2020 Recent Developments
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Helpful Hints from A to Z from Fannin Street

Hon. Jeanette Garrett
Second Circuit Court of Appeal

HELPFUL HINTS FROM A TO Z FROM FANNIN AND OTHER STREETS

Presentation for
The Shreveport Bar Association

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Recent Developments
Seminar

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December 17, 2020

Presented by:

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Second Circuit Court of Appeal
430 Fannin Street
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"A" Attorney Malpractice

Ewing v. Westport Ins. Corp., 2019-551 (La. App. 3 Cir. 2/5/20), 290 So. 3d 707, *writ granted*, 2020-00339 (La. 6/22/20), 297 So. 3d 759, *affirmed*, 2020-00339 (La. 11/19/20), ___ So. 3d ___, 2020 WL 6789490

- Malpractice case arising out of attorney's failure to timely file plaintiff's tort suit after she was rear-ended.
- Attorney argues plaintiff's damages in the malpractice action should be capped at $30,000, which was the policy limit of the negligent driver's insurance.
- Trial court agreed and granted defendant's MSJ on the "collectability" issue and reasoned:

  > "…for me to rule otherwise, would mean that a plaintiff, where there is limited insurance coverage, would be better off if their attorney committed malpractice, because the attorney would have more coverage than that underlying coverage."

- Tortfeasor was an air technician who worked for his father, did not file tax returns, earned $17,000 in 2018, and stated in his deposition he would have considered filing bankruptcy if an excess judgment were to be granted.
- Ruling reversed on appeal – the defendant's attorney cannot rely on a "hypothetical situation" of bankruptcy to limit the plaintiff's recovery against the negligent attorney.
- La. Supreme Court granted writs to determine whether "collectability" is a relevant consideration in a legal malpractice case. Over two dissents, they ruled it's not relevant and cannot be raised as an affirmative defense.

"B" Bathroom Floor/Blessing of the Fleet

Barker v. City of Grand Isle, 19-451 (La. App. 5 Cir. 1/8/20), 288 So. 3d 286, *writ denied*, 2020-00230 (La. 4/27/20), 295 So. 3d 949

- Barker fell and injured herself in the bathroom in a trailer at the "Blessing of the Fleet Fair" in Grand Isle.
- It was a rainy day; this was her second trip to the bathroom, where the floor was slippery, the toilets were backed up, and toilet paper was sticking to the floor.
- City's MSJ was denied by the trial court, who indicated he had been reversed before by the appellate court on a wet floor case.
- Here the trial court gets reversed for <u>not</u> granting the defendant's MSJ.
- This wet floor was "open and obvious" and, therefore, not unreasonably dangerous and thus no legal duty was owed.

"C" Cello

Jensen v. Matute, 2019-0706 (La. App. 4 Cir. 1/29/20), 289 So. 3d 1136

- Is plaintiff entitled to damages for loss of use of his 19th century Granjon cello (valued at $65,000) for the 111-day period it took to repair the cello?
- Plaintiff was rear-ended; the cello was in the back seat and was possibly cracked.
- Cello was sent to a "luthier" in New Mexico for repairs.
- Defendant paid for the repair and shipping costs, but balked at plaintiff's exorbitant claim for loss of use ($60,000+) premised on a rental value of $541.67 per day, which was almost the appraised value.
- Good discussion of differences between "special" and "general" damages.
- Plaintiff used the other cello he had used for 30+ years as a professional cellist with Louisiana Philharmonic Orchestra.
- Traditional loss of use cases "presupposes a functional rental market from which a market rental value can be estimated with a fair amount of certainty…A vintage cello, however, does not…"
- Also not entitled to mental anguish and emotional upset.

Cows

Garland v. Beaubouef Co., L.L.C., 53,572 (La. App. 2 Cir. 9/23/20), ___ So. 3d ___, 2020 WL 5648527

- At 3:00 a.m. on Easter Sunday, while driving down I-49 in DeSoto Parish, the plaintiff's car collided with a black cow owned by the defendant.
- Cow owner was able to exculpate itself from liability under La. C.C. art. 2321 and La. R.S. 32:263 by showing that copper thieves had cut through the fence on Good Friday to steal copper from a cell tower operated by AT&T that was on the defendant's property.
- Defendant was able to show that the property was fenced with "hog wire" made of steel, and there were no prior escapes.
- The DPSO and AT&T did not report the fence cutting incident to defendant until after the plaintiff's accident.
- Defendant was able to show it reasonably and prudently inspected the fences on a regular basis.
- In other cases, courts have approved of once-a-week inspections.

Custody

Cook v. Sullivan, 53,741 (La. App. 2 Cir. 11/18/20), ___ So. 3d ___, 2020 WL 6750097

- Custody dispute between former same-sex partners.
- Child was born in 2009 after one of the former partners had sexual relations with a male friend of the couple.
- Partners split up in 2013 (prior to the 2015 *Obergefell v. Hodges* decision).
- There was no adoption and no domestic relations agreement as in other cases.
- After a lengthy trial that began in 2017 and was not completed until 2019, the trial court found that the plaintiff was a

"psychological parent," granted joint custody, and implemented a reunification plan.

- Reversed on appeal.
- La. law does not currently provide for the award of custody to a non-parent based on status as a "psychological parent" – our legislature has not acted, and it's not the judiciary's role to fill in gaps left by the legislature.
- Dispute must be decided under La. C.C. art. 133, which governs parent vs. non-parent disputes.
- Burden of proof under art. 133 is "substantial harm to the child."
- Here, the mother's constitutionally protected fundamental rights as a natural parent were violated, and the trial court misapplied the law.

"D" Deportation

State v. Sewell, 2019-1062 (La. App. 4 Cir. 2/5/20), 290 So. 3d 1227, *writ granted*, 2020-00300 (La. 6/22/20), 297 So. 3d 758

- Defendant granted PCR relief by trial court based on ineffective assistance of counsel.
- Defendant, a Jamaican national, was subject to mandatory deportation after he pled guilty to first degree robbery (reduced from armed robbery).
- Defendant had been represented by three different attorneys (third was only "stand-in counsel" when plea was taken).
- Attorneys testified they were unaware the defendant was not a US citizen. Trial court noted nothing from defendant's appearance would indicate he was not a US citizen.
- Trial court questions whether it's the defendant's duty to tell his attorneys he is not a US citizen or is it the attorney's duty to ask or should the judge have asked?
- Citing *Padilla v. Kentucky*, appellate court affirms with one dissent.

- Query: Should this question be added to the *Boykin* colloquy?? Do you want to "stand in" at a plea?

DWI

State v. Barber, 19-286 (La. App. 5 Cir. 10/2/19), 282 So. 3d 347, *writ denied*, 2019-01634 (La. 5/14/20), 296 So. 3d 607

- Rare case where a DWI conviction is reversed because there was insufficient evidence that the defendant was "operating" the vehicle.
- After getting drunk at a Mardi Gras parade, defendant's friend drove him back to his parents' home at midnight.
- To avoid a confrontation with his father, the defendant got in his car and went to sleep.
- Engine was running so he could run the heater, and doors were unlocked.
- Appellate court distinguished all the cases where the defendant was asleep in vehicle but could not have gotten to the location without driving.
- The trial court did not make any credibility findings on the record and simply assumed turning the key is enough.

"E" Elections

Kocher v. Truth in Politics, Inc., 2019-0993 (La. App. 4 Cir. 11/15/19), 283 So. 3d 649

- 2019 governor election was on November 16, 2019.
- Voter in New Orleans obtained a TRO on November 13th for false advertising under La. R.S. 18:1463, which prohibited the defendant from running TV ads described in her petition, which allegedly falsely accused Gov. Edwards of entering into "backroom deals" and enriching a Lt. Col. Starkel to the tune of $65,000,000.

- Defendant appealed the TRO and the appellate court issued an order on November 15th vacating the TRO because the order itself failed to comply with La. C.C.P. art. 3605, which provides that the order has to describe the prescribed conduct in reasonable detail within its four corners and not by reference to the petition.
- Case punted back down for a proper order to be reissued.
- Concurrences note that the technical procedural error did not diminish the substantive finding by the trial court that a TRO was warranted; the ads were false; Winston Churchill would call them a "terminological inexactiture," as opposed to mere hyperbole, as posited by the defense.
- NOTE: In judicial races, the candidates can file complaints with the "Judicial Campaign Oversight Committee" (48 hour turnaround; press releases; referral to ODC or Judiciary Commission).

Kocher v. Truth in Politics, Inc., 2020-0264 (La. App. 4 Cir. 9/2/20), ___ So. 3d ___, 2020 WL 5229495

- Round 2.
- Following remand and correction of language in TRO, defendants filed exception of no cause of action because election was over and court could not afford any relief.
- Exception denied.
- Look at operative facts at time suit is filed and not through "lens of time."
- La. R.S. 18:1463 provides for injunctions to restrain future violations, attorney fees and costs.

Google Earth

Walker v. S.G.B.C., L.L.C., 2019-506 (La. App. 3 Cir. 2/5/20), 290 So. 3d 700, *writ denied*, 2020-00355 (La. 6/3/20), 296 So. 3d 1070

- Underlying suit was for recognition of a predial servitude/right of way based on 30 years acquisitive prescription.
- "Google Earth" images from 2004, 2005, and 2017 were utilized by the Plaintiff during the trial, over the defendant's objection, who contended the images were not properly authenticated under La. C.E. art. 901.
- Defendant contended plaintiff did not have the creator of the images testify as to their authenticity; obtain any type of certification from Google that the images were what they purported to be; and have an expert testify they were accurate depictions.
- Lower court and court of appeal rule none of this was required.
- Authentication is a condition precedent to admissibility under La. C.E. art. 901(A).
- Under La. C.E. art. 901(B)(1), a lay witness with personal knowledge that the evidence is what it is claimed to be is sufficient.
- Here, many witnesses ID'd all the roads and access points depicted in the Google Earth images.

Evidence

Lee v. Louisiana Bd. of Trustees for State Colleges**,** 2017-1433 (La. App. 1 Cir. 3/13/19), 280 So. 3d 176, *reh'g granted* (Sept. 18, 2019), *writ denied*, 2019-01647 (La. 1/14/20), 291 So. 3d 690

- Incoming basketball player at Grambling suffers a severe heatstroke during an unauthorized four-mile run in the August heat known as the "Tiger Mix."
- His teammate, and roommate in his hospital room, was Henry White, who died from his heatstroke and whose case is reported in *Williams v. Bd. of Sup'rs of Univ. of Louisiana Sys.*, 48,763 (La. App. 2 Cir. 2/26/14), 135 So. 3d 804, *writ denied*, 2014-0666 (La. 5/2/14), 138 So. 3d 1249.
- Plaintiff Lee survived but suffers from permanent irreversible damage to his skeletal muscles and exercise intolerance.
- Jury awarded $2.5 million in damages.

- One of many contested issues at trial was his prospect of ever playing professional basketball.
- Lee's high school JV coach at Huntington was allowed over defense objection to give his opinion regarding Lee's ability to play professional basketball, even though he was not a scout and had never evaluated talent for professional basketball.
- Although he was not an expert, his testimony was allowed under C.E. art. 701.
- Because he had coached for 17 years and coached Lee for four years, he testified plaintiff could "run like a deer and jump like a kangaroo;" people came to games to see him dunk; he was a team leader; all district, etc.
- Opined Lee could have played overseas in an international league as were four other players from Huntington.

"F" Fast Cars

Putman v. Costello, 53,142 (La. App. 2 Cir. 11/20/19), 284 So. 3d 1225

- Putman buys a 1955 Chevy BelAir and pays Costello to perform "restomod" (restoration and modification) work on it.
- They go out for a test drive on a slick state highway, and the driver accelerates too quickly, with the car owner as the passenger and the mechanic as the driver.
- Car spins out of control, both get seriously hurt, and both sue each other.
- Basis of mechanic's claim is that the owner has an unreasonably dangerous souped up car.
- Owner files MSJ on issue of his liability to the driver, and trial court grants the MSJ.
- Cause of the wreck was due to the driver's action; the car did not pose an unreasonable risk of harm; and the owner does not owe a duty to the mechanic/operator here.
- In his deposition, the owner stated, "We all take risks in life…. We all think we are bulletproof."

"G" Gymnastics

Glorioso v. City of Kenner, 19-298 (La. App. 5 Cir. 12/18/19), 285 So. 3d 601, *writ denied*, 2020-00120 (La. 3/9/20), 294 So. 3d 484

- 5-year-old child gets injured while attending a gymnastics camp in a facility owned by a municipality and operated by the city's Parks and Recreation Department.
- She fell and cut herself on a broken metal electrical box.
- Does La. R.S. 9:2795 – the Recreational Use Statute – provide blanket tort immunity to the municipality?
- ¶ A(3) of statute does not expressly define "recreational purposes" and only contains a illustrative list.
- Although gymnastics is not listed, City contended that it comes under the "omnibus clause."
- Trial court agreed and granted City's MSJ.
- Reversed on appeal.
- Because immunity statutes limit the rights of tort plaintiffs, they should be strictly construed.
- In their view, the statute contemplates a legislative intent to only apply to activities engaged in "the true outdoors."

"H" Hospitals

Hawkins v. Schumacher Grp. of Louisiana, Inc., 53,137 (La. App. 2 Cir. 11/20/19), 284 So. 3d 1237, *writ denied*, 2019-02014 (La. 2/10/20), 292 So. 3d 62

- When you go to the hospital, who is responsible for the various people who may treat you?
- In this case, the rural hospital has a contract with an entity to supply the anesthesia service.
- CRNA improperly intubates patient, resulting in brain injury.
- Did entity that contracted with hospital to provide anesthesia services violate any of its duties here?

- Because lengthy contract required way more than just supplying CRNAs, the trial court erred in granting summary judgment in defendant's favor here.

"I" Judicial Immunity

Palowsky v. Campbell, 2018-1105 (La. 6/26/19), 285 So. 3d 466, *reh'g denied*, 2018-1105 (La. 9/6/19), 278 So. 3d 358, and *cert. denied sub nom. Winters v. Palowsky*, 140 S. Ct. 2570, 206 L. Ed. 2d 499 (2020)

- Judges do not enjoy absolute immunity from civil liability for administrative decisions that are not judicial or adjudicative.
- Conduct by a law clerk in allegedly destroying documents and improper supervision was the crux of the suit.

Johnson v. Jasmine, 19-365 (La. App. 5 Cir. 1/29/20), 289 So. 3d 1209

- Father, dissatisfied with custody plan, sues trial court judge for intentional infliction of emotional distress and also accuses her of improper ex parte communications.
- Exceptions of no cause of action sustained.
- Judge acting in judicial capacity on custody issue.
- Proper forum for ex parte complaint is with the Judiciary Commission, and there is no cause of action for personal liability for damages.

"J" Jury Deposit and Cost

Rodrigue v. Travelers Ins. Co., 2019-0713 (La. App. 4 Cir. 1/8/20), 288 So. 3d 294

- Plaintiff paid a $5,600 cash deposit for an expected 10-day civil jury trial.

- Case settles four working days before trial, and plaintiff files a motion for a refund.
- Trial court denies motion and orders Clerk of Court to pay entire $5,600 to Judicial Expense Fund.
- Plaintiff files Motion for New Trial, which was denied.
- Plaintiff files writ seeking a writ of mandamus to order district court to release the money; writ denied as "premature" but converted to an appeal.
- Ultimate ruling is the plaintiff is entitled to a refund, less a deduction of $1,500 provided for in the local jury deposit order, which was "re-interpreted" by the appellate court.
- La. C.C.P. art. 1734.1 regulates all this.
- Timeline here was: 4/16/18 – $5,600 deposit
  3/18/19 – jury trial date
  3/12/19 – case settles
  1/8/20 – appellate ruling
- Long time for your money to be tied up.

Kshirsagar v. State Farm Ins. Co., 53,520 (La. App. 2 Cir. 7/22/20), 300 So. 3d 914

- Case being discussed under Quantun, *infra*.
- Dog bite case tried before a jury.
- Plaintiffs prevailed, but jury award ($31,000+) was well below what the plaintiffs sought.
- One of defendant's arguments on appeal was that the trial court erred in denying the defendant's motion to tax costs because they were the prevailing party.
- Trial court reasoned that the plaintiffs were the prevailing party, even though the amounts awarded by the jury were minimal.
- No abuse of discretion here.
- Unclear who asked for the jury trial here.

"K" Kiddie Corral

Coleman v. Lowery Carnival Co., 53,467 (La. App. 2 Cir. 4/22/20), 295 So. 3d 427, *writ denied*, 2020-00594 (La. 9/23/20), 301 So. 3d 1179

- Two-year old child fell 8' from the "Zamperla Mini-Jet" ride in the "Kiddie Corral" section at the La. State Fair, causing a TBI and epileptic seizures.
- Plaintiff contended operator failed to properly secure the child or timely stop the ride.
- State Fair annual event includes a carnival, livestock show, rodeo, and other exhibits and food.
- State Fair contracts with Lowery Carnival Company to operate the rides, who then has a verbal agreement with another company, Crabtree, to provide additional rides.
- A Crabtree employee wearing a Lowery shirt was operating the ride when the accident occurred.
- State Fair and Lowery file MSJs on grounds they did not own, operate, or have custody or control of the ride or its operator.
- Trial court grants the MSJs.
- MSJ reversed as to Lowery because genuine issues of material fact existed as to its relationship with Crabtree because they shared profits, etc.
- MSJ affirmed as to State Fair, and the prior case of *Lewis v. Pine Belt Multipurpose Cmty. Action Acquisition Agency, Inc.*, 48,880 (La. App. 2 Cir. 5/7/14), 139 So. 3d 562, *writ denied*, 2014-0988 (La. 8/25/14), 147 So. 3d 1120, and *writ denied*, 2014-1190 (La. 8/25/14), 147 So. 3d 1121, was distinguished where ride had no safety switch.
- The accident was due to "operator" error and State Fair had no control here.

"L" Lobster

Wilkerson v. Darden Direct Distribution, Inc., 53,263 (La. App. 2 Cir. 3/4/20), 293 So. 3d 146

- Plaintiff allegedly chips a tooth on a bone in some lobster ravioli at Olive Garden.
- Waitress inadvertently throws napkin containing chewed ravioli in garbage can.
- Although plaintiff had subpoena returns for two witnesses who did not show, trial court denied plaintiff's motion to continue as he found other addresses on his cell phone.
- Abuse of discretion to not grant continuance.
- Attorneys can rely on subpoena returns.

"M" Medical Malpractice

Nordgren v. State, 53,480 (La. App. 2 Cir. 7/22/20), 300 So. 3d 473, *writ denied sub nom. Nordgren v. Bd. of Supervisors of the Louisiana State Univ.*, 2020-01046 (La. 11/10/20), ___ So. 3d ___, 2020 WL 6581003

- Lack of informed consent case.
- Plaintiff's contention is that surgeon improperly harvested bone from his right knee without his consent during surgery to repair a fracture in his upper right arm.
- Plaintiff, a runner, contended he was told and only agreed to have a bone graft taken from his hip.
- Consent form did not specify the location for the bone graft.
- LSU policies require locations to be specified.
- The parties' recollections of the conversations between the plaintiff and the LSU resident assisting the surgeon differed.
- Genuine issues of material fact as to possible misrepresentations under La. R.S. 40:1157.1(A).

- Genuine issues of material fact as to whether a reasonable patient in the plaintiff's position would not have consented to the arm surgery had he been told the knee was a potential donor site for the autograft.
- Error to grant defendant's MSJ.

Munchausen by Proxy Syndrome

Babcock v. Martin, 2019-0326 (La. App. 1 Cir. 10/24/19), 289 So. 3d 606

- Ongoing custody dispute beginning in 2005.
- Suspicions arose that mother had "MSbP" – Munchausen Syndrome by Proxy: "a mental illness in which a caregiver, usually a mother, intentionally produces or feigns illness or injury in a person under her care in order to assume the role of a parent who is suffering the hardship of having a sick child."
- Pursuant to court-ordered testing, a psychologist confirmed the diagnosis and recommended supervised visitation.
- At court hearing, medical reports are admitted and a consent judgment is issued, in 2008, awarding father sole custody, supervised visitation for mother with a nurse present, and mother has to undergo therapy.
- Mother doesn't comply, locates other mental health professionals who disputed and disagreed with the diagnosis and seeks to modify custody.
- Twelve-day trial held in 2018. Her experts say she is just "nervous and scared," as opposed to diagnosis of MSbP.
- Can mother now seek to discredit the expert who diagnosed her in 2008? No – she did not question the methodology or request a *Daubert* hearing back in 2008, nor did she object to the admissibility of the report back then.

"N" Negligence

Green v. Brookshire Grocery Co., 53,066 (La. App. 2 Cir. 9/25/19), 280 So. 3d 1256

- Slip and fall at grocery store.
- A customer spilled a red drink, and the store commenced efforts to clean it up.
- Before it could be cleaned up, the plaintiff slipped and fell in the liquid.
- A video of the area and the fall shows the presence of cones, but the plaintiff, in her affidavit, denied seeing the cones.
- The trial court opined the cones were visible from all directions and absolved the store of any negligence, and granted MSJ.
- Court failed to take into account her affidavit that she could not see the cones.
- Genuine issue of material fact as to what could be seen:

> "In this case, we have the benefit of a video of the entire incident. We have carefully reviewed the video and affidavit of the Brookshire's manager. The video shows that a Brookshire's employee placed a warning cone near two pallets. As Ms. Green was walking through the store aisle, it is arguable that she was looking up at products at the end of the aisle. Further, it is arguable that the cone's visibility could have been obstructed by the pallets. The other warning cone was placed several aisles away from the initial spill site. Given the distance between the cones and the placement of the single cone near the initial spill site, there is a genuine issue of material fact as to whether these cones were sufficient to properly warn the store patrons of the spill. Furthermore, it is arguable that the store employee failed to properly warn Ms. Green of the wet floor. There is a genuine issue as to whether Brookshire exercised reasonable care."

- Although a video is worth 1,000 words, it's subject to interpretation.

Negligent Entrustment

Duran v. Allmerica Fin. Benefit Ins. Co., 53,615 (La. App. 2 Cir. 11/18/20), ___ So. 3d ___, 2020 WL 6750367

- Bank president is provided with a bank-owned vehicle for business and personal use.
- During a "hunting vacation week," he is involved in an incident causing the front wheel to dislodge.
- He is injured and, at hospital, his BAC is 0.346.
- When the tired dislodged, he was en route to the bank after hours to pick up his travel itinerary for an out of state hunting trip.
- Plaintiff's vehicle hits the tire in the dark road, causing serious injuries.
- Plaintiff sues the bank on theories of vicarious liability, negligent entrustment, and for punitive damages, under La. C.C. art. 2315.4.
- Trial court grants bank's Motions for Summary Judgment and dismisses bank.
- On appeal, the Summary Judgment on the issue of negligent entrustment is reversed due to genuine issues of material fact existing on this issue.
- Plaintiff produced evidence that President had been involved in other bank vehicle incidents; President's wife had voiced concern about her husband's alcohol use to a board member; talk among bank employees about alcohol use raised issues regarding whether bank knew or should have known about the drinking problem, and should he be entrusted with a vehicle.
- As to vicarious liability, the evidence showed the President was clearly on vacation.
- Split in circuits remains as to responsibility for La. C.C. art. 2315.4 damages as unnecessary to reach this issue.

"O" Out of Time

Pittman v. Flanagan, 2019-0038 (La. App. 1 Cir. 9/27/19), 287 So. 3d 721

- Trial court had presided over this domestic case for 7 years and was thoroughly familiar with the matters at issue.

- "Case management schedule" setting a one day hearing on the complex child support issue (special needs children; was mother voluntarily unemployed, etc.).
- Trial court then set a two hour time limit for each side and allowed each party additional time.
- On appeal, father claims his due process rights to a fair hearing were violated.
- Under La. C.C.P. art. 1631(A), courts have discretion to control their dockets, and it's only upon a showing of a "gross abuse of discretion" that appellate court will reverse…none here.
- Because husband did not timely designate an expert, no error by trial court in disallowing the testimony.
- One dissent.

"P" Pit Bull

Figaro v. Lafayette Animal Shelter & Care Ctr., 2019-610 (La. App. 3 Cir. 2/5/20), 289 So. 3d 1146

- Lafayette Animal Shelter Advisory Board (consisting of eight members) conducted a "Dangerous Dog Hearing" and found "Diamond," the plaintiff's pit bull mixed dog, to be dangerous because it bit two people.
- Plaintiff sought review in district court, which reviews the record, including the CD recording of the dangerous dog hearing, and declares the dog dangerous and signs a judgment on June 7, 2019.
- Plaintiffs appeal this ruling and complain due process rights were violated by both the Board and lower court.
- Meanwhile, the dog was euthanized on June 20, 2019, and this information is addressed in briefs, and defendant wants appeal dismissed as moot.
- Appellate court agrees they cannot offer any practical relief to bring back the pet, but they proceed to conduct a "bare" due process review.

- Based on the documented biting incidents that occurred off the plaintiff's property, neither the Board nor the trial court committed manifest error.
- Is this a complete waste of judicial resources?
- Was dog tested for rabies?

Parking Lots

Sepulvado v. Farm Bureau Ins. Co., 2019-317 (La. App. 3 Cir. 11/6/19), 283 So. 3d 569, *writ denied*, 2019-01914 (La. 1/28/20), 288 So. 3d 786

- Does the highly successful restaurant in Many, "Fisherman's Galley Restaurant," owe a duty to its customers to take actions to remedy the overcrowded parking situation during busy times?
- Restaurant was particularly crowded on Sundays after church and patrons parked along the shoulder of the highway blocking views.
- Plaintiff was in an accident with a restaurant patron who was easing out to make a left turn, and his view was obstructed by all the vehicles.
- Trial court granted the restaurant's MSJ on grounds that the Department of Highways is charged with the duty to enforce traffic laws.
- Court of Appeal reverses – factual questions here as to whether there was ample parking during busy hours, did owners take any actions to remedy the situation, etc.
- This is one of the areas where duty is a mixed legal/factual issue.

Collins v. Creighton, 53,522 (La. App. 2 Cir. 9/23/20), ___ So. 3d ___, 2020 WL 5648534

- Very minor fender bender in parking lot at a community college during busy noon hour.
- Lower court assessed 100% fault to driver of truck backing out of a parking space and placed no duty on the other driver.

- The trial court misapplied the law applicable to liability in parking lot cases (*Lawrence v. Groan*, 973 So. 2d 959).
- Drivers moving through the lot have the paramount duty of attentiveness and maintaining a low vehicle speed.
- *De novo* review conducted due to trial court's legal error.
- Video established that the defendant was cautiously backing up and stopped when it saw the plaintiff's car, and the plaintiff hit the defendant's truck.

"Q" Quantum

Kshirsagar v. State Farm Ins. Co., 53,520 (La. App. 2 Cir. 7/22/20), 300 So. 3d 914

- Dog bite case.
- Plaintiff bitten numerous times on leg and hip requiring 28 stitches, 7 days of bedrest, permanent scarring, chronic pain and swelling, inoperable tear to Achilles tendon, scar tissue impingement on nerve, etc.
- Jury awarded:
  $15,000 – past medicals
  0 – future medical expenses
  $16,000 – general damages
  0 – loss of consortium to husband
- Good survey of dog bite liability and quantum cases.
- General damage award increased to $45,000 as "lowest reasonable amount."
- As to future meds, the evidence conflicted as to the scarring, and the only evidence the plaintiff presented was a statement from a plastic surgeon estimating cost to remove scar would be $3,550 (did not testify, was not deposed, and no medical report produced), so no jury error here.
- Loss of consortium – evidence showed the husband had to perform household duties and yard work and their sexual relationship was negatively impacted (15-16 times a month reduced to hardly once or twice a month).
- Husband awarded $5,000 for loss of consortium.

Malbrough v. Rodgers, 2019-10 (La. App. 3 Cir. 1/29/20), 290 So. 3d 204, *writs denied*, 2020-00357, 2020-00354 (La. 6/3/20), 296 So. 3d 1066

- Six-year-old boy tragically dies from Ewing sarcoma, which is a very aggressive bone cancer.
- Narrow issue was whether failure of the child's pediatrician to order an X-ray on August 10 deprived the child of a lost chance of survival when the cancer was discovered on August 15 when the child was taken to the emergency room.
- Bench trial – court ruled in mother's favor that the five-day delay caused a lost chance of survival.
- Court awarded $200,000 for lost chance of survival; $50,000 for loss of enjoyment of life; and $8,569 for funeral expenses.
- Two-to-one opinion on appeal as to whether plaintiff proved causation here.
- To refute the defendant's argument that the damages were duplicative, the court of appeal "explained" that what the trial court meant to do was:
    (1) The $50,000 was to compensate the child for his loss of enjoyment of life;
    (2) The $200,000 was intended to compensate the mother for her damages, which include loss of love, affection and companionship.

  But, under the *Burchfield* case, the award has to be a "lump sum," so there's a $258,569 judgment.
- Case illustrates difficulty of "loss of chance of survival" and "loss of a better outcome" cases.

Dotson v. Balsamo, 53,644, (La. App. 2 Cir. 11/18/20), ___ So. 3d ___, 2020 WL 6750121

- Very minor and hotly disputed fender bender in drive-through lane at Popeye's Fried Chicken.
- Plaintiff went to ER, which showed no back pain, no cervical spine tenderness, and full range of motion.
- Plaintiff is referred, by her attorney, to a chiropractor, who saw her on 28 occasions.

- City Court only awarded her recovery for the ER bill and the first five chiropractor visits and no general damages.
- Upheld on appeal – record supports that the last 23 chiropractor visits were in "bad faith," and the trial court found the plaintiff not credible.
- No abuse of discretion here.
- Court noted in a footnote that trial courts have the authority to make awards for "precautionary medical examinations," and the trial court "very generously" awarded the ER costs and five chiropractor visits.
- Query: Perhaps the defendant should have appealed the liability question here?

"R" Res Judicata

Thomas v. Marsala Beverage Co., 52,898 (La. App. 2 Cir. 11/20/19), 284 So. 3d 1212

- Defendant had an ongoing worker's compensation case stemming from a work-related injury, in which he was receiving benefits and medical expenses.
- In his third party tort suit, the jury rejected his claims for future medical expenses and future earnings, which was upheld on appeal.
- Thereafter, LUBA terminated WC benefits based on the outcome of the tort suit.
- The WC judge sustained LUBA's exception of res judicata when plaintiff sued for WC benefits.
- Reversed on appeal.
- Legislature has created a separate and distinct tribunal for resolution of WC claims between employees and employers, and res judicata should not be applicable here.

"S" Supreme Court

Glob. Mktg. Sols., L.L.C. v. Blue Mill Farms, Inc., 2019-1402 (La. 1/28/20), 288 So. 3d 124

- More fallout from the hotly contested races in south Louisiana for the seats on the La. Supreme Court.
- In this writ application in a "legacy suit," a party successfully moved to have newly elected Justice William Crain recused from the case.
- Although the basis for the recusal motion is not reported, Justice Crichton's dissent from the recusal order notes that "[a] campaign mailer such as the one at issue here cannot—and should not—be the basis of recusal."
- Justice Crain filed an affidavit attesting to his ability to be fair and impartial, and it is attached to the writ disposition.
- Unclear what the procedure is for such a motion at the La. Supreme Court or who decided it, but this seems highly unusual.

"T" Trash Can

Strozier v. Loux, 53,136 (La. App. 2 Cir. 11/20/19), 285 So. 3d 70

- At 2:00 p.m. on Saturday, the plaintiff's motorcycle collided with a trash can that was in the roadway on the Caplis Sligo Road.
- Plaintiff sues the homeowner whose garbage can was hit and the waste removal company for creating the hazardous condition.
- The defendants were able to establish that the garbage had been picked up on Friday morning, and the container had been put back in the homeowners' yard; the homeowner had put the container back in her yard on Friday morning while leaving town for a soccer tournament; two sheriff's deputies who performed "wellness checks" and "vacation checks" at the property saw no can in the road on Friday or Saturday; and the neighbor who tended to the dogs on Friday evening and Saturday morning saw no can.

- Plaintiff was unable to establish any causation by the defendants here, and MSJ was granted.
- Whodunnit???
- Query: What are our duties with regard to our trash cans?

"U" Unlawful Intoxilizer Test

Jacobs v. Dep't of Pub. Safety, 53,208 (La. App. 2 Cir. 1/15/20), 289 So. 3d 221

- Intoxilizer test is shown to be invalid based on time stamps on documentary evidence, which completely contradicted the officer's recollection on warnings and rights.

"V" Venereal Disease

Gaston v. Harkless, 19-410 (La. App. 5 Cir. 12/30/19), 289 So. 3d 186, *writ granted*, 2020-0187 (La. 5/7/20), 296 So. 3d 594

- Plaintiff begins a sexual relationship with her dentist ("Smiles Family Dentistry").
- On their second or third encounter, he gives her 40 penicillin pills without any explanation.
- She goes to see her gynecologist, who informs her she has a VD.
- She then breaks out in hives as a reaction to the penicillin.
- She then goes to work for him, but they have a falling out.
- Lawsuit filed for intentional exposure to STD and intentional infliction of emotional distress.
- Prescription arises – plaintiff doesn't show up for hearing; court sustains exception.
- Plaintiff argues on appeal the two-year period in La. C.C. art. 3493.10 (delictual actions arising from a crime of violence under Title 14) should apply because this was a "sexual battery" under La. C. Cr. P. art. 14:43.1.

- Based on her allegations, she doesn't come under this statute because she consented to the sexual acts.
- Most of her claims were prescribed, except for:
    - A text sent with the dentist holding a gun to her head
    - The hives breakout
- Query: Who would want all this reported for the world to see??
- La. Supreme Court granted writ and overruled "objection of prescription" and remanded for further proceedings.

"W" Watermelon

Matlock v. Brookshire Grocery Co., 53,069 (La. App. 2 Cir. 11/20/19), 285 So. 3d 76, *writ denied*, 2020-00259 (La. 4/27/20), 295 So. 3d 389

- Plaintiff slipped in watermelon juice in produce section at grocery store.
- A watermelon at the bottom of a large box burst open and leaked through the cardboard box.
- No evidence that Brookshire's was responsible or that it had constructive notice the puddle had been there for a sufficient period of time.
- With store video, a timeline could be reconstructed showing other customers safely traversing the area.

"X" Ex-Wife

Clay v. Sutton, 53,333 (La. App. 2 Cir. 3/4/20), 293 So. 3d 676

- Ex-wife (in proper person) sues former husband in City Court seeking $10,000 in damages for "extreme mental and emotional abuse."
- Among her complaints were:
    - Immediately after their wedding, he drives off with his ex-wife and their children.

    - Failure to reveal his diabetic condition to her, inability to consummate the marriage, and refusal to take medicine.
    - Sitting in church with his ex-wife and children, while she sang in the choir, and allowing ex-wife to sit in the front seat of the car.
    - She purchased 20 bicycles for his grandchildren.
- Without issuing any reasons for judgment, the City Court awarded her $3,500 in damages.
- Reversed on appeal.
- No proof of either intentional or negligent infliction of emotional distress under *White v. Monsanto* or *Covington v. Howard*.
- Although she was humiliated, she sought no treatment.
- She admitted she chose not to litigate any of this in her divorce proceedings, as her attorney told her it "would cost her more than she could afford" and, instead, is allowed to proceed in forma pauperis in City Court even though she could afford 20 bicycles??

"Y" YMCA

Niang v. Dryades YMCA Sch. of Commerce, Inc., 2019-0425 (La. App. 4 Cir. 12/4/19), 286 So. 3d 506

- Res nova question presented here.
- Plaintiff's husband has heart attack while playing basketball at YMCA.
- Wife, who is present and happens to be certified in cardiac life support, asks for the AED (automated external defibrillator).
- Y does not have one, in contravention of La. R.S. 40:1137.3 (physical fitness centers with more than 50 members shall keep an AED on premises).
- Husband dies in hospital nine days later of anoxic encephalopathy, secondary to sudden cardiac arrest.
- In addition to wrongful death and survival claims, wife asserts a claim for "loss of chance of survival."

- Does Louisiana law recognize this cause of action in non-medical malpractice cases?
- No – legislature has not provided for this, and the current jurisprudence has not been expanded to recognize this.

"Z" Zoning

Larkin Dev. N., L.L.C. v. City of Shreveport, 53,374 (La. App. 2 Cir. 3/4/20), 297 So. 3d 980

- The MPC and the Shreveport City Council denied the plaintiff's subdivision plat requests because the property was in the pathway of the possible extension of La. 3132.
- Property owner did not seek judicial review of the plat application denials and instituted actions seeking damages/compensation under La. law for inverse condemnation.
- City maintained that, because the owner did not seek judicial review and exhaust its remedies, there was no cause of action or it's premature, and district court had no subject matter jurisdiction.
- Trial court ruling granting all the exceptions reversed on appeal.
- Relying on cases dealing with the prescription issue for inverse condemnation claims, the court held the cause of action arose when application was denied; exhaustion was not required because the city cannot award damages.
- "Inverse condemnation claims" are judicial creations.
- State constitution requires damages at time of taking.

Zoom Court

- How is courtroom order and decorum maintained now?
- Contentious litigation in East Baton Rouge Parish between legislature and AG on one side and the Governor on the other pertaining to authority to issue Executive Orders.

- A Zoom “virtually crowded” court hearing was held with 300 participants that spun out of control and Court “muted” some participants.
- Post-hearing comments appearing in the media accused the judge of “rewriting the law from the bench” and “turning Louisiana into a dictatorship under King Edwards” and of “sexism” for showing disdain for the female DOJ attorneys and giving deference to the Governor’s male attorneys.
- Query: Is this appropriate?