

COMMENTS

CONFLICTING RESULTS: THE DEBATE IN LOUISIANA COURTS OVER THE PROPER METHOD OF APPELLATE REVIEW FOR THE INCONSISTENT VERDICTS OF BIFURCATED TRIALS

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I. INTRODUCTION

A woman is killed in an automobile accident when she is struck broadside by another vehicle at the intersection of South Claiborne Avenue and Broadway Street in New Orleans, Louisiana. Her family brings a wrongful death action against the driver of the other car, as well as a negligence action against the City of New Orleans for failure to maintain a traffic light. The family timely requests a trial by jury, but as jury trials against the City are statutorily prohibited,¹ the trial is bifurcated, with the jury hearing the claim against the driver and the judge hearing the claim against the City.² After a trial on the merits, the jury finds the defendant driver to be twenty-five percent at fault, the decedent twenty-five percent at fault, and the City fifty percent at fault, with \$200,000 in total damages.³ The judge, however, finds the City to be only ten percent at fault, with \$100,000 in total damages. The court enters judgment for the plaintiff in the amount of \$50,000 from the driver (twenty-five percent of \$200,000) and \$10,000 from the City (ten percent of \$100,000), for a total of \$60,000.⁴

1. LA. REV. STAT. ANN. § 13:5105 (2006) (prohibiting a jury trial in any suit against a political subdivision of the State).

2. This method of bifurcation is unrelated to the method governed by article 1562 of the Louisiana Civil Code, in which a court may order separate proceedings for liability and damages. *See* LA. CODE CIV. PROC. ANN. art. 1562 (2010). The bifurcation of trials involving a combination of claims triable to a jury with claims for which a jury trial is unavailable originated in the Louisiana Supreme Court case of *Champagne v. American Southern Insurance Co.* *See* *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437 (La. 1974); *see also infra* Part III.B.2. This type of bifurcation most commonly occurs in cases involving a combination of claims against one or more private defendants, for which a jury trial has been requested, with one or more public defendants, for which a jury trial is prohibited. *See* 1 FRANK L. MARAIST & HARRY T. LEMMON, LOUISIANA CIVIL LAW TREATISE, CIVIL PROCEDURE § 11:13 (2009). However, these are not the only types of cases in which a trial court has used the procedure. *See generally* *Thornton v. Moran*, 341 So. 2d 1136 (La. App. 1 Cir. 1976), *rev'd*, 343 So. 2d 1065 (La. 1977) (in which two drivers involved in an automobile accident filed suit against one another, but only one requested a jury trial); *see also* *Hussey v. Russell*, 2004-2377 (La. App. 1 Cir. 3/29/06); 934 So. 2d 766 (in which certain claims did not meet the required amount for a jury trial).

3. Although it may seem that the jury's apportionment of fault to a political subdivision like the City would violate § 5105's prohibition of jury trials against the state, the Louisiana Supreme Court has held that it does not. *Lemire v. New Orleans Pub. Serv., Inc.*, 458 So. 2d 1308, 1310 (La. 1984). The *Lemire* court reasoned that in a comparative fault regime like Louisiana, the jury is required to determine the fault of all the parties. *Id.*; *see also* LA. CIV. CODE ANN. art. 2323 (2010) (requiring a determination of fault as to all persons who contributed to the plaintiff's injuries, "regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute . . . or that the other person's identity is not known or reasonably ascertainable"). In this type of bifurcated trial, the judge and the jury will usually both determine the fault of every party; however, only the judge's determination and assessment of fault are binding as to the state defendant, and only the jury's determination and assessment are binding as to the private defendants. *See Lemire*, 458 So. 2d at 1310.

4. Louisiana first adopted the concept of comparative fault in 1979 when the legislature amended article 2323 of the Louisiana Civil Code to provide that a plaintiff may still recover

Both parties appeal to the Louisiana Fourth Circuit Court of Appeal. This case would present the difficult question to the appellate court of the proper method of review for the inconsistent findings of the jury and the trial judge.

This difficult procedural question has plagued Louisiana courts since it first arose in 1977.⁵ Some courts have granted a measure of deference to the findings of the judge and the jury, simply by determining which of the findings is more reasonable.⁶ Other courts have refused to defer to either of the findings, instead reviewing the entire record independently.⁷ Still other courts have found no conflict can exist as a matter of law when a jury decides the fault of a public defendant⁸ or when the total percentage of fault is less than or equal to 100%.⁹ The question has reached the Louisiana Supreme Court on several occasions, but the court has repeatedly declined to address the issue directly.¹⁰

damages from an injury partly caused by his or her own negligence, “but the amount recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the [plaintiff].” Act of Jul. 12, 1979, No. 431, § 1, 1979 La. Acts 1165, 1166 (codified as amended at LA. CIV. CODE ANN. art. 2323 (1979)). In 1996, articles 2323 and 2324 of the Louisiana Civil Code were amended to adopt a “pure” comparative negligence scheme. See Act of Apr. 16, 1996, No. 3, § 1, 1996 La. Acts 713 (codified as amended as LA. CIV. CODE ANN. arts. 2323, 2324 (1996)). For a discussion of the 1996 amendments and the concept of “pure” comparative fault, see David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 189 n.29 (1998).

5. The issue of the proper standard of review for bifurcated trials with inconsistent results originated with the Louisiana Supreme Court case of *Thornton v. Moran*, 343 So. 2d 1065 (La. 1977). See *infra* Part IV.

6. See, e.g., *Hussey v. Russell*, 2004-2377 (La. App. 1 Cir. 3/29/06); 934 So. 2d 766; *Hays v. State*, 37,229 (La. App. 2 Cir. 9/24/03); 856 So. 2d 64; *Am. Cas. Co. v. Ill. Cent. Gulf R.R. Co.*, 601 So. 2d 712 (La. App. 5 Cir. 1992); *Hatcher v. State ex rel. Dep’t of Transp. & Dev.*, 478 So. 2d 774 (La. App. 3 Cir. 1985); *Deville v. Town of Bunkie*, 364 So. 2d 1378 (La. App. 3 Cir. 1978); *Thornton v. Moran*, 348 So. 2d 79, 81-82 (La. App. 1 Cir. 1977) (per curiam).

7. See, e.g., *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, *rev’d on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635; *Sevin v. Parish of Plaquemines*, 2004-1439 (La. App. 4 Cir. 2005); 901 So. 2d 619; *Aubert v. Charity Hosp. of La.*, 363 So. 2d 1223 (La. App. 4 Cir. 1978).

8. See, e.g., *Davis v. Witt*, 2001-894 (La. App. 3 Cir. 11/13/02); 831 So. 2d 1075, *rev’d on other grounds*, 2002-3012 (La. 7/2/03); 851 So. 2d 1119; *Bishop v. Shelter Ins. Co.*, 461 So. 2d 1170 (La. App. 3 Cir. 1984), *superseded by statute on other grounds*, 1988 La. Acts 1085, 1129 (codified as amended at LA. CODE EVID. ANN. art. 411 (1989)), *as recognized in Steers v. Int’l Paper Co.*, 540 So. 2d 1236 (La. App. 3 Cir. 1989)).

9. See *State Farm Mut. Auto. Ins. Co. v. LeRouge*, 2007-0918 (La. App. 4 Cir. 11/12/08); 995 So. 2d 1262; *Madison v. Ernest N. Morial Convention Ctr. – New Orleans*, 2000-1921 (La. App. 4 Cir. 12/4/02); 834 So. 2d 578.

10. The court has faced the issue several times but has always decided the case on other grounds. See *Fontenot v. Patterson Ins.*, 2008-0414 (La. 12/12/08); 997 So. 2d 529 (holding that the jury trial prohibition does not apply to suits involving claims filed by public defendants); *Hebert v. Rapides Parish Police Jury*, 2006-2001 (La. 4/11/07); 974 So. 2d 635 (holding that the

Section II of this Comment will examine the various standards of review used in Louisiana, as well as the statutory and jurisprudential evolution of those standards. Section III will discuss the procedure of bifurcation in Louisiana courts generally, as well as the procedure's application to cases involving a combination of public and private defendants. Section IV will explain the different methods used by Louisiana's appellate courts to review inconsistent results of bifurcated trials, and Section V will analyze these methods. Section VI will suggest that the appellate courts review any supposedly conflicting findings separately under Louisiana's traditional standards of review for findings of fact and damages. Finally, Section VII will offer a brief conclusion.

II. STANDARDS OF APPELLATE REVIEW IN LOUISIANA CIVIL CASES

The Louisiana constitution grants the Louisiana Supreme Court and the Louisiana courts of appeal jurisdiction over questions of both law and fact in civil cases.¹¹ Unlike in other states and in the federal system, Louisiana appellate courts are constitutionally authorized to review the factual record of a case and issue a contrary judgment.¹² Nevertheless, Louisiana has developed jurisprudential limitations on the appellate review of fact in civil cases, and these limitations take the form of deferential standards of review.¹³

public defendant owed no legal duty to the plaintiff); *Davis v. Witt*, 2002-3012 (La. 7/2/03); 851 So. 2d 1119 (finding the trial judge's allocation of fault manifestly erroneous, rendering moot a decision on how to reconcile reasonable but conflicting findings); *Powell v. Reg'l Transit Auth.*, 96-0715 (La. 6/18/97); 695 So. 2d 1326 (holding that an action against a political subdivision and its employee should be tried to the judge alone); *Lemire v. New Orleans Pub. Serv., Inc.*, 458 So. 2d 1308 (La. 1984) (holding that the trial court should have allowed the plaintiff to submit written interrogatories to the jury on the issue of a public defendant's fault).

11. LA. CONST. art. V, § 5(C) ("Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts."); *Id.* § 10(B) ("Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.").

12. LA. CONST. art. V, § 10(B). This grant of appellate jurisdiction to questions of fact is considered to have derived from Louisiana's civilian legal tradition. *See Rosell v. Esco*, 549 So. 2d 840, 844 n.2 (La. 1989). In the federal system, appellate review in civil cases is limited by the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. However, the Federal Rules of Civil Procedure do allow for appellate review of findings of fact in a non-jury trial; these findings are to be upheld unless "clearly erroneous." FED. R. CIV. P. 52(a)(6). Since this Comment will focus primarily on Louisiana's standards of review, an in-depth examination of federal standards is beyond the scope of this discussion.

13. It should be noted that Louisiana's Civil Code recognizes only two sources of law: legislation and custom. LA. CIV. CODE ANN. art. 1 (2010). Thus, unlike in common law jurisdictions, judicial decisions are not considered binding authority on the courts of this state.

A. THE MANIFEST ERROR STANDARD FOR FINDINGS OF FACT

Since it would be inefficient for Louisiana appellate courts to redetermine every finding by the trier of fact, the Louisiana Supreme Court has imposed a limitation on the appellate courts' examination of questions of fact: the reviewing court may not set aside a factual finding unless it is found to be manifestly erroneous.¹⁴ This "manifest error" standard thus accords a degree of deference to the findings below.¹⁵ When the reviewing court finds no manifest error in the findings of fact, it must defer.¹⁶ However, if its review shows a manifest error, the reviewing court is constitutionally authorized to reach an independent factual determination.¹⁷ This basic procedure has remained the same throughout the history of the manifest error standard, although it has experienced some varying interpretations at times.¹⁸

In 1973, the manifest error standard of review was well defined in the Louisiana Supreme Court case of *Canter v. Koehring*:

When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error. . . . [T]he reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable

See Mary G. Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 787 (2005). However, under the concept of *jurisprudence constante*, a consistent line of decisions on a particular issue is entitled to great weight and is considered highly persuasive authority. *Id.* In fact, Louisiana appellate courts have often referred to the Louisiana Supreme Court's decisions as controlling authority. *Id.* Accordingly, although the Louisiana Supreme Court's holdings on the issue of standards of review are not technically binding, they effectively have the force of law and the appellate courts follow them in the absence of a strong reason not to do so. *See id.* Any similar suggestions hereinafter that the supreme court's holdings are binding authority should be interpreted in this light.

14. *See* MARAIST & LEMMON, *supra* note 2, § 14:14; *see also* David W. Robertson, Comment, *Appellate Review of Facts in Louisiana Civil Cases*, 21 LA. L. REV. 402, 404-05 (1961) ("[I]n its inception, the rule was intended to operate as a limitation upon the freedom with which the appellate court would overturn the trial court's factual conclusions."). Additionally, the identity of the trier of fact has no relevance to the amount of deference granted its findings. *See* Gilliland v. Feibleman's, Inc., 108 So. 112, 113 (La. 1926) ("The jurisprudence of this state does not attach greater importance to the verdict of a jury than to judgments of a trial court upon questions of fact.").

15. MARAIST & LEMMON, *supra* note 2, § 14:14.

16. *See id.*

17. *See id.*

18. *See id.*

inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.¹⁹

The *Canter* court provided two rationales for the manifest error standard: (1) the trial court is in a more favorable position from which to evaluate the credibility of witnesses, and (2) the proper allocation of trial and appellate functions necessitates a deferential standard of review.²⁰

Following the court's decision in *Canter*, several appellate court cases construed it to apply a lower standard of review to the trial court's factual findings.²¹ Recognizing this misapplication of *Canter* by the appellate courts, the Louisiana Supreme Court rectified the problem in the 1978 case of *Arceneaux v. Domingue*.²² In *Arceneaux*, the supreme court clarified that "the appellate review of facts is not completed by reading so much of the record as will reveal a reasonable factual basis for the finding in the trial court; there must be a further determination that the record establishes that the finding is not [manifestly erroneous]."²³ The *Arceneaux* court thus explained that the manifest error standard is a two-step inquiry in which the reviewing court must determine: (1) whether there exists a reasonable factual basis for the findings of the trial court, and (2) whether the trial court's ruling is manifestly erroneous.²⁴ According to Professor Frank Maraist, the *Arceneaux* decision can be interpreted as an attempt to expand the scope of appellate review in Louisiana to ensure that courts of appeal

19. *Canter v. Koehring*, 283 So. 2d 716, 724 (La. 1973), *superseded by statute on other grounds*, 1976 La. Acts 527, 527-28 (codified as amended at LA. REV. STAT. ANN. § 23:1032 (1977)), *as stated in* *Bostick v. Int'l Minerals & Chem. Corp.*, 360 So. 2d 898 (La. App. 2 Cir. 1978).

20. *Id.* For an excellent discussion on the purpose of the manifest error rule, see Albert Tate, Jr., "Manifest Error": *Further Observations on Appellate Review in Louisiana Civil Cases*, 22 LA. L. REV. 605, 606-08 (1962).

21. *See, e.g.*, *Whatley v. Red Ball Motor Freight*, 351 So. 2d 850 (La. App. 2 Cir. 1977); *Addison v. Checker Cab Co.*, 337 So. 2d 592 (La. App. 4 Cir. 1976); *Ogden v. Ogden*, 331 So. 2d 592 (La. App. 1 Cir. 1976); *Lake Charles Tile & Carpet Co. v. DeKoning*, 307 So. 2d 757 (La. App. 3 Cir. 1975). For example, in the 1976 case of *Ogden v. Ogden*, the first circuit examined only whether there was "evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding . . ." *Ogden*, 331 So. 2d at 598 (quoting *Canter v. Koehring*, 283 So. 2d 716, 724 (La. 1973), *superseded by statute on other grounds*, 1976 La. Acts 527, 527-28 (codified as amended at LA. REV. STAT. ANN. § 23:1032 (1977)), *as stated in* *Bostick v. Int'l Minerals & Chem. Corp.*, 360 So. 2d 898 (La. App. 2 Cir. 1978)).

22. *Arceneaux v. Domingue*, 365 So. 2d 1330, 1333 (La. 1978); *see also* Frank L. Maraist, *Work of Appellate Courts—1978-1979: Civil Procedure*, 40 LA. L. REV. 761, 763 (1980).

23. *Arceneaux*, 365 So. 2d at 1333.

24. *See id.*

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make a thorough review of the jury's factual findings.²⁵ Thus, while the manifest error standard is one characterized by great deference, the Louisiana Supreme Court has continually safeguarded the appellate courts' constitutional power to review factual findings.²⁶ One specific example of a factual finding is the allocation of fault determined by the trial court or the jury, and a special method of review was formulated for this finding in *Clement v. Frey*.²⁷

In 1996, the first circuit heard *Clement v. Frey* and held that when an appellate court finds the allocation of fault to be manifestly erroneous, it should conduct a *de novo* review to reapportion the fault as it sees fit.²⁸ The supreme court reversed, finding instead that an appellate court, after a finding of manifest error, should only adjust the allocation "to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion."²⁹ Thus, the appellate court may not independently reach its own apportionment of fault, but rather must constrain itself to an apportionment which was reasonably within the trial court's window of discretion. The court based this finding on the policy of granting deference to the trier of fact, who is in the better position to decide factual issues.³⁰ The *Clement* court borrowed this rule from the method of appellate review for damages, as announced in *Coco v. Winston Industries, Inc.*³¹

B. THE MUCH DISCRETION STANDARD FOR DAMAGES

The standard of appellate review for the fact-finder's assessment of damages is similar to the standard for questions of fact in that it grants the

25. Maraist, *supra* note 22, at 764. The court expressed concern that a lower standard of review might infringe upon the right to appeal in civil cases. *Arceneaux v. Domingue*, 365 So. 2d 1330, 1334 (La. 1978). The *Arceneaux* court stated:

If the Court of Appeal should decide . . . only that there is some evidence to support the judgment, without determining whether the district court judgment is clearly wrong considering all the evidence, the Louisiana system of review breaks down. The losing litigant may never obtain actual review of the district court judgment, if the issue is factual.

Id. at 1334.

26. *See Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 93-3099 (La. 7/5/94); 639 So. 2d 216, 220 (reiterating that "[a]lthough deference to the factfinder should be accorded, the court of appeal, and the Louisiana Supreme Court, nonetheless have a constitutional duty to review facts.").

27. *Clement v. Frey*, 95-1119 (La. 1/16/96); 666 So. 2d 607.

28. *Clement v. Frey*, 94-1278 (La. App. 1 Cir. 4/7/95); 653 So. 2d 1341, *rev'd in part, aff'd in part*, 95-1119 (La. 1/16/96); 666 So. 2d 607.

29. *Clement*, 666 So. 2d at 611; *see infra* Part II.B.

30. *Clement v. Frey*, 95-1119 (La. 1/16/96); 666 So. 2d 607.

31. *Coco v. Winston Industries, Inc.*, 341 So. 2d 332 (La. 1977).

trial court a great amount of deference.³² However, the standard for damages is characterized as the “much discretion” standard.³³ Louisiana Civil Code article 2324.1 provides: “In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury.”³⁴ The much discretion standard is based on the rationale that the trier of fact is in more direct contact with the parties, the witnesses, and the evidence, and can thus make a better estimation of the plaintiff’s injuries.³⁵ As explained by the supreme court in *Bitoun v. Landry*, the appellate court should not disturb the award of damages unless the record shows the trial court abused the much discretion standard.³⁶ Further, simply because evidence from the record supports a different award, the appellate court may not change the award so long as it is reasonable.³⁷ The *Bitoun* court found that “when the trial court abuses its broad discretion [the award] should . . . be adjusted, either up or down.”³⁸ The supreme court would clarify the limits of that adjustment only three years later in *Coco v. Winston Industries, Inc.*³⁹

In the 1977 case of *Coco v. Winston Industries, Inc.*, the Louisiana Supreme Court held that an appellate court may not simply disregard the amount awarded by the trial court upon finding an abuse of discretion.⁴⁰ As with allocations of fault, the appellate court may only raise the award to the lowest amount, or lower the award to the highest amount, which was reasonably within the discretion of the trier of fact.⁴¹ The *Coco* standard thus grants significant deference to the fact-finder by permitting only a modification of the damage award, rather than allowing the appeals court to reach its own amount *de novo*.⁴²

32. See MARAIST & LEMMON, *supra* note 2, § 14:14.

33. *Id.*

34. LA. CIV. CODE ANN. art. 2324.1 (2010).

35. See Ernest L. Nix, Jr., Note, *Appellate Review of Damage Awards—An Affirmation of the Trial Court’s “Much Discretion,”* 38 LA. L. REV. 628, 628-30 (1978).

36. *Bitoun v. Landry*, 302 So. 2d 278, 279 (La. 1974).

37. *Id.*

38. *Id.*

39. *Coco v. Winston Industries, Inc.*, 341 So. 2d 332 (La. 1976).

40. *Id.*

41. *Id.* at 335.

42. MARAIST & LEMMON, *supra* note 2, § 14:14. However, when there is an error in the trial court that interfered with the determination of damages, the appellate court is allowed to fix the award *de novo*. *Mart v. Hill*, 505 So. 2d 1120 (La. 1987). There is some uncertainty as to what standard the appellate court should use when the trial judge orders an *additur* or *remittitur*. Compare *Karl v. Amoco Production Co.*, 507 So. 2d 263 (La. App. 3 Cir. 1987), *superseded by statute*, 1989 La. Acts 675 (asking whether the trial judge was “clearly wrong” in ordering the *additur* or *remittitur*), with *Lougon v. Era Aviation, Inc.*, 609 So. 2d 330 (La. App. 3 Cir. 1992) (reviewing the jury’s initial award to determine whether it was within the jury’s discretion, and if

C. THE DE NOVO STANDARD FOR FINDINGS OF LAW

In contrast to the deference granted to factual findings, appellate courts give little or no deference to a trial court's determinations of law.⁴³ When the trial court makes an error of law, the appellate court "is subject to no doctrinal restrictions in its reconsideration of the case, and will substitute its own judgment for that of the trial court with relative freedom."⁴⁴ This standard of no deference for legal findings is known as *de novo* review.⁴⁵

Standards of appellate review in Louisiana civil cases may be viewed on a spectrum of deference.⁴⁶ At one extreme is the *de novo* standard, which grants no deference to the trial court's findings of law and allows the appellate court to substitute its own judgment for that of the lower court. At the other extreme, for purposes of discussion, is an "absolute inviolability of the trial court's conclusions," or the narrowest scope of review imaginable.⁴⁷ Somewhere in between are the manifest error standard, under which the trial court's findings of fact will not be upset unless they are manifestly erroneous or clearly wrong, and the much discretion standard, which grants the trial court a similar amount of deference in its determination of damages.⁴⁸ These standards have caused confusion in Louisiana courts in many ways, but most germane to this Comment is the confusion surrounding their application to bifurcated trials.

III. BIFURCATION OF CIVIL TRIALS IN LOUISIANA

The term "bifurcated trial" is defined as a "trial that is divided into two stages"⁴⁹ Despite its seemingly simple definition, bifurcation can refer to a number of different procedures in both civil and criminal cases, and in both the federal district courts and in Louisiana trial courts.⁵⁰ This

it was, finding that the judge abused his discretion in ordering the remittitur and reinstating the jury's award).

43. See, e.g., *Thibodeaux v. Donnell*, 2008-2436 (La. 5/5/09); 9 So. 3d 120, 123.

44. Robertson, *supra* note 14, at 405-06.

45. De novo review is defined as "[a] court's nondeferential review of an administrative decision, [usually] through a review of the administrative record plus any additional evidence the parties present." BLACK'S LAW DICTIONARY 392 (8th ed. 2004).

46. Robertson, *supra* note 14, at 406.

47. *Id.*

48. *Id.*

49. BLACK'S LAW DICTIONARY 733 (8th ed. 2004). Bifurcation must be distinguished from the procedure of severance, which is governed in Louisiana by article 465 of the Louisiana Code of Civil Procedure. Bifurcation involves separate trials of claims originally brought together, and will result in a single judgment, while severed claims become independent actions, and thus result in the entry of independent judgments. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2387 (3d ed. 2010).

50. In the federal system, bifurcation of civil cases is governed by Federal Rule of Civil

Comment will limit itself, however, to a discussion of the bifurcation of Louisiana civil trials.

In the Louisiana courts, bifurcation refers to two possible scenarios, one of which is similar to the federal procedure of ordering separate trials of two or more issues.⁵¹ The term also refers to cases like this Comment's introductory hypothetical, in which a claim containing a request for a jury trial has been cumulated or consolidated with a claim to be tried before a judge.⁵²

A. BIFURCATION OF ISSUES IN LOUISIANA CIVIL CASES

The bifurcation of issues in Louisiana civil cases is governed by article 1562 of the Louisiana Code of Civil Procedure, which allows the trial judge, with the consent of all parties to the litigation, to order separate trials for liability, damages, or insurance coverage if it would simplify the proceeding or would serve the interests of justice.⁵³ Modeled on Federal Rule 42(b),⁵⁴ article 1562 provides three rationales for the bifurcation of issues: simplifying the proceedings, permitting an orderly disposition of the case, and serving the interests of justice.⁵⁵ The most obvious interest served by the bifurcation of issues is the avoidance of the prejudicial effects of juror sympathy.⁵⁶ By allowing the jury to decide liability apart from the issue of damages, the trial judge is able to prevent the possibility that evidence of the plaintiff's injuries would affect the jury's determination of liability.⁵⁷ Besides allowing trial courts to bifurcate the issues of a case, Louisiana law also allows for bifurcation when certain claims in a multiple tortfeasor case are not triable to a jury.⁵⁸

Procedure 42(b), which provides: “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.” Fed. R. Civ. P. 42(b). The most common example of this “issue bifurcation” in federal civil cases is the division of trials into separate proceedings for liability and damages. Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 705 (2000).

51. MARAIST & LEMMON, *supra* note 2, § 11:13.

52. *Id.*

53. LA. CODE CIV. PROC. ANN. art. 1562 (2010). Article 1562 was enacted in 1983, but contains the same subject matter as former article 466 of the Louisiana Code of Civil Procedure.

54. FED. R. CIV. P. 42(b).

55. LA. CODE CIV. PROC. ANN. art. 1562 (2010).

56. *See generally* James D. Bayard, *Eliminating the Barrier to Bifurcation in Louisiana Personal Injury Trials: Article 1562(A) of the Louisiana Code of Civil Procedure's Consent Requirement*, 52 LOY. L. REV. 345 (2006) (arguing that the consent requirement should be stricken from article 1562).

57. Bayard, *supra* note 56, at 346.

58. MARAIST & LEMMON, *supra* note 2, § 11:13.

B. BIFURCATION OF COMBINED JURY AND NON-JURY ACTIONS IN LOUISIANA CIVIL CASES

The bifurcation of combined jury and non-jury actions occurs when claims triable to a jury are consolidated with claims for which a jury trial is unavailable.⁵⁹ An examination of the right to a jury trial in Louisiana civil cases is necessary to better understand this type of bifurcation. It will also be useful to discuss the most common example of the bifurcation of combined jury and non-jury actions: the consolidation of a claim against a private defendant, for which a jury trial has been requested, with a claim against a public body, for which a jury trial is prohibited.

1. THE RIGHT TO A CIVIL JURY TRIAL IN LOUISIANA

Although the Seventh Amendment to the United States Constitution preserves the right to a jury in federal civil cases, the Seventh Amendment's protections have not been extended to the states through the Fourteenth Amendment's Due Process Clause.⁶⁰ And while most states have adopted the right to jury trial in civil cases in their state constitutions,⁶¹ Louisiana has not done so. Thus, there is no constitutional right to a trial by jury for civil cases in Louisiana.⁶² However, Louisiana Code of Civil Procedure article 1731 expressly recognizes the right to a jury trial, except in those

59. MARAIST & LEMMON, *supra* note 2, § 11:13. Unlike with the bifurcation of issues, the judge and the jury separately try the same matters in these cases. Thus, the possibility of inconsistent verdicts can only occur in this type of bifurcation. For this reason, the remainder of this Comment will focus on the bifurcation of cases involving combined jury and non-jury actions.

60. *See, e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418 (1996) (“[The] Seventh Amendment . . . governs proceedings in federal court, but not in state court”); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (“The [Supreme] Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.”).

61. *See* 1 GEORGE D. BRADEN ET AL., *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 57 (1977), available at <http://www.sll.state.tx.us/const/braden.html> (stating that all state constitutions guarantee a right of jury trial in criminal cases and that “[a]lmost without exception they guarantee the jury in civil cases as well.”).

62. *See* *Brewton v. Underwriters Ins. Co.*, 2002-2852 (La. 6/27/03); 848 So. 2d 586, 588-89. The denial of a civil jury trial in Louisiana has been challenged numerous times. *See, e.g.*, *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd*, 409 U.S. 943 (1973); *Letendre v. Fugate*, 701 F.2d 1093 (4th Cir. 1983). However, as noted above, the United States Supreme Court has held this denial to be constitutional. *See Melancon*, 345 F. Supp. at 1035 (refusing to hold Seventh Amendment applicable in state court); *see also* *Rudolph v. Mass. Bay Ins. Co.*, 472 So. 2d 901 (La. 1985). In contrast to civil cases, the right to trial by jury in criminal cases is guaranteed by article 1, § 17 of the Louisiana constitution and by the Sixth Amendment to the United States Constitution. *See* *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that “the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”).

cases specifically delineated in article 1732.⁶³ Further, Louisiana courts have indicated that the right to a civil jury trial is “fundamental in character and courts should indulge in every presumption against a waiver, loss, or forfeiture of that right.”⁶⁴ Courts have also recognized the absolute and inviolate nature of the right, except where limited by law.⁶⁵

Louisiana Code of Civil Procedure article 1736 provides that trial by jury shall cover all issues for which it has been requested, unless the parties stipulate that the jury will try only certain issues or unless the right is statutorily unavailable.⁶⁶ However, “except as otherwise provided under the provisions of Article 1562, *there shall be but one trial.*”⁶⁷ Thus, it seems clear that article 1736 contemplates bifurcation of the trial, with certain claims available to a jury and certain claims available to a judge. Nevertheless, the Louisiana Supreme Court did not sanction the bifurcation of trials involving combined jury and non-jury actions until the landmark 1974 case of *Champagne v. American Southern Insurance Co.*⁶⁸

2. BIFURCATION OF LOUISIANA CIVIL TRIALS INVOLVING COMBINED CLAIMS AGAINST PUBLIC AND PRIVATE DEFENDANTS

The question of whether a trial court could bifurcate a trial involving combined jury and non-jury actions originally arose in the wake of the Louisiana Legislature’s passage in 1960 of what is now called the Louisiana

63. LA. CODE CIV. PROC. ANN. arts. 1731, 1732 (2010). Article 1732 provides the specific instances in which a jury trial is not available:

A trial by jury shall not be available in:

- (1) A suit where the amount of no individual petitioner’s cause of action exceeds fifty thousand dollars exclusive of interest and costs.
- (2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want, or failure of consideration.
- (3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, workers’ compensation, emancipation, tutorship, interdiction, curatorship, filiation, annulment of marriage, or divorce proceeding.
- (4) A proceeding to determine custody, visitation, alimony, or child support.
- (5) A proceeding to review an action by an administrative or municipal body.
- (6) All cases where a jury trial is specifically denied by law.

LA. CODE CIV. PROC. ANN. art. 1732 (2010).

64. *Parker v. Rowan Cos.*, 628 So. 2d 1108, 1110 (La. 1991) (citing *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437, 439 (La. 1974)).

65. *Adams v. City of Baton Rouge*, 95-2515 (La. App. 1 Cir. 4/30/96); 673 So. 2d 624, 635.

66. LA. CODE CIV. PROC. ANN. art. 1736 (2010). Amended in 1983, article 1736 contains the same subject matter of pre-revision article 1735.

67. LA. CODE CIV. PROC. ANN. art. 1736 (2010) (emphasis added). As noted above, article 1562 allows for separate trials on the issues of liability, damages, and insurance coverage. LA. CODE CIV. PROC. ANN. art. 1562 (2010).

68. *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437 (La. 1974); *see infra* Part III.B.2.

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Governmental Claims Act.⁶⁹ At the time of its enactment, the Act, and specifically what is now § 13:5105 of the Louisiana Revised Statutes,⁷⁰ prohibited a jury trial in a suit against the State of Louisiana, a state agency,⁷¹ or a political subdivision⁷² of the state.⁷³ The Act was intended to discourage the jury's inclination to "dig into the deep pockets of the State."⁷⁴ The Act also had a more unexpected side effect: it would spur the development of Louisiana's procedure of bifurcating cases involving combined jury and non-jury actions.

In the wake of the Act's enactment in 1960, its jury trial prohibition led to a dispute among the appellate circuits as to the proper procedure for

69. Act of June 16, 1960, No. 27, §§ 1-11, 1960 La. Acts 95, 95-97 (codified at LA. REV. STAT. ANN. § 13:5101-5113(1960)).

70. The section of the Louisiana Revised Statutes containing the jury trial prohibition was renumbered as § 13:5105 in 1975. Act of July 17, 1975, No. 434, §§ 1-3, 1975 La. Acts 981, 981-84 (codified as amended at LA. REV. STAT. ANN. § 13:5101-5111 (1975)). In 1988, § 13:5101 was amended to extend the Act's application to suits against officers and employees of political subdivisions, when those suits arise out of their official duties or employment. Act of July 18, 1988, No. 781, § 1, 1988 La. Acts 2017 (codified as amended at LA. REV. STAT. ANN. § 13:5101-5102 (1988)). The most significant modification of the jury trial prohibition was effected in 1993, when § 13:5105's jury trial prohibition was amended to limit it to suits against political subdivisions of the state. Act of July 30, 1993, No. 993, §§ 1-2, 1993 La. Acts 2760, 2761 (codified as amended at LA. REV. STAT. ANN. § 13:5105 (1993)).

71. Section 13:5102 defines a state agency as:

[A]ny board, commission, department, agency, special district, authority, or other entity of the state and . . . any nonpublic, nonprofit agency, person, firm, or corporation which has qualified with the United States Internal Revenue Service for an exemption from federal income tax . . . and which, through contract with the state, provides services for the treatment, care, custody, control, or supervision of persons placed or referred to such agency, person, firm, or corporation by any agency or department of the state in connection with programs for treatment or services involving residential or day care for adults and children, foster care, rehabilitation, shelter, or counseling . . .

LA. REV. STAT. ANN. § 13:5102 (2006).

72. Section 13:5102(B) defines a political subdivision as:

(1) Any parish, municipality, special district, school board, sheriff, public board, institution, department, commission, district, corporation, agency, authority, or an agency or subdivision of any of these, and other public or governmental body of any kind which is not a state agency.

(2) Any private entity . . . which on the behalf of a public transit authority was created as a result of Section 13(c) of the Urban Mass Transportation Act, requiring the terms of transit workers' collective bargaining agreements to be honored and provides management and administrative duties of such agency or authority and such entity is employed by no other agency or authority, whether public or private.

LA. REV. STAT. ANN. § 13:5102(B) (2006).

73. LA. REV. STAT. ANN. § 13:5105 (2006). This prohibition was held constitutional in the case of *Rudolph v. Massachusetts Bay Insurance Co.* *Rudolph v. Mass. Bay Ins. Co.*, 472 So. 2d 901, 905 (La. 1985) (finding that § 13:5105's jury trial prohibition violated neither the Seventh Amendment to the United States Constitution nor the Fourteenth Amendment's due process and equal protection clauses).

74. *Rudolph*, 472 So. 2d at 905.

cases in which a public body is only one of several defendants.⁷⁵ Then in the 1968 case of *Jobe v. Hodge*, the Louisiana Supreme Court held that when one of several defendants is a public body, the entire case should be tried before a judge.⁷⁶ In *Jobe*, three bar patrons accused police officers of false arrest and assault and battery.⁷⁷ The plaintiffs filed separate suits against the officers in their individual capacities, the Village of Tallulah and the Mayor as the officers' employers, and the owner of the bar for illegally serving the officers liquor on Sunday.⁷⁸ After the plaintiffs demanded a jury trial, the public defendants filed a motion to strike the plaintiffs' demands, on the grounds that a jury trial was statutorily prohibited in suits against municipalities.⁷⁹ The trial court consolidated the suits, granted the defendants' motion to strike, and tried the claims alone without a jury.⁸⁰ The plaintiffs appealed the trial court's denial of a jury trial to the Louisiana Second Circuit Court of Appeal.⁸¹

On appeal to the second circuit, the plaintiffs argued that a single trial should have been held, in which the jury would try all claims against the private defendants and the judge would try the claims against the public defendants.⁸² They reasoned that present-day Code of Civil Procedure article 1736 allows a jury trial for some defendants and a bench trial for others.⁸³ In affirming the trial court's denial of a jury trial, the second circuit found that article 1736 is of general application, while § 13:5105 of the Louisiana Revised Statutes applies specifically to suits against state defendants.⁸⁴ Therefore, there was no conflict between the two laws, and the express language of § 13:5105 prohibited the plaintiff's demand for a jury trial.⁸⁵

The Louisiana Supreme Court granted writs of certiorari and held that if a trial involved a combination of jury and non-jury issues, it should be

75. See *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437, 438 (La. 1974); see also Steven A. Glaviano, Note, *Appellate Review in Bifurcated Trials*, 38 LA. L. REV. 1056, 1057 (1978).

76. *Jobe v. Hodge*, 218 So. 2d 566, 570 (La. 1969), *overruled by Champagne*, 295 So. 2d 437.

77. *Id.* at 568.

78. *Id.*

79. *Jobe v. Hodge*, 207 So. 2d 912, 913 (La. App. 2 Cir. 1968), *rev'd*, 218 So. 2d 566 (La. 1969).

80. *Id.*

81. *Id.* at 913-14.

82. *Id.* at 914-15.

83. *Id.*; see LA. CODE CIV. PROC. ANN. art. 1736 (2010) (requiring a jury trial on all issues for which one has been requested, "unless the parties stipulate that the jury trial shall be as to certain issues only or unless the right to trial by jury as to certain issues does not exist; however, except as otherwise provided under the provisions of Article 1562, there shall be but one trial.").

84. *Jobe*, 207 So. 2d at 915.

85. *Id.*

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tried before a judge in its entirety, in part because of the potential for inconsistent results were judge and jury allowed to separately determine the same factual matters.⁸⁶ This rationale would persist in Louisiana for another five years, until the groundbreaking case of *Champagne v. American Southern Insurance Co.*⁸⁷

In 1974, the Louisiana Supreme Court expressly overruled its decision in *Jobe v. Hodge* when it decided *Champagne*.⁸⁸ In *Champagne*, the administrator of an estate filed a wrongful death action against a deputy of the St. Landry Parish Sheriff's Department after the deceased jumped out of a vehicle belonging to the department.⁸⁹ In its answer, the deputy's insurance company requested a jury trial on the issue of liability,⁹⁰ after which the plaintiff requested a jury trial on all issues.⁹¹ The insurance company named the State as a third party defendant, and the plaintiff amended his petition to add the State as a principal defendant.⁹² The State then filed a motion to strike the demand for a jury trial.⁹³ Basing its decision on the reasoning of the supreme court in *Jobe*, the trial court ruled that all motions for a jury trial would be denied.⁹⁴

On granting writs directly from the trial court pursuant to its supervisory jurisdiction,⁹⁵ the supreme court noted the conflict between the right to jury trial and the prohibition of jury trials against the state provided by present-day § 13:5105.⁹⁶ The court then cited what is now article 1736 of the Louisiana Code of Civil Procedure, which allows the jury to try certain issues and the judge to try others and concluded,

86. *Jobe v. Hodge*, 218 So. 2d 566, 570 (La. 1969), *overruled by Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437 (La. 1974). In *Jobe*, the Louisiana Supreme Court stated:

Such a system of trial [in which the judge and jury are allowed to make separate determinations on the same facts] can only operate to destroy the independent determination of either the judge or jury in their conscious or unconscious efforts to avoid the ludicrous consequences of opposite results reached in the same trial on the same evidence.

Id.

87. *Champagne*, 295 So. 2d 437.

88. *Id.* at 439.

89. *Id.* at 437.

90. As officers and employees of political subdivisions like the Sheriff's Department were not covered by the jury trial prohibition at the time of *Champagne*, the deputy and his insurance company were entitled to request a trial by jury.

91. *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437, 438 (La. 1974).

92. *Id.*

93. *Id.*

94. *Id.*

95. See LA. CONST. art. 5, § 5(A) (stating that "[t]he supreme court has general supervisory jurisdiction over all other courts.>").

96. *Champagne*, 295 So. 2d at 438.

[T]he better practice, and the one which gives effect to the code articles, is to permit but one trial with the judge determining the issues relative to the State, and the jury ascertaining all the others. *Jobe v. Hodge*, *supra*, is expressly overruled. The right to trial by jury in a civil case is a basic right and should be protected in the absence of specific authority for its denial.⁹⁷

The *Champagne* court also recognized that conflicting results could potentially occur using this method, but it maintained that such a possibility would not affect its decision.⁹⁸ The court reasoned that because the judge can set aside a decision of the jury with which he disagrees⁹⁹ and appellate courts can review findings of fact, the difficulties created would be no more severe than those which might arise in separate suits against the public and private defendants.¹⁰⁰ Considering the subsequent problems experienced by Louisiana courts in the thirty-six years since *Champagne*, the accuracy of the court's prediction is highly debatable.¹⁰¹

The 1993 amendments to Louisiana Revised Statute § 13:5105,¹⁰² restricting the jury trial prohibition to suits against political subdivisions of the state, somewhat lessened the frequency of bifurcated trials involving combined jury and non-jury actions.¹⁰³ Nevertheless, these cases have continued to arise, the appellate courts have taken wildly divergent methods to resolve their inconsistent results, and the Louisiana Supreme Court has failed to address the issue directly.¹⁰⁴

97. *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437, 439-40 (La. 1974).

98. *Id.* at 439.

99. *Id.* The court cited articles 1812 and 1813 of the Louisiana Code of Civil Procedure for this proposition. *Id.* At the time, article 1812 allowed the trial judge, when the jury's answers to interrogatories were inconsistent, to return the answers to the jury for further consideration or to order a new trial. LA. CODE CIV. PROC. ANN. art. 1812 (1974). Article 1813, at the time, allowed the judge to grant a new trial if one of the parties did not consent to the entry of an additur or remittitur. LA. CIV. CODE PROC. ANN. art. 1813 (1974). In a later supreme court case, the court asserted that neither of these articles would have allowed the trial judge to reconcile inconsistent results of a bifurcated trial. *Powell v. Reg'l Transit Auth.*, 96-0715 (La. 6/18/97); 695 So. 2d 1326, 1330 n.4.

100. *Champagne*, 295 So. 2d at 438.

101. *See infra* Part IV.

102. Act of July 30, 1993, No. 993, §§ 1-2, 1993 La. Acts 2760, 2761 (codified as amended at LA. REV. STAT. ANN. § 13:5105 (1993)).

103. MARAIST & LEMMON, *supra* note 2, § 11:13.

104. As noted above, the court has been confronted with the issue on several occasions but has always decided the case on other grounds. *See Fontenot v. Patterson Ins.*, 2008-0414 (La. 12/12/08); 997 So. 2d 529; *Hebert v. Rapides Parish Police Jury*, 2006-2001 (La. 4/11/07); 974 So. 2d 635; *Davis v. Witt*, 2002-3102 (La. 7/2/03); 851 So. 2d 1119; *Powell v. Reg'l Transit Auth.*, 96-0715 (La. 6/18/97); 695 So. 2d 1326; *Lemire v. New Orleans Pub. Serv., Inc.*, 458 So. 2d 1308 (La. 1984).

IV. THE DIVERGENT METHODS USED BY LOUISIANA APPELLATE COURTS TO REVIEW CONFLICTING RESULTS OF BIFURCATED TRIALS

As noted above, the *Champagne* court recognized the possibility of conflicting results in a bifurcated trial in which judge and jury separately try the same issues, but the court dismissed the significance of this potential conflict.¹⁰⁵ In reality, this type of conflict has occurred quite often in the thirty-six years since *Champagne*, and the appellate courts have taken several different approaches in resolving it.¹⁰⁶ However, the first issue that an appellate court must address when reviewing a bifurcated trial with inconsistent results is the question of when an inconsistency can exist between the findings of the judge and the jury.¹⁰⁷ Louisiana's third and fourth circuit courts of appeal have each developed their own approach to determining the existence of a conflict, and the Louisiana Supreme Court has suggested yet another approach.

The Louisiana Third Circuit Court of Appeal has held there cannot be a conflict as a matter of law, even where the fault allocations as to particular defendants are inconsistent, when the jury decides the fault of non-governmental defendants.¹⁰⁸ In other words, because the jury's determination of fault as to the public defendant is not binding on the trial judge, that determination can never conflict with the judge's determination.¹⁰⁹

105. See generally *Champagne v. Am. S. Ins. Co.*, 295 So. 2d 437 (La. 1974).

106. See *infra* Part IV.A-B.

107. See *Bishop v. Shelter Ins. Co.*, 461 So. 2d 1170, 1174 (La. App. 3 Cir. 1984), *superseded by statute*, 1988 La. Acts 1085, 1129 (codified as amended at LA. CODE EVID. ANN. art. 411 (1989)), *as recognized in Steers v. Int'l Paper Co.*, 540 So. 2d 1236 (La. App. 3 Cir. 1989). *Bishop* found no conflict and thus no need to reconcile the facts found by the judge and jury. *Bishop*, 461 So. 2d at 1174.

108. See, e.g., *Davis v. Witt*, 2001-894 (La. App. 3 Cir. 11/13/02); 831 So. 2d 1075, *rev'd on other grounds*, 2002-3102 (La. 7/2/03); 851 So. 2d 1119; *Hasha v. Calcasieu Parish Police Jury*, 94-705 (La. App. 3 Cir. 2/15/95); 651 So. 2d 865; *Lasswell v. Matlack*, 527 So. 2d 1199 (La. App. 3 Cir. 1988); *Felice v. Valleylab, Inc.*, 520 So. 2d 920 (La. App. 3 Cir. 1987); *Bishop*, 461 So. 2d 1170. This line of cases was likely abrogated by the third circuit's decisions in *Fontenot* and *Hebert*, using de novo review to resolve conflicts in cases involving a combination of public and private defendants. See *Fontenot v. Patterson Ins.*, 2006-1624 (La. App. 3 Cir. 12/5/07); 972 So. 2d 401, *rev'd*, 2008-0414 (La. 12/12/08); 997 So. 2d 529; *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635; see also discussion *infra* Part IV.B.

109. See *Davis*, 831 So. 2d 1075. In *Davis*, the jury found the public defendant free from fault, but the judge assessed it with twenty percent fault. *Id.* at 1078-79. Nevertheless, the appellate court found no inconsistency between the findings, because "a jury's adjudication of issues involving a public [defendant] are not to influence a trial judge's 'independent judicial obligation' with respect to the public agency defendant." *Id.* at 1085 (citing *Lemire v. New Orleans Pub. Serv., Inc.*, 458 So. 2d 1308, 1310 (La. 1984)).

The Louisiana Fourth Circuit Court of Appeal has recently formulated another approach to the existence of a conflict, finding that if the relevant percentages of fault total less than or equal to 100%, then there is no conflict.¹¹⁰ If the percentages add up to more than 100%, then there is a conflict that must be reconciled.¹¹¹

Finally, in *Powell v. Regional Transit Authority*, the Louisiana Supreme Court wrote in dicta that there was arguably no real barrier to an appellate court simply reviewing any conflicting verdicts separately under the manifest error standard.¹¹² If the two findings are both reasonable but inconsistent, then the court would not be required to reconcile them.¹¹³ Despite this suggestion by the supreme court, Louisiana's appellate courts continue to attempt to reconcile any inconsistent results of bifurcated trials through the application of several different standards of review.¹¹⁴ These varying standards of review have caused great confusion among the appellate courts of Louisiana since the issue first arose in the 1977 Louisiana Supreme Court case of *Thornton v. Moran*.¹¹⁵

A. THORNTON V. MORAN: THE LOUISIANA SUPREME COURT REQUIRES THE RECONCILIATION OF CONFLICTING RESULTS

Only three years after the *Champagne* court predicted the problem of a conflict between the results of bifurcated trials, the supreme court faced this type of conflict in *Thornton v. Moran*.¹¹⁶ *Thornton* involved an automobile accident, in which Moran's vehicle ran into the rear of the Thorntons'

110. See *State Farm Mut. Auto. Ins. Co. v. LeRouge*, 2007-0918 (La. App. 4 Cir. 11/12/08); 995 So. 2d 1262; *Madison v. Ernest N. Morial Convention Ctr. – New Orleans*, 2000-1929 (La. App. 4 Cir. 12/4/02); 834 So. 2d 578.

111. *State Farm*, 995 So. 2d 1262; *Madison*, 874 So. 2d 578.

112. *Powell v. Reg'l Transit Auth.*, 96-0715 (La. 6/18/97); 695 So. 2d 1326, 1330 n.6.

113. *Id.* The court provided an example:

[Imagine] a case involving two tortfeasor defendants in which the jury finds D-1 (the non-governmental tortfeasor) sixty percent at fault and awards \$120,000 in damages, while the judge finds D-2 (the governmental tortfeasor) fifty percent at fault and awards \$100,000 in damages. Arguably, there is no reason why the appellate court, upon finding no manifest error in either allocation of fault and no abuse of discretion in either award of damages, should not affirm both decisions. The plaintiff would recover \$72,000 from D-1 and \$50,000 from D-2, arguably an over-recovery, but there would have been an "under-recovery" (\$98,000) if the jury had assessed only forty percent of the fault to D-1.

Id. Additionally, the Louisiana Civil Law Treatise explains,

Louisiana has a pure comparative fault system, and there appears to be no obstacle to, for example, a blameless plaintiff's collecting sixty percent (or forty percent) of different amounts of damages from each of two defendants in accordance with the "contradictory" findings of each trier of fact in a bifurcated trial.

MARAIST & LEMMON, *supra* note 2, § 11:13 n.11 (citing *Powell*, 695 So. 2d 1326).

114. See *infra* Part IV.A-B.

115. *Thornton v. Moran*, 343 So. 2d 1065 (La. 1977).

116. *Id.*

vehicle.¹¹⁷ Each party filed suit against the other alleging negligence, but only Moran requested a jury trial.¹¹⁸ The cases were consolidated for trial, with the jury hearing the action against Moran and the judge hearing the action against the Thorntons.¹¹⁹ In the Thornton action, the trial judge found that Mr. Thornton was negligent, but that Moran had the last clear chance¹²⁰ to avoid the accident, and was thus liable to the Thorntons.¹²¹ As for damages, Moran and her insurer owed \$8,250.00 in solido, and Moran owed \$1,993.50 individually.¹²² In the Moran suit, the jury also found Mr. Thornton to be negligent; however, the jury found Moran to be free from fault.¹²³ Moran was awarded damages against Mr. Thornton and his insurer in the amount of \$90,000.00.¹²⁴ Both parties appealed the case to the Louisiana First Circuit Court of Appeal.¹²⁵

In assessing the contradictory results, the court of appeal first noted the difficulty created by this unusual situation; the record revealed the trial judge's findings of fact and conclusions of law, but showed only the conclusions of the jury.¹²⁶ The court then stated its resolve not to be influenced by a desire for uniform results, since inconsistent results from

117. *Thornton v. Moran*, 341 So. 2d 1136, 1138 (La. App. 1 Cir. 1976), *rev'd*, 343 So. 2d 1065 (La. 1977).

118. *Id.* It should be noted that the vast majority of bifurcated trials in which the judge and jury separately try the same issues involve a combination of public and non-public defendants and an application of § 13:5105. See MARAIST & LEMMON, *supra* note 2, § 11:13; see also *supra* note 2. For this reason, this Comment will primarily focus on these cases. It is interesting, though, that the foundational case for determining the standard of review in such bifurcated trials, *Thornton*, involved a rare exception to the rule. See *Thornton*, 341 So. 2d 1136.

119. *Thornton*, 341 So. 2d at 1139. Article 1561 of the Louisiana Code of Civil Procedure provides that two or more separate actions pending in the same court may be consolidated for trial “after a contradictory hearing, and upon a finding that common issues of fact and law predominate.” LA. CODE CIV. PROC. ANN. art. 1561 (2010).

120. The “last-clear-chance” doctrine is “[t]he rule that a plaintiff who was contributorily negligent may nonetheless recover from the defendant if the defendant had the last opportunity to prevent the harm but failed to use reasonable care to do so” BLACK’S LAW DICTIONARY 409 (8th ed. 2004). Several authorities have maintained that the last clear chance doctrine cannot have survived Louisiana’s adoption of a pure comparative negligence system in 1996. See *Robertson*, note 4, at 188-89 (“It is almost universally accepted that the last clear chance doctrine must disappear whenever a comparative fault regime—particularly, a ‘pure’ comparative fault regime like Louisiana’s—goes into effect.”).

121. *Thornton v. Moran*, 341 So. 2d 1136, 1139 (La. App. 1 Cir. 1976), *rev'd*, 343 So. 2d 1065 (La. 1977).

122. *Id.*

123. *Id.* It is important to note that *Thornton* was decided in 1976, three years before Louisiana adopted a comparative fault system. See *supra* note 4.

124. *Thornton*, 341 So. 2d at 1139.

125. *Id.* Hereinafter, the first circuit’s original decision in *Thornton* will be referred to as “*Thornton I.*”

126. *Id.* at 1142.

separate triers of fact are always a possibility.¹²⁷ Applying this reasoning, the court decided to review each of the findings separately, stating “[i]f the results reached in these cases after our review remain contradictory or should they conform one to the other, so be it.”¹²⁸ Using the manifest error standard, the court affirmed both judgments.¹²⁹

The Louisiana Supreme Court granted writs, and in a one paragraph, *ex parte* decision, reversed the judgment of the court of appeal and remanded the case with instructions to “resolve the differences in the factual findings between the jury and the judge in these consolidated cases and to render a single opinion based upon the record.”¹³⁰ Since the court issued this directive in 1977, Louisiana’s appellate courts have interpreted it to apply several different standards of review to the inconsistent results¹³¹ of bifurcated trials, and the Louisiana Supreme Court has yet to speak directly to the issue. These various standards of review comprise the remainder of this section.

B. THE MORE REASONABLE STANDARD

One of the two most common approaches to the proper standard of appellate review for bifurcated trials with inconsistent results is known as the “more reasonable” standard. This standard originated in the Louisiana First Circuit Court of Appeal in 1977¹³² and has since been adopted by the second,¹³³ third,¹³⁴ and fifth circuits.¹³⁵ The more reasonable standard has

127. Thornton v. Moran, 341 So. 2d 1136, 1142 (La. App. 1 Cir. 1976), *rev’d*, 343 So. 2d 1065 (La. 1977).

128. *Id.*

129. *Id.* at 1146.

130. Thornton v. Moran, 343 So. 2d 1065 (La. 1977) (citing LA. CONST. art. 5, § 10(B)). Justice Summers dissented from the “*ex parte* in chamber reversal of the judgment of the court of appeal without a hearing and opportunity for the parties to be heard.” *Id.* Justices Calogero and Dennis dissented, noting that “the writ should be granted and the case taken up in this Court in the normal course, with oral arguments followed by written opinion.” *Id.*

131. The meaning of the term “results” should be noted here. While several of the cases on this issue refer to “conflicting findings of fact,” the overwhelming majority of the cases involve the review of the jury and judge’s determinations as to liability and damages. Perhaps this is because these findings of fact are ultimately the only ones that may conflict with one another in any significant way. Regardless, this Comment will mainly focus on the appellate review of the “results” of cases, or the determinations as to liability and damages. For a discussion of the significance of inconsistencies between *underlying* findings of fact, such as determinations as to the wetness of a floor, see Madison v. Ernest N. Morial Convention Ctr. – New Orleans, 2000-1921 (La. App. 4 Cir. 12/4/02); 834 So. 2d 578.

132. Thornton v. Moran, 348 So. 2d 79, 81-82 (La. App. 1 Cir. 1977) (*per curiam*).

133. Eppinette v. City of Monroe, 29,366 (La. App. 2 Cir. 6/20/97); 698 So. 2d 658.

134. Deville v. Town of Bunkie, 364 So. 2d 1378 (La. App. 3 Cir. 1978).

135. Amer. Cas. Co. v. Ill. Cent. Gulf R.R. Co., 601 So. 2d 712 (La. App. 5 Cir. 1992).

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undergone a number of changes and clarifications during its development in the appellate courts, but it has always been marked by a deferential approach toward the findings of the judge and the jury.

On remand in *Thornton (Thornton II)*,¹³⁶ the first circuit stated its impression that the “manifest error” and “reasonable conclusion of fact” rules are inapplicable when conflicting results are reached in bifurcated trials.¹³⁷ The court then defined a new standard, in which the reviewing court must “harmonize” the judgment by “ascertain[ing] which of the triers of fact accorded a more reasonable measurement to the evidence in reaching a decision, and [deciding] which of the said triers of fact gave a more reasonable evaluation and drew a more reasonable inference from the facts.”¹³⁸ The more reasonable standard, therefore, grants a measure of deference to the findings of the judge and jury by forcing the appellate court to choose which of those findings is *more* reasonable. The court may not look elsewhere for a determination it considers to be the *most* reasonable. In applying this new standard, the *Thornton II* court found that the more reasonable finding was the jury’s conclusion that Moran was free from fault.¹³⁹

It is important to note that at the time of the Louisiana Supreme Court’s decision in *Thornton*, the appellate court had already determined that neither the judge’s nor jury’s findings were manifestly erroneous.¹⁴⁰ Later cases have interpreted this fact to mean that the supreme court’s directive first requires the appellate court to conduct a threshold review of both findings for manifest error.¹⁴¹ This conceptualization of the more reasonable standard seems to have originated in the 1994 first circuit case of *Cornish v. State*.¹⁴² In *Cornish*, the plaintiff was injured in an automobile

136. Hereinafter, the first circuit’s decision on remand will be referred to as “*Thornton II*.”

137. *Thornton v. Moran*, 348 So. 2d 79, 81-82 (La. App. 1 Cir. 1977). It should be noted that *Thornton II* was decided one year before the Louisiana Supreme Court dismissed any notion of a separate “reasonable conclusion of fact” standard in *Arceneaux v. Domingue*, 365 So. 2d 1330, 1333 (La. 1978). See *supra* Part II.A.

138. *Thornton*, 348 So. 2d at 82. While *Thornton II* suggested that the trial judge is under a similar requirement to “harmonize” the judgment, the first circuit later held in *Bunkie Bank & Trust Co. v. Avoyelles Parish Police Jury* that “[t]he preferable procedure, under *Thornton*, is that the court of appeal harmonize [conflicting] decisions by the jury and the judge.” *Bunkie Bank & Trust Co. v. Avoyelles Parish Police Jury*, 347 So. 2d 1305, 1308 (La. App. 1 Cir. 1977).

139. *Thornton*, 348 So. 2d at 82.

140. *Thornton v. Moran*, 341 So. 2d 1136, 1142-43 (La. App. 1 Cir. 1976), *rev’d*, 343 So. 2d 1065 (La. 1977).

141. *Davis v. Witt*, 2002-3012 (La. 7/2/03); 851 So. 2d 1119; *Eppinette v. City of Monroe*, 29,366 (La. App. 2 Cir. 6/20/97); 698 So. 2d 658; *Cornish v. State, Dep’t of Transp. & Dev.*, 93-0194 (La. App. 1 Cir. 12/1/94); 647 So. 2d 1170.

142. *Cornish v. State, Dep’t of Transp. & Dev.*, 93-0194 (La. App. 1 Cir. 12/1/94); 647 So. 2d

accident when he drove his vehicle into a cattle guard.¹⁴³ The plaintiff filed suit against the State Department of Transportation and Development (DOTD), claiming negligence for failure to place warning signs on the highway.¹⁴⁴ He also filed suit against Ponchatoula Homestead and Savings Association and the owner of the cattle guard for negligence in maintaining a hazardous obstacle and failing to warn of the obstacle.¹⁴⁵ The jury, determining the liability of Ponchatoula, found the DOTD fifty percent at fault, Ponchatoula twenty-five percent at fault, and the plaintiff twenty-five percent at fault.¹⁴⁶ The judge, however, found DOTD fifty percent at fault, Ponchatoula thirty-five percent at fault, and the plaintiff fifteen percent at fault.¹⁴⁷

In discussing *Thornton's* statements that the manifest error rule is inapplicable where conflicting results are reached in bifurcated trials, the court noted that the rule should still be used to make an initial determination as to the reasonableness of the two verdicts.¹⁴⁸ The more reasonable standard is therefore “an *additional* standard of appellate review to be applied in bifurcated trials that resulted in inconsistent *reasonable* findings.”¹⁴⁹ The court then explained that if, in an initial review for manifest error, it found both findings to be manifestly erroneous, it would be free to use *de novo* review.¹⁵⁰ If only one of the findings was manifestly erroneous, the appellate court could disregard that finding and adopt the finding of the other trier of fact.¹⁵¹ The more reasonable standard, therefore, “should be applied only after an appellate court is satisfied that the record contains sufficient evidence to furnish a reasonable factual basis to support the conclusions reached by each trier of fact and that these conclusions are inconsistent, thus requiring harmonization to arrive at a single decision.”¹⁵² The court proceeded to find both fact-finders’

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143. *Cornish v. State, Dep’t of Transp. & Dev.*, 93-0194 (La. App. 1 Cir. 12/1/94); 647 So. 2d 1170, 1175.

144. *Id.* at 1176.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1178.

149. *Cornish v. State, Dep’t of Transp. & Dev.*, 93-0194 (La. App. 1 Cir. 12/1/94); 647 So. 2d 1170, 1178 (second emphasis added).

150. *Id.* This is, of course, the traditional method of review for factual findings in Louisiana. *See supra* Part II.A. A qualification to this rule is that the appellate court is required to adjust the fact-finder’s apportionments of fault in accordance with the Louisiana Supreme Court case of *Clement v. Frey*, 95-1119 (La. 1/16/96); 666 So. 2d 607. *Id.*

151. *Cornish*, 647 So. 2d at 1178.

152. *Id.* at 1178-79.

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apportionments of fault as to the plaintiff manifestly erroneous; then, conducting an independent review of the plaintiff's fault, the court found the appropriate percentage to be fifty percent.¹⁵³ The *Cornish* approach has proved to be quite influential; in fact, the Louisiana Supreme Court seemingly endorsed it in *Davis v. Witt*.¹⁵⁴

In dicta in the 2003 case of *Davis v. Witt*, the Louisiana Supreme Court appeared to endorse the *Cornish* approach regarding the initial determination to be made.¹⁵⁵ In *Davis*, the court declined to address the issue of the proper standard of review for bifurcated trials resulting in inconsistent verdicts.¹⁵⁶ The court explained, though, that the issue of resolving an inconsistency between the verdicts only comes into play when the verdicts individually survive an initial review for manifest error.¹⁵⁷ Therefore, it appears that the supreme court endorsed the conceptualization advocated by the *Cornish* line of cases, in that the appellate court must conduct an initial manifest error review. In making this determination, one of the cases the court cited was the second circuit's 1997 decision in *Eppinette v. City of Monroe*, in which that court first used the more reasonable standard.¹⁵⁸

In *Eppinette v. City of Monroe*, the plaintiff, Mr. Eppinette, was injured by an electrified chain link fence at the Monroe Regional Airport.¹⁵⁹ Eppinette brought suit against the City and the construction company that had erected the fence.¹⁶⁰ The jury, hearing the case against the construction

153. *Cornish v. State, Dep't of Transp. & Dev.*, 93-0194 (La. App. 1 Cir. 12/1/94); 647 So. 2d 1170, 1183-84. Thus, the *Cornish* court never reached the more reasonable standard. *Id.* *Cornish* was abrogated in part by the Louisiana Supreme Court in the 1996 case of *Clement v. Frey*. See *Clement v. Frey*, 95-1119 (La. 1/16/96); 666 So. 2d 607. In *Clement*, the supreme court found that the *Cornish* panel had erred when, after finding the trial court manifestly erroneous in its apportionment of fault, it conducted a de novo review on the issue. *Id.* at 609. Instead, the supreme court in *Clement* held that appellate courts should apply the *Coco v. Winston Industries, Inc.* standard after finding manifest error in apportionment of fault. *Id.* at 609-11; see *Coco v. Winston Industries, Inc.*, 341 So. 2d 332 (La.1977); see also discussion *supra* Part II.A. *Clement* did not address the problem of resolving a conflict between two reasonable results in a bifurcated trial, because in *Clement*, the manifestly erroneous apportionment of fault occurred in a bench trial. *Clement*, 666 So. 2d at 608-09.

154. *Davis v. Witt*, 2002-3102 (La. 7/2/03); 851 So. 2d 1119.

155. *Id.* at 1126.

156. *Id.*

157. *Id.*

158. *Id.* (citing *Eppinette v. City of Monroe*, 29,366 (La. App. 2 Cir. 6/20/97); 698 So. 2d 658, 663).

159. *Eppinette*, 698 So. 2d at 662.

160. *Id.* The suit was also brought against the construction company's insurer, but as the issues were the same with the insurer as with the construction company, mention of the insurer has been omitted in the interests of clarity. *Id.*

company, assessed fault at fifty percent to the City and fifty percent to the construction company, with \$111,000 in damages.¹⁶¹ The judge assessed fault at twenty-five percent to the City and seventy-five percent to the construction company, with approximately \$130,000 in damages.¹⁶² The plaintiffs and the City appealed to the Louisiana Second Circuit Court of Appeal.¹⁶³ The second circuit, in using the nuanced approach from *Cornish*, found that neither allocation of fault was manifestly erroneous, but that the judge's allocation was more reasonable.¹⁶⁴ As for damages, the court found that the jury's awards for medical expenses and loss of future earnings and earning capacity were manifestly erroneous; thus, it affirmed the judge's awards. As for general damages and loss of consortium, the court found the judge's award of general damages was more reasonable, and the jury's award for loss of consortium was more reasonable.¹⁶⁵

The Louisiana Fifth Circuit Court of Appeal did not face the issue of the proper standard review in bifurcated trials with inconsistent verdicts until 1992, when it decided *American Casualty Co. v. Ill. Central Gulf Railroad Co.*¹⁶⁶ In that case, the plaintiff was injured at a railroad crossing, and he sued the railroad company and the Parish of St. Charles, among others.¹⁶⁷ The court bifurcated the trial, with the jury hearing the claim against the railroad company and the judge hearing the claim against the Parish.¹⁶⁸ After the trial, the jury found the plaintiff to be forty-six percent at fault, the Parish thirty-one percent, and the railroad company twenty-three percent.¹⁶⁹ The judge, meanwhile, found the plaintiff sixty-five percent at fault and the Parish ten percent at fault, leaving twenty-five percent unassigned.¹⁷⁰ The fifth circuit found the findings inconsistent and held that "the manifest error standard of review is inapplicable and we adopt as our own the [more reasonable standard]. We will carefully examine the record and decide which decision, the judge's or the jury's, is more reasonable."¹⁷¹ After conducting its review of the record, the court found that the judge's determination as to fault was more reasonable than

161. *Eppinette v. City of Monroe*, 29,366 (La. App. 2 Cir. 6/20/97); 698 So. 2d 658, 663.

162. *Id.*

163. *Id.* at 664.

164. *Id.* at 667.

165. *Id.* at 671-74.

166. *Am. Cas. Co. v. Ill. Cent. Gulf R.R. Co.*, 601 So. 2d 712 (La. App. 5 Cir. 1992).

167. *Id.* at 713.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 715.

the jury's.¹⁷² Since its decision in *American Casualty Co.*, the fifth circuit has applied the more reasonable standard with relative uniformity, in contrast to the third circuit.¹⁷³

In 1978, the third circuit adopted the more reasonable standard in the case of *Deville v. Town of Bunkie*.¹⁷⁴ In *Deville*, the plaintiff filed suit against two police officers, the town, and the town's insurer, alleging the use of unreasonable force in his arrest and mistreatment during his imprisonment.¹⁷⁵ The trial was bifurcated so that the trial court heard the claims against the town, and the jury heard the claims against all other defendants.¹⁷⁶ While the jury found one of the officers and the insurer liable, the trial court found that the officers used reasonable force in the plaintiff's arrest.¹⁷⁷ On appeal, the third circuit found that the trial court's finding was more reasonable.¹⁷⁸

For the next twenty-eight years, the third circuit would continue to employ the more reasonable standard as used in *Deville*.¹⁷⁹ Then on July 12, 2006, the court issued two opinions on the proper standard of review in bifurcated trials with inconsistent results.¹⁸⁰ One of these opinions adopted de novo review,¹⁸¹ and the other, *McDaniel v. Carencro Lions Club*, set forth an entirely new approach to the more reasonable standard.¹⁸²

In *McDaniel*, country music singer Mel McDaniel¹⁸³ was injured when

172. *Am. Cas. Co. v. Ill. Cent. Gulf R.R. Co.*, 601 So. 2d 712, 717 (La. App. 5 Cir. 1992).

173. *See, e.g., id.*; *Haydel v. Commercial Union Ins. Co.*, 617 So. 2d 137 (La. App. 5 Cir. 1993).

174. *Deville v. Town of Bunkie*, 364 So. 2d 1378 (La. App. 3 Cir. 1978).

175. *Id.* at 1379.

176. *Id.* At this time in 1978, the jury trial prohibition did not apply to employees of political subdivisions like the Bunkie Police Department. *See supra* note 70.

177. *Deville*, 364 So. 2d at 1379. *Deville* was decided before Louisiana instituted a comparative fault scheme in 1979. *See supra* note 4.

178. *Deville*, 364 So. 2d at 1382.

179. *See supra*, Part IV. As noted above, however, the third circuit differed from most of the other circuits in one respect after the case of *Bishop v. Shelter Insurance* in 1984. *See id.*; *see also* *Bishop v. Shelter Ins. Co.*, 461 So. 2d 1170 (La. App. 3 Cir. 1984), *superseded by statute*, 1988 La. Acts 1085, 1129 (codified as amended at LA. CODE EVID. ANN. art. 411 (1989)), *as recognized in* *Steers v. Int'l Paper Co.*, 540 So. 2d 1236 (La. App. 3 Cir. 1989). It consistently refused to find a reconcilable conflict between findings in cases involving a combination of public and private defendants. *See Bishop*, 461 So. 2d at 1174.

180. *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635; *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945.

181. *Id.*

182. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945. The de novo standard will be discussed at length below. *See infra* Part IV.B.

183. *McDaniel's* hits include the songs "Louisiana Saturday Night" and "Baby's Got Her Blue

he fell into an open orchestra pit while on stage at a performing arts center in Lafayette.¹⁸⁴ McDaniel filed a suit for negligence against the City of Lafayette, who owned the performing arts center, the social club who was leasing the center, and an event promoter.¹⁸⁵ The trial was bifurcated, with the trial judge hearing the claims against the City and the jury hearing the claims against the club and the promoter.¹⁸⁶ The trial judge found the plaintiff to be seventy-five percent at fault, the City fifteen percent at fault, the social club two percent at fault, and the promoter eight percent at fault.¹⁸⁷ The jury, however, found the plaintiff 35.5% at fault, the City 41.5% at fault, the club two percent at fault, and the promoter twenty-one percent at fault.¹⁸⁸ All parties appealed to the third circuit court of appeal.¹⁸⁹

On appeal, the third circuit attempted to conflate several approaches taken by the different courts into one workable standard.¹⁹⁰ The court first stated its view that the term “harmonize” must “require[] one judgment assessing fault percentages to all of the defendants that total 100%.”¹⁹¹ Accordingly, the court laid out its four-part standard, in which the first step is to consider the “trial court’s finding of fault as to the public defendant under the manifest error standard.”¹⁹² If those findings are not manifestly erroneous, then the appellate court should adopt them without considering the jury’s findings.¹⁹³ However, if the findings of the trial court are manifestly erroneous, then the appellate court may conduct de novo review.¹⁹⁴ Second, in deciding the findings of fault as to the other defendants, the court should again review both the trial court’s and the

Jeans On.” *Mel McDaniel*, CMT.COM, http://www.cmt.com/artists/az/mcdaniel_mel/artist.jhtml (last updated Oct. 18, 2009).

184. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945, 952.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 953.

190. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945, 954-60.

191. *Id.* at 959.

192. *Id.* at 960. This initial step appears to be an attempt to preserve the public defendant’s right to a bench trial. *See id.* at 959 (“While it is true . . . that only the trial court is able to adjudicate the fault of a state defendant, that does not mean that a conflict will not exist based on the jury’s fault attribution to the remaining parties.”).

193. *Id.* at 960.

194. *Id.* Again, this step is simply a part of the traditional manifest error standard for all factual findings in Louisiana. *See supra* Part II.A.

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jury's findings under the manifest error standard.¹⁹⁵ If neither is manifestly erroneous, then the court should choose the more reasonable finding.¹⁹⁶ Third, if only one of the findings is manifestly erroneous, then the court should adopt the other finding.¹⁹⁷ If the findings do not equal exactly 100%, then the court must harmonize the verdicts, which could require adjusting the percentages of fault assigned to the private defendants.¹⁹⁸ If both of the verdicts are manifestly erroneous, then the court must conduct a de novo review based on the record.¹⁹⁹ Finally, in reviewing damages, if the court determines that neither finder of fact abused its discretion in awarding general damages and was not manifestly erroneous in awarding special damages, the court may choose the more reasonable award.²⁰⁰ If one is manifestly erroneous, the court should adopt the other award.²⁰¹ If the court finds both fact-finders abused their discretion or were manifestly erroneous, then the court should conduct a de novo review, subject to the rule set forth by *Coco v. Winston Industries*.²⁰²

The *McDaniel* standard has since been criticized by the third circuit,²⁰³ and even offhandedly by the Louisiana Supreme Court, for being too complex and contorted.²⁰⁴ While affording deference to the trial judge's findings as to the public defendant by reviewing that finding separately, it fails to accord the same deference to the jury's finding as to the private defendants. In this sense, it seems to value § 13:5105's jury trial prohibition as being more important than the plaintiff's right to a jury trial. It also suggests that the appellate court should "adjust[] the percentage[s] of fault assigned to the non-public parties"²⁰⁵ when the percentages do not reach exactly 100%, but the court did not provide instructions for how a

195. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945, 960.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* Again, this step is a part of the traditional "manifest error" standard for factual findings. See *supra* Part II.A.

200. *Id.*

201. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945, 960.

202. *Id.* (citing *Coco v. Winston Indus. Inc.*, 341 So. 2d 332, 335 (La. 1976)). As noted above, *Coco* requires the appellate court, once it finds manifest error in a damage award, to only raise the award to the lowest point, or lower the award to the highest point, reasonably within the court's discretion. *Coco*, 341 So. 2d at 335; see also *supra* Part II.B.

203. *Fontenot v. Patterson Ins.*, 2006-1624 (La. App. 3 Cir. 12/5/07); 972 So. 2d 401, 407, *rev'd*, 2008-0414 (La. 12/12/08); 997 So. 2d 529.

204. *Fontenot v. Patterson Ins.*, 2008-0414 (La. 12/12/08); 997 So. 2d 529, 534.

205. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945, 960.

court should perform this adjustment. In these and other ways, the *McDaniel* standard represents the type of clumsy and confusing approach the advocates of the de novo standard attempt to avoid.

C. THE DE NOVO STANDARD

In contrast to the standard of deference established by *Thornton II*, the Louisiana Fourth Circuit Court of Appeal has continually held that the reviewing court should conduct an independent review of the record when analyzing conflicting results in a bifurcated trial.²⁰⁶ The de novo standard for reviewing bifurcated trials originated in the case of *Aubert v. Charity Hospital of Louisiana* in 1978, just one year after the Louisiana Supreme Court's decision in *Thornton*.²⁰⁷ In *Aubert*, a woman died during childbirth while under general anesthesia at defendant's hospital, and the surviving spouse and child filed suit against the public hospital, as well as the anesthesiologist and several other employees of the hospital.²⁰⁸ The hospital challenged plaintiff's demand for a jury trial by invoking § 13:5105 of the Louisiana Revised Statutes, and the trial was bifurcated.²⁰⁹ The jury found that none of the individual defendants were liable; however, the judge found that the anesthesiologist and a nurse anesthetist were negligent, making the hospital vicariously liable as their employer.²¹⁰ The judge accordingly dismissed the claims against the individual defendants and entered judgment against the hospital.²¹¹ Writing for the appellate court, Judge Harry Lemmon began by noting that the traditional function of the court of appeal is to let the factual findings of the judge or jury stand as long as "the record contains credible evidence to support such findings."²¹²

206. See, e.g., *Sevin v. Parish of Plaquemines*, 2004-1439 (La. App. 4 Cir. 4/27/05); 901 So. 2d 619; *Smith v. City of New Orleans*, 616 So. 2d 1262 (La. App. 4 Cir. 1993); *McCullough v. Reg'l Transit Auth.*, 593 So. 2d 731 (La. App. 4 Cir. 1992); *Justin v. City of New Orleans*, 499 So. 2d 629 (La. App. 4 Cir. 1986); *Davis v. Visco's, Inc.*, 380 So. 2d 739 (La. App. 4 Cir. 1980); *Aubert v. Charity Hosp. of La.*, 363 So. 2d 1223 (La. App. 4 Cir. 1978).

207. *Aubert*, 363 So. 2d 1223.

208. *Id.* at 1225.

209. *Id.* As noted above, § 13:5105 was amended in 1988 to extend the prohibition of jury trials to "any suit . . . against an officer or employee of a political subdivision arising out of the discharge of his official duties or within the course and scope of his employment." Act of July 18, 1988, No. 781, § 1, 1988 La. Acts 2017 (codified as amended at LA. REV. STAT. ANN. § 13:5101 (1988)). Thus, today the trial of a public hospital and its employees would be tried by the judge alone, without a jury. See *Powell v. Reg'l Transit Auth.*, 96-0715 (La. 6/18/97); 695 So. 2d 1326.

210. *Aubert*, 363 So. 2d at 1225.

211. *Id.* at 1225-26.

212. *Aubert v. Charity Hosp. of La.*, 363 So. 2d 1223, 1226 (La. App. 4 Cir. 1978). It should be noted that *Aubert* was decided before the supreme court's decision in *Arceneaux v. Domingue*, in which that court reiterated that the proper standard of review for factual findings always asks whether manifest error was committed below. See *Arceneaux v. Domingue*, 365 So. 2d 1330, 1333 (La. 1978); see also *supra* Part II.A.

However, when the record does not contain such credible evidence, the decision of the trial court is set aside, and the appellate court may conduct an independent review of the record, without consideration of the findings of the original fact-finder.²¹³ After discussing the peculiar nature of the function of the appellate court in reviewing inconsistent findings of a bifurcated trial, the court concluded that the proper standard is for the appellate court to conduct a de novo review.²¹⁴ The court cited the supreme court's *Thornton* directive as authority for this position.²¹⁵ Following its independent review of the record, the court found that the anesthesiologist and the nurse, along with their hospital employer, were liable for the plaintiff's damages.²¹⁶ Other than a very brief adoption of the de novo standard by the second circuit,²¹⁷ the fourth circuit was alone in its use of the standard until the 2006 case of *Hebert v. Rapides Parish Police Jury* in the third circuit.²¹⁸

On the same day in 2006 that the third circuit advocated a four-step "more reasonable" standard in *McDaniel*, another panel from that court issued an opinion adopting the de novo standard used by the fourth circuit.²¹⁹ *Hebert v. Rapides Parish Police Jury* arose out of an automobile accident, in which a young girl was killed when her vehicle collided with a bridge railing.²²⁰ The decedent's parents filed a wrongful death and survivor action against the parish police jury,²²¹ the State Department of Transportation and Development (DOTD), and the contractor that built the bridge.²²² After the contractor was dismissed from the case, the trial was

213. *Aubert v. Charity Hosp. of La.*, 363 So. 2d 1223, 1226 (La. App. 4 Cir. 1978).

214. *Id.* at 1226-27.

215. *Id.* at 1227 n.3 ("It is evident the Supreme Court rejected any notion that the findings of either trier of fact were entitled to greater weight.").

216. *Id.* at 1231.

217. The second circuit used de novo review before adopting the "more reasonable" standard in *Eppinette v. City of Monroe*. See, e.g., *Mayo v. Audubon Indem. Ins. Co.*, 26,767 (La. App. 2 Cir. 1/24/96); 666 So. 2d 1290, *abrogated by* *Eppinette v. City of Monroe*, 29,366 (La. App. 2 Cir. 6/20/97); 698 So. 2d 658; *Smiley v. Sikes*, 543 So. 2d 1084 (La. App. 2 Cir. 1989), *abrogated by* *Eppinette*, 698 So. 2d 658; see also *Eppinette*, 698 So. 2d 658.

218. *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635.

219. *Id.* at 920. Interestingly, the authors of these two opinions each wrote a concurrence in the other opinion disagreeing with the method used there. *Id.* at 926 (Gremillion, J., concurring) (arguing for "the procedure set forth in *McDaniel v. Carencro Lions Club*"); *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945 (Thibodeaux, J., concurring) (arguing for de novo review).

220. *Hebert*, 934 So. 2d at 916.

221. The governing body of a parish is known as a "police jury" in Louisiana. It is similar to the boards of commissioners that govern the counties of other states. See PARISH GOVERNMENT STRUCTURE, <http://www.lpgov.org/about/structure/page1.html> (last visited Feb. 8, 2011).

222. *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912,

bifurcated when the police jury requested a bench trial, and the jury determined the fault of the DOTD.²²³ While the jury assessed fifty percent of the fault to each defendant, with \$1,568,871.24 in total damages the judge assessed forty percent to the police jury, sixty percent to the deceased motorist, and no fault to the DOTD, with \$1,380,066.00 in total damages.²²⁴ The DOTD suspensively appealed the judgment to the third circuit, and the plaintiffs answered the appeal.²²⁵

The court of appeal began by examining the confusion in its fellow circuits and concluded that, other than the fourth circuit, the standards of review used by the remaining circuits were too “cumbersome and unwieldy to survive objective application.”²²⁶ The court, expressing its opinion that the more reasonable standard ignores the role of the fact-finder, found that the *de novo* standard was “the most practical and legally sound procedure susceptible of *uniform* application.”²²⁷

The court further found that a reversible error of law is committed when a bifurcated trial results in judgments that “do not fully determine the rights of the parties involved,” thus requiring an independent review of the record.²²⁸ After making this review, the court assessed fault at ten percent to the driver, fifty percent to the DOTD, and forty percent to the police jury, and the court also made its own determination of damages.²²⁹

The *Hebert* parties were granted writs of certiorari by the Louisiana Supreme Court, which did not address the issue of appellate review of bifurcated proceedings with inconsistent results.²³⁰ The court instead held that the DOTD possessed no duty to maintain the bridge railing and that this finding precluded a decision on how to harmonize the verdicts.²³¹ In a subsequent case in the third circuit, *Fontenot v. Patterson Insurance*, the court interpreted the supreme court’s silence in *Hebert* as an acceptance of

916, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635.

223. *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, 917, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635. As *Hebert* was decided after the 1993 amendments to § 13:5105 of the Louisiana Revised Statutes, a state agency like the DOTD did not fall under the statutory jury trial prohibition. *See supra* note 70.

224. *Hebert*, 934 So. 2d at 917.

225. *Id.*

226. *Id.* at 920.

227. *Id.*

228. *Id.*

229. *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, 924-25, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635.

230. *See Hebert v. Rapides Parish Police Jury*, 2006-2164 (La. 4/11/07); 974 So. 2d 635.

231. *Id.* at 641, 652.

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the de novo standard.²³²

In *Fontenot*, a police officer was injured in an automobile accident.²³³ The accident led to several suits, reconventional demands,²³⁴ and third party claims; however, most of these claims were dismissed before trial.²³⁵ The only issues remaining for trial were a reconventional demand by the police officer's employer, Lafayette City Government (LCG), against the other driver, and the officer's principal demands against the other driver and the State.²³⁶ The trial was bifurcated, with the jury hearing the police officer's claims and the judge hearing LCG's claims.²³⁷ The jury found the other driver ninety percent at fault, the officer ten percent at fault, and the State free from fault.²³⁸ The judge, though, found the other driver and the State to be each fifty percent at fault and the officer to be free from fault.²³⁹ Both parties appealed to the third circuit court of appeal.²⁴⁰

The third circuit began by noting the conflict among the circuits as to the appropriate standard of review.²⁴¹ The court then analyzed the supreme court's decision in *Thornton* and reasoned that the plain language of the *Thornton* directive mandates de novo review.²⁴² After a thorough review of

232. *Fontenot v. Patterson Ins.*, 2006-1624 (La. App. 3 Cir. 12/5/07); 972 So. 2d 401, 408 (“While declining to comment on the approach of this court in harmonizing the conflicting verdicts, and without stating its own approach, the supreme court [in *Hebert*] addressed the liability issue by performing what amounted to a de novo review of the record before it.”) (citing *Hebert v. Rapides Parish Police Jury*, 2005-471 (La. App. 3 Cir. 7/12/06); 934 So. 2d 912, *rev'd on other grounds*, 2006-2001 (La. 4/11/07); 974 So. 2d 635), *rev'd*, 2008-0414 (La. 12/12/08); 997 So. 2d 529.

233. *Id.* at 405.

234. The reconventional demand is the Louisiana equivalent of the common law counterclaim. See MARAIST & LEMMON, *supra* note 2, § 7:2.

235. *Fontenot v. Patterson Ins.*, 2006-1624 (La. App. 3 Cir. 12/5/07); 972 So. 2d 401, 405, *rev'd*, 2008-0414 (La. 12/12/08); 997 So. 2d 529.

236. *Fontenot v. Patterson Ins.*, 2008-0414 (La. 12/12/08); 997 So. 2d 529, 531.

237. *Fontenot*, 972 So. 2d at 408.

238. *Id.* at 405-06.

239. *Id.* at 406.

240. *Id.*

241. *Id.*

242. *Fontenot*, 972 So. 2d at 407. The court stated:

In [interpreting *Thornton*], we choose not to read an ambiguity into the two infinitive phrases, “to resolve the difference in the factual findings between the jury and the judge . . . and to render a single opinion based upon the record.” Instead, we find it reasonable to conclude that the supreme court gave its blessing to an independent de novo review by the use of this language.

Id. (alterations in original). The *Fontenot* court buttressed this interpretation by pointing out that the supreme court in *Thornton* cited article 5, section 10(B) of the Louisiana constitution, and the court cited that same article two years before in *Gonzales v. Xerox Corp.* to hold that “where one or more trial court legal errors interdict the fact finding process, the manifest error standard is no longer applicable, and . . . the reviewing court should make its own independent de novo review

the record, the court found the other driver and the State to be each fifty percent at fault.²⁴³

The State applied for a writ of certiorari to the Louisiana Supreme Court, which claimed that it “granted a writ application . . . in order to determine the standard of review that should be applied by a court of appeal reviewing conflicting results of a jury and trial judge in a bifurcated trial.”²⁴⁴ Nevertheless, after reviewing the history of the debate surrounding this issue, the court decided the case on other grounds, holding that the jury trial prohibition provided by § 13:5105 of the Louisiana Revised Statutes applies only to claims filed *against* the state, not to reconventional or third party demands filed *by* the state.²⁴⁵ Therefore, the trial judge had no authority to hear these claims, and the trial should not have been bifurcated.²⁴⁶ The court remanded the case to the third circuit to apply manifest error review to the jury’s verdict.²⁴⁷

With the Louisiana Supreme Court’s decision in *Fontenot*, the court once again sidestepped the difficult issue of the proper standard of appellate review to resolve the conflicting results of bifurcated trials. The confusion over this issue, as well as the question of what constitutes a conflict between the results, have contaminated Louisiana law for far too long. Due to the complex and confusing nature of the debate surrounding these issues, an analysis is needed of the various methods used by Louisiana courts to review the inconsistent results of bifurcated trials. Several arguments, based on both law and policy, may be made for and against these divergent methods. For these reasons, the Louisiana Supreme Court should promptly take steps to resolve the dispute over this issue by adopting the approach used by the first circuit in *Thornton I*.

and assessment of the record.” *Id.* at 407-08 (citing *Gonzales v. Xerox Corp.*, 320 So. 2d 163 (La. 1975)).

243. *Fontenot v. Patterson Ins.*, 2006-1624 (La. App. 3 Cir. 12/5/07); 972 So. 2d 401, 415, *rev’d*, 2008-0414 (La. 12/12/08); 997 So. 2d 529.

244. *Fontenot v. Patterson Ins.*, 2008-0414 (La. 12/12/08); 997 So. 2d 529, 530. *Fontenot* was one of the final opinions authored by former Chief Justice Pascal Calogero.

245. *Id.* at 535.

246. *Id.* at 538.

247. *Id.* On remand, the third circuit determined that the jury committed manifest error in its apportionment of fault, and the court reassessed fault at sixty percent to the other driver, and forty percent to the State. *Fontenot v. Patterson*, 2006-1624 (La. App. 3 Cir. 2/18/09); 5 So. 3d 954, 966, *rev’d*, 2009-0669 (La. 10/20/09); 23 So. 3d 259. In so doing, the court used the same reasoning as it had before when conducting de novo review. *Id.* When the case was again granted writs of certiorari, the Louisiana Supreme Court found that the third circuit erred in finding manifest error in the jury’s verdict, and the court accordingly reinstated that verdict. *Fontenot v. Patterson*, 2009-0669 (La. 10/20/09); 23 So. 3d 259, 275.

V. A COMPARISON OF THE METHODS USED TO REVIEW THE INCONSISTENT RESULTS OF BIFURCATED TRIALS

The two main standards of review used by Louisiana appellate courts to review the inconsistent results of bifurcated trials are the *de novo* standard and the “more reasonable” standard. The *de novo* standard, used mainly by the fourth circuit court of appeal, allows the appellate court to disregard the findings of the judge and jury and conduct an independent review of the record. The more reasonable standard compels the appellate court to determine which of the two findings has a more reasonable basis in the record. The court may not look beyond the findings to reach a result it considers to be the *most* reasonable. Courts have used certain modifications and clarifications of the “more reasonable” standard; the *de novo* standard, however, has remained relatively static since its origins in *Aubert v. Charity Hospital of Louisiana* in 1978.

The strength of the *de novo* standard lies in its simplicity. In applying the standard, an appellate court is not forced to choose between two reasonable findings. If a court is required to do so, it is, in effect, granting greater deference to either the judge or the jury, which arguably violates the rule that neither trier of fact is accorded more deference.²⁴⁸ The *de novo* standard allows an appellate court to avoid this problem by simply reviewing the record independently and substituting its own findings for those of the trial court.

Despite its simplicity, the *de novo* standard may be at odds with the right to jury trial in Louisiana civil cases. Although this right is not constitutionally provided for civil cases in Louisiana, it has been consistently recognized as being “fundamental in character” by the courts of this state.²⁴⁹ The *de novo* standard usurps the jury’s decision-making power, as well as its duty to determine the facts of a case, by making an independent review of the record. This independent review contradicts the policy behind the courts’ use of the manifest error standard for the appellate review of facts. Observing the trial directly, the jury is in a better position to weigh the sufficiency of the evidence in the case, including the credibility of any witnesses. The appellate court, however, is constrained to making determinations as to the sufficiency of evidence from the sterile record before it. Accordingly, the *de novo* standard fails to grant deference to the trial court and could render trials meaningless if bifurcated in this way.

248. *See supra* note 14.

249. *See supra* Part III.B.1.

The de novo standard could also conceivably lead to bifurcation being used as a tactical tool, whereby a party would opt to add a public defendant to ensure that it had a second chance at success on appeal. If a party did not receive a favorable assessment of fault or damages, it would be comforted by the court of appeal's ability to independently review the record and reach its own findings as to fault and damages. Of course, if the claim against the private defendant had not been consolidated with the claim against the public defendant, and each claim comprised its own case, the court of appeal would be required to review each finding under the manifest error standard. If, for example, a plaintiff had a strong case against a private defendant, but juries in its jurisdiction were particularly friendly to defendants, the plaintiff could add a political subdivision defendant in an attempt to ensure that no deference would be paid to the jury's finding on appeal if it contradicted the judge's finding. Conversely, a defendant in a plaintiff-friendly jurisdiction might be tempted to file a third-party claim against a political subdivision for the same reasons.

The more reasonable standard appears to grant more deference to the findings of the jury and the trial court. This standard forces the appellate court to choose one or the other of the findings; the appellate court may not go beyond these findings to independently reach its own decision. This approach best effectuates the policy behind the limitation placed on the appellate review of fact by Louisiana courts. Specifically, the more reasonable standard conforms with the idea that the trial court is in the better position to estimate the sufficiency of the evidence. By constraining the appellate court to choose one of the findings below, the standard ensures that the ultimate decision will be made by one of the fact-finders at the trial court level. Similarly, the standard seems to be more effective in preserving the proper allocation of functions between the levels of Louisiana's judicial system, guaranteeing that the trial court determines the facts and the appellate court reviews that determination. In this way, the more reasonable standard is more consistent with the policies behind manifest error review than the de novo standard.

At times, the appellate courts have misapplied the more reasonable standard by citing *Thornton II* to support the proposition that manifest error review was inapplicable when inconsistent results are reached in bifurcated trials. As shown by the first circuit in *Cornish*, the more reasonable standard is an additional method of review once the appellate court is satisfied that neither of the findings are manifestly erroneous. This approach to the more reasonable standard seems to be more compatible with Louisiana's traditional review of facts under the manifest error standard. Further, the Louisiana Supreme Court seemingly endorsed this approach in dicta in *Davis v. Witt*, by stating that "[i]f the respective

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contradictory verdicts individually survive a review for error, then the troubling issue of harmonizing the verdicts comes into play.²⁵⁰

One major weakness inherent in the more reasonable standard, when applied to the results of a bifurcated trial involving a combination of public and private defendants, is its potential to violate the jury trial prohibition provided by § 13:5105. If an appellate court considers the jury's allocation of fault more reasonable than the trial judge's allocation, the court will adopt that finding. The jury's allocation would necessarily include a determination of the fault of any public defendants. Thus, the appellate court would effectively allow the fault of public defendants to be decided by a jury, in clear violation of Louisiana law.

Conversely, the more reasonable standard can also violate the right to a jury trial if the judge's findings are considered more reasonable than the jury's findings. If the appellate court determines that the trial judge's findings are more reasonable, it would indirectly allow the judge to decide a claim for which a jury trial has been requested. Regardless of whether it was the plaintiff or the private defendant who requested it, one of these parties would necessarily be denied its right to have a jury try this claim.

In *McDaniel v. Carencro Lions Club*, the third circuit attempted to establish a logical four-step method of review, combining several different concepts. However, the *McDaniel* standard is much too complex to be uniformly applied, and it can also lead to one of the same problems inherent in the more reasonable standard. The *McDaniel* standard begins by asking whether the trial judge's decision as to the public defendant is manifestly erroneous. If it is not, then the appellate court will look no further and will simply adopt the trial court's findings as to that defendant.²⁵¹ Through this initial step, the standard attempts to preserve § 13:5105's jury trial prohibition. By isolating the judge's finding as to the public defendant and reviewing it under the manifest error standard, the *McDaniel* approach ensures that the jury's findings as to the public defendant will not be adopted by the appellate court. Thus, unlike the traditional more reasonable standard, it does not indirectly allow the jury to decide the fault of any public defendants in the suit.

However, the subsequent step of the *McDaniel* standard seems to be at odds with Louisiana's protection of the right to jury trial. When examining the findings of fault as to the private defendants in the suit, the appellate court must employ the more reasonable standard. In this way, the

250. *Davis v. Witt*, 2002-3102 (La. 7/2/03); 851 So. 2d 1119, 1126.

251. *McDaniel v. Carencro Lions Club*, 2005-1013 (La. App. 3 Cir. 7/12/06); 934 So. 2d 945, 960.

McDaniel standard falls prey to the same trap as the more reasonable standard when it comes to these defendants, in that it may indirectly allow the trial judge to decide a claim for which a jury trial has been requested. Parties who request a jury trial for a claim involving a non-public defendant should be allowed to have their rights determined by a jury, and to have the fact-finding of the jury subject to manifest error review on appeal.

The approach originally used by the first circuit in *Thornton I* is undoubtedly the simplest approach. The *Thornton I* approach states that a conflict can never exist when a bifurcated trial involves a combination of jury and non-jury actions. In other words, the appellate court should separately review the findings of the respective fact-finders under the manifest error standard, and if the results are both reasonable but inconsistent, no reconciliation is required. As for damages, the court would separately review the damage awards under the much discretion standard. In all ways, the appellate court would treat the two claims as if they were brought in separate suits. While the *McDaniel* standard isolates the public defendants in order to preserve § 13:5105's jury trial prohibition, the *Thornton I* approach essentially goes one step further and isolates *both* sets of defendants, preserving both the jury trial prohibition and the right to a jury trial on those claims for which it has been requested. The Louisiana Supreme Court has suggested this to be the most logical approach in dicta in *Powell v. Regional Transit Authority*. For this and other reasons, the most logically sound approach capable of uniform application is the *Thornton I* approach to the possibility of a conflict between the results of bifurcated trials.

VI. A SUGGESTION FOR RESOLVING THE DISPUTE

The question of the proper method of review for the inconsistent results of bifurcated trials has troubled Louisiana's appellate courts since the Louisiana Supreme Court's decision in *Thornton v. Moran* in 1977. To resolve this dispute, Louisiana courts should adopt the approach used by the first circuit in *Thornton I*; that is, the appellate court should accord deference to both triers of fact and review their findings separately under the well-settled manifest error standard of review for factual findings and the much discretion standard for damages. To effect this resolution, the Louisiana Supreme Court should grant writs of certiorari to a case involving this issue, whereupon it should sanction this approach outright.

For the supreme court to adopt the *Thornton I* approach, it would need to overrule its decision in *Thornton v. Moran*, in which it remanded the case to the first circuit to "resolve the differences . . . and to render a single

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opinion based on the record.”²⁵² The court’s decision in *Thornton*, therefore, clearly recognizes that a conflict can exist when two finders of fact reach inconsistent results. However, there are three important reasons why *Thornton* poses no legitimate obstacle to the solution suggested here.

First, *Thornton* was decided in 1978, one year before Louisiana instituted its comparative fault scheme. At the time *Thornton* was decided, a plaintiff received either all or none of his or her damage award. Therefore, the plaintiff’s recovery in a bifurcated trial with inconsistent verdicts would be limited to one of the two extreme scenarios depicted in the previous section.²⁵³ That is, either the jury would apportion the entirety of the fault to the private defendant and the judge would apportion all of the fault to the public defendant, or neither would apportion any fault to their respective defendants. This would pose an incredibly difficult problem to an appellate court, and it surely must have formed part of the supreme court’s reasoning in *Thornton*. Today, the supposed inconsistency can be as negligible as both fact-finders assessing forty-nine percent or fifty-one percent to their respective defendants. Thus, since the introduction of comparative fault into Louisiana, the motivation to avoid drastically unjust recoveries is no longer as urgent.

Second, *Thornton* involved only private parties. In *Thornton*, two drivers involved in an automobile accident filed suit against one another, but only one of the parties requested a jury trial. For this reason, the *Thornton* holding is arguably limited to such a situation and is inapplicable to bifurcated trials involving a combination of public and private defendants. In fact, the Louisiana Supreme Court has never directly addressed the issue of whether a conflict can exist in a case involving a combination of public and private defendants.²⁵⁴ Overruling *Thornton* would provide such an opportunity.

Finally, and most importantly, the *Thornton* decision is not binding authority on any court in this state. Judicial decisions are not a source of law in Louisiana; thus, the supreme court is free to overrule any of its prior decisions.²⁵⁵ Although a consistent line of decisions on a certain issue can rise to the level of *jurisprudence constante*, the Louisiana Supreme Court has not once directly addressed the issue in the thirty-three years since

252. *Thornton v. Moran*, 343 So. 2d 1065 (La. 1977).

253. *See supra* Part V.

254. However, in dicta in *Davis v. Witt*, the court recognized that “[i]f the respective contradictory verdicts individually survive a review for error, then the troubling issue of harmonizing the verdicts comes into play.” *Davis v. Witt*, 2002-3102 (La. 7/2/03); 851 So. 2d 1119, 1126.

255. *See supra* note 13.

Thornton was decided. Thus, the court may, and should, render a new decision on this matter. Furthermore, while such a pronouncement by the court would not technically be binding on the appellate courts, it would be highly persuasive and would supply much needed and long overdue guidance on the issue.

Certain obvious concerns accompany this approach. Chief among them is the fear that it would lead to severe under-recoveries and over-recoveries by plaintiffs in suits involving a combination of jury and non-jury actions. For an extreme example, imagine a trial judge finds a public defendant to be free from fault, with \$500,000 in total damages; however, the jury finds a private defendant to be also free from fault, with \$750,000 in total damages. The trial court would likely enter a judgment whereby the plaintiff would collect no money from either defendant, even though both fact-finders deemed the plaintiff to deserve a large damage award.

For another extreme example, first imagine the judge finds the public defendant 100% at fault, and the jury finds the private defendant 100% at fault. The judge awards \$100,000 in total damages, and the jury awards \$120,000 in total damages. A judgment would likely be entered in which the plaintiff would collect \$100,000 from the public defendant and \$120,000 from the private defendant, for a total of \$220,000. This could be seen as a windfall for the plaintiff, since the most money that either fact-finder deemed the plaintiff deserved was only \$120,000. In dicta in *Powell v. Regional Transit Authority*, the Louisiana Supreme Court seemed to dismiss the problems represented in both of these examples by implying that the possibility of an under-recovery or over-recovery by the plaintiff does not necessarily create a conflict. While the *Powell* court did not elaborate on any reasons for this position, several can be derived from an examination of Louisiana's law of tort and civil procedure.

Regarding an under-recovery, this same result obtains in other types of multiple tortfeasor cases. As noted above, article 2323 of the Louisiana Civil Code requires that the trier of fact determine the fault of all persons contributing to a plaintiff's injuries, whether or not they are parties to the action.²⁵⁶ For example, in a case involving a combination of a statutorily immune defendant and a non-immune defendant, if the trier of fact determines that the statutorily immune defendant is partly or entirely at fault, the plaintiff will be undercompensated. Other examples include cases involving absentee defendants, bankrupt defendants, and defendants not subject to the court's personal jurisdiction. In these cases, the plaintiff may lose out on some or all of the damages deserved when the trier of fact

256. LA. CIV. CODE ANN. art. 2323 (2010).

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assigns fault to persons not parties to the action.

Regarding an over-recovery, the result in the extreme example above would be no different if the claims were brought in two separate lawsuits. In both cases, two triers of fact independently apportion fault to defendants for whom they have the authority to do so. The simple fact that these defendants are tried in one suit rather than separate suits should not change the situation. The latter case is actually preferable, due to the benefit to judicial efficiency a single suit provides. Additionally, plaintiffs commonly recover more money than they would otherwise deserve in multiple tortfeasor cases. One example is when a plaintiff reaches a large settlement with one defendant in a multiple tortfeasor case before trial, then recovers a large damage award from the remaining defendants. In another example, imagine a jury apportions seventy percent fault to a party defendant and thirty percent fault to an absentee defendant. Later, the plaintiff discovers the missing defendant and files a new suit against her. In this suit, the new jury apportions fifty percent fault to the previously missing defendant, thereby leading to a plaintiff's over-recovery.

Nevertheless, these examples should be considered as neither an over-recovery nor an under-recovery. Characterizing these awards in such a manner neglects the fact that the percentages of fault are calculated against entirely different damage awards. The danger of over-recovery or under-recovery should be that more or less than 100% of fault will be assessed toward a *single* award, not two awards on two different claims, decided by two different fact-finders.

Another reason not to consider the possibility of an extreme under-recovery or over-recovery as a formidable obstacle is that they would rarely occur. The extreme scenarios depicted above, where the plaintiff receives either zero percent or 100% of her damage award, would occur no more frequently than the judge and jury assessing identical percentages of fault to the parties. In fact, the latter situation would likely be much more common. The judge and jury in these cases will be viewing the same exhibits, hearing the same witness testimony, and otherwise judging the exact same evidence. All things being equal, it is reasonable to assume that the findings of the two triers of fact would tend toward uniformity. For these reasons, the threat of an under-recovery or over-recovery should not outweigh the advantages that would be effected by the adoption of the *Thornton I* approach.

The adoption of the *Thornton I* approach would benefit Louisiana law in several ways. First, a considerable amount of confusion over this issue has infected the appellate courts of this state for over thirty-three years. If the Louisiana Supreme Court were to adopt the *Thornton I* approach, it

would eliminate this confusion by erasing the need to reconcile any conflicting results of bifurcated trials.

Second, the adoption of the *Thornton I* approach would promote judicial efficiency. The two most common standards of review used today, the more reasonable and *de novo* standards, both require the appellate court to engage in lengthy processes of review. Under the more reasonable standard, the appellate court must first ask whether the two findings are manifestly erroneous. If neither is manifestly erroneous, the court will choose the more reasonable finding. If one is manifestly erroneous and the other is not, the court will adopt that finding. If both are manifestly erroneous, the court will use *de novo* review. The *McDaniel* standard is even more complicated than the traditional more reasonable standard, requiring the court to adjust the percentages of fault in the event they do not total 100%. The *Thornton I* approach, however, merely asks whether the findings are manifestly erroneous, and if they are not, it affirms both findings without having to choose a more reasonable one. If one finding is manifestly erroneous and the other is not, the court would conduct an independent review of the former and affirm the latter. And if they are both manifestly erroneous, it will reach its own independent determination, as authorized by the Louisiana Constitution.²⁵⁷ The entire process would be conducted as though the claims were brought in separate trials. Under the *de novo* standard, the appellate court is always required to conduct an independent and thorough review of the record. Unlike with the manifest error standard, the court must always determine the sufficiency of the evidence, including the credibility of any witnesses. Thus, the appellate courts would save both time and resources by using the *Thornton I* approach rather than either of the approaches in use today.

Finally, the adoption of the *Thornton I* approach would balance the competing policies behind the right to a jury trial and the jury trial prohibition provided by § 13:5105. As shown above, the *de novo* standard seems to be at odds with the right to a jury trial, as well as with the deferential stance towards a trial court's findings of fact in Louisiana. By making an independent review of the record and granting no deference to the trier of fact, an appellate court using the *de novo* standard usurps the jury's decision-making power. Although it has been interpreted erratically at times, the policy of according deference to a jury's findings of fact through the manifest error standard of review is well-settled in Louisiana. In contrast, the more reasonable standard, while attempting to grant a

257. Of course, the court would be limited to modifying the apportionments of fault and damage awards according to the rules set forth in *Clement v. Frey* and *Coco v. Winston Industries*. See *supra* Part II.A-B.

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measure of deference to the fact-finder, can simultaneously violate the right to a jury trial or § 13:5105's jury trial prohibition. And while the *McDaniel* standard attempts to alleviate the latter of these concerns by isolating the public defendant, it does not go far enough. By isolating both defendants, the *Thornton I* approach ensures that neither the right to a jury trial nor § 13:5105's jury trial prohibition is violated. For these reasons, the Louisiana Supreme Court should adopt *Thornton I*'s method of appellate review for the inconsistent results of bifurcated trials.

VII. CONCLUSION

A debate has persisted in the Louisiana appellate courts for more than thirty-three years over the proper method of appellate review when bifurcated trials result in inconsistent verdicts. With the Louisiana Supreme Court's decision in *Fontenot v. Patterson Insurance* in 2008, the court once again sidestepped this difficult question. The supreme court must take action to resolve this issue and provide some much needed guidance to the courts of appeal. The supreme court should adopt the *Thornton I* approach for these cases, in which the appellate court simply reviews each verdict under this state's well-settled manifest error standard of review for findings of fact, and the much discretion standard for damage awards. In this way, the protracted dispute in the Louisiana appellate courts over this issue would finally be resolved.

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