LOUISIANA

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2020 Transportation Law Compendium

1. **Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.**

A review of the case law, indicates that "black box data" is largely accepted as competent evidence. However, issues have arisen with respect to admissibility when the "black box" is subsequently lost. In *LaBorde v. Shelter Mut. Ins. Co.*, 80 So. 3d 1 (La. Ct. App. 3d Cir. 2011), *writ granted, judgment rev'd*, 82 So. 3d 1237 (La. 2012), the defendants' Motion in Limine to exclude information retrieved from the "black box" should not have been granted. The "black box," was supplied to the police, and the data was retrieved by conventional means. The black box was lost thereafter, but there was no question about gaps in the chain of custody. The court opined that across the nation the black box has been found to be reliable and has been allowed in evidence in many states.

With respect to accident simulations, when determining whether a particular videotape/simulation is admissible in a particular trial a trial judge must: (1) determine whether the videotape accurately depicts what it purports to represent, whether it tends to establish a fact of the proponent's case, and whether it will aid the jury's understanding; (2) weigh against those factors the question of whether the videotape will unfairly prejudice or mislead the jury, confuse the issues, or cause undue delay; and (3) determine whether the factors favoring admission are substantially outweighed by the factors against admission. *Frye v. Dupre' Transport, Inc.*, 798 So.2d 1012 (La. App. 5th Cir. 2001).

In *Franz v. First Bank System, Inc.*, 868 So. 2d 155 (La. App. 4th Cir. 2004) the trial court did not abuse its discretion by excluding a videotape reenactment of the elevator accident, where the videotape was not a clear indication as to what happened.

In *Shepard v. Duhon*, 523 So.2d 870 (La. App. 4th Cir. 1988), Plaintiff contended that the court committed reversible error by admitting into evidence a video tape made under the direction of defendants' expert, Mr. Burkart. The tape showed the streets involved in the accident as they appeared several days prior to trial and was offered to show how parked cars could obstruct the view of a motorist driving and also to rebut the statement of plaintiff's wife, Patsy Shepard, that

she left her house about 45 seconds after plaintiff did, travelled twenty miles per hour, and was only one-half block behind plaintiff when the collision occurred.

The determination of whether motion pictures or video tapes are admissible is largely within the discretion of the trial court. *Lafleur v. John Deere Company,* 491 So.2d 624, 632 (La.1986). In the *Shepard* case, the trial court could have properly concluded that the probative value of a tape showing the actual layout of the streets and tending to discredit the testimony of the only eyewitness to the collision outweighed the possible prejudice to plaintiff of having the jury view Beechwood street with cars parked on it that were not necessarily there on the day of the accident, which fact the jury should have been capable of comprehending. The Appellate Court held that the trial judge did not abuse his discretion by admitting the video tape.

Swaiian v. General Motors Corp., 916. F.2d 31, 36 (1st Cir. 1990) was, a products liability case alleging defective manufacture and design of the rear axle of a GMC vehicle which, the plaintiff claimed, caused the axle to fracture and the vehicle to rollover. The trial judge excluded several videotape reenactments prepared by GMC, showing what happened to the vehicle when an identical axle fractured, on the ground that they were not sufficiently similar to the circumstances of the accident. The court of appeal affirmed, stating:

> In this case, the record reveals that the videotapes depicted an experienced test driver performing all the driving, and the driver knew what to expect. Moreover, the videotaped tests took place at controlled facilities, and the tests involved axles that had been rigged to fracture. *Swajian,* 916 F.2d at 36. The court found that the test driver's knowledge of what to expect rendered the reenactment dissimilar to the accident at issue and thus inadmissible.

2. **Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.**

Police body camera footage is routinely introduced into evidence in criminal and civil cases. Defendants in *Brady v. Global Hawk Ins. Co.*, 2017 WL 4619740 (E.D. La. 10/16/17) moved the court to strike the video from a police officer's body camera on the basis that it lacked foundation and was not authenticated. The Court held that evidence need not be fully authenticated and admissible to constitute competent summary judgment evidence so long as it is capable of being presented in admissible form at trial. *See Lee v. Offshore Logistical & Transp., LLC,* 859 F.3d 353, 355 (5th Cir. 2017).

Aerial photographs can also assist in evaluating accidents. However, an aerial photograph which lacks scale and was taken and described by a lay person was not admissible evidence. *U.S. v. McCall,* 553 F.3d 821 (5th Cir. 2008).

Also, see answer to Question #3 regarding introduction into evidence of U-Tube videos.

3. **Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?**

Spoliation

If you are in possession of evidence that may be important in a claim or lawsuit and you fail to preserve or destroy same, it may be presumed that the evidence was adverse to you even if it was not.

The Louisiana Supreme Court's most recent articulation regarding the law of spoliation established that no cause of action exists for *negligent* spoliation of evidence. *Reynolds. Bordelon*, 14-2362 (La. 6/30/15), 172 So.3d 589. The court's holding was based on the Court's refusal to recognize any general duty to preserve evidence in the context of negligent spoliation. The Court did not limit its ruling to third party spoliation and expressly found that the same rationale applies to parties in a pending lawsuit. With respect to negligent spoliation, it reasoned discovery sanctions, criminal sanctions, and the adverse presumption to be equally effective and far more practical remedies. Unless and until the Legislature establishes a preservation duty, plaintiffs/defendants need to take proactive steps such as entering a contract or obtaining a court order to protect relevant evidence outside their possession.

In decisions since *Reynolds*, the Fourth Court has cited the Supreme Court's holding that Louisiana only recognizes a cause of action for intentional spoliation, which is in line with the circuit's jurisprudence as established in *Quinn. Fiveash v. Pat O'Brien's Bar, Inc.*, 2015-1230 (La. App. 4 Cir. 9/14/16), 201 So.3d 912; *Danna v. The Ritz-Carlton Hotel Co. LLC*, 2015-0651 (La App. 4 Cir. 5/11/16), 213 So.3d 26; *Tomilson v. Landmark Am. Ins. Co.*, 2015-0276 (La App. 4 Cir. 3/23/16), 192 So.3d 153. The remedy for spoliation is that the spoiled evidence is excluded or to instruct the jury of the adverse presumption that "had the evidence been produced, it would have been unfavorable to the litigant." *Danna*, 213 So.3d 26 at 36-37; *Tomilson, supra* at 160.

In sum, before any remedy for spoliation is imposed, Fourth Circuit jurisprudence requires proof of the following:

1) the party having control of the evidence had a duty to preserve at the time it was destroyed; and
2) whether the party intentionally destroyed the evidence. *Tomilson*, 192 So.3d at 160. However, if the destruction of the evidence is adequately explained, the adverse presumption does not apply. *Danna*, 213 So.3d 26 at 37.

Social Media Evidence

Louisiana Code of Evidence Art. 901 states that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. In other words, the basic requirement for the introduction of evidence is to show that, more probable than not, the evidence

is what it purports to be. Initially, the authentication decision as to admissibility is made by the trial judge using the aforementioned standard. Although authentication is generally associated with documents and identification with other tangible evidence, the terms are synonymous and involve a virtually identical process.

One issue that has arisen with the advent of social media is the proper way to authenticate a video on social media. The Fourth Circuit Court of Appeal has identified four ways to authenticate a video on social media. *State v. Gray*, 2016-1195 La. App. 4 Cir. 6/28/17, 2017 WL 3426021 (La. Ct. App. 4th Cir. 2017). The first method is to call the creator of the video and ask her if she added the post in question. The second way to authenticate a video on social media is to search the computer of the person who created the profile. This process involves an examination of the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting. The third method is to obtain information directly from social networking website that would link together the profile and entry to the person or persons who created them. The fourth technique for authenticating a video on social media is to call a person with knowledge of the scenes depicted in the video to explain that the matter on the video is what it is claimed to be.

For example, in *State v. Gray*, the court allowed a police detective who had studied a specific gang for many years to authenticate three YouTube videos depicting the defendant and the Uptown areas of New Orleans that were shown in the videos. The detective testified that the videos were filmed over a three year period. After describing the videos, the detective made a visual in-court identification of the defendant as the person spotlighted in the videos, and identified the location in which the videos were filmed and landmarks in the videos. The court found that the detective was a witness with personal knowledge of the scenes portrayed in the videos and that the detective properly authenticated the videos. In other words, the testimony of the detective provided sufficient support for the district court's finding that the YouTube videos were what the State claimed them to be—videos posted on YouTube depicting the defendant and other gang members in Uptown New Orleans and the surrounding area. One would expect additional ways to authenticate social media videos to be recognized by the courts as Internet technology changes.

Louisiana courts have also addressed the admissibility of Facebook messages. In *State v. Dillon*, 2018-27 La. App. 1 Cir. 9/21/18, 2018 WL 4520463 (La. Ct. App. 1st Cir. 2018) a case involving a prosecution for molestation of a juvenile, the court refused to allow the defendant to introduce a screenshot of a Facebook message from the boyfriend of the mother of the victims to the defendant's mother which would have exonerated the defendant because the message was not properly authenticated. The boyfriend, the sender of the message did not testify to authenticate the Facebook message. Only the recipient of the message, the defendant's mother, testified about the Facebook message. The court found that the defendant did not present sufficient evidence to allow the trier of fact to conclude that the boyfriend sent the Facebook message because the defendant's mother only received one communication from the boyfriend, and such communication was made nearly a year after the defendant's attempted molestation of one of the victims. Moreover, the court found that the defendant made a showing that the defendant's mother subjectively believed that the boyfriend sent the message, and this evidence was found to be insufficient to authenticate the Facebook message.

On the other hand, in *State v. Jones*, the court found that a Facebook message sent by the defendant to his victim of domestic violence was properly authenticated because the recipient of the Facebook message was able to provide more information about the sender's account and the circumstances surrounding the sending of the message. The recipient of the message testified that she knew that the sender was the author of the message because only the sender had access to his Facebook account password and that the contents of the message aligned with the circumstances of their relationship.

In *Bourgeois v. Bourgeois*, 218 So. 3d 684 (La. Ct. App. 5th Cir. 2017), another case dealing with technology, the Fifth Circuit Court of Appeal held in a custody dispute that the husband failed to properly authenticate a text message ostensibly written by his wife and sent to him. The husband proffered into evidence a printout of a purported phone text message allegedly sent to him by his wife wherein she threatened him and others with physical harm. He argued that his trial testimony stating that he received the text message from his wife and that the message contained the contact label "Wifey" were sufficient under Article 901 to authenticate the text. The court disagreed, stating that the trial court did not commit an error when it ruled that the text message in question was not properly authenticated under Article 901. The text printout itself contained no objective evidence of the date it was allegedly sent by the wife, and the sender's telephone number was not identified on the printout, but only the contact label "Wifey." Consequently, the court found that the husband failed to present sufficient evidence to support a finding that the "text" in question was what it purported to be. And in State v. Bridges, the court allowed, in a prosecution of an indecent behavior with juvenile action, a police detective who conducted a forensic search of the defendant's cell phone to testify about pornographic video links found on the defendant's cell phone with titles containing the terms "virgin" and "teen naïve."

In *S.L.B. v. C.E.B.*, 252 So. 3d 950 (La. Ct. App. 4th Cir. 2018), the court held that an audio recording made by a doctor in a child custody case was properly authenticated. Citing *State v. Hennigan*, 404 So. 2d 222 (La. 1981), it noted that the following factors are helpful to determine whether the proper foundation has been laid for admissibility of the recording. "(1) That the recording device was capable of taking the conversation now offered in evidence. (2) That the operator of the device was competent to operate the device. (3) That the recording is authentic and correct. (4) That changes, additions or deletions have not been made in the recording. (5) That the recording had been preserved in a manner that is shown to the court. (6) That the speakers are identified. (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement." *Id.*

Claim File Production

The request for a blanket production of an entire "claim file" is not permitted per *Broussard v. State Farm Mut. Auto. Ins. Co.*, 519 So. 2d 136 (La. 1988). The entire opinion in Broussard is as follows:

Writ granted. The judgments of the court of appeal and the district court are reversed. Blanket production of the attorney's and insurer's files is not permitted. The plaintiff is free to

renew her discovery requests upon identifying the documents or types of documents she seeks. If any such requested documents are those prepared in anticipation of litigation, those documents should not be produced unless the plaintiff makes the showing required by La. Civ. Code Proc. art. 1422. In all events, documents which contain the opinions, conclusions, theories or mental impressions of the defendant's attorney as well as privileged communications are not discoverable.

> The Louisiana Supreme Court has subsequently stated that while a "plaintiff is not entitled to blanket production of the insurer's file" such files may contain discoverable information. *Lewis v. Warner*, 639 So.2d 1182 (La. 1994); see also *Stelly v. Mouret*, 609 So. 2d 827, 828 (La. 1992) (stating that to obtain claims file information, "claimants must first describe, in general terms, the types of documents which they seek"). The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable. *McLeod, Alexander, Powel, & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)

4. **Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?**

"The distinction between employee and independent contractor status is a factual determination to be decided on a case-by-case basis." *Tate v. Progressive Sec. Ins. Co.*, 2008-0950, p. 2 (La. App. 4 Cir. 1/28/09), 4 So.3d 915, 916. The essence of the employer-employee relationship is the right to control. *Id.*at p. 8, 4 So.3d at 920. The primary factors evidencing the right to control are: (1) selection and engagement, (2) payment of wages, (3) power of dismissal, and (4) power of control. Id., citing *Hillman v. Comm-Care, Inc.*, 2001-1140, p. 8 (La. 1/15/02), 805 So.2d 1157, 1162. "[T]he courts have reasoned that none of the factors is controlling, that the totality of the circumstances must be considered, and that the burden of proof is on the party seeking to establish an employer-employee relationship." *Hillman,* 2001-1140 at p. 9, 805 So.2d at 1163.

In *Morgan*, the Louisiana Supreme Court stated:

> Our jurisprudence has held that special and general employers may be solidarily liable in tort to third parties injured by the negligence of their employees. In *LeJeune v. Allstate Ins. Co.*, 365 So.2d 471 (La. 1978), we addressed the issue of whether the general employer of a negligent employee remained liable for its employee's tort despite the fact that the employee had been borrowed to perform services for a special employer at the time of an accident. We held that a general and special employer may be solidarily liable for injuries to a third party caused by an employee"s negligence..."
>
> [B]oth employers had contemporaneous control over [the worker at issue], and both contemporaneously benefited from his labor. It is therefore reasonable that considering the overlapping control and shared financial interest that they share liability.

Morgan, 97-0956 at p. 10, 710 So.2d at 1082-83, citing *Blair*, 621 So.2d at 599.

5. **What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?**

The trial judge has considerable discretion in accepting or rejecting expert testimony and the weight which he/she gives to expert testimony is determined by the qualifications, the field experience, and the facts upon which the expert's opinion is based. *Harris v. Best of America, Inc.*, 466 So.2d 1309 (La.App. 1st Cir.1985).

In *Cole v. Department of Public Safety,* 2001–2123, p. 14 (La. 9/4/2002), 825 So.2d 1134, 1144, the supreme court held that after an extensive review of the medical evidence they found insufficient evidence to support the findings of the district and appellate courts that Mr. Cole suffered a severe closed head trauma as a result of a battery to his head. In that case, the court concluded that although several doctors diagnosed Cole with a traumatic brain injury, there was no objective medical evidence to support the finding that he suffered a serious head trauma. The testimony of treating physicians that Cole suffered a head injury was based solely on the history relayed to them by Cole, without objective confirmation of such an injury. The supreme court noted that if an expert opinion is based upon facts not supported by the record, the opinion might be rejected.

In *Andrew v. Patterson Motor Freight, Inc.* 2014 WL 5449731 (U.S. W.D. La. 10/23/14), defendants argue that the evidence and testimony offered by plaintiff's neuropsychology expert, Dr. Mark S. Warner, should be excluded, or alternatively, limited because: (1) he never met or examined plaintiff; (2) "[h]is opinion is based solely upon the reported findings of other treating professionals and his general knowledge of the science surrounding traumatic brain injury"; and (3) because one of the expert opinions upon which Dr. Warner relies is that of Dr. Gonzalez–Toledo, who is the subject of a defense *Daubert* motion.

Defendants argued that Dr. Warner's testimony is cumulative, because defendants anticipate plaintiff will present testimony from his treating physicians (*i.e* . his treating neurosurgeon, neuropsychologist, and psychiatrist). As to defendants' argument Dr. Warner's methodology is flawed because he never examined plaintiff, and his opinion is based "solely upon the reported findings of other treating professionals and his general knowledge of the science surrounding traumatic brain injury," the Court notes defendants have provided no legal authority in support of this argument. Rather, "experts [,] particularly doctors[,] customarily rely upon third party reports from other experts such as pathologists and radiologists in whom the testifying expert places his trust." *Bryan v. John Bean Division of FMC Corp.,* 566 F.2d 541, 546 (5th Cir.1978); *see also Daubert,* 509 U.S. at 592 ("Unlike an ordinary witness ..., an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation"). Federal Rule of Evidence 703 provides, "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed". As the notes to Fed.R.Evid. 703 make clear, the rule contemplates opinions based upon data provided to the expert "outside of court and other than by his own perception." Fed.R.Evid. 703 (1972 Notes). Furthermore, " '[a]s a general rule, questions relating to the bases and sources of an expert's

opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.' " *U.S. v. 14.38 Acres of Land, More or Less Sit. in Leflore County, Miss.*, 80 F.3d 1074, 1077 (5th Cir.1996)(quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir.1987)).

Moreover, there is no requirement that a neurologist also have expertise in bio-mechanical engineering or accident reconstruction in order to opine as to the nature and cause of his patient's brain injury. *Barnett v. National Continential Ins. Co.*, 2019 WL 126732 (M.D. La. 1/8/19).

6. **Is a positive post-accident toxicology result admissible in a civil action in your State?**
Yes.

7. **What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?**

In Louisiana, federal mandated testing is adhered to by drivers of commercial motor vehicles in interstate commerce regardless if the driver is classified as an employee, independent contractor, borrowed servant, or an additional insured.

8. **Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?**
No.

9. **Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?**
Yes.

10. **What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?**

Louisiana Civil Code Article 2324 states that solidary obligations only apply to intentional acts. Any other liability for damages caused by two or more persons shall be joint and divisible, each party liable for his degree of fault. Interruption of prescription for one joint tortfeasor is effective against all tortfeasors.

11. **What are the most dangerous/plaintiff-friendly venues in your State?**
Orleans Parish
Caddo Parish
East Baton Rouge Parish
West Baton Rouge Parish
Calcasieu Parish
Ouachita Parish
Iberville Parish
Avoyles Parish

12. **Is there a cap on punitive damages in your State?**
No.

13. **Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?**

In Louisiana, the seminal case on the Collateral Source Rule is *Gunter v. Lord*, 140 So. 2d 11 (La. 1962), which established the plaintiff's right to fully receive benefits he has paid for (or those benefits paid for on his behalf) and to fully recover those same amounts from the tortfeasor. Codification of the Rule Today, the Collateral Source Rule is codified in both the Louisiana Code of Evidence and the Federal Rules of Evidence. LA. Code Evid. art. 409 provides in pertinent part that "[i]n a civil case, evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor." Fed. R. Evid. Rules 407, 408, and 409 are similar and provide for the same Collateral Source Rule.

In *Bozeman v. State*, 2003-1016 (La. 7/2/04), 879 So.2d 692,705, the Louisiana Supreme Court stated: "Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution." *Id.* at 693. However, the Collateral Source Rule does not apply, and a tort victim who is a Medicaid recipient may not recover medical expenses that were written off by a health care provider pursuant to the Medicaid program. *Bozeman, supra* at 692; see also, *Benoit v. Turner Indus. Group, L.L.C.*, 2011-1130 (La. 1/24/12), 85 So.3d 62

The Louisiana Supreme Court has not squarely addressed the issue of whether the Collateral Source Rule applies where a tort victim is insured through Medicare. Following *Bozeman*, the answer is likely: Yes, the Rule applies because Medicare is a form of insurance for which the insured pays premiums, thereby diminishing the insured's patrimony. Nevertheless, the Louisiana Courts of Appeal are split on the issue. 1st, 2nd, 3rd and 5th Circuits — The Rule applies. *Ketchum v. Roberts*, 2012- 1885 (La. App. 1 Cir. 5/29/14), 2014 WL 3510694; *Johnson v. CLD*, Inc., 50,094 (La. App. 2 Cir. 9/30/15), 179 So.3d 695; *Niles v. American Bankers Ins. Co.*, 229 So.2d 435 (La. App. 3 Cir. 1969), writ ref'd, 255 La. 479, 231 So.2d 394 (1970); *Kozina v. Zeagler*, 94-413 (La. App. 5 Cir.11/29/94), 646 So.2d 1217. 4th Circuit — The Rule does not apply, but the cases predate *Bozeman. Suhor v. Lagasse*, 2000-1628 (La. App. 4th Cir. 9/13/00), 770 So.2d 422 (holding that the Rule did not give a tort victim the right to recover medical expenses extinguished by operation of federal law governing Medicare); *Boutte v. Kelly*, 2002-2451(La. App. 4 Cir. 9/17/03), 863 So.2d 530, writ denied, 2004-0071 (La. 5/21/04), 874So.2d 172 (following the reasoning in *Suhor*). Note: Tort victims must reimburse the Medicare Trust Fund to the extent they are awarded damages for the medical expenses paid by Medicare. 42 U.S.C. § 1395y(b).

Of significance, recently on May 9, 2019, the Louisiana Supreme Court issued an important opinion restricting application of the collateral source rule in personal injury lawsuits. In *Simmons v. Cornerstone Investments, LLC,* et al., 2018-CC-0735 (La. 5/8/19), the Court held the collateral source rule inapplicable to medical expenses charged above the amount actually paid by a workers' compensation insurer pursuant to the workers' compensation medical fee schedule.

Kerry Simmons, a Cintas warehouse employee, was injured on the job and received workers' compensation benefits from Cintas, including disability and medical expenses. *Id.* Invoices from healthcare providers totaled $24,435, but the charges were reduced to $18,435 in accordance with the Louisiana Workers' Compensation Act Medical Reimbursement Schedule, resulting in a "write off" of $6,000. *Id.* In Simmons' tort suit against the third-party building owner and its insurer, the defendants filed a motion in limine to exclude any evidence of medical expenses "written off" by the workers' compensation insurer. The trial court granted the defendants' motion and ruled that the only evidence to be presented to the jury was that of amounts actually paid under the fee schedule. The court of appeal denied the plaintiff's writ in a 2-1 decision. Thereafter, the Louisiana Supreme Court granted the writ to determine the applicability of the time-honored collateral source rule to the medical write off.

The Court began its analysis noting that the question of whether a plaintiff may benefit from the "written off" portion of medical expenses is subject to a two-part analysis:

1. Whether the plaintiff paid any consideration, or suffered any diminution to patrimony, for the "written off" amount; and

2. Whether application of the rule will further the major policy goal of tort deterrence.

The Court held that neither consideration applied and upheld the lower courts' exclusion of the "written off" amount. *Id.* at 9. In support, it relied on *Bozeman v. State*, 03-1016 (La. 7/2/04), 879 So.2d 692, and *Hoffman v. 21st Century North American Ins. Co.*, 14-2279(La. 10/2/15), 209 So.3d 702. Both opinions held the collateral source rule did not apply when a plaintiff had paid no consideration for the benefits. Simmons at 3-4. In Bozeman, the Court considered whether the collateral source rule applied to medical expenses "written off" under the Medicaid program and concluded that because Medicaid is a free medical service for which no consideration is given by a patient, the plaintiff was unable to recover the write off amount. *Bozeman*, 879 So.2d at 705. Similarly, in Hoffman, the Court declined to apply the collateral source rule to an attorney-negotiated medical discount, finding the discount, obtained through the litigation process, fell outside the ambit of the collateral source rule since the plaintiff suffered no diminution of his patrimony. Hoffman, 209 So.3d at 706.

The Court also looked to the recent United States Fifth Circuit opinion *of Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 353 (5th Cir. 2016), a decision that was "legally indistinguishable," albeit only persuasive and non-binding. *Simmons* at 7. In *Deperrodil*, the Fifth Circuit held that a plaintiff may not recover from a third-party tortfeasor the amount of medical expenses "written off" by its employer/carrier under the Longshore and Harbor Workers' Compensation Act.

The S*immons* Court followed this line of jurisprudence and found the "written off" amount under the state workers' compensation act was a "phantom charge that [p]laintiff has not ever paid nor one he will ever be obligated to pay." *Simmons*, 2018-0735, p. 7. With this reasoning, the Court concluded there was no basis to differentiate the "written off" amount created by a reduced reimbursement fee under workers' compensation and those of a Medicaid program or an attorney-negotiated medical discount. The Court gave only brief consideration to the argument that inclusion of the "written off" costs would further the policy of tort deterrence. While acknowledging the importance of tort deterrence in the tort system, the Court found that "there is no true deterrent effect to allowing [p]laintiff to recover expenses over and above what was actually paid" and noted that a ruling allowing plaintiff to recover such a windfall would amount to an unauthorized award of punitive damages Id. at 9. As a result, the Court ruled the collateral source rule did not apply. *Id.* at 9-10.

The decision in *Simmons* is yet another substantial and appropriate clarification in the law (1) denying recovery of costs that were never incurred and (2) allowing recovery of only actual medical costs paid.