contained in the promissory note is the basis for defendant's exception of prematurity and motion to stay. Further, the trial court erred in denying the exception of prematurity without having first held an evidentiary hearing to determine whether there was fraud in the inducement of the arbitration clause. Here, the plaintiff challenges the validity of the arbitration clause itself and claims that because defendant knew of an impending criminal investigation at the time the promissory note was signed and presented the promissory note to obtain the arbitration clause, consent to arbitrate was fraudulently induced. Under the FAA, the issue of the validity of the contract containing the arbitration provision is decided by the arbitrator unless the challenge is to the validity of the arbitration clause itself. The trial court erred in denying the exception of prematurity without having first held an evidentiary hearing to determine whether there was fraud in the inducement of the arbitration clause, because the allegations of fraudulent inducement of the arbitration provision are not so factually intertwined with its allegations of fraud in the agreement sued upon that the two issues cannot be decided separately. Star Transport, Inc. v. Pilot Corp., et al, 14-CA-1228 c/w 14-CA-1393 (La. App. 4 Cir. 2015), found at la4th.org/opinion/2014/381425_2.pdf

Class Actions

Reversal of trial court's class action certification in case where police officers used tear gas to disperse a crowd of 200-500 people during the Sugar Cane Festival in New Iberia and deployed the tear gas three separate times at three different locations. There were no common claims amongst people who claimed not to have heard any warnings but left immediately once the first tear gas was dispersed, people who heard the warnings but refused to leave, and people who may or may not have heard the warnings but reacted with criminal behavior toward the police in response. There were three different dispersals involving different types of plaintiffs such that commonality was lacking. Remanded for trial court to redefine the class. Hill v Sheriff Sid Hebert, et al, 15-11 (La. App. 3 Cir. 6/24/15), found at http://la3circuit.org/Opinions/2015/06/062415/15-0011opi.pdf

Damages

For severe crush-type injury to left foot - $1,937,242.20 in special and general damages, but 90% fault attributed to plaintiff. Bourg v. Cajun Cutters, Inc., 14-CA-0210 (La. App. 1 Cir. 5/7/15), found at http://www.la-fcca.org/opiniongrid/opinionpdf/2014%20CA%200210%20Decision%20Appeal.pdf

Trial court erred in awarding replacement value of house instead of using market value for home wrongfully demolished after Katrina by governing authority. Reduced property loss damages from $102,036 to $24,500 which put the plaintiff in the same position he was before the demolition. Reversed $25,000 award for mental anguish. Sandrock v. St. Bernard Parish Government, 14-CA-1019 (La. App. 4 Cir. 5/27/25), found at la4th.org/opinion/2014/379696_1.pdf

Insurance

In suit by injured customer against restaurant, the restaurant/lessee filed a third party demand against the property owner's insurer, demanding defense and indemnification for the property owner. The owner intervened in the lawsuit, naming its insured as a defendant and demanding that it provide a defense and indemnification for the restaurant/lessee. Exception of no right of action as to restaurant's third-party demand was maintained because the restaurant has no right to act or sue on behalf of the owner and exception of no cause of action maintained because the owner has not been sued and with no claim pending against it, there can be no cause of action for defense/indemnification of owner. Further, exception of no right of action as to owner's intervention maintained, because it has no right to sue on behalf of its tenant, and exception of no cause of action maintained because it has not been sued. Hershberger v. LKM Chinese, L.L.C. d/b/a China Palace, 14-CA-1079 (La. App. 4 Cir. 5/20/15), found at la4th.org/opinion/2014/379208.pdf

Legal Malpractice

Faced with a conflict among the circuits in a peremption case on the issue of whether post-malpractice fraudulent concealment can constitute fraud as contemplated by La. R.S. 9:5605(E), or whether the act of malpractice itself must be fraudulent to apply the exception in La. R.S. 9:5605, the Supreme Court overruled several cases and found that post-malpractice fraudulent concealment can constitute fraud as contemplated by La. R.S. 9:5605(E). Lomont v. Myer-Bennett and XYZ Ins. Co., 14-C-2483 (La. 6/30/15) (Guidry, J., concurring), found at www.lasc.org/opinions/2015/14C2483.opn.pdf

Medical Malpractice

Nurse's act of dragging a dementia patient into her room at a nursing home and leaving her there for 15 minutes was not treatment-related and did not constitute healthcare or professional services, and therefore not subject to the Medical Malpractice Act. However, summary judgment was inappropriate because whether the nursing staff intended to commit an intentional tort on the patient presents a genuine issue of material fact. Porter v. Southern Oaks Nursing & Rehabilitation Center, LLC, 49,807-CA (La. App. 2 Cir. 5/20/15), found at www.la2nd.org/archives/docs/d903f9.pdf

Interventional radiologist qualified to offer expert opinion regarding the standard of care of a neurosurgeon where the malpractice alleged was not treatment that is peculiar to the discipline of a neurosurgeon, but rather fell within an area of overlap of the two disciplines. Further, the trial court erred in not conducting an evidentiary hearing on the expert's qualifications before making the determination she was not qualified. Pertuit v. Jefferson Parish Hospital Service District No. 2, 14-CA-752 (La. App. 5 Cir. 5/14/15), found at http://www.fifthcircuit.org/dmzdocs/OI/PO/2015/B3AE2CBC-2AA8-47BC-B686-D7D5BBADB981.pdf

Negligence

Water supply company shut off the water supply to make repairs to its rural public water system supply, while the Fifth Louisiana Levee District was attempting to draw water from one of the water supply company's customers to mix with a tank of acid primarily used to kill weeds. The drop in water pressure in water lines inadvertently pulled from the tank of concentrated acid, which was released into the Walnut Bayou water supply. Although the water was ultimately found to be uncontaminated, the water supply was turned off for 10 days and residents were worried about the possible contamination. Plaintiffs can recover in tort for loss of use of their property, even though there was no physical damage to their property. The Levee District 75% at fault for failing to have backflow preventers at the faucet and on the tank. Water supply company 25% at fault for failing to require customer backflow preventer devices and failing to notify its customers of the repair work. Plaintiffs' claims for mental anguish dismissed because in order to recover for mental distress in the absence of physical injury, there must be a strong and obvious likelihood that plaintiffs would suffer genuine severe emotional distress. $600 per plaintiff for loss of use of water for 10 days. England v. Fifth Louisiana Levee District, 49,795-CA (La. App. 2 Cir. 6/3/15, found at www.la2nd.org/archives/docs/6f19ce.pdf.

Defendant/property owner in premises liability case entitled to summary judgment where plaintiffs produced no evidence to show defendant knew asbestos was being used, specified its use, or knew of its dangers, or that the construction site was inadequate for the safe handling of

asbestos or that the alleged exposure was due to the failure of the premises owner to provide a safe working environment. In the nine months between the filing of the suit and the motion for summary judgment, the parties had a fair opportunity to present their claims and plaintiffs did not show probable injustice so as to necessitate a delay in acting upon defendant's motion for summary judgment. Jordan v. Thatcher Street, LLC, et al, 49,820-CA (La. App. 2 Cir. 6/10/15), found at www.la2nd.org/archives/docs/9f3cc8.pdf

Summary judgment granted in favor of City of Shreveport where plaintiff failed to prove that tasing by police officer caused plaintiff's subsequent heart attack. Only evidence offered by plaintiff was self-serving assertion that doctor told him that his heart attack was a result of the tasing and a 2012 article on a study by a university cardiologist suggesting that tasing "can trigger heart trouble." Scott v. City of Shreveport, 49,944-CA (La. App. 2 Cir. 6/24/15), found at www.la2nd.org/archives/docs/477a92.pdf

Under La. R.S. 15:832, the Department of Corrections owes no duty to ensure the safety of its inmates while they are performing work release at another facility. Madison v. State of Louisiana, Department of Public Safety & Corrections, 14-1067 (La. App. 3 Cir. 05/06/15) (Thibodeaux and Saunders, JJ., dissenting), found at www.la3circuit.org/Opinions/2015/05/050615/14-1067opi.pdf

Pedestrian was on premises leased by the State when she slipped on a mildewed or moldy substance that had accumulated on the sidewalk as a result of a leak in a gutter. The evidence suggested the substance developed over a period of time and that it was easily remedied by applying bleach to the area. Plaintiff's claim against the State satisfied the requirements of La. R.S. 9:2800, but the Police Jury (the owner of the premises) was not responsible for remedying the problem, nor was it responsible for indemnifying the State, because the condition was not reported to it by the State, and the Police Jury was unaware of it. Campbell v. Evangeline Parish Police Jury, et al, 14-1301 (La. App. 3 Cir. 5/6/15), found at www.la3circuit.org/Opinions/2015/05/050615/14-1301opi.pdf

The organizers of a motorcycle "demo ride" were entitled to summary judgment dismissing them from suit where a rider was killed because the plaintiffs produced no evidence that the organizers had a duty to obtain a police escort for the demo ride, that they breached their duty to take reasonable safety precautions to protect the participants in demo rides by failing to require the riders to wear safety gear and use headlights modulators, or that the route chosen by the organizers constituted negligence. Doucet v. Alleman, 15-61 (La App. 3 Cir. 7/1/15), found at www.la3circuit.org/Opinions/2015/07/070115/15-0061opi.pdf

Generally, when other vehicles are able to stop behind the lead vehicle without incident and the driver of the last vehicle is the one that causes the collision, the driver of the last vehicle is

negligent. However, summary judgment in favor of plaintiff finding following driver solely at fault was reversed where material issues of fact remained over the comparative fault of the other drivers involved, namely the unknown driver of the vehicle that entered the highway in front of the lead vehicle in a manner that caused the lead vehicle to stop short. Berthiaume v. Gros, 15-116 (La. App. 3 Cir. 6/3/15), found at www.la3circuit.org/Opinions/2015/06/060315/15-0116opi.pdf

Defendants' motion for summary judgment properly denied where there remained a genuine issue of material fact over whether a hole in the porch was open and obvious to all. Hooper v. Brown, 15-CA-0339 (La. App. 4 Cir. 5/22/15), found at la4th.org/opinion/2015/379465.pdf

A person injured while lawfully on a merchant's property can establish the merchant's liability for damages under La. R. S. 9:2800.6 provided he shows that (1) the merchant created the condition which caused his harm; (2) while it did not create the condition which cause the harm, the merchant had actual notice of the condition, or (3) while it did not create the condition which caused the harm, the merchant had constructive notice of the condition. The plaintiff slipped on a gas spill covered with kitty litter. Summary judgment was proper in favor of defendant as to the constructive notice allegation, because the Merchant Liability Statute "does not allow for the inference of constructive notice absent some showing of this temporal element." A plaintiff "who simply shows that the condition existed without an additional showing that the condition existed for some time before the fall has not carried the burden of proving constructive notice as mandated by the statute." However, a plaintiff need not prove notice if it can prove that the merchant actually created the condition and there exists a genuine issue of material fact on this issue. While an employee on duty testified she was the only employee on duty and she did not put the kitty litter over the spill, plaintiff testified there were two employees on duty and an employee of another gas station told her they commonly cover spills with kitty litter to absorb the spill. Defendant acknowledges that plaintiff slipped on a kitty litter-like substance, and hence it is a reasonable inference that it was the merchant, and not a customer or stranger who put the substance on its parking lot surface to remedy an oil slick. Partial summary judgment granted in favor of defendant dismissing any theory of recovery under 9:2800.6 based upon the proposition that defendant had actual or constructive notice of the condition. Davis v. Cheema, Inc. and Century Surety Co., 14-CA-1316 (La. App. 4 Cir. 5/22/15), found at la4th.org/opinion/2014/379424_1.pdf

Child died after being admitted hospital. Plaintiffs' allegations that the coroner misplaced the child's body for nine months before cremating it and burying it in a "John Doe" burial site without notification to family sufficiently pleads for purposes of overcoming an exception of no cause of action the first element (extreme and outrageous conduct) of an intentional infliction of emotional distress claim. Their allegations that the coroner's office deprived them of the opportunity to provide a Christian burial site and has not yet provided the family with the

specific location of the grave site sufficiently pleads for purposes of overcoming an exception of no cause of action the second element (the plaintiffs suffered severe emotional distress). Finally, their allegation that the coroner's office repeatedly ignored court orders to preserve the body and efforts to obtain information as to body implicitly indicates that the coroner knew or should have known that the acts and omissions of his office inflicted severe emotional distress upon plaintiffs (the third element). Simmons v. The State of Louisiana, Department of Children and Family Services, et al, 15-CA-0034 (La. App. 4 Cir. 6/24/15), found at la4th.org/opinion/2015/381204.pdf

Code of the City of New Orleans (Ord. No. 828 M.C.S) § 11-26 provided that "the owners of a vacant house shall keep the doors and other entrances to such house so closed as to prevent the ingress therein by tramps or individuals not regularly occupying such house." Where fire started in vacant church and damaged neighboring property, plaintiffs were not entitled to a Mistretta jury instruction that the owner's failure to keep the house secure was a cause-in-fact of the fire that was reasonably proven to have been ignited by vagrants or children nor were they entitled to a res ipsa loquitur jury instruction. Show and Tell of New Orleans, L.L.C., 15-CA-0067 c/w 15-CA-0068 c/w 15-CA-0069 (La. App. 4 Cir. 6/24/15), found at la4th.org/opinion/2015/381077.pdf

Prescription

Defendant installed power lines 20 years before plaintiff was injured by power line. The line had the proper clearance when installed but sagged over the years. Defendant argued the 10-year peremptive period for actions related to construction of an improvement to immovable property under La. R.S. 9:2772 applied such that the claim was perempted. Plaintiffs argued that post-construction sagging created a hazardous condition due to inadequate clearance, which was known or should have been known to defendant, who failed to warn of or remedy the condition. Court found the power system, including the uninsulated power line, was an "improvement to immovable property" within La. R.S. 9:2772, such that the peremption statute would apply. However, the issue of whether defendant had a continuing duty to warn about the condition of the power line after its installation was not properly decided by an exception of peremption but by motion for summary judgment. Chesney v. Entergy Louisiana, LLC, 49,816-CA (La. App. 2 Cir. 5/20/15), found at www.la2nd.org/archives/docs/0dbb23.pdf

Res Judicata

While the doctrine of res judicata is ordinarily premised on a final judgment on the merits, it also applies where the opposing parties have entered into a compromise or settlement of a disputed matter. Full settlement of workers compensation claim precluded claimant from bringing new claim for benefits alleging a new injury resulting from the prior accident. Toliver v. Entergy Services, Inc., 49,954-WCA (La. App. 2 Cir. 6/24/15), found at www.la2nd.org/archives/docs/23ebd4.pdf

After suit against school board was dismissed because the plaintiff/employee could not prove an intentional act, the school board filed an intervention in its capacity as plaintiff's employer alleging it had paid $81,661 in medical expenses as a result of the injuries plaintiff sustained in the course and scope of her employment and seeking repayment of this sum and a credit against future payments should plaintiff's recovery against the remaining defendants be sufficient. The trial court granted the plaintiff's exception of res judicata on the grounds that the school board was required to file this compulsory counterclaim before being dismissed from suit. The court of appeal reversed, finding the school board raised its reimbursement claim before the filing of the petition for intervention, reserved its rights in the settlement agreement and the judgment dismissing other defendants, and appeared in a different capacity in the petition for intervention. Penton v. Castellano, 49,843-CA (La. App. 2 Cir. 6/24/15), found at www.la2nd.org/archives/docs/dbc610.pdf

A party asserting res judicata based on a compromise agreement must have been a party to the compromise agreement (overruling Tyler v. Roger, 08-2468 (La. App. 1 Cir. 3/19/12), 91 So. 3d 1056, to the extent that Tyler conflicts with this principle of law). Although the defendant not a party to the compromise agreement may raise the compromise as a defense on the merits, it may not do so via the exceptions of res judicata and no right of action. Garrison v. James Construction, Group, LLC and XYZ Ins. Co., 14-CA-0761 (La. App. 1 Cir. 5/6/15), found at www.la-fcca.org/opiniongrid/opinionpdf/2014%20CA%200761%20Decision%20Appeal.pdf

Spoliation of Evidence

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 4) 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 v. Bordelon, 2014-2362 (La. 6/30/15), available at http://www.lasc.org/opinions/2015/14C2362.opn.pdf

Summary Judgment

The Supreme Court declined to address the merits of plaintiffs' constitutional challenge to the administrative adjudicative procedure for tickets issues on the basis of photographic evidence obtained from traffic cameras because plaintiffs failed to follow the strictures of motion for summary judgment procedure. First, although plaintiffs prayed for summary judgment declaring the hearing process unconstitutional, they did not attack the constitutionality of the administrative hearing procedure anywhere in their motion for summary judgment. The only argument they raised in their motion was that they were entitled to summary judgment granting a permanent injunction because the Court of Appeal affirmed the district court's judgment granting them a permanent injunction. However, the burden of proof is entirely different for a permanent injunction, although the parties can agree to consolidate trial on the merits of a permanent injunction with the judgment issuing a preliminary injunction. That was not done in this case. Thus, as a matter of law, plaintiffs would not be entitled to a summary judgment granting a permanent injunction based solely on the fact that the district court and the court of appeal determined it made the prima facie showing requisite to obtaining a preliminary injunction. Further, plaintiff's evidentiary offering was "woefully inadequate" because La. C.C.P. art. 966(F)(2) limits the materials courts may consider on summary judgment as follows; "evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded . . ." The only evidence plaintiffs cited and attached to their motion was plaintiffs' affidavits, the district court's judgment granting the preliminary injunction, the court of appeal's opinion affirming that judgment, and this Court's action sheet denying the City's writ application seeking review of the judgment granting the preliminary injunction. While the record on appeal contains additional materials which would be helpful to the court in deciding the merits, these materials were not in the field of evidence properly subject to the court's consideration, as "only evidence admitted for purposes of the motion for summary judgment may be considered by the court in ruling on the motion." Rand v. City of New Orleans, 14-CA-2506 (La. 6/30/15) (Johnson concurring), found at www.lasc.org/opinions/2015/14CA2506.opn.pdf

Where defendant filed a motion for summary judgment in 2005, which was continued several times at the request of the parties, and the plaintiff filed a motion to compel production of certain

documents in September, 2012, which defendant failed to do, the trial court did not abuse its discretion by entertaining defendant's motion for summary judgment in July of 2014, before defendant produced the requested documents. Plaintiff did not ensure that the motion to compel was heard before the hearing on defendant's motion for summary judgment, nor did he avail himself of the potential remedies for defendant's failure to provide the requested discovery. Madison v State of Louisiana, Department of Public Safety & Corrections, 14-1067 (La. App. 3 Cir. 5/6/15), found at www.la3circuit.org/Opinions/2015/05/050615/14-1067opi.pdf

Torts

The retail sale of expired over-the-counter medication is not a direct violation of 21 U.S.C.A. Section 331 of the Food, Drug, and Cosmetic Act, because such medication is not an "adulterated drug" within the meaning of that statute, which is meant to govern the "manufacture of drugs." Cooper v. CVS Caremark Corp., et al, 14-CA-1797 (La. App. 1 Cir. 6/17/15), found at www.la-fcca.org/opiniongrid/opinionpdf/2014%20CA%201797%20Decision%20Appeal.pdf

Workers' Compensation

Surveillance videotape may form the basis of a forfeiture of benefits under La. R.S. 23:1208 if it directly contradicts the claimant's statements. Here, the claimant testified repeatedly about the severity of her condition, the physical limitations she suffered as a result of the fall and the high level of pain she continued to experience from her injury, all of which was contradicted by the video surveillance recordings. Malone-Watson v. Strategic Restaurants, 14-CA-1191 (La. App. 1 Cir. 6/11/15), found at
www.la-fcca.org/opiniongrid/opinionpdf/2014%20CA%201191%20Decision%20Appeal.pdf

Two checks issued in error and subsequently returned by the claimant did not interrupt prescription because they were not payments pursuant to La. R.S. 23:1209(A). Alexander v. Medical Staffing Network, Inc., 49,774-WCA (La. App. 2 Cir. 5/20/15), found at www.la2nd.org/archives/docs/6495e3.pdf

Claimant's workers' compensation benefits reduced by 50% for his failure to cooperate with an order of rehabilitation which required that he attend adult education classes in order to obtain his GED. Willis Knighton Health System v. Sims, 49,967-WCA (La. App. 2 Cir. 6/24/15), found at www.la2nd.org/archives/docs/b2c266.pdf

When an accident causes a disability from which a workman would have recovered except for further disability produced by a separate, intervening cause, there is no liability for compensation beyond the disability produced by the job connected accident. Where claimant was released to work with no restrictions following a work related fall and several days later was involved in an automobile accident on the way to a doctor's appointment which rendered her disabled, the

employer is not liable for her subsequent disability because the automobile accident was not a natural or expected consequence of her original accident. Dilliard's, Inc. v. Nichols, 14-CA-740 c/w 14-CA-741 (La. App. 5 Cir. 5/28/14), found at www.fifthcircuit.org/dmzdocs/OI/PO/2015/822FB44A-192C-4CAA-8990-9AC6427FA8DB.pdf

While a claimant can meet his burden of proving a work-related accident by his own uncontradicted testimony "absent circumstances casting suspicion on the reliability of this testimony," such burden was not met where the claimant failed to report the incident to his employer for several days and did so only after he had seen an attorney who referred him to a medical rehab accident injury center, and where the claimant was not forthcoming with his employer that he had a previous injury. Garcia v. Rouses Enterprise, Inc., 15-CA-7 (La. App. 5 Cir. 5/14/15), found at http://www.fifthcircuit.org/dmzdocs/OI/PO/2015/1D37488D-CDB7-4352-A508-687469F8A421.pdf

Claimant was searching for a parking space in the parking lot where employees were instructed to park, 15-25 minutes before her shift began, when her vehicle was struck by a vehicle driven by another casino employee. Claimant was in the course and scope of her employment when the accident occurred. Theriot v. Full Service Systems Corp., 14-1199 (5/27/15), found at www.la3circuit.org/Opinions/2015/05/052715/14-1199opi.pdf

Reversing trial court's denial of plaintiffs' motion for directed verdict and rendering judgment that injured plaintiff was not in the course and scope of his employment at the time of the accident. The injured plaintiff primarily drove a truck for Industrial Helicopters but he was injured when he fell out of a helicopter owned by Industrial while helping a related company on a deer netting mission. Industrial acknowledged in a statement of contested facts on a motion for summary judgment, in which it was attempting to prove that the injured employee was the general employee of Industrial but that he was the borrowed employee of GMI for purposes for workers compensation immunity, that the injured plaintiff was not doing the work of Industrial at the time of the accident, which constituted a judicial admission and which should have been admitted into evidence at trial. Hebert v. Richard, et al, 15-8 (La. App. 3 Cir. 6/17/15), found at www.la3circuit.org/Opinions/2015/06/061715/15-0008opi.pdf

A third-party tortfeasor's voluntary payment of medical expenses does not serve to interrupt prescription as to a solidarily-liable employer. Shailow v. Gulf Coast Social Services, 15-91 (La. App. 3 Cir. 6/10/15), found a www.la3circuit.org/Opinions/2015/06/061015/15-0091opi.pdf

A boat ramp was not pier for purposes of the LHWCA where there was no evidence presented that it was "a structure built on pilings extending from land to navigable water" and does not extend into the water on pilings. The grassy area thirty feet from the ramp was not customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel and thus

did not meet the situs requirement of the LHWCA. Further, performing work on property used to construct physical reinforcements to stabilize the earth around a boat launch was not "maritime employment" sufficient to trigger the application of the LHWCA. Hernandez v. Louisiana Workers' Compensation Corp., 15-118 (La. App. 3 Cir. 6/3/15), found at http://la3circuit.org/Opinions/2015/06/060315/15-0118opi.pdf

Cab driver murdered while driving a cab was not an employee of the cab company for purposes of workers' compensation where the driver only utilized the dispatch and goodwill services provided by the cab company and paid the cab company for use of these services. The cab driver was paid by his customers. Wilfred v. A. Service Cab Co., Inc., 14-CA-1121 (La. App. 4 Cir. 5/27/15), found at la4th.org/opinion/2014/379573.pdf

LOUISIANA CLARIFIES THE OPEN AND OBVIOUS DOCTRINE—AGAIN

John M. Church[1]

After Louisiana abandoned contributory negligence in favor of comparative fault, one of the remaining questions was to determine whether there were circumstances where the plaintiff's fault or knowledge of the hazard or defect would result in a finding of no liability. In 1996, the Louisiana Supreme Court affirmed that there was a class of cases where defendants could escape tort liability for defects on land or buildings because the "open and obvious" nature of the defect sufficiently reduced the probability of injury to justify a conclusion that the burden of precaution outweighed the expected loss. *Pitre v. Louisiana Technological University*, 673 So.2d 585 (1996). While the basic principle has remained, Louisiana courts have struggled to establish the appropriate standards to define these "no liability" cases. In the last several years the Louisiana Supreme Court has examined the issue three times and provided what appear to be very different approaches.

The progression of cases is quite stunning. *Pitre* was the first post-comparative fault case to analyze the "no liability" issue. The Supreme Court determined that implied assumption of the risk no longer existed, but that where the facts reveal that the defect did not constitute an unreasonable risk of harm, the court should conclude that the defendant owed "no duty" to the plaintiff. Id. at 593. In part, the decision was based on the argument that because the defect was "open and obvious", a plaintiff exercising due care would have avoided the harm. Id. *Pitre* spawned what became known as the "open and obvious" defense. Courts routinely ruled, as a matter of law, that the defendants owed no duty to the plaintiff because the defect was "open and obvious". See, e.g., *Pryor v. Iberia Parish School Board*, 10–1683, (La.3/15/11), 60 So.3d 594, 597 (per curiam); *Eisenhardt v. Snook,* 08–1287, 208 So.3d 541 (per curiam); *Dauzat , v. Curnest Guillot Logging, Inc,* 08–0528, 995 So.2d 1184(per curiam). The growth and application of the "open and obvious" defense provided defendants with a valuable tool to obtain summary dismissal.

The opportunity to obtain preliminary dismissal of defect cases appeared to come to a screeching halt in April 2013 with *Broussard v. State of Louisiana*, 2012-1238 (La.4/5/13), 113 So.3d 175. In *Broussard*, the Louisiana Supreme Court reiterated that any analysis of the "open

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and obvious" nature of the defect should be part of a complete risk-utility analysis. Id. at 184. In addition, the *Broussard* court seemed to shift the risk-utility analysis from a question of duty to a question of breach. Id. at 185. Because duty is traditionally a question of law while breach is a question of law, the *Broussard* ruling would seem to result in fewer preliminary dismissals and more cases going to the jury. Predictably, in the relatively short period of time where courts were applying the new *Broussard* standard courts almost universally found that the "open and obvious" nature of the defect was just one part of larger risk-utility analysis and that the question of whether the defendant breached its duty, including the question of whether the open and obvious nature of the risk sufficiently reduced the risk of injury to support a no breach result, was properly submitted to the jury. *See, e.g., Currie v. Scottsdale Indem. Co.*, 12-1666 (La. App. 1 Cir. 8/26/13); 123 So.3d 742; *Farrow v. Dolgencorp, LLC*, CIV.A. 12-804-SDD-RLB, 2014 WL 1118122 (M.D. La. Mar. 20, 2014)

In October of 2014, the Supreme Court, without overruling *Broussard*, affirmed a summary judgment in favor of a defendant because the defect was open and obvious. In *Bufkin v. Felipe's Louisiana, LLC*, 2014-0288 (La. 10/15/14), -- So.3d.--, 2014 WL 5394087, the Louisiana Supreme Court noted that defect cases require a risk-utility analysis, consistent with both *Pitre* and *Broussard*. However, the analysis was performed as part of the duty element and focused heavily on the open and obvious nature of the defect. Id. The analysis seemed to signal a return to *Pitre*, where courts would routinely dismiss cases because the defect was open and obvious. Less than a year later, the Supreme Court affirmed and clarified the *Bufkin* holding in *Allen v. Lockwood*, 2014-1724 (La. 2/13/15), 156 So.3d 650, suggesting that "[a]ny reading of *Broussard* interpreting it as a limit on summary judgment practice involving issues of unreasonable risk of harm is a misinterpretation of the *Broussard* case."

To be sure, it is possible to interpret *Bufkin* in a way that is consistent with *Broussard* and *Pitre*. As the Court noted In *Allen*, "*Broussard* was a three-day jury trial involving a fact-intensive determination as to whether the defect posed an unreasonable risk of harm or constituted an open and obvious defect. The jury returned a verdict in favor of Broussard. The First Circuit Court of Appeal reversed on grounds of manifest error because it found the defect was open and obvious. This Court reversed finding no manifest error in the jury's determination. We resolved the issue under the risk-utility balancing test. Our comments under this discussion clearly pertained to cases that were tried either by judge or jury. *Broussard* did not involve summary judgment practice nor did our discussion infer that issues of this nature must be determined by a trial." Id. at 653. Similarly, Justice Guidry's concurrence in *Bufkin* recognizes that the determination of an unreasonable risk is a question of fact, but emphasizes that "our jurisprudence does not preclude the granting of a motion for summary judgment in cases where the plaintiff is unable to produce factual support for his or her claim that a complained-of condition or thing is unreasonably dangerous." *Bufkin* (Guidry, J., concurring)

Although distinguishable, the cases represent very different approaches. To use very plain language, it is much easier for defendants to obtain summary judgement after *Bufkin* than it was before. Even if *Bufkin* and *Allen* do not represent a complete return to *Pitre*, it most certainly swings the pendulum in *Pitre's* direction. Defendants should find judges more receptive to summary dismissal by utilizing the analysis signaled in *Bufkin* and *Allen*. However, the standard for determining which cases should be dismissed remains uncertain. The cases leave many issues unresolved.

There are two principal issues in the "open and obvious" cases. First, the cases raise the issue of whether the application of the risk-utility balance occurs as part of the duty element or as

part of the breach element. *Pitre* was very clear that the risk-utility balance and the open and obvious nature of the defect should be part of the duty analysis. In contrast, *Broussard* appeared to signal that the risk-utility analysis should be performed as part of the breach element. The Court noted that "our prior decisions have admittedly conflated the duty and breach elements of our negligence analysis. See Maraist, et. al., Answering a Fool, 70 LA. L.REV. at 1121–22, 1124. This conflation, in turn, has confused the role of judge and jury in the unreasonable risk of harm inquiry and arguably transferred 'the jury's power to determine breach to the court to determine duty or no duty.' Id. at 1124, 1132–33." *Broussard*, at 185. The Court concludes that "the analytic framework for evaluating an unreasonable risk of harm is properly classified as a determination of whether a defendant breached a duty owed, rather than a determination of whether a duty is owed *ab initio*." Id.

To complete the cycle, *Bufkin* seems to return the unreasonable risk analysis to the duty element. Analyzing a building contractor's liability to a pedestrian alleging that the contractor created a hazard by placing a dumpster in a location that obscured the pedestrian's view of oncoming bicycles, the Court concluded that "Shamrock, having assumed custody of the sidewalk and abutting parking spaces outside of 622 Conti Street during the pertinent time period, would have been liable for any unreasonably dangerous condition it created. However, the evidence presented on motion for summary judgment established that any vision obstruction, caused by the dumpster, to a pedestrian crossing Conti Street at that mid-block location was obvious and apparent, and reasonably safe for persons exercising ordinary care and prudence. Moreover, because the size of the dumpster was comparable to a pick-up truck, this particular situation was of the type any pedestrian might encounter on a regular basis. Thus, we conclude that Shamrock had **no duty** to warn of the obstruction presented to pedestrians by its pick-up-truck-sized dumpster, a large inanimate object visible to all." *Bufkin, 2014 WL at *10* [bold added]. The majority continues, "Once Shamrock demonstrated that the plaintiff would be unable to bear his burden to prove an essential element of his negligence action**, that a duty was owed** by Shamrock to him, then the burden shifted to the plaintiff to demonstrate that he would be able to meet the burden at trial." Id. [bold added]

While the question may seem academic, the duty/breach issue is vital to the availability of summary judgment. The *Broussard* court explains: "It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. (citation omitted) … The judge decides the former, and the fact-finder—judge or jury—decides the latter. 'In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.'' *Pitre*, 95–1466 at p. 22, 673 So.2d at 596 (Lemmon, J., concurring). Because the determination of whether a defect is unreasonably dangerous necessarily involves a myriad of factual considerations, varying from case to case, (citation omitted) … , the cost-benefit analysis employed by the fact-finder in making this determination is more properly associated with the breach, rather than the duty, element of our duty-risk analysis. (citation omitted) … Thus, while a defendant only has a duty to protect against unreasonable risks that are not obvious or apparent, the fact-finder, employing a risk-utility balancing test, determines which risks are unreasonable and whether those risks pose an open and obvious hazard. In other words, the fact-finder determines whether defendant has breached a duty to keep its property in a reasonably safe condition by failing to discover, obviate, or warn of a defect that presents an unreasonable risk of harm." *Broussard,* 113 So.3d at 185.

To the extent that *Bufkin* represents a return to the *Pitre* "no duty" approach, defendants should find it easier to dismiss cases as a matter of law. Even with Justice Guidry's recognition that the question of the existence of an unreasonable risk is a question of fact, *Bufkin* is a clear signal that summary judgment is available in defect cases.

The second issue raised in the cases is whether a court is free to dismiss a case solely because the defect is "open and obvious" or whether a complete, detailed risk-utility balance is required. Once again, the cases are inconsistent. In *Pitre,* the Court conducted a very detailed balance, analyzing the benefits of telephone poles, the costs and feasibility of various precautions including signage, the nature of the activity of sledding, concluding that "[t]he most effective means of preventing this accident rested with Pitre. To require Tech to take the proposed measures to protect from this obvious and apparent danger would place a huge burden upon the University by requiring it to warn and/or protect against all risks (e.g., buildings, signs, fences, trees, etc.) associated with sledding on campus. The cost to prevent potential harm by posting signs, officers and/or barriers at every object on campus that one might slide into would be enormous. " *Pitre*, 673 So.3d at 593.

Lower courts cited and applied *Pitre* liberally, dismissing cases because the defect was "open and obvious" without engaging in any lengthy or detailed balance of any kind. The author's informal analysis reveals that from 1998-2005, there were twenty-six Louisiana cases discussing the open and obvious doctrine. From 2006-2013, there were fifty-five. Thirty cases relied on the doctrine to relieve the defendant of liability. However, only twenty of the cases applying the open and obvious doctrine utilized a detailed risk-utility analysis like that performed in *Pitre* and, ultimately, *Broussard*. While this statistical is far from scientific, it does reveal that lower courts were uncertain about the proper application of the open and obvious doctrine.

Perhaps concerned that courts were applying the "open and obvious" doctrine too frequently to dismiss cases, the *Broussard* court signaled a very clear retreat, analyzing the utility of the elevators, the probability of the harm, the nature of the activity and the cost of prevention. The "open and obvious" nature of the defect is relevant to the probability of injury. The theory is that where the defect is open and obvious, the victim will take sufficient care to avoid any injury. Noting that an individual plaintiff's awareness of the risk should go to comparative fault rather than liability, *Broussard* clarifies that a risk must be apparent to all to be "open and obvious." Because the question of whether a defect is apparent to all will almost inevitably involve significant factual issues, *Broussard* notes that, "[t]he fact-intensive nature of our risk-utility analysis will inevitably lead to divergent results. Moreover, each defect is equally unique, requiring the fact-finder to place more or less weight on different considerations depending on the specific defect under consideration. What may compel a trier-of-fact to determine one defect does not present an unreasonable risk of harm may carry little weight in the trier-of-fact's consideration of another defect. For instance, a fact-finder analyzing a defective sidewalk may find the cost and feasibility of repair to the city or municipality outweighs all other considerations. (citation omitted) … In contrast, the inherently dangerous nature of the plaintiff's activity may persuade the trier-of-fact to conclude a defective logging road, for example, is not unreasonably dangerous." *Broussard*, 113 So.3d at 191.

While *Bufkin* recognizes that the unreasonable nature of a defect involves a risk-utility analysis, the Supreme Court seems to invite lower courts to focus on the open and obvious nature of the risk. "The second prong of this risk-utility inquiry focuses on whether the allegedly dangerous or defective condition was obvious and apparent. Under Louisiana law, a defendant

generally does not have a duty to protect against that which is obvious and apparent. In order for an alleged hazard to be considered obvious and apparent, this court has consistently stated the hazard should be one that is open and obvious to everyone who may potentially encounter it. Broussard v. State ex rel. Office of State Buildings, 113 So.3d at 184; Hutchinson v. Knights of Columbus, Council No. 5747, 866 So.2d at 234." Applying *Bufkin*, a defendant should be able to obtain a summary dismissal based solely on a demonstration that the defect is "open and obvious." *Bufkin*, 2014 WL at *7.

In future cases, the Louisiana Supreme Court should have the opportunity to clarify the doctrine. Although prediction has never been a fruitful exercise, the experience in other jurisdictions may be instructive. Several jurisdictions distinguish a duty to warn of a defect from a duty to remedy a defect, finding that the "open and obvious" nature of the defect is a defense to the former, but merely a non-dispositive factor in the determination of the unreasonable nature of the risk for the latter. *See, e.g., Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ken. 2010); *Donohue v. San Francisco Housing Authority*, 16 Cal.App.4th 658, 665 (1993); *City of Winder v. Girone*, 462 S.E.2d 704 (Ga. 1995). Similarly, several jurisdictions have adopted the approach of §343(A) of the Second Restatement which provides that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Wilmington Country Club v. Cowee*, 747 A.2d 1087 (Del. 2000); *Coffin v. Lariat Associates*, 766 A.2d 1018 (Me. 2001) (citing *Williams v. Boise Cascade Corp.*, 507 A.2d 576, 577 (Me.1986) (citing the Restatement (Second) of Torts § 343A(1) (1965))). Finally, it is noteworthy that, if there is any discernable trend, jurisdictions tend to be abandoning the "open and obvious" defense in lieu of an approach that treats the open and obvious nature of the defect as either a factor in determining duty or breach or as a fact that goes to comparative fault. *Cummings v. Prater*, 95 Ariz. 20, 27, 386 P.2d 27, 31 (1963); *Gargano v. Azpiri*, 955 A.2d 593 (2008). For example, Texas has "expressly abolished a 'no-duty' doctrine previously applicable to open and obvious dangers known to the invitee. Instead, a plaintiff's knowledge of a dangerous condition is relevant to determining his comparative negligence but does not operate as a complete bar to recovery as a matter of law by relieving the defendant of its duty to reduce or eliminate the unreasonable risk of harm." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tx. 2010) (citing *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 516–17 (Tex.1978)).

However, there are states that continue to treat the open and obvious nature of the hazard as a complete defense, usually treating the issue as part of the duty element. For example, the Ohio Supreme Court recently ruled that "[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Lang v. Holly Hill Motel, Inc*., 909 N.E.2d 120 (Oh. 2009). "The owner or occupier may reasonably expect that persons entering the premises will discover open and obvious dangers and take appropriate measures to protect themselves. When a plaintiff is injured by an open and obvious danger, summary judgment is generally appropriate because the duty of care necessary to establish negligence does not exist as a matter of law." Id.

In short, while there seems to be a trend to eliminating the open and obvious defense, there are jurisdictions that retain it, typically treating the question as part of duty. This should provide ample support for further analysis of the issue in Louisiana. Following *Bufkin* and *Allen*, the defense has been reborn following the premature announcement of its death in *Broussard*. The open and obvious defense is alive and well in Louisiana—for now.