Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of January, 2023** are as follows:

BY Genovese, J.:

2022-CC-00469
c/w
2022-CC-00539
c/w
2022-CC-00730

BRITTANY LYNN SPENCER VS. VALERO REFINING MERAUX, LLC
(Parish of St. Bernard)

REVERSED. SEE OPINION.

Weimer, C.J., concurs and assigns reasons.

Hughes, J., dissents and would affirm the ruling of the lower courts.

Crain, J., concurs and assigns reasons.

McCallum, J., concurs and assigns reasons.

Griffin, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-CC-00469

BRITTANY LYNN SPENCER VS. VALERO REFINING MERAUX, L.L.C.

C/W

No. 2022-CC-00539

KEVREION RAINES VS. VALERO REFINING MERAUX, L.L.C.

C/W

No. 2022-CC-00730

ROSEMARY GAGLIANO VS. VALERO REFINING MERAUX, L.L.C.

On Supervisory Writ to the 34th Judicial District Court, Parish of St. Bernard

GENOVESE, J.

This Court granted certiorari in the above captioned matters arising from lawsuits brought following an incident at Valero Refining-Meraux, LLC ("Valero") in order to consider whether the lower courts erred in awarding Plaintiffs damages for negligent infliction of emotional distress in the absence of physical damage/injury. The matters presently before the Court involve the claims of four Plaintiffs: Brittany Spencer, Chloe LaFrance, Kevreion Raines, and Rosemary Gagliano, each of which are discussed below. This Court consolidated the matters for briefing and argument. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

On April 10, 2020, at approximately 12:45 a.m., an accident, fire, and explosion ("the explosion") occurred in the hydrocracker unit at the Valero refinery in Meraux, Louisiana.[1] The fire was extinguished at approximately 10:00 a.m. on

[1] Valero's Unauthorized Discharge Notification Report states:

> At approximately 11:40 PM on April 9th, a brief, but intense rainstorm passed over the refinery. Shortly afterwards, a vessel in the Hydrocracker Unit began relieving to the North Flare via a Pressure Safety Valve (PSV). It was determined that the elevated pressure had subsided, but the PSV had not fully reseated. A plan was developed to briefly close an inlet valve at the PSV to reseat the PSV. This plan

April 11, 2020, and the all-clear was given. No significant levels of chemicals were detected as a result of the explosion. Multiple residents in the vicinity of the refinery filed suit for the negligent infliction of emotional distress.

Brittany Spencer and Chloe LaFrance

Plaintiff, Brittany Spencer, and her two minor children, Chloe LaFrance and Lanny LaFrance III, were at home sleeping when the explosion occurred. Their residence was approximately 2,000 feet from the epicenter of the explosion. Ms. Spencer and Chloe were unexpectedly awakened by a loud sound of unknown origin and a significant shockwave and vibration of unknown origin. Lanny was not awakened. The sound resembled the shattering of a window and/or gun shot. The sound and/or shockwave shook Ms. Spencer's bedroom window. Ms. Spencer went outside and observed a large flame of the fire coming from the refinery, and the sky was lit up. Almost immediately after the explosion, Ms. Spencer began to hear police vehicles, fire trucks, and ambulances as part of the emergency response that lasted for several hours. Ms. Spencer went back inside, and she and Chloe went back to sleep.

On the morning of the explosion, Ms. Spencer and her children left their residence out of an abundance of caution and did not return until Monday, April 13, 2020. Ms. Spencer eventually returned to her normal sleep schedule, albeit with some trouble. She did not allow her children to play outside due to concerns for

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was approved by Operations management and documented through Meraux's Process Safety Management program.

However, due to concerns regarding access and egress at the targeted valve, several operators changed the plan in the field, instead opting for the closure of the *outlet* valve of the PSV. It was not recognized that additional review and approval by the Operations management was necessary to authorize this change. A review of the new plan would have revealed that the closure of the outlet valve only would result in it being exposed to pressure in excess of its design. When the outlet valve was closed, it immediately failed, resulting in a release of a pressured hydrogen/hydrocarbon mix which quickly ignited.

their safety. Thereafter, Ms. Spencer and her children began staying at their residence less and later moved away from the refinery in June of 2020.

As a result of the explosion, Ms. Spencer was anxious and concerned about her physical safety and that of her children as well as the potential exposure to chemicals. Ms. Spencer continued to be concerned about possible adverse health effects from exposure to chemicals for herself and her children. Chloe was scared and anxious as a result of the explosion; and, thereafter, she was anxious and concerned.

Ms. Spencer, individually and on behalf of her minor children, and Lanny LaFrance, Jr. on behalf of his minor children (sometimes collectively referred to as "Ms. Spencer") filed suit against Valero in the Justice of the Peace Court in St. Bernard Parish. Ms. Spencer alleged damages for emotional distress, but did not allege physical injury, property damage, or financial loss.

After a trial, the justice of the peace dismissed Ms. Spencer's suit.[2] Ms. Spencer then appealed to the 34th Judicial District Court pursuant to La.Code Civ.P. art. 4924.[3] The district court conducted a *de novo* trial. There was no live testimony. The parties stipulated to what Ms. Spencer would have testified to if she had testified live, to a number of relevant facts, and to the admissibility and authenticity of

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[2] The judgment stated:

> [T]he court finds that the plaintiff did not show enough evidence to award damages for the event that occurred on April 10th, 2020.
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> The court was not presented with any professional medical evidence of anguish. Also, no physical damage to property was claimed during the trial. Finally, the plaintiff showed minimal to no proof of intentional negligence on behalf of the defendant. For these reasons, the court finds for the defendant.

[3] Louisiana Code Civil Procedure Article 4924 provides, in part:

> A. Appeal from a judgment rendered by a justice of the peace court or a clerk of court shall be taken to the parish court or, if there is no parish court, to the district court of the parish in which the justice of the peace court is situated.
>
> B. The case is tried de novo on appeal. However, a trial de novo, in the district court from the justice of the peace court, is not subject to the jurisdictional limit of the justice of the peace court.

numerous documents/evidence. The district court also heard oral argument. The district court awarded Ms. Spencer $1,000 plus interest and costs for her own mental anguish and $250 plus interest and costs for the mental anguish of Chloe.[4] The district court dismissed Ms. Spencer's claim on behalf of Lanny, finding he slept through the explosion.[5] Valero applied for supervisory review to the Fourth Circuit Court of Appeal. The court of appeal denied the writ without comment. *Spencer v. Valero Refining Meraux, LLC*, 21-383 (La.App. 4 Cir. 7/13/21) (*unpub*.). Valero then sought review by this Court. This Court granted the writ and remanded the matter to the court of appeal for the sole purpose of briefing, argument, and full opinion. *Spencer v. Valero Refining Meraux, LLC*, 21-1188 (La. 11/17/21), 327 So.3d 489.

On remand, the court of appeal granted the writ, but denied relief, concluding that the district court was not clearly wrong in finding Ms. Spencer and Chloe were entitled to damages. *Spencer v. Valero Refining Meraux, LLC*, 21-383 (La.App. 4 Cir. 2/2/22), 2022 WL 305319. The court of appeal determined that Ms. Spencer satisfied her burden under La.Civ. Code art. 2315 in establishing general negligence. It further found she met her burden of establishing a likelihood of genuine and serious emotional distress arising from her particular circumstances. The court of appeal concluded that the stipulated testimony and the evidence supported the district court's findings.[6] Therefore, the court of appeal granted the writ, but denied

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[4] The district court explained that there was no evidence that Chloe had subsequent anxiety over safety and health impacts, as was the case with Ms. Spencer; therefore, her award was lower.

[5] In Written Findings of Fact and Reasons for Judgment, the district court explained, in part:

> The Court further found that plaintiffs[] Brittany LaFrance and Chloe Mae LaFrance met their burden of proving that Valero's conduct was the cause of the plaintiffs' injuries. The plaintiffs met their burden of proving "genuine and serious mental distress, arising from the special circumstances, which serve as a guarantee that the claim is not spurious." [*Lester v. Exxon Mobil Corp.*, 12-1709, p. 8 (La.App. 4 Cir. 6/26/13), 120 So.3d 767, 774, *writs denied*, 13-2397, 13-2465 (La. 2/7/14), 131 So.3d 862, 863].

[6] The appellate court stated:

relief. It also denied Valero's request for a rehearing. Valero then sought writs in this Court, which were granted. *Spencer v. Valero Refining Meraux, LLC*, 22-469 (La. 9/20/22), 345 So.3d 1025.

Kevreion Raines

When the explosion occurred, Plaintiff, Kevreion Raines, was at her home helping her aunts, Robin Leflore and Lisa Leflore, change the trach tube for her mother, Rosalind Leflore, a ventilator-dependent ALS patient. The explosion sounded "like a bomb" to her. She felt "the vibration," and the house shook. The lights began to flicker, and the alarms of Ms. Rosalind's ventilator went off. Ms. Rosalind became distressed. Ms. Raines and her aunts attempted to settle her down and finish the trach care. When Ms. Raines went outside, she saw "big gray clouds of smoke[,]" which was "very scary[.]" She did not notice any unusual odors or smoke in the house, nor in the area around the home. Ms. Raines remained at her mother's bedside until later that morning.

At first, Ms. Raines had trouble sleeping, but she returned to her normal sleep schedule a couple of days after the explosion. Ms. Raines continued to feel uncomfortable living in the house out of fear it may happen again. She was of the belief that the explosion caused cracks in the ceiling and "little small cracks within the floors" of the home. At the time of trial, Ms. Raines felt fear in the back of her mind and remained uncertain about what was in the air and if it was safe.

> Considering the totality of the evidence, we find the district court's finding that Ms. Spencer and Chloe suffered genuine and serious emotional distress resulting from the Valero refinery event of April 10, 2020 reasonable. Louisiana courts have allowed recovery for negligent infliction of emotional distress under such factual scenarios. *See [Crockett v. Cardona*, 97-2346, p. 6 (La.App. 4 Cir. 5/20/98), 713 So.2d 802, 805]. Thus, the district court was not clearly wrong in finding Ms. Spencer and Chloe entitled to damages for negligent infliction of emotional distress absent physical injuries.

Spencer, 21-383, at p. 8.

Ms. Raines filed suit against Valero in the Justice of the Peace Court in St. Bernard Parish, alleging negligent infliction of emotional distress. The justice of the peace issued a judgment in favor of Valero.[7] Ms. Raines then appealed to the 34th Judicial District Court. After a trial *de novo*, the district court reversed and awarded Ms. Raines $2,500.[8] From this ruling, Valero sought writs. The Fourth Circuit Court of Appeal denied the writ in part, granted in part, and remanded. *Raines v. Valero Refining Meraux, LLC*, 21-726 (La.App. 4 Cir. 2/28/22) (*unpub*.).[9] Valero then

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[7] The judgment provides:

> After hearing testimony and all evidence from the defense and plaintiff in this case, the court rules in favor of the defense. The plaintiff did not present sufficient evidence to prove injuries from the incident that occurred at the Valero Refinery. There was no medical or substantial evidence beyond witness testimony that provides a clear idea of the injuries received and the effects from the injuries on the plaintiff's everyday life.

[8] The judgment provides, in part:

> **IT IS ORDERED ADJUDGED AND DECREED** that there be a judgment herein in favor of Plaintiff, Kevreion Raines, and against Defendant, Valero Refining Meraux, LLC, in the amount of $2,500.00 which is inclusive of both general and *Lejeune* damages for the physical impact of the explosion felt by the Plaintiff, which was strong enough to generate a crack in the floor of the home, presented by the credible testimony of the Plaintiff, as well as the emotion[al] distress caused by the explosion which resulted in a loss of power as Plaintiff's mother, Rosalind Leflore, of whom Plaintiff is a primary care give[r], also resides in the home. Rosalind Leflore has ALS and is unable to breath without the assistance of an endotracheal tube connected to a ventilator and went into a state of distress following the explosion.

[9] The court of appeal opined:

> After *de novo* review of the record in light of the applicable law, the relator's writ application is denied in part and granted in part. We find no error in the district court judgment awarding the respondent general damages for the mental distress she suffered as a result of the refinery explosion on April 10, 2020. The respondent's home is five blocks from the refinery and the explosion resulted in flames shooting fifty-feet into the air, shaking the respondent's home with sufficient force to cause some damage to the floor and ceiling. Accordingly, under the particular facts of this case, there was a special likelihood that the respondent suffered genuine and serious mental distress as a result of the explosion and the claim is not spurious.
>
> However, the district court erred in granting the respondent bystander damages based on the respondent's observation of her mother's response to the explosion. Although the respondent's mother (who has ALS and is on a ventilator) no doubt experienced panic and fear due to the explosion, there is nothing in the record to support a finding that the respondent suffered severe, debilitating, and foreseeable emotional distress due to her mother's panic. Accordingly, we grant the writ in part, reverse the award of bystander damages, and remand the matter to the district court to determine the amount of general damages.

Id. at pp. 1-2 (footnote omitted).

sought writs in this Court, which were granted. *Raines v. Valero Refining Meraux, LLC*, 22-539 (La. 9/20/22), 345 So.3d 1025.

Rosemary Gagliano

At the time of the explosion, Plaintiff, Rosemary Gagliano, was staying at her mother's home. She heard a loud "boom" that shook everything in the home. The noise woke her up and scared her. She witnessed a "glow," and the explosion "lit up the house through the blinds[.]" Ms. Gagliano was "shaky and very scared." She went outside and saw the flames. She and her mother left the home and began driving away from the refinery; however, the roadway was blocked. Therefore, Ms. Gagliano drove in the opposite direction and went to her sister's home nearby. Ms. Gagliano and family members sat outside until early morning "nervous" and "shaking[.]" Eventually, she went inside and dozed. She returned home the evening of April 10, 2020. Ms. Gagliano remained nervous that an explosion was going to happen again. The explosion did not affect her daily lifestyle, she was "just leery about it[.]"

Ms. Gagliano filed suit against Valero in the Justice of the Peace Court in St. Bernard Parish alleging negligent infliction of emotional distress. The justice of the peace issued a judgment in favor of Ms. Gagliano and awarded her $750 in damages plus $100 for court costs.[10] Both sides appealed to the 34th Judicial District Court. After a *de novo* review, the district court increased her damage award to $1,750.[11] From this ruling, Valero sought writs, which the Fourth Circuit Court of Appeal denied. *Gagliano v. Valero Refining Meraux, LLC*, 22-124 (La.App. 4 Cir. 3/31/22)

[10] The judgment provides:

> [T]he court, using the precedent set by the court case of [*Spencer v. Valero*] ruled upon by the Honorable Judge William McGoey, finds that defendants were negligent and at-fault for the mental distress experienced by Ms. Gagliano. The mental distress was intense enough for the plaintiff to leave her house because she was not notified by Valero on the circumstances of the explosion.

[11] The district court judgment did not provide reasons for judgment.

(*unpub*.).[12] Valero then sought writs in this Court, which were granted. *Gagliano v. Valero Refining Meraux, LLC*, 22-730 (La. 9/20/22), 345 So.3d 1026.

STANDARD OF REVIEW

In civil cases, the appropriate standard for appellate review of factual determinations is the manifest error or clearly wrong standard, which precludes the setting aside of a district court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. *Hall v. Folger Coffee Co.,* 03-1734, p. 9 (La. 4/14/04), 874 So.2d 90, 98; *Rosell v. ESCO,* 549 So.2d 840, 844 (La.1989). In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and: (1) find that a reasonable factual basis does not exist for the finding; and, (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State, through the Dep't of Transp. & Dev.*, 617 So.2d 880, 882 (La.1993).

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[12] The court of appeal stated:

> After *de novo* review, we find that the respondent met her burden of proving the relator failed to conform its conduct to the applicable standard, the relator's negligence resulted in the release of hazardous materials that was a cause-in-fact of the respondent's emotional distress, and she suffered actual damages. Moreover, the explosion fits the "special circumstances" exception to allow an award for emotional distress absent physical injury. See *Moresi v. State Through Dept. of Wildlife & Fisheries,* 567 So.2d 1081, 1096 (La. 1990) (providing "special circumstances" exception when there is "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious"). The refinery explosion shook the respondent's home with sufficient force that the respondent felt the vibrations. The fireball resulted in flames fifty-feet in diameter and twenty-five feet in the air. The glow of the fire lit the respondent's home. The respondent feared for her safety and that of her mother so much that they left their home. The respondent witnessed emergency response vehicles near the refinery. The respondent did not know whether she was exposed to hazardous materials. The respondent lost sleep and suffered fright but did not require medical attention. The fact that the respondent suffered minimal damages does not preclude recovery. Under the particular facts presented herein, there was a special likelihood of genuine and serious mental distress arising from the April 10, 2020 explosion, which serves as a guarantee that the respondent's claim is not spurious.

Id. at pp. 1-2.

LAW AND DISCUSSION

Valero argues that the court of appeal erred in taking the "exceptional circumstances" exception of *Moresi*, 567 So.2d 1081, and transforming it into the general rule, thereby making a defendant guilty of mere negligence liable for negligent infliction of emotional distress in the absence of physical damage/injury. Valero asks this Court to reverse the court of appeal and adapt the following reformulation of this Court's jurisprudence governing claims for negligent infliction of emotional distress:

1. As a general rule, if a defendant's conduct is merely negligent and causes only mental disturbance, without accompanying physical injury, illness, or other physical consequences, the defendant is not liable for such emotional disturbances.[13]

2. An exception to this general rule exists when:

    a. A defendant owes a special, direct duty to the plaintiff intended to protect the plaintiff's emotional well-being;[14]

    b. The defendant, through outrageous conduct, breaches that duty;[15] and,

    c. The defendant's conduct is likely to cause and in fact does cause the plaintiff to suffer severe, debilitating emotional distress.[16]

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[13] In support, Valero cites *Moresi,* 567 So.2d at 1096.

[14] In support, Valero cites: *Clomon v. Monroe City Sch. Bd*., 572 So.2d 571 (La.1990); *Norred v. Radisson Hotel Corp*., 95-748 (La.App. 1 Cir. 12/15/95), 665 So.2d 753; *Covington v. Howard*, 49,135 (La.App. 2 Cir. 8/13/14), 146 So.2d 933, *writ denied*, 14-1927 (La. 11/21/14) 160 So.3d 973; and, *Walker v. Allen Par. Health Unit*, 97-1007 (La.App. 3 Cir. 4/1/98), 711 So.2d 734, *writ denied*, 98-1698 (La. 10/9/98), 727 So.2d 440. Valero provides the following examples of special legal relationships: doctor-patient; hospital-patient; private investigator-client; landlord-tenant; and, fiduciary-beneficiary.

[15] In support, Valero cites: *Arco Oil & Gas Co., a Div. of Atlantic Richfield Co. v. DeShazer*, 98-1487, p. 5 (La. 1/20/99), 728 So.2d 841, 845 ("[W]e have held that only one who by extreme and outrageous conduct intentionally or negligently causes severe emotional distress to another is subject to liability for such damages."); *Prest v. Louisiana Citizens Prop. Ins. Corp.*, 12-513, p. 14 (La. 12/4/12), 125 So.3d 1079, 1089) ("merely negligent" conduct "did not rise to the level of the 'special circumstances' necessary for an award of general damages" for emotional distress."); and, *Dufreche v. Coco*, 20-30, p. 13 (La.App. 4 Cir 4/15/20), 298 So.3d 800, 809 (A plaintiff seeking recovery for negligent infliction of emotional distress without physical injury must meet "the heavy burden of proving outrageous conduct by the defendant.").

[16] In support, Valero cites: *Lejeune v. Rayne Branch Hosp.*, 556 So.2d 559, 570 (La.1990) (requiring "severe and debilitating" emotional distress); and, *Arco Oil & Gas Co.*, 728 So.2d at 845 (requiring that the conduct "cause[] severe emotional distress" and stating that "[m]inimal and normal inconvenience is not compensable.").

Valero breaks down these elements and argues: (1) there was no breach of a special, direct duty to the Plaintiffs; (2) there was no outrageous conduct, only ordinary negligence; and, (3) the Plaintiffs' emotional distress was neither severe nor debilitating.

For the reasons set forth below, we reject Valero's argument that "special circumstances" under *Moresi* requires a breach of a "special, direct duty." We also reject Valero's argument that recovery is permitted only when the defendant's conduct is "outrageous." We find no merit to Valero's argument that, to recover, a plaintiff must suffer "severe, debilitating emotional distress." Finally, we agree with Valero that public policy considerations require reasonable limits on recovery for negligent infliction of emotional distress. These policy concerns are especially acute in claims for negligent infliction of emotional distress without physical damage/injury.[17]

This Court agrees with Plaintiffs that the standard of recovery proposed by Valero seeks to combine the standards set forth in *Moresi*, 567 So.2d 1081, L*ejeune*, 556 So.2d 559, *Bonnette v. Conoco, Inc.*, 01-2767 (La. 1/28/03), 837 So.2d 1219, *Arco Oil & Gas, Co.*, 728 So.2d 841, *Clomon*, 572 So.2d 571, and *Prest,* 125 So.3d 1079. We decline to adopt Valero's proposed standard.

Jurisprudence

The parties rely on numerous decisions in support of their respective positions on whether Plaintiffs are entitled to recover for negligent infliction of emotional distress. A review and consideration of the jurisprudence is warranted and instructive. However, we note that each of these decisions are readily distinguishable from the instant matters. We emphasize that the instant matters

[17] In C*onsolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396, 512 U.S. 532 (1994), the United States Supreme Court noted that while states recognize a right to recover for negligent infliction of emotional distress, no jurisdiction allows recovery for all emotional harms. This is because, unlike physical injury, "there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act." *Id.* at 545.

involve claims for negligent infliction of emotional distress absent physical damage/injury. These claims arose from an explosion that caused no substantial chemical release. There was no evacuation order or shelter-in-place issued. None of the Plaintiffs experienced any physical symptoms, nor received any medical treatment. Damages are sought for general fear and anxiety resulting from the explosion. Finally, none of the Plaintiffs seek "bystander damages."[18] Cognizant of these specific facts, this Court has considered the jurisprudence relied upon by the parties, some of which is discussed herein.

In *Moresi*, 567 So.2d 1081, hunters filed suit against the State of Louisiana, through the Department of Wildlife and Fisheries, and its agents. Following the hunters' arrest, the agents left a message on their camp door, which read: "We missed you this time but look out next time!!" Plaintiffs testified that following these events, their enjoyment of the camp was diminished because of their fear of further harassment. Relevant to the cases at bar, this Court was called upon to decide whether the trial court properly awarded plaintiffs damages for negligent infliction of emotional distress under state law. The *Moresi* Court found that plaintiffs neither alleged nor proved that they suffered any bodily harm or property damage as a result of the agents' negligence; instead, they were seeking recovery on the basis that the agents' ordinary negligence caused them only mental disturbance. *Moresi* recognized that there had been deviations from the general rule that a defendant is not liable for mere negligence causing mental disturbance without physical injury, illness or other physical consequences and opined: "There may be other cases, but all of these categories have in common the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." *Id.* at 1096. The Court found "plaintiffs' mental

[18] In *Lejeune*, 556 So.2d 559, this Court held that mental pain and anguish claims arising out of injury to third persons are allowable and delineated the limits on the cause of action. Awards for claims of this nature are referred to as "bystander damages."

disturbance was not severe, or related to personal injury or property damage, and the plaintiffs were not in great fear for their personal safety." *Id.* Therefore, the case did not "fall within any category having an especial likelihood of genuine and serious mental distress, and thus lack[ed] any recognized elements guaranteeing the genuineness of the injury claimed." *Id.* Notably, *Moresi* did not involve a fire, explosion, or fear of one's personal safety.

In *Bonnette*, 837 So.2d 1219, plaintiffs were property owners who brought an action against a refinery owner for damages arising from exposure to asbestos contained within soil which had been delivered to their property. In addition to punitive damages and damages for diminished property values, plaintiffs sought compensatory damages for damage to their property and landscape, exposure to contaminated soil, and "emotional fears worrying about the presence of the dirt on their property and the contaminants therein." *Id*. at 1223. Addressing the claims for mental anguish, the *Bonnette* Court opined that "[t]he problems inherent in awarding damages for mental disturbance in the absence of manifest physical injury are particularly pronounced in cases involving exposure to asbestos or other carcinogens." *Id.* at 1234. The *Bonnette* Court stated:

> Thus, under the rule announced in *Moresi*, which must be stringently applied in asbestos exposure cases due to their inherently speculative nature, in order for plaintiffs to recover emotional distress damages in the absence of a manifest physical injury, they must prove their claim is not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances.

Id. at 1235. This Court found that "while plaintiffs expressed a generalized fear of contracting an asbestos-related disease, they failed to prove they suffered genuine and serious mental distress arising from the placement of asbestos-containing soil on their properties." *Id.* at 1235-36. Apart from X-rays arranged for by their attorneys just prior to trial, plaintiffs did not seek medical treatment for their alleged

physical concerns. They did undergo a pre-trial evaluation by a psychiatrist[19] at the request of their attorney. Additionally, some plaintiffs, although exposed, failed to have the sources of asbestos removed. The *Bonnette* Court opined: "[W]e cannot say [plaintiffs] suffered from genuine and serious mental distress that guarantees their claim for mental distress damages is not spurious." *Id.* at 1236. It held, in part, that: compensatory damages for an increased risk of contracting cancer in the future were not warranted; and, plaintiffs could not recover for mental anguish.[20] *Bonnette* is similar to the instant matters in that the claims were due to health concerns from exposure; however, the *Bonnette* plaintiffs were actually exposed to asbestos and did present some degree of medical evaluations and psychological testing.

Prest, 125 So.2d 1079, involved, in part, an action for mental anguish brought against an insurance agency and insurer for failure to procure increases in plaintiff's coverage limits. This Court found that the defendant's conduct "was not such as to lead to the especial likelihood of genuine and serious mental distress" and that its actions constituted mere negligence which did not rise to the level of the "special circumstances" necessary for an award of damages. *Id.* at 1089. The evidence in *Prest* established that plaintiff suffered "sleepless nights," was "on edge," resorted to alcohol to relieve stress, and was prescribed "minor things" by his physician. *Id.* No counseling or therapy was sought. The *Prest* Court concluded: "While we do not doubt Mr. Prest experienced disappointment, inconvenience and stress . . ., the

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[19] The psychiatrist testified that some plaintiffs' preexisting anxiety disorders were aggravated by the stress of the exposure, and others' preexisting health conditions were exacerbated by their worry. Additionally, some were depressed due to the additional stress.

[20] The Court also stated:

> While we recognize that much of the general public exhibits a degree of anxiety concerning exposure to asbestos and asbestos-containing materials, it is a fact of modern life that most of us are exposed to *de minimus* amounts of asbestos on a daily basis. Plaintiffs have failed to prove their exposures resulted in a particular likelihood of genuine and serious mental distress.

Id.

record does not establish he suffered more than the level of distress people in southern Louisiana experienced in the aftermath of Hurricane Katrina." *Id.* at 1089-90. The *Prest* Court held that although general damage awards are possible for claims of mental anguish without physical injury, the evidence was insufficient to support such an award. Obviously, the underlying facts giving rise to the claims in *Prest* are vastly different than those asserted herein.

In *Arco Oil & Gas Co.*, 728 So.2d 841, this Court addressed the appropriate standard for recovery of mental anguish damages under La.Code Civ.Proc. art. 3608 and reasoned "that the narrow standard governing liability for damages in tort cases involving negligent or intentional infliction of emotional distress also provides an appropriate standard for recovery of mental anguish damages under Article 3608." *Id.* at 844. The Court opined that although recovery was permitted for negligent infliction of emotional distress, it had previously "held that only one who by extreme and outrageous conduct intentionally or negligently causes severe emotional distress to another is subject to liability for such damages." *Id.* at 845 (citing *White v. Monsanto Co.,* 585 So.2d 1205 (La.1991); *Moresi,* 567 So.2d 1081). "Minimal and normal inconvenience is not compensable." *Id.* The *Arco* Court held "that damages for mental anguish are recoverable under Article 3608 only in the presence of special circumstances involving outrageous or egregious conduct." *Id.* Applying this standard, it found that Arco "did not act in an outrageous or egregious manner" when it sought and obtained the temporary restraining order. *Id.* at 846. Additionally, DeShazer's mental anguish was not "severe," as he "merely felt depressed and was unable to concentrate. Further, no physician, psychiatrist, psychologist or other disinterested individual testified as to DeShazer's mental state during that time period." *Id.* Therefore, the Court determined that the evidence "presented simply does not indicate that there was 'an especial likelihood of genuine and serious mental distress.'" *Id.* (quoting *Moresi,* 567 So.2d at 1096). In context, the holding of *Arco*

Oil & Gas, Co., and the language utilized therein, addressed the standard for recovery of mental anguish damages under La.Code Civ.Proc. art. 3608.

The foregoing decisions are instructive. There are also numerous appellate court decisions which yield differing results. The decisions use similar wording, but arguably language of a different meaning. Each are also fact intensive. We emphasize the unique facts of these cases presently before us as set forth in detail above. To be certain, no one fact, or lack thereof, necessarily entitles a plaintiff to a recovery, nor does it preclude recovery. A trier of fact is to weigh all relevant facts of each case before it and give each due weight and consideration. As previously held, recovery for negligent infliction of emotional distress absent physical damage/injury is not precluded; however, given the nature of such claims, a trier of fact must be heedful of the goal of preventing spurious claims, and that not every occasion that causes some harm yields concomitant liability and compensatory damages.

Analysis

While each case will differ, we provide the following relative to claims for negligent inflection of emotional distress absent physical damage/injury. A claim for negligent infliction of emotional distress without physical injury is viable under La.Civ.Code art. 2315(A), which provides: "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it." A duty-risk analysis is utilized in determining whether one may recover under La.Civ.Code art. 2315. *Doe v. McKesson*, 21-929, p. 7 (La. 3/25/22), 339 So.3d 524, 531. For liability to attach, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4)

the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and, (5) actual damages (the damages element). *Mathieu v. Imperial Toy Corp.,* 94-952, pp. 4-5 (La.11/30/94), 646 So.2d 318, 322. A negative answer to any of those inquiries results in a determination of no liability. *Id.* at 326.

Additionally, for negligent infliction of emotional distress claims absent physical damage/injury, a plaintiff must prove "the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." *Moresi*, 567 So.2d at 1096. This rule must be "stringently applied" in cases that are inherently speculative in nature. *Bonnette*, 837 So.2d at 1235. The actions of the defendant must constitute negligence. The plaintiff's mental disturbance must be "serious." *Moresi*, 567 So.2d at 1096. Evidence of generalized fear or evidence of mere inconvenience is insufficient. Evidence of medical treatment is not required, nor is expert medical testimony; however, a plaintiff bears the burden of presenting sufficient evidence of the nature and extent of the mental anguish suffered that was caused by the defendant's conduct. Whether the mental distress is "serious" is a matter of proof. Finally, we reiterate that these guidelines must be applied with the policy considerations discussed herein.

In reaching our conclusion, we further elaborate on what is not required to be proven by a plaintiff seeking damages for intentional infliction of emotional distress absent physical damage/injury. The existence of a special, direct duty owed by the defendant is not required. We also decline to impose a requirement of outrageous conduct on the part of a defendant. A claim for negligent infliction of emotional distress is a claim that, by definition, requires a plaintiff to prove negligence. Further, we expressly reject application of the standard set forth in *Lejeune*, 556

So.2d 559.[21] The emotional distress suffered by a plaintiff need not be "reasonably foreseeable," nor "severe and debilitating." *Lejeune*, 556 So.2d at 571.

This Court has considered the complex policy considerations advanced by both parties and find they do not clearly favor either. As Plaintiffs advance, allowing recovery may serve to compensate victims and provide an incentive for the safe operation of the refinery so as to deter future harm. Relative to economic considerations, there has been no evidence that this litigation will be a burden on the industry, nor this particular refinery. Likewise, there has been no evidence that potential liability would lead to an unmanageable flow of litigation. The fact that the awards may be low does not warrant precluding recovery.[22] There is a finite number of plaintiffs arising out of a discrete accident. Valero is best positioned to protect against such accidents, and there are no reasonable precautions Plaintiffs could have taken to avoid or mitigate damages. Valero's operation of the refinery does serve a legitimate purpose. As this Court has observed, the purpose of tort law is "to protect *some* persons under *some* circumstances against *some* risks."[23] These policy considerations are considered along with those previously explained by this Court to be applicable to claims for negligent infliction of emotional distress.

Applying the foregoing guidelines to the facts of this case, we find that Valero owed a duty to protect those in the surrounding community. Indeed, various courts

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[21] Given that the present claims do not assert "bystander damages," the modifications and restrictions set forth in *Lejeune* are not applicable. To the extent the language of *Lejeune* differs from that of *Moresi*, we reject Valero's invitation to adapt *Lejeune*'s language as the standard for claims for negligent infliction of emotional distress absent physical damage/injury. We acknowledge the argument advanced by Valero and find similar policy considerations of *Lejeune* to be relevant; however, the standard set forth in *Lejeune* and La.Civ.Code art. 2315.6 is limited exclusively to claims for bystander damages.

[22] The *de minimus* amounts of the awards does not alone mean that damages are not recoverable. This Court does not turn a blind eye to the fear and anxiety reasonably experienced by Plaintiffs.

[23] *Gresham v. Davenport*, 537 So.2d 1144, 1147 (La.1989) (quoting Malone, *Ruminations on Cause-In-Fact*, 9 Stanford L.Rev. 60, 73 (1956)); *see also Roberts v. Benoit*, 605 So.2d 1032, 1044 (La.1991); *Hill v. Lundin & Assocs., Inc.*, 256 So.2d 620, 623 (La.1972).

have found such a duty is owed.[24] We also find that Plaintiffs fall within the broad class of plaintiffs to whom a duty is owed. In this case, Valero breached the duty it owed, which was a cause-in-fact of Plaintiffs' generalized fear and anxiety. However, we find that the element of damages within the parameters of claims for negligent infliction of emotional distress absent physical damage/injury were not proven. Stringently applying the rule of *Moresi*, 567 So.2d at 1096, Plaintiffs failed to prove "the "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." No Plaintiff has put forth sufficient evidence that the mental disturbance suffered was "serious." *Moresi*, 567 So.2d at 1096. Viewing the record in its entirety, we find that a reasonable factual basis does not exist to support the awards for negligent infliction of emotional distress; thus, we find the lower courts manifestly erred.

Codal nuisance doctrine

Because Plaintiffs have also relied heavily on the codal doctrine of nuisance, set forth in La.Civ.Code arts. 667-669,[25] as an independent duty and basis for

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[24] *Aaron v. Exxon Mobil Corp.*, 18-476 (La.App. 1 Cir. 12/27/18), 271 So.3d 205; *Andry v. Murphy Oil, U.S.A., Inc.*, 05-126 (La.App. 4 Cir. 6/14/06), 935 So.2d 239, *writ denied*, 06-2256 (La. 12/8/06), 943 So.3d 1093; *Doerr v. Mobile Corp.*, 04-1789 (La.App. 4 Cir. 6/14/16), 935 So.2d 231, *writ denied*, 06-1760 (La. 11/3/06), 940 So.2d 664.

[25] Louisiana Civil Code Article 667 provides:

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

Louisiana Civil Code Article 668 provides:

recovery, we address their contention. Plaintiffs rely primarily on *Inabnet v. Exxon Corp.*, 93,681 (La. 9/6/94) 642 So.2d 1243. According to Plaintiffs, *Inabet* and the nuisance doctrine refer to "inconvenience," which is a lower standard than traditional cases to which *Moresi* was applied. In *Inabnet*, this Court discussed La.Civ.Code arts. 667-669 and opined that, together, the articles establish the following principles:

> No one may use his property so as to cause damage to another or to interfere substantially with the enjoyment of another's property (Article 667). Landowners must necessarily be exposed to some inconveniences arising from the normal exercise of the right of ownership by a neighbor (Article 668). Excessive inconveniences caused by the emission of industrial smoke, odors, noise, dust, vapors and the like need not be tolerated in the absence of a conventional servitude; whether an inconvenience is excessive or not is to be determined in the light of local ordinances and customs (Article 669).

Inabnet, 642 So.2d at 1251 (quoting 4 A.N. Yiannopoulos, *Louisiana Civil Law Treatise—Predial Servitudes* §§ 25, 34 (1983)). The *Inabnet* Court reasoned that Exxon was prohibited from performing any actions "which would cause damage to plaintiff on the adjoining property or interfere substantially with plaintiff's enjoyment of the property, and plaintiff was required to tolerate some inconvenience from Exxon's normal use of its property rights." *Id*. at 1253.

> Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.
>
> Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

Louisiana Civil Code Article 669 provides:

> If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.

A landowner's right of ownership does "require that he tolerate some inconvenience from the lawful use of a neighbor's land."[26] Based upon the facts of the cases before us, Plaintiffs have failed to prove that Valero "interfered substantially" with their enjoyment of their property. Proof of mere inconvenience is insufficient, and the codal doctrine of nuisance may not be used as a grounds to provide remedies for claims which would otherwise fail under the guidelines set forth herein relative to negligent infliction of emotional distress absent physical damage/injury. Additionally, in order to recover, a plaintiff asserting claims under La.Civ.Code arts. 667-669 must prove damages. As explained above, Plaintiffs have failed to meet their burden of proving damages.

CONCLUSION

General damages may be recovered for claims of negligent infliction of emotional distress absent physical damage/injury; however, the foregoing guidelines must to be applied in determining a plaintiff's entitlement to recovery. In this fact-intensive case, based on the record, we find the evidence presented by each Plaintiff to be insufficient to support an award for negligent infliction of emotional distress. We acknowledge that the facts in these consolidated cases differ, and we find that some approach the brink of that Plaintiff having made the requisite showing; however, no Plaintiff has met their burden of proving they are entitled to such an award.

DECREE

For the foregoing reasons, the awards of the lower courts to Brittany Spencer individually, Brittany Spencer and Lanny LaFrance, Jr., on behalf of Chloe LaFrance, Kevreion Raines, and Rosemary Gagliano for negligent infliction of emotional distress are reversed.

REVERSED.

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[26] *Constance v. State, through Dep't of Transp. & Dev. Off. of Highways*, 626 So.2d 1151, 1155 (La.1993).

SUPREME COURT OF LOUISIANA

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C/W

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KEVREION RAINES VS. VALERO REFINING MERAUX, L.L.C.

C/W

No. 2022-CC-00730

ROSEMARY GAGLIANO VS. VALERO REFINING MERAUX, L.L.C.

On Supervisory Writ to the 34th Judicial District Court, Parish of St. Bernard

WEIMER, C.J., concurring.

I agree the plaintiffs in this case are not entitled to recover damages for negligent infliction of emotional distress. This does not imply plaintiffs were not harmed in some way or that plaintiffs are not to be believed. There is no question the explosion caused damages; however, the law does not impose unlimited liability and not each and every type of damage is legally compensable.

The Civil Code establishes only two sources of law in Louisiana: legislation and custom. See La. C.C. art. 1. Legislation is superior to custom and will supercede it in every instance. See La. C.C. art. 3; **Doerr v. Mobil Oil Corp.**, 00-0947, p. 13 (La. 12/19/00), 774 So.2d 119, 128. Judicial decisions are not intended to be an authoritative source of law in Louisiana. **Doerr**, 00-0947 at 13, 774 So.2d at 128.

Thus, in our civilian jurisdiction,[1] legislation is a solemn expression of legislative will and the superior source of law, and we must apply legislation to govern decisions. See La. C.C. arts. 1 and 2; **Unwired Telecom Corp. v. Parish of Calcasieu**, 03-0732, p. 14 (La. 1/19/05), 903 So.2d 392, 403.

Having said so often that citation is unnecessary, we begin as we must with the language of the statute. Louisiana C.C. art. 2315(A) provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This article sets forth the general principle that a person is liable for all damages caused by his or her fault. Yet certain exceptions may exist by law and limitations may be imposed to prevent indefinite and indeterminate liability. See **Clomon v. Monroe City School Bd.**, 572 So.2d 571, 573-74 (La. 1990); **Lejeune v. Rayne Branch Hosp.**, 556 So.2d 559, 569 (La. 1990). Relative to damages for negligent infliction of emotional distress, limitations on recovery are reasonable and regularly imposed. As the United States Supreme Court has recognized, substantial limitations are often placed on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable because "a cause of action for negligent infliction of emotional distress holds out the very real

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[1] Some scholars suggest Louisiana is more properly referred to as a mixed jurisdiction, possessing qualities of both the common and civil law traditions. See, e.g., *Kenneth M. Murchison, The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1, 3 (1988); James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L. Rev. 1 (1993); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 La. L. Rev. 677, 737 (2000); Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 La. L. Rev. 1, 3 (2002). Despite our civil law heritage, often, in practice, judges will ask counsel for a specific case to support an argument which is on "all fours" rather than a statute or codal provision which are usually more general principles to which deductive reasoning must be applied.

possibility of nearly infinite and unpredictable liability for defendants." **Consolidated Rail Corp. v. Gottshall**, 512 U.S. 532, 546 (1994).[2]

The majority opinion recognizes that public policy considerations require reasonable limits on recovery for negligent infliction of emotional distress and proceeds to evaluate the jurisprudence. Although the majority performs an excellent analysis of the jurisprudence, I would avoid jurisprudentially imposing guidelines that are applied with "policy considerations" untethered to legislation. Rather, in the civilian tradition, I find it more appropriate to base the analysis on the Civil Code, which already reflects aspects of the legislative will regarding the policy of limiting claims for negligent infliction of emotional distress without physical damage or injury. The analysis should begin with legislation.

Louisiana C.C. art. 2315.6 specifically defines the limits on recovery for mental distress damages by bystanders. In addition to defining the narrow class of bystanders who may recover damages for mental anguish or emotional distress suffered as a result of another person's injury,[3] the article defines the type of emotional distress injuries that are compensable:

> To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or

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[2] This court recognized similar concerns in **Lejeune**, 556 So.2d at 569-70.

[3] La. C.C. art. 2315.6 (A) states:

> The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:
>
> (1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.
> (2) The father and mother of the injured person, or either of them.
> (3) The brothers and sisters of the injured person or any of them.
> (4) The grandfather and grandmother of the injured person, or either of them.

> emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable.

La. C.C. art. 2315.6 (B). Although this case does not directly involve bystander damages, Article 2315.6 nonetheless provides a template for addressing emotional distress injuries where there in no corresponding physical harm. The reasons for limiting recovery in this case are no different. Applying the legislative limitations delineated in Article 2315.6 by deductive reasoning and analogy is consistent with a civilian methodology, which requires judges "to search for legal concepts in the Civil Code delimiting a pattern of competing interests closely resembling the interests pressing for recognition in the instant case." James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 L.Law.Rev. 1, 15 (1993). This methodology is logical because "[a] code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge. For laws, once drafted, remain as they were written. Men, on the contrary, are never at rest; they are constantly active, and their unceasing activities, the effects of which are modified in many ways by circumstances, produce at each instant some new combination, some new fact, some new result." Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 769 (1969) (citing THE PRELIMINARY DISCOURSE OF PORTALIS, M. Shael Herman trans.). This court has also recognized:

> It is in the nature of codified law to be in the form of general rules and principles rather than specific solutions for individual fact situations. Accordingly, the courts which administer justice in a system of written law must do more than mechanically apply the law. These courts have the duty to interpret the written law and to fix the meaning of terms in their proper context, to determine the applicability of the articles to new fact situations, to make extensions by analogy in appropriate civilian fashion, and to solve new problems in a manner consistent with existing laws.

Bergeron v. Bergeron, 492 So.2d 1193, 1197-98 (La. 1986) (internal citations omitted). As explained by the eminent civilian scholar, Professor Alain Levasseur, "the civilian reasons by analogy from a statutory provision the same as from any other legal rule." Alain A. Levasseur, *Portalis and Pound: A Debate on "Codification"*, 81 La. L. Rev. 1113, 1127 (2021) (internal citation omitted).

Likewise, former Justice Dennis further instructs:

> Whenever the judge finds such a gap in the Code, the Code expressly requires him to decide the case anyway, implicitly requiring that he resort either to analogy or to rulemaking in order to fashion a concept or rule to adjust the conflict of interests in the case before him.
>
> The method of analogy has always been used in the civil law. Although the facts of a particular case may not have been foreseen by any code article, if the same conflict of interests underlying the dispute before the court has been expressly regulated by a legislated rule or concept, the judge must balance the interests or resolve the conflict between them in the same manner in the instant case. Whenever the facts of a particular case are not foreseen by the code article, the judge must first determine the conflict of interests which underlies the dispute. Then he must examine whether or not that same conflict of interests underlies other factual situations which have been expressly regulated by legislation. If the answer is in the affirmative, he must transfer the value decision, or the balance of interests, contained in the article to the facts of the dispute presented before him, that is to say, he must decide the identical conflict of interests in the same way.

Dennis, 54 L.Law.Rev. at 11-12. Louisiana C.C. art. 2315.6 clearly expresses the legislative will regarding line-drawing relative to recovery of emotional distress damages.

Ultimately, I agree with the result of the thoughtful and thorough opinion of the majority, but I would take a more civilian approach to reach that decision. It is appropriate for this court to follow the legislative policy incorporated in Article 2315.6 and apply the same limits in this case: to recover for mental anguish or emotional distress in the absence of physical injury, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer

serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable. Considering the record, and applying this standard to the facts of this case, I find that plaintiffs are not entitled to recover damages for their mental distress. I agree with the majority that the rulings of the district court should be reversed.

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On Supervisory Writ to the 34th Judicial District Court, Parish of St. Bernard

CRAIN, J., concurs and assigns reasons.

I concur in the result and the majority's recognition of negligent infliction of emotional distress absent physical damage as a valid tort. I further concur that the scope of this tort is limited, thus requiring stringent analysis to fulfill our objective of guaranteeing no spurious claims. However, I respectfully disagree that the standard embraced by the majority will achieve that just end.

Because defining the scope of this tort involves policy considerations that are normally best left to the legislative branch of government, we should be mindful of the jurisprudential evolution of this tort in Louisiana and any expressions by the legislature relative to it. As an independent theory of liability, the tort of negligent infliction of emotional distress absent physical injury was first recognized by this court in *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 561 (La. 1990), after being rejected for more than a century. (*See Black v. Carrollton R.R. Co.*, 10 La. Ann. 33

(1855), where the tort was first discussed and rejected. That standard held for the next 135 years.) In *Lejeune*, the "bystander recovery rule"–that is, recovery for mental pain and anguish due to an injury to a third party–was recognized and defined. Later that same year, a direct claim of negligent infliction of emotional distress–that is, recovery for mental pain and anguish inflicted directly upon the plaintiff himself–was recognized, although the plaintiffs' claims were denied for failing to meet their burden of proof. *Moresi v. State Through Dept. of Wildlife & Fisheries*, 567 So.2d 1081, 1096 (La. 1990). Again that same year, in *Clomon v. Monroe City Sch. Bd.*, 572 So.2d 571 (La. 1990), the bystander recovery rule was expanded and recovery was allowed for a bystander who did not have a close relationship to the third party victim.

In apparent response to these jurisprudential developments, in 1991, the legislature enacted Louisiana Civil Code article 2315.6, recognizing the bystander recovery theory of negligent infliction of emotional distress, but with significant restrictions as to the class of persons allowed recovery and the extent of the emotional distress required to recover. We are now tasked with articulating a standard for recovery applicable to negligent infliction of emotional distress claims other than those involving the "bystander recovery rule." As noted in *Lejeune*, 556 So. 2d at 569, "there are policy reasons for placing limits on the types of claims that may be redressed." These limits are not to frustrate the pursuit of valid claims; rather, they are to authenticate them, thus ensuring their recovery while thwarting the consumption of limited resources on spurious claims.[1]

[1] In an asbestos exposure case, the U.S. Supreme Court mused, "In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease? Cf. J. Weinstein, Individual Justice in Mass. Tort Litigation 10–11, 141 (1995); Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541(1992)." *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 435–36, 117 S. Ct. 2113, 2120, 138 L. Ed. 2d 560 (1997).

The majority acknowledges these cases, as well as others (*Bonnette*,[2] *Arco*,[3] and *Prest*[4]), and Article 2315.6, but distinguishes them because in each the class of plaintiff differs from those presenting here. However, I believe what is most important is not the differences, but what is common to all. The common thread is each involves damages for mental and emotional distress absent physical injury.[5] And in each, regardless of the class of plaintiff, recovery is allowed only for severe and debilitating emotional distress.

The majority adopts a standard of negligence and serious injury. They attempt to define what the tort is by defining what it is not. I believe that approach will only frustrate the objective we all agree upon—guaranteeing these claims are not spurious. To the contrary, our definition should be narrowly tailored to restrict recovery to exceptional cases, as the legislature did in enacting Article 2315.6. Again, in *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396, 2401, 2405, 512 U.S. 532, 537, 546 (1994), the United States Supreme Court correctly observed that the "restrictive attitude" toward these claims is to prevent "the very real possibility of nearly infinite and unpredictable liability for defendants." Courts have pursued this goal by putting restrictions on the class of plaintiffs who may recover and the injuries that are compensable. Id. at 2405-2406.

To define the appropriate limits for the tort, we turn to analytical principles rooted in our civilian tradition. Because negligence is involved, we apply the duty-risk analysis. Under that approach, a plaintiff must prove each of the following five elements to recover: (1) the defendant had a duty to conform his conduct to a

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[2] *Bonnette v. Conoco, Inc.*, 01-2767 (La. 1/28/03), 837 So.2d 1219.

[3] *Arco Oil & Gas Co. v. DeShazer*, 98-1487 (La. 1/20/99), 728 So.2d 841.

[4] *Prest v. Louisiana Citizens Prop. Ins. Corp.*, 12-513 (La. 12/4/12), 125 So.3d 1079.

[5] It is important to note that "absent physical injury" refers to no concomitant physical impact from the negligent act, not a physical reaction to the emotional distress.

specific standard (the duty element); (2) the defendant's conduct failed to conform to the applicable standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of the duty element); and (5) actual damages (the damages element). *See Lemann v. Essen Lane Daiquiris, Inc.*, 05–1095, p. 7 (La. 3/10/06), 923 So.2d 627, 633.

Duty:

Louisiana Civil Code article 2315 creates accountability for fault, stating, "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it." It is the source of the duty owed in this case because the act (negligently operating the refinery) allegedly caused damage (mental anguish and emotional distress) to another (plaintiffs), thus creating an obligation for the defendant to repair it. Looking at the element of duty broadly, as we are required to do, the defendant owed a duty of care to the community in which it operated its refinery. There are no moral, social, or economic considerations requiring the categorical exclusion of this duty, nor is there a reason to exclude an entire category of defendants (refinery operators and owners) from exercising reasonable care. *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 4 762, 766 (La. 1999).

Breach and Causation

Through a series of acts or omissions that resulted in an explosion and fire, the defendant breached its duty of care. Plaintiffs allege their harm, specifically generalized fear and anxiety, was caused by the breach. Thus, I find the elements of duty, breach, and cause-in-fact are easily met.

Scope of the Duty

We next analyze the scope of the duty, asking whether mental distress absent physical injury is a harm risked when the defendant negligently operated a valve, releasing combustible chemicals that ignited. As stated in my concurrence in *McKesson v. Doe*, 21-929 (La. 3/25/22), 339 So.3d 524, this element asks whether the stated duty extends to support liability for a particular circumstance. *See* Louisiana Tort 19 Law at § 5.02[7]. The question is, "should this plaintiff recover from this defendant for these particular damages that arose in this particular manner?" *Id.* at § 3.05. This inquiry is generally not a policy question; rather it is a matter of common sense, justice and fairness. *Id.* at 5.02[7]. At this stage of the analysis, foreseeability and ease of association of the injury are relevant considerations. *Hill*, 256 So. 2d at 622, citing Prosser, Law of Torts (3rd ed. 1964), 282.

The majority concludes, "Plaintiffs fall within the broad class of plaintiffs to whom a duty is owed." As a reference to legal cause, I disagree. It is not foreseeable that the negligent act of opening the outlet valve instead of the inlet valve, which caused pressurized chemicals to ignite, would cause a person with reasonable sensibilities outside the exposure area of both the fire and any released chemicals to suffer emotional distress. In this regard, one useful test applied by several common law jurisdictions is the "zone of danger" test, which, based on proximity, requires either actual physical injury or an immediate risk of physical harm. As explained in *Gottshall*, *supra* "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot." *Gottshall*, 512 U.S. at 547-48, 114 S. Ct. at 2406. This test recognizes the common sense reality that the closer a plaintiff is to the cause of alleged harm, the more foreseeable that that person may suffer harm; thus, that plaintiff is more likely to recover. While this test is not controlling in all

negligent infliction of emotional distress cases, where the class of plaintiffs allege fear of some physical contact or exposure, the zone of danger test is helpful in analyzing foreseeability.

In this case, I believe application of the zone of danger test is determinative. No significant level of chemicals was detected after the explosion. No chemical was shown to have reached any of the plaintiffs. The fire was neither large enough nor of sufficient duration to physically affect plaintiffs. Plaintiffs failed to show they were in immediate risk of physical harm from the explosion. Because they were outside the zone of danger, it was not reasonably foreseeable that the defendant's breach would cause these plaintiffs harm. Because there is no ease of association between the duty of the refinery to exercise reasonable care and the risk that plaintiffs would develop general anxiety, fear, or emotional distress, I find the element of legal cause or scope of the duty is not met. Thus, plaintiffs' claims fail.

Damages

Even if legal cause is established, I agree with the majority that the element of damages is not met. "Serious" injury is required. The problem with the majority's approach is that "serious" is not defined; rather, it is left to be defined in an ad hoc manner, determined largely through the eyes of the beholder. A more discriminating test was signaled by the legislature and our prior jurisprudence, and I would adopt it. Article 2315.6 states:

> To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious anguish or emotional distress from the experience, and the claimant's mental anguish or emotional stress *must be severe, debilitating, and foreseeable.*

(emphasis added). We need not guess how the legislature would define recoverable mental or emotional distress absent physical injury. It has done so. It is "severe, debilitating, and foreseeable." The fact that Article 2315.6 is written for the class of

plaintiffs in a "bystander" case is immaterial. The damage is the same. The majority makes no attempt to explain why the damage should be defined differently when a bystander is not involved. I think it should not.

The legislature also requires foreseeability to recover under Article 2315.6. Again, there is no logical reason to reject foreseeability as a factor in determining liability, particularly when it is already part of the legal analysis under duty-risk. *See supra*. I would adopt the standard of "severe, debilitating, and foreseeable" to define recoverable damages.[6] Because there was no evidence that plaintiffs experienced severe and debilitating emotional distress, I find they failed to satisfy the damage element of the duty-risk analysis.

Conclusion

As it relates to bystander damages, the legislature limited the availability of the tort by restricting the class of plaintiffs and defining the damages. The legislature's silence on the relevant restrictions for other claims for negligent infliction of emotional distress puts the development of such restrictions within the province of the judiciary. The duty-risk analysis is the analytical tool utilized by the courts to determine whether a defendant should bear the cost of a plaintiff's alleged injury in given circumstances. Each of the five elements play an essential role in making this determination. In this case, the elements of legal cause (scope of the duty) and damages are determinative. Guided by legislative policy decisions, our jurisprudence, and a strict application of the duty-risk test, I find the legal cause and

[6] It is notable that the tort of intentional infliction of emotion distress requires "severe" injury. In those cases, this court has stated, "The distress suffered must be such that no reasonable person could be expected to endure it. Liability arises only where the mental suffering or anguish is extreme." *White v. Monsanto Co.*, 585 So. 2d 1205, 1210 (La. 1991). Why should we require a lesser standard for proving emotional harm caused by negligent acts than by intentional ones?

the damage elements were not met. Thus, I concur in the reversal of plaintiffs' awards.

SUPREME COURT OF LOUISIANA

No. 2022-CC-00469

BRITTANY LYNN SPENCER

VS.

VALERO REFINING MERAUX, LLC

C/W

No. 2022-CC-00539

KEVREION RAINES VS. VALERO REFINING MERAUX, L.L.C.

C/W

No. 2022-CC-00730

ROSEMARY GAGLIANO VS. VALERO REFINING MERAUX, L.L.C.

On Supervisory Writ to the 34th Judicial District Court, Parish of St. Bernard

MCCALLUM, J., concurs and assigns reasons.

I concur in the result reached by the majority. I also agree with much of what my concurring colleagues have said; their analysis corresponds to my own in reaching a result in this discrete case. Resolving disputes by deciding cases is this Court's foremost function. In doing so, we should bear in mind that in our civilian tradition of *jurisprudence constante*, it is only of secondary importance that our opinions may provide some guidance concerning the meaning or application of laws in a prospective context.

Jurisprudence constante flows naturally from Louisiana's written declaration that judicial decisions are not a source of law (*See*: Civil Code Articles 1-3).[1]

[1] Louisiana Civil Code article 1 provides two sources of law: "legislation and custom." And, while "[l]egislation is a solemn expression of legislative will" under La. C.C. art. 2, our code contemplates custom as well, which "results from practice repeated for a long time and [which is] generally accepted as having acquired the force of law." La. C.C. art. 3. However, "[c]ustom may not abrogate legislation." *Id.*

Understandably, no system of written laws can formulate a specific remedy for every possible future conundrum. As Portalis, the leading drafter of the Code Napoleon noted, in foreseeing that "the code must constantly be applied to unexpected issues and circumstances: A code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge. . . . A. Levasseur, Code Napoleon or Code Portalis? 43 Tul.L.Rev. 762, 769 (1969) (Translation by Shael Herman)." *Reynolds v. Bordelon*, 2014-2362, p. 12 (La. 6/30/15), 172 So. 3d 589, 599. When a perceived vacuum in the law exists, a judge must use a civilian approach, ineradicably fixed in the Civil Code and statutory law, to reach a result and render a decision.

However, our words are only "the law" as concerns the particular case under consideration. The words of a literary critic may be instructive in understanding the meaning of a poem, but they do not constitute the original work itself. Likewise, our opinions do not constitute the law, but reflect only our attempt to apply the existing, written law to the facts of a case.

It is sufficient that we have resolved the litigation among these parties and prevented a contrary result from becoming part of our *jurisprudence constante*. The court must not allow *horror vacui* to coerce us to provide filler for every vacuum or gap in the law. We need not create a new "judicial doctrine." Filling these vacuums is a legislative function that must not be usurped by judicial pronouncements.

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GRIFFIN, J., additionally concurs and assigns reasons.

I agree with the majority that no plaintiff has put forth sufficient evidence that indicates there was "an especial likelihood of genuine and serious mental distress" that serves to guarantee a claim is not spurious. *Moresi v. State Through Dep't of Wildlife & Fisheries*, 567 So.2d 1081, 1096. "Minimal and normal inconvenience is not compensable." *Arco Oil & Gas Co., A Div. of Atlantic Richfield Co. v. DeShazer*, 98-1487, p. 5 (La. 1/20/99), 728 So.2d 841, 845. A plaintiff must show some objective basis for their mental distress distinct from that which individuals experience from the dangers inherent in the realities of modern life. *See, e.g., Doerr v. Mobil Oil Corp.*, 04-1789, pp. 10-11 (La.App. 4 Cir. 6/14/06), 935 So.2d 231, 238 (plaintiff's claims of inconvenience and concerns over using tap water were corroborated as it was undisputed that contaminants had been released in the water supply); *Cooper v. Christensen*, 212 So.2d 154, 156 (La.App. 4th Cir. 1968)

(accident aggravated plaintiff's prior mental illness requiring brief hospitalization in a mental institution and resulting in physical manifestations including headaches and shortness of breath).