EVANGELA LONZO, ET AL.	*	**NO. 2017-CA-0549**
VERSUS	*	
		COURT OF APPEAL
DANIEL LONZO, ET AL.	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-04322, DIVISION "E"
Honorable Clare Jupiter, Judge
* * * * * *
Judge Rosemary Ledet
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Rosemary Ledet, Judge Regina Bartholomew Woods)

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REVERSED AND REMANDED

November 15, 2017

This is a personal injury suit. The trial court granted the peremptory exceptions of no cause of action and no right of action filed by two of the defendants, Daniel Lonzo and GEICO General Insurance Company, in its capacity as Mr. Lonzo's liability insurer ("GEICO") (collectively the "Defendants"). From that judgment, Evangela Lonzo, individually and on behalf of her four minor children (Kaylah Boston, Ezekiel Maximillen, Amiyah Lonzo, and Daliyah Lonzo) (the "Children") (collectively the "Plaintiffs" or "Mrs. Lonzo"), appeals. For the reasons that follow, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a one-car accident that occurred on August 29, 2015, in Oxford, North Carolina. Mr. Lonzo was the driver; the Plaintiffs were the passengers. As a result of the accident, all the occupants of the car allegedly were injured. In April 2016, the Plaintiffs commenced this suit against, among others, the Defendants. In their petition, the Plaintiffs averred that the underlying events giving rise to this suit were as follows:

> On August 29, 2015, the defendant, Daniel Paul Lonzo, leased a U-Haul trailer . . . from the defendant, Pets Plus, Inc. d/b/a [a] U-Haul Dealer ["Pets Plus"]. . . [in] Stafford, VA, under a one-way rental contract . . . with Pets Plus . . . being fully apprised and aware that its trailer would be used to move the Lonzo family from Virginia to New Orleans, Louisiana. While traveling on I-85 South in the city of Oxford, North Carolina, the drawbar pin detached causing the U-Haul trailer to separate from the car resulting in the Lonzo vehicle swerving and then flipping. As a result, Evangela Lonzo and her minor children sustained severe injuries.

The Plaintiffs further averred that Mr. Lonzo's negligence included failing to maintain the vehicle and failing to properly inspect the trailer hitch, the drawbar pin, and the chains attaching the trailer to the vehicle.

Answering the petition, Mr. Lonzo generally denied liability; he admitted, however, that, on the date of the accident, he leased a U-Haul trailer from Pets Plus under a one-way rental; that the drawbar pin malfunctioned and detached, causing the U-Haul trailer he was towing to become unhitched and separate from the vehicle he was driving; and that, as a result of the accident, all the occupants in the vehicle were injured. In his answer, Mr. Lonzo asserted a cross-claim against GEICO, in its capacity as his uninsured motorist insurer ("GEICO-UM"). In its answer to the cross-claim, GEICO-UM averred that the "policy of insurance at issue was issued and delivered in the state of Virginia, and therefore, Virginia laws apply to the interpretation of the UM coverage afforded by the GEICO policy issued in Virginia."

Thereafter, the Defendants—Mr. Lonzo and GEICO—filed peremptory exceptions of no right and no cause of action. They contended that the Plaintiffs have no cause of action to sue Mr. Lonzo given two Louisiana statutes providing for intra-family tort immunity—La. R.S. 9:291, which provides for spousal

immunity,[1] and La. R.S. 9:571, which provides for parental immunity.[2] Defendants thus contended that Mrs. Lonzo cannot sue Mr. Lonzo because of his status as her spouse and that the Children cannot sue Mr. Lonzo because of his status as their father or a person with parental authority over them.

The basis for the Defendants' exception of no right of action was two-fold. First, they contended that the Plaintiffs "have essentially brought suit against GEICO without suing its insured because, as per La. R.S. 9:291 and 9:571, plaintiffs are barred from filing suit against Daniel Lonzo." Second, they contended that the Louisiana Direct Action Statute (the "DAS"), La. R.S. 22:1269,[3]

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[1] La. R.S. 9:291 provides as follows:

> Spouses may not sue each other except for causes of action pertaining to contracts or arising out of the provisions of Book III, Title VI of the Civil Code; for restitution of separate property; for divorce or declaration of nullity of the marriage; and for causes of action pertaining to spousal support or the support or custody of a child while the spouses are living separate and apart.

None of the exceptions to the immunity enumerated in the statute apply here.

[2] La. R.S. 9:571 B and C, respectively, provide that "[a]n unemancipated minor may not sue any person having parental authority over him" and that "[a]n unemancipated minor may not sue his tutor."

[3] La. R.S. 22:1269 provides, in part, as follows:

> B. (1) The injured person or his survivors or heirs mentioned in Subsection A of this Section, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42 only; however, such action may be brought against the insurer alone only when at least one of the following applies:
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> * * *
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> (d) When the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons.
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> * * *

would not apply because the accident did not occur in Louisiana and the GEICO policy at issue was neither written nor delivered in Louisiana. *See Esteve v. Allstate Ins. Co*., 351 So.2d 117, 120 (La. 1977) (holding that "[t]he right of direct action against a liability insurer in a Louisiana court is expressly conferred by statute, but only under certain conditions: (1) the accident occurred in Louisiana, or (2) the policy was issued or delivered in Louisiana.").

Opposing the exceptions, the Plaintiffs raised a constitutional challenge to the spousal immunity statute, La. R.S. 9:291.[4] Following a hearing, the trial court rendered judgment in the Defendants' favor, granting their exceptions and dismissing the Plaintiffs' claims against them with prejudice. This appeal followed.

DISCUSSION

Peremptory exceptions of no cause of action and no right of action present legal questions; thus, this court reviews a trial court's judgment granting such exceptions under a *de novo* standard. *Zeigler v. Housing Auth. of New Orleans*, 12-1168, p. 6 (La. App. 4 Cir. 4/24/13), 118 So.3d 442, 449 (citing *St. Pierre v. Northrop Grumman Shipbuilding, Inc*., 12-545, p. 7 (La. App. 4 Cir. 10/24/12), 102 So.3d 1003, 1009).

No cause of action and no right of action are two separate and distinct exceptions; each of these exceptions serves a different purpose and is governed by

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> (2) This right of direct action shall exist whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the state of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if such provisions are not in violation of the laws of this state.

[4] The Plaintiffs also asserted that the same arguments they advanced regarding the spousal immunity statute applied to the parental immunity statute, La. R.S. 9:571.

different procedural rules. *Badeaux v. Southwest Computer Bureau, Inc*., 05-0612, 05-719, p. 6 (La. 3/17/06), 929 So.2d 1211, 1216. As the Louisiana Supreme Court has noted, "one of the primary differences between the exception of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant." *Badeaux*, 05-0612, 05-719, at p. 6, 929 So.2d at 1216-17. As one commentator has noted, "[w]hen the facts alleged in the petition provide a remedy under the law to someone, but the plaintiff who seeks the relief for himself or herself is not the person in whose favor the law extends the remedy, the proper objection is no right of action, or want of interest in the plaintiff to institute the suit." 1 Frank L. Maraist, LA. CIV. L. TREATISE, CIVIL PROCEDURE § 6:7 (2d ed. 2016).

Consistent with these principles, the jurisprudence has recognized that a peremptory exception of no right of action is the proper procedural device to raise the defense of intra-family tort immunity. *Walker v. State Farm Mut. Auto. Ins. Co*., 33,781, p. 2 (La. App. 2 Cir. 8/25/00), 765 So.2d 1224, 1226 (noting that "[t]he Louisiana jurisprudence has considered the application of immunity statutes through the exception of no right of action.").[5] The trial court thus legally erred in

[5] Under Louisiana law, one spouse has a valid tort cause of action against the other spouse; however, during the marriage, one spouse lacks a right of action against the other spouse because of La. R.S. 9:291. *Smith v. Southern Farm Bureau Cas. Ins . Co*., 247 La. 695, 703, 174 So.2d 122, 125 (1965) (holding that "[t]he immunity created by LSA-R.S. 9:291 is not an exception to the creation of this substantive cause of action; it is merely a procedural bar to the wife's right to sue the husband personally."); *Gremillion v. Caffey*, 71 So.2d 670, 672 (La. App. 1st Cir. 1954) (noting that "[a] married woman has a cause of action for a tort arising during the marriage against her husband but no right of action."); *Duplechin v. Toce*, 497 So.2d 763, 765 (La. App. 3d Cir. 1986) (noting that "[i]t is well settled that the interspousal immunity created by this statute [La. R.S. 9:291] does not destroy any cause of action which one spouse might have against the other. The effect of this statute is to bar the right of action which one spouse has

granting the Defendants' exception of no cause of action based on two intra-family immunity statutes—spousal tort immunity pursuant to La. R.S. 9:291 and parental immunity pursuant to La. R.S. 9:571.

Nonetheless, the jurisprudence dictates that we construe every pleading so as to do "substantial justice." *Hightower v. Schwartz*, 14-0431, pp. 6-7 (La. App. 4 Cir. 10/15/14), 151 So.3d 903, 906 (citing La. C.C.P. arts. 865 and 1005 and noting that "our current practice directs us particularly to treat a mistakenly designated peremptory exception or mistakenly designated affirmative defense as if it were properly designated"). Stated otherwise, "[h]arsh rules of pleading are not favored in this state." *State, Dep't of Children & Family Servs. ex rel. A.L. v. Lowrie*, 14-1025, p. 5 (La. 5/5/15), 167 So.3d 573, 578 (citing *Succession of Smith*, 247 La. 921, 928, 175 So.2d 269, 271 (1965)). Following these dictates, we treat the Defendants' mistakenly designated peremptory exception of no cause of action as a properly designated exception of no right of action. *See also* La. C.C.P. art. 927 B (providing that "the failure to disclose . . . a right or interest in the plaintiff to institute the suit . . . may be noticed by either the trial or appellate court on its own motion").

On appeal, the Plaintiffs re-urge their constitutional challenge to La. R.S. 9:291, the spousal immunity statute. In the alternative, the Plaintiffs contend that the trial court erred in failing to conduct a choice-of-law analysis to determine which state's law—Louisiana, Virginia, or North Carolina—applies to the spousal

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against the other for any such cause of action."). The jurisprudence likewise has recognized that the same principles apply to a defense based on parental immunity under La. R.S. 9:571. *See Cox v. Gaylord Container Corp*., 03-0692, p. 3 (La. App. 1 Cir. 2/23/04), 897 So.2d 1, 3 (citing *Walker*, *supra*, and noting that La. R.S. 9:571 "operates only as a procedural bar to an action by the child against his parent and does not destroy the cause of action.").

immunity issue presented here.[6] Because we find the choice of law issue dispositive, we pretermit discussion of the constitutional issue raised by the Plaintiffs. Before turning to the choice-of-law issue, however, we address a preliminary issue raised by the Defendants.

Uniform Rules-Courts of Appeal, Rule 1-3

The Defendants contend that the choice-of-law issue is not properly before this court because it was not submitted to the trial court. In support, they cite the general rule, codified in Uniform Rules—Courts of Appeal, Rule 1-3 ("Rule 1-3"), that "[t]he Courts of Appeal will review only issues which were submitted to the trial court."[7] The Plaintiffs counter that Rule 1-3 is not an absolute bar to this court considering their choice-of-law assignment of error. In support, they emphasize the "interest of justice" exception set forth in Rule 1-3.

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[6] The Plaintiffs assign the following three errors:

1. The trial court erred in failing to conduct a choice of law analysis to determine which state, Louisiana, Virginia, or North Carolina, has the interest in the application of its law with respect to interspousal immunity.

2. La. R.S. 9:291 is unconstitutional as a violation of equal protection guarantees afforded under the Louisiana Constitution.

3. The denial to a Louisiana citizen of a direct right of action against an insurer, because an accident occurred outside Louisiana or because the policy of insurance was written or delivered in Louisiana, violates public policy principals [sic] in that liability insurance is issued for the protection of innocent injury victims and the general public.

The Plaintiffs fail to assign as error the trial court's grant of the Defendants' exceptions based on the parental immunity statute, La. R.S. 9:571. Given that the choice-of-law issue as to the parental immunity statute was neither addressed in the trial court nor assigned as error, we decline to address it on appeal. *See* Uniform Rules–Courts of Appeal, Rule 1-3 (quoted elsewhere in this opinion). Nonetheless, we reserve the parties' right to re-raise the parental immunity issue in the trial court on remand.

[7] Uniform Rules–Courts of Appeal, Rule 1-3 provides as follows:

> The scope of review in all cases within the appellate and supervisory jurisdiction of the Courts of Appeal shall be as provided by LSA-Const. Art. 5, § 10(B), and as otherwise provided by law. The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.

This court has recognized that "[t]here are, of course, times when 'the interest of justice clearly requires otherwise' that we are authorized to decide a civil case based on an issue not raised or addressed by the parties." *Weatherly v. Sanchez*, 15-0534, p. 3 (La. App. 4 Cir. 11/25/15), 181 So.3d 218, 221, n. 3 (citing Rule 1.3; *Merrill v. Greyhound Lines, Inc*., 10-2827, pp. 2-3 (La. 4/29/11), 60 So.3d 600, 602). The jurisprudence addressing the scope of the "interest of justice" exception in Rule 1-3 is scant.[8]

A parallel statutory provision is La. C.C.P. art. 2164, which states that "[t]he appellate court shall render any judgment which is just, legal, and proper upon the

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[8] *See Maurello v. Dep't of Health & Human Res., Office of Mgmt. & Fin.,* 510 So.2d 458, 460 (La. App. 1st Cir. 1987) (finding the exception applied "[b]ecause of the importance of assuring that Ms. Maurello's fundamental constitutional due process rights are met"); *Gauthier v. Harmony Const., LLC*, 13-269, pp. 8-9 (La. App. 5 Cir. 10/9/13), 128 So.3d 314, 319 (finding the "interest of justice" exception applied because the argument raised "jurisdictional concerns"); *Delo Reyes v. Liberty Mut. Fire Ins. Co*., 08-0769, p. 5 (La. App. 4 Cir. 2/18/09), 9 So.3d 890, 893 (finding it was in the "interest of justice" to allow review of the issue of "whether the trial judge's *ex parte* communications were in error" despite the appellants' failure to object on the record); *Davis v. Recreation Dep't*, 12-1273, p. 8 (La. App. 4 Cir. 1/30/13), 107 So.3d 1254, 1259 (applying the exception).

Summarizing the principles applied by federal courts in addressing a similar issue, the federal Fifth Circuit in *French v. Estelle*, 696 F.2d 318, 319-20 (5th Cir. 1982), stated:

> It is well established that an appellate court is not precluded from considering an issue not properly raised below in a civil proceeding, if manifest injustice would otherwise result. In *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), the Supreme Court stated that a federal appellate court would certainly be justified in resolving an issue that was not passed on below "where the proper resolution [was] beyond any doubt . . . or where 'injustice might otherwise result.' " 428 U.S. at 121, 96 S.Ct. at 2877 (citations omitted). In *Empire Life Insurance Co. v. Valdak Corp*., 468 F.2d 330, 334 (5th Cir. 1972), we held that "it is well established that as a matter of discretion, an appellate court could pass upon issues not pressed before it or raised below where the ends of justice will best be served by doing so," and that this court has a "duty to apply the correct law." (citations omitted) (emphasis in original) *See also Thorton v. Schweiker*, 663 F.2d 1312, 1315 (5th Cir. 1981) (rule that court will not consider issue not raised below on appeal is not inflexible and gives way to prevent a miscarriage of justice); *Weingart v. Allen & O'Hara, Inc*., 654 F.2d 1096, 1101 (5th Cir. 1981) (rule that appellate court will consider only errors of which appellant specifically complains is not inflexible); *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976) (rule requiring issues to be raised below "can give way when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice").

record on appeal." *See Georgia Gulf Corp. v. Bd. of Ethics for Pub. Employees*, 96-1907, p. 6 (La. 5/9/97), 694 So.2d 173, 176 (noting the similarity in purpose of Rule 1-3 and La. C.C.P. art. 2164). As noted in the Official Revision Comments to La. C.C.P. art. 2164, "[t]he purpose of this article is to give the appellate court complete freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below." La. C.C.P. art. 2164, cmt. (a); *see also* Roger A. Stetter, LA. PRAC. CIV. APP. § 10:34 (2017) (noting that "[g]enerally, the appellate court may consider an issue that is raised for the first time on appeal if its resolution is necessary to render a just, legal and proper judgment."). In sum, an appellate court, as the Defendants acknowledge, has the constitutional and statutory authority to raise an issue *sua sponte* on appeal when justice requires it to do so. Such is the case here for the following two reasons.

First, choice of law, which is a legal issue,[9] is implicitly raised by the exception of no right of action that this court, *sua sponte*, recognizes on appeal. Stated differently, it is only in the context of the applicable substantive law—Louisiana's spousal immunity statute or the contrary law of Virginia or North Carolina (which would allow spouses to sue each other in this context)[10]—that this

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[9] *See Jones v. Gov't Employees Ins. Co*., 16-1168, p. 17 (La. App. 4 Cir. 6/14/17), 220 So.3d 915, 926, n. 2 (noting that the "choice of law issue may consider some of the same underlying evidence, but the inquiry is a legal one and for the court to decide before a trial on the merits").

[10] The Plaintiffs emphasize that neither Virginia nor North Carolina recognizes spousal tort immunity. Indeed, they point out that "Louisiana's law with respect to interspousal immunity is approximately thirty (30) years behind the law of forty-nine (49) [states] and the District of Columbia, which ha[ve] all abrogated interspousal immunity, at least with respect to auto torts." The Defendants do not dispute the Plaintiffs' contention that both Virginia and North Carolina have abrogated spousal immunity, at least with respect to cases, such as this one, arising out of automobile torts. We thus find it unnecessary to engage in a detailed analysis of the laws of those other states. *See* Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3d 901 (1979).

court can ascertain whether there is a right of action on the part of Mrs. Lonzo to sue Mr. Lonzo.

In *Berard v. L-3 Commc'ns Vertex Aerospace, LLC*, 09-1202 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, 340, a similar issue was addressed, albeit in the summary judgment context. In that case, the appellate court reasoned that a choice of law issue was properly before it "by virtue of the threshold inquiry that summary judgment be appropriate 'as a matter of law.'" *Id.*, 09-1202 at p. 6, n. 1, 35 So.3d at 340. Continuing, the appellate court noted that "[a] judgment granting or denying summary judgment is necessarily based upon the initial determination of the substantive law applicable to the issues, as it is only in the context of that applicable substantive law that any issues of material fact can be ascertained." *Id.*[11] The same reasoning applies here to the exception of no right of action.

Second, the interplay between the spousal immunity statute and the DAS dictates addressing the choice-of-law issue in this case involving multiple out-of-state contacts—an insurance policy that was issued in Virginia, an accident that occurred in North Carolina, and a suit that was filed in Louisiana. As commentators have explained, in the state of Louisiana, "[spousal] immunity is mainly illusory, because . . . the immunity is personal, so that during the marriage, the victim spouse may bring a direct action against the injuring spouse's liability insurer." Frank L. Maraist & Thomas C. Galligan, Jr., LOUISIANA TORT LAW § 11.02, n. 4 (2d ed. 2016) ("MARAIST & GALLIGAN"). Explaining the typical

[11] *See also Goldstein v. Madison Nat'l Bank of Wash., D.C.*, 807 F.2d 1070, 1072, n. 5 (D.C. Cir. 1986) (stating that "application of the correct law is surely in the interest of justice, and well within the federal appellate court's discretion to raise and decide on its own initiative") (citing *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976)); *Roofing & Sheetmetal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 989-90 (11th Cir. 1982); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 455, n. 6 (8th Cir. 1990) (noting that "an appellate court may, sua sponte, apply the correct rule of law to an issue properly before it even though neither party argued it at either the district or appellate level").

interplay between the spousal immunity statute and the DAS, commentators also have noted the following:

> Justifiably, one may conclude that the direct action statute, [formerly] La. R.S. 22:655 [presently La. R.S. 22:1269], has allowed Louisiana to partially preserve the immunity, which has been abrogated in most other states. In states that do not permit the direct action, the injuring spouse's insurer also is immune because a judgment against the injuring spouse is a predicate to a suit against the insurer. In Louisiana, the direct action statute permits suit against the insurer without prior judgment against the insured spouse. Thus it permits Louisiana to pay lip service to the preservation of domestic tranquility while at the same time assuring recovery of damages by victim spouses. Interestingly, when the Legislature amended the direct action statute to require that the plaintiff name the insured party as a party, it exempted interspousal torts. Consequently, the direct action statute continues to allow recovery during marriage against the insurer of a spouse.

MARAIST & GALLIGAN, *supra*.

Here, however, the out-of-state contacts produce a different result. As the Defendants acknowledge in their exception of no right of action, the Plaintiffs are "prevented from filing a direct action against GEICO because the Direct Action Statute requires, under La. R.S. 22:1269(B)(2), that, in order to sue a liability insurer directly under the Louisiana Direct Action Statute, the accident or injury must have occurred in Louisiana or the policy must have been written or delivered in Louisiana." *See Esteve*, 351 So.2d at 120. Neither of these elements is met here; thus, the DAS does not apply.[12]

For these two reasons, we conclude that this is a case in which the interest of justice requires us to decide the choice-of-law issue that was neither raised nor addressed by the parties in the trial court. We confine our analysis, however, to the

[12] The same manifest injustice results from the interplay between the parental immunity statute and the DAS. The DAS exempts suits by children against their parents from the requirement of naming the insured. La. R.S. 22:1269B(1)(d) ("[w]hen the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons"). Nonetheless, the DAS does not apply here given the facts—an out-of-state accident and an out-of-state issued and delivered policy of insurance.

choice-of-law issue briefed by the parties on appeal—the conflict of laws regarding the spousal immunity issue.

Choice of law

A choice of law issue is presented whenever a suit presents "a foreign element such as a nonresident party or an event outside the forum." James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 836 (1994). Three potential procedural mechanisms for triggering a choice of law inquiry have been identified: "(1) a prior choice of law agreement by litigants; (2) a pleading for the application of foreign law; or (3) on the court's own discretionary motion." *Id.* at 836-37. None of those mechanisms was used to trigger an analysis of the choice-of-law issue in the trial court.[13] We thus address the issue for the first time on appeal.

The starting point in a choice-of-law analysis is to identify "'the particular issue as to which there exists an actual conflict of laws'" *Marchesani v. Pellerin-Milnor Corp*., 269 F.3d 481, 487 (5th Cir. 2001) (quoting La. C.C. art. 3542, cmt. (d)); *Tolliver v. Naor*, 115 F.Supp.2d 697, 701 (E.D. La. 2000) (noting that "[a]s a

[13] The only mention of the choice of law issue in the trial court was in GEICO-UM's answer to Mr. Lonzo's cross-claim. In their brief to this court, the Plaintiffs assign as error the trial court's failure to conduct a choice of law analysis on the issue of spousal immunity. The Plaintiffs acknowledge that this issue was not raised in the trial court. Nonetheless, in their reply brief, the Plaintiffs cite *Griffin v. Safeway Ins. Co*., 12-1632 (La. App. 1 Cir. 7/29/13), 2013 WL 3947104 (*unpub*.), for the proposition that the trial court had "an obligation in this matter to conduct a choice of law analysis and order briefing of the issue by the parties." The Plaintiffs' reliance on the *Griffin* case is misplaced.

The *Griffin* case involved the interpretation of an uninsured motorist ("UM") policy. The trial and appellate courts in *Griffin* followed the holding in *Champagne v. Ward*, 03-3211 (La. 1/19/05), 893 So.2d 773, that "Louisiana law does not automatically apply to UM claims under a policy issued in another state, even though a Louisiana resident is involved in the accident and the accident occurs in Louisiana. Rather, a choice-of-law analysis is necessary." *Griffin*, 12-1632 at p. 3. Although Mr. Lonzo filed a cross-claim against GEICO-UM, the UM coverage issue is not before us on this appeal. As discussed elsewhere in this opinion, Louisiana choice-of-law rules recognize that different state laws can apply to different issues in a case.

threshold matter, this Court must determine that there is an actual conflict of law before conducting a conflict of law analysis"). The parties identify the particular issue on which there is an alleged conflict of laws as the application of the spousal tort immunity statute, La. R.S. 9:291.

In analyzing the choice-of-law issue, the parties cite the general choice-of-law rules applicable to tort claims, set forth in La. C.C. Arts. 3542 and 3515, and the detailed discussion of those general rules in the *Marchesani* case. The Plaintiffs contend that the state of Virginia has the most contacts with the parties because the events giving rise to the accident occurred there and because GEICO issued and delivered its policy there. In contrast, the Plaintiffs contend that the parties have minimal contact with the state of Louisiana. As alleged in the petition, the Plaintiffs and Mr. Lonzo were Louisiana residents at the time this suit was filed. The Plaintiffs, however, emphasize that they did not become Louisiana residents until "after the negligent acts and injury occurred and after the GEICO insurance policy was issued and delivered."

The Defendants counter that even though the events giving rise to the accident occurred in the states of Virginia and North Carolina, those contacts are not pertinent to the issue presented here regarding the application of the spousal immunity statute, La. R.S. 9:291. The Defendants contend that the state of Louisiana has a strong interest in the application of an immunity statute that does not permit spouses to sue each other, except under certain exceptions (inapplicable here), to a case involving a Louisiana plaintiff against a Louisiana defendant.

Although the parties focus on the general choice-of-law rules for tort claims, a more in-depth analysis of the Louisiana choice-of-law rules reveals that there is a more specific statutory provision on point. Spousal immunity from tort liability is

an issue of "loss distribution and financial protection" governed by a sub-rule[14]—La C.C. art. 3544, which provides, in pertinent part, as follows:

> Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi offense and the person who caused the injury, by the law designated in the following order:
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> (1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state.

To explain our holding that the sub-rule in La. C.C. art. 3544 applies, we briefly address three pertinent factors that dictate this result: (i) specific versus general rules; (ii) issue-by-issue analysis; and (iii) loss distribution and financial protection issues.

Specific versus general rules

Louisiana choice-of-law rules are set out in the Civil Code, starting with La. C.C. art. 3515—the overarching, general residual rule. For tort suits, the Civil Code includes a parallel, residual rule in La. C.C. art. 3542. The Civil Code also includes several specific sub-rules for tort suits, including a sub-rule for "standards of conduct and safety" in La. C.C. art. 3543, and a sub-rule for "loss distribution and financial protection" in La. C.C. art. 3544. Being more specific, the sub-rules in La. C.C. arts. 3543 and 3544, when applicable, prevail over the general rules in La. C.C. arts. 3515 and 3542. *See* La. C.C. art. 3515, cmt. (a) [15] and La. C.C. art.

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[14] *See Babin v. Caddo E. Estates I, Ltd*., 496 B.R. 804, 809 (E.D. La. 2013) (referring to the more specific rules for tort suits as "sub-rules").

[15] La. C.C. art. 3515, cmt. (a) provides as follows:

> This Article applies only to cases that fall within the scope of this Book and that are not "otherwise provided [for] in this Book". Thus, this is the residual article. If any other article in this Book is found to be applicable to a particular case or issue, that article prevails. However, Article 3515 also serves as the general article, in the sense that it contains the general principles from which the

3544, cmt. (c);[16] *see also Wartelle v. Women's & Children's Hosp., Inc*., 97-0744, p. 9 (La. 12/2/97), 704 So.2d 778, 783 (noting that "[w]hile the revision comments do not form part of the law, they were presented together with the proposed legislation and illuminate the understanding and intent of the legislators.").

Issue-by-issue analysis

Louisiana choice-of-law rules recognize the concept of "dépeçage"—issue-by-issue analysis—by using, in both La. C.C. arts. 3515 and 3542, the term "issue." *Rigdon v. Pittsburgh Tank & Tower Co., Inc.*, 95-2611, p. 7 (La. App. 1 Cir. 11/8/96), 682 So.2d 1303, 1306. Under the dépeçage concept, "courts must utilize an issue-by-issue analysis which may result in laws of different states being applied to different issues in the same dispute." *Id.* (citing La. C.C. art. 3515, cmt. (d)).[17] Indeed, the Civil Code choice-of-law rules "contemplate the application of

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other articles of this Book have been derived and in light of which they should be applied.

[16] La. C.C. art. 3544, cmt. (c) provides as follows:

> Like Article 3543, this Article is derived from the general principles of Article 3542. When applicable, this Article, being more specific, prevails over Article 3542. However, according to Article 3547, *infra*, the rules provided in this Article may, in exceptional cases, be subordinated to the principles of Article 3542. See comment under Article 3547, *infra*. Moreover, this Article does not cover the entire spectrum of cases involving issues of loss distribution. As with Article 3543, the objective of this Article is to lighten the court's choice-of-law burden by attempting to identify those cases for which a safe choice-of-law rule could be established in advance based on accumulated experience. Because this experience does not yield safe choice-of-law rules for all cases, this Article is purposefully left open-ended. For instance, this Article does not cover situations in which the wrongful conduct, the resulting injury, and the domicile of each party are each located in different states. Such cases are, therefore, governed by Article 3542, the residual Article.

[17] La. C.C. art. 3515, cmt. (d) states, in part, as follows:

> The use of the term "issue" in the first paragraph of this Article is intended to focus the choice-of-law-process on the particular issue as to which there exists an actual conflict of laws. When a conflict exists with regard to only one issue, the court should focus on the factual contacts and policies that are pertinent to that issue. When a conflict exists with regard to more than one issue, each issue should be analyzed separately, since each may implicate different states, or may bring

the laws of different states to different issues in a tort suit, depending upon whether the issue is one of 'conduct and safety' or one of 'loss distribution and financial protection.'" MARAIST & GALLIGAN, *supra*, § 22.05. As noted, the Civil Code provides specific sub-rules for these two types of issues.

Loss distribution and financial protection issues

"Article 3544 provides a mechanical rule for choice-of-law determinations in issues related to loss distribution and financial protection." *Duhon v. Union Pac. Res. Co*., 43 F.3d 1011, 1013 (5th Cir. 1995). The issue of spousal immunity under La. R.S. 9:291 falls within the ambit of an issue of "loss distribution and financial protection." *See* La. C.C. art. 3543, cmt. (a) (stating that "rules that impose a ceiling on the amount of compensatory damages or provide immunity from suit are 'rules of loss-distribution and financial protection.'"). As one commentator has noted, "[r]ules . . . providing immunity from suit, such as intrafamily immunity or guest statutes, are examples of rules of loss distribution or financial protection." Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 699 (1992).

Applying the above factors, we determine that the applicable choice-of-law rule, contrary to the parties' contentions, is not the general tort rule, but the specific sub-rule in La. C.C. art. 3544. Because La. C.C. art 3544 applies here, this court need not indulge in a detailed interest analysis, as in *Marchesani*, *supra*, comparing the relevant policies of Louisiana with those of Virginia, North Carolina, or any other state. *See* La. C.C. art. 3547, cmt. (stating that "[b]y designating in advance

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into play different policies of these states. Seen from another angle, each state having factual contacts with a given multi-state case may not have an equally strong interest in regulating all issues in the case, but only those issues that actually implicate its policies in a significant way.

the applicable law, these rules will enable the courts to avoid the laborious analysis required by Article 3542"); La. C.C. art. 3542, cmt. (b) (noting that the "specific rules contained in Articles 3543-3546 . . . are a priori legislative determinations of 'the state whose policies would be most seriously impaired if its law were not applied.'"). The parties' reliance on the general choice-of-law rules, set forth in La. C.C. arts. 3515 and 2542, and analyzed in the *Marchesani* case, is thus misplaced.

When, as in this case, the parties have a common domicile, the governing choice-of-law rule is La. C.C. art. 3544(1), which provides for the application of the law of the common domicile.[18] In determining the location of that common domicile, La. C.C. art. 3544(1) expressly refers to the domicile, in the past tense, "at the time of the injury."[19] For purposes of La. C.C. art. 3544 (1), the parties'

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[18] The reason for the rule that the state of the common domicile is selected is explained in La. C.C. art. 3544, cmt. (e) as follows:

> The first sentence of subparagraph (1) of this Article deals with situations in which, at the time of the injury, both the tortfeasor and the victim were domiciled in the same state. This provision calls for the application of the law of the common domicile regardless of whether that law provides for a higher or a lower standard of financial protection for the victim than does the law of the state where the conduct and/or the injury occurred. In cases where the law of the state of the common domicile provides for a higher standard of financial protection than does the state of conduct and/or the injury, the application of the law of the common domicile has become routine in all states that have abandoned the traditional lex loci delicti rule. . . . *Jagers v. Royal Indemnity Ins. Co*., 276 So.2d 309 (La.1973), the leading Louisiana case, involved this law-fact pattern and was decided the same way. Cases in which the law of the common domicile provides for a lower standard of financial protection than does the law of the state of conduct and/or injury are more controversial. . . . This Article adopts the view that, as a general rule, these cases should also be resolved under the law of the common domicile, unless the special circumstances of the case warrant resort to the escape clause of Article 3547, *infra*.

[19] Explaining the use of the domicile at the time of the injury, one commentator has observed the following:

> When the selection of the applicable law depends on a person's domicile and is made a priori by the specific articles of Book IV, the pertinent domicile is the domicile at the time of the critical event rather than the time of litigation. This point is either stated explicitly through the use of appropriate words or is implied by the use of the past tense in almost all specific articles that use domicile as a connecting factor.

domicile at a subsequent time, such as at the time of the litigation, is not considered. Thus, the issue here is whether the Lonzos were domiciled in the state of Virginia at the time of the injury (automobile accident).

It is undisputed that when the accident occurred, the Lonzos were in the process of moving from Virginia to Louisiana. The Plaintiffs suggest that at the time of the accident the Lonzos were still domiciled in the state of Virginia.[20] The trial court's ruling on the Defendants' exceptions, however, was made on the face of the pleadings. As a result, the only evidence in the record regarding the Lonzos' domicile or residence is the allegation in the petition and Mr. Lonzo's answer. In

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> On the other hand, the flexible articles, such as articles 3515, 3519, 3537, and 3542, refer to domicile without assigning any time dimension to it. Consequently, in selecting the applicable law under the flexible approach of these articles, the court is free to take into account a party's domicile at both the time of the critical event and the time of litigation. The same would be true for a court pondering whether to employ the escape clause of article 3547, which does not mention domicile per se but operates in conjunction with article 3542. Thus, in determining whether a case falls within the common-domicile rule or any other rule of article 3544, the court should focus on the domicile of the parties "at the time of the injury." However, in deciding whether such a case is exceptional enough to come under the escape clause of article 3547, the court should consider the parties' domicile at both the time of the injury and the time of the trial. For example, a postinjury change of domicile by the victim usually brings into play the pertinent compensatory policies of his new domicile—in the same way that a postinjury change of domicile by the tortfeasor will bring into play the new domicile's policy of deterring or protecting tortfeasors. Since the court's decision will inevitably impact these states, the change of domicile cannot be dismissed as irrelevant (provided, of course, that it is bona fide).

Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original*?, 83 TUL. L. REV. 1041, 1076-77 (2009) (footnotes omitted).

The "escape hatch" provision set forth in La. C.C. art. 3547, provides that "[t]he law applicable under Articles 3543-3546 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue." A party urging "exceptional circumstances" under La. C.C. art. 3547 has the burden of proving such circumstances. La. Civ. Code art. 3547, cmt. Moreover, the comments to that article caution that "[t]his mechanism should be reserved for the truly exceptional cases." La. Civ. Code art. 3547, cmt. There is no indication that this is an exceptional case.

[20] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971) (providing that "[a] domicil[e] once established continues until it is superseded by a new domicil[e]" and giving the following illustration: "4. A, having a domicil[e] in state X, decides to make his home in state Y. He leaves X and is on his way to Y but has not yet reached Y. His domicil[e] is in X.").

those pleadings, it is averred only that the Lonzos were residents of the state of Louisiana at the time this suit was filed.

Based on the current state of the record, we decline to speculate on whether the Lonzos' common domicile at the time of the injury was Virginia. Rather than assume that the Lonzos were domiciled in Virginia, we remand to the trial court for this factual issue to be resolved.[21] Given our reversal of the trial court's grant of the peremptory exception of no cause of action and our remand to the trial court for resolution of the peremptory exception of no right of action against Mr. Lonzo, we pretermit addressing whether the Plaintiffs have a right of action against GEICO. As the Defendants acknowledge, their contention that the Plaintiffs lack a right of action against GEICO is premised on their allegation that the Louisiana spousal immunity statute applies. It would be premature to reach the issue of whether the Plaintiffs have a right of action against GEICO before the choice-of-law issue is resolved. For this reason, we reserve the parties' right to re-raise that issue on remand.[22]

DECREE

For the foregoing reasons, the judgment of the trial court is reversed. This matter is remanded to the trial court for further proceedings consistent with the views expressed in this opinion.

REVERSED AND REMANDED

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[21] *See Estate of Bergman v. Eastern Idaho Health Servs., Inc*., 2015 WL 506566, at *5 (D. Idaho 2/6/15) (*unpub*.) (noting that "based on the current record, the Court cannot decide where Mr. Bergman resided or was domiciled at the time of the injury" and that the court would "resist the temptation to simply assume that Mr. Bergman was a Montana resident on the date of the injury").

[22] As noted elsewhere in this opinion, we likewise reserve the parties' right to re-raise the issue of whether the parental immunity statute applies.