

SUPREME COURT OF LOUISIANA

---

DOCKET NO. 2022-CC-469

---

BRITTANY LYNN SPENCER,  
*Plaintiff-Respondent*

Versus

VALERO REFINING MERAUX, LLC,  
*Defendant-Applicant*

---

A CIVIL PROCEEDING

---

On Application for supervisory writ or writ of certiorari and review  
to the Court of Appeal, Fourth Circuit  
Parish of St. Bernard

---

**INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL'S BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPLICANT'S BRIEF ON THE MERITS**

---

Respectfully submitted,

Kelly Brechtel Becker (Bar #27375)  
kbbecker@liskow.com  
Mark R. Deethardt (Bar #34511)  
mrdeethardt@liskow.com  
LISKOW & LEWIS, APLC  
Hancock Whitney Center  
701 Poydras Street, Suite 5000  
New Orleans, Louisiana 70139-5099  
Telephone: (504) 581-7979  
Facsimile: (504) 556-4108

*Attorneys for International Association of  
Defense Counsel*

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. LEGAL ARGUMENT .....	2
III. CONCLUSION.....	5
CERTIFICATE OF SERVICE .....	6

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b>Cases</b>	
<i>Bonnette v. Conoco, Inc.</i> , 2001-2767 (La. 1/28/03), 837 So. 2d 1219.....	3
<i>Broussard v. State ex rel. Office of State Bldgs.</i> , 2012-1238 (La. 4/5/13), 113 So. 3d 175.....	4
<i>Consolidated Rail Corp. v. Gottshall</i> , 512 U.S. 532 (1994).....	5
<i>Covington v. Howard</i> , 49,135 (La. App. 2 Cir. 8/13/14), 146 So. 3d 933, <i>writ denied</i> , 2014-1927 (La. 11/21/14), 160 So. 3d 973.....	4
<i>Crabtree v. State Farm Ins. Co.</i> , 632 So. 2d 736 (La. 1994).....	2
<i>Hedgepeth v. Whitman Walker Clinic</i> , 22 A.3d 789 (D.C. 2011).....	4, 5
<i>LeJeune v. Rayne Branch Hosp.</i> , 556 So. 2d 559 (La. 1990).....	2, 3
<i>Meany v. Meany</i> , 94-0251 (La. 7/5/94), 639 So. 2d 229.....	4
<i>Palmero v. Port of New Orleans</i> , 2004-1804 (La. App. 4 Cir. 1/19/07), 951 So. 2d 425, <i>writ denied</i> , 2007-0363 (La. 6/13/07), 957 So. 2d 1289.....	4
<i>Trahan v. McManus</i> , 97-1224 (La. 3/2/99), 728 So. 2d 1273.....	3
<i>White v. Monsanto Co.</i> , 585 So. 2d 1205 (La. 1991).....	3, 4
<i>Williams v. City of Baton Rouge</i> , 98-1981 (La. 4/13/99), 731 So. 2d 240.....	3
<b>Statutes</b>	
LA. CIV. CODE art. 2315.....	4
LA. CIV. CODE art. 2315.6.....	2, 3
LA. CODE CIV. P. art. 966(A)(2).....	5
RESTATEMENT (SECOND) OF TORTS.....	4
RESTATEMENT (THIRD) OF TORTS.....	2, 3
RESTATEMENT (THIRD) OF TORTS: Phys. & Emot. Harm § 47(b) (2012).....	4, 5

**Other Authorities**

Louisiana Economic Development, Louisiana Economic Quarterly (Q2 2016),  
<https://www.opportunitylouisiana.gov/eq/q2-2016/louisiana-process-industries>  
(last visited Oct. 17, 2022) .....1

State of Louisiana Department of Natural Resources, Refinery Maps and other Oil  
& Gas Related Maps,  
<http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=204>  
(last visited Oct. 17, 2022) .....1

Thomas C. Galligan, Jr., *Let the Jury Decide! A Plea for the Proper Allocation of  
Decision-Making Authority in Louisiana Negligence Cases*,  
94 TUL. L. REV. 769 (2020) .....2

U.S. Energy Information Administration, Louisiana State Energy Profile  
(Updated May 19, 2022), <https://www.eia.gov/state/print.php?sid=LA>  
(last visited Oct. 17, 2022); .....1

## I. INTRODUCTION

This case presents the Court with an important opportunity to set forth the parameters for when a plaintiff is allowed to recover for negligent infliction of emotional distress without suffering personal injuries or property damage. The separate *amicus curiae* brief filed by the Louisiana Association of Business and Industry and the Louisiana Coalition for Common Sense (the “Industry *Amici*”) urges this Court to adopt a bright-line, duty-based approach to NIED claims. Under this framework, a plaintiff can recover on an NIED claim where, among other elements, a defendant undertakes an independent, direct duty to the plaintiff that implicates the plaintiff’s emotional wellbeing. The International Association of Defense Counsel (“The IADC”) agrees with the Industry *Amici* and likewise urges this Court to adopt this bright-line duty rule to NIED claims.

The IADC writes separately to advise the Court that the limiting approach advocated by the Industry *Amici* is consistent with recent commentary from a leading scholar on Louisiana tort law, as well as this Court’s historical practice of placing stringent criteria on the recovery of emotional damages, which are inherently speculative. This approach will further provide Louisiana courts with a clear framework for determining as a legal matter, for instance on summary judgment, whether the defendant owes the plaintiff an independent duty sufficient to support an NIED claim. Having a practical and workable mechanism for potentially resolving thousands of non-meritorious NIED claims prior to trial will curb time-consuming and costly mass actions based on events at industrial facilities like the one here.<sup>1</sup> This is the exact goal that Louisiana’s summary judgment procedure was designed to achieve—a goal that the Fourth Circuit’s opinion in this case thwarts.

Allowing the Fourth Circuit’s decision to stand leaves industries with little to no predictability regarding the scope of the duty to protect against emotional distress. Thus, The IADC respectfully submits that this Court’s guidance is sorely needed, and that NIED claims

---

<sup>1</sup> Louisiana is home to over a dozen crude oil refineries and hundreds of other industrial facilities, which may face events in their operations similar to what occurred at Valero’s refinery. *See* U.S. Energy Information Administration, Louisiana State Energy Profile (Updated May 19, 2022), <https://www.eia.gov/state/print.php?sid=LA> (last visited Oct. 17, 2022); State of Louisiana Department of Natural Resources, Refinery Maps and other Oil & Gas Related Maps, <http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=204> (last visited Oct. 17, 2022); Louisiana Economic Development, Louisiana Economic Quarterly (Q2 2016), <https://www.opportunitylouisiana.gov/eq/q2-2016/louisiana-process-industries> (last visited Oct. 17, 2022).

should be curtailed to those situations where a defendant undertakes a special duty implicating the plaintiff's emotional wellbeing.

## II. LEGAL ARGUMENT

There are several important reasons for this Court to recognize a duty-based limiting principle for NIED claims under Louisiana law.

*First*, this approach was implicitly endorsed in a recent law review article by one of the leading commentators on Louisiana tort law, Professor Thomas Galligan. *See* Thomas C. Galligan, Jr., *Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases*, 94 TUL. L. REV. 769 (2020). In that article, Professor Galligan argues that this Court should follow the approach to negligence adopted in the Restatement (Third) of Torts and recognize a general duty to exercise reasonable care to others in garden variety negligence cases. *Id.* at 828–29. Notably, however, Professor Galligan does not advocate for a sweeping tort duty in all instances. Instead, Professor Galligan suggests an important qualification, noting that “despite [its] breadth, Louisiana jurisprudence has long recognized that the law does not impose unlimited liability, and in broad categories of cases, the Louisiana Supreme Court may, after an articulated analysis of the relevant Code articles, policies, and jurisprudence (both in Louisiana and elsewhere), conclude that the general duty to exercise reasonable care either should not apply or should be cabined by other broadly applicable rules.” *Id.* at 829. The principle that broad tort duties should be limited in appropriate circumstances is particularly relevant where claimants seek damages purely for emotional distress. Indeed, Professor Galligan cites *LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559, 569 (La. 1990), as an example of an appropriate case where this Court recognized the right to bystander recovery for emotional damages but further chose to “narrow the circle of plaintiffs who may be allowed to recover[.]” to prevent indefinite and indeterminate liability. *See* Galligan, at 828 n.375.

This Court's approach in *LeJeune* should be followed in this case. Specifically, just as this Court in *LeJeune* established a narrow category of claimants who could recover bystander damages for emotional distress,<sup>2</sup> so too should this Court apply Professor Galligan's suggestion to restrict

---

<sup>2</sup> The Louisiana Legislature approved this Court's limiting approach to bystander recovery by codifying *LeJeune* in Civil Code article 2315.6. *See Crabtree v. State Farm Ins. Co.*, 632 So. 2d 736, 738 n.2 (La. 1994). In fact, the Legislature placed additional restrictions on who may recover for such damages based on close family relationships. *See* LA. CIV. CODE art. 2315.6(A)(1)-(4).

the category of plaintiffs who can recover for emotional distress without personal injury. Recovery in such cases should be limited to those plaintiffs for whom the defendant undertook a direct duty to protect their emotional wellbeing.<sup>3</sup>

**Second**, this Court has historically taken a cautious approach in allowing claims for emotional distress damages, and adoption of a duty-oriented limiting principle would be consistent with that treatment. Because emotional damages are inherently speculative, Louisiana courts have been careful to limit the circumstances under which they may be recovered. *See Bonnette v. Conoco, Inc.*, 2001-2767 (La. 1/28/03), 837 So. 2d 1219, 1235. Outside of exemplary damages, emotional distress damages have been curtailed more than any other category of damages. *See, e.g., Bonnette*, 837 So. 2d at 1234–36 (requiring plaintiff to establish that claim for emotional distress based on exposure to asbestos was “not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances”); *Williams v. City of Baton Rouge*, 98-1981 (La. 4/13/99), 731 So. 2d 240, 250 n.5 (listing limiting elements for recovery of emotional distress arising out of property damage claim); *Trahan v. McManus*, 97-1224 (La. 3/2/99), 728 So. 2d 1273, 1279 (requiring plaintiff to be contemporaneously aware of injury-causing event to direct victim to recover for bystander damages under article 2315.6); *White v. Monsanto Co.*, 585 So. 2d 1205, 1209–10 (La. 1991) (requiring extreme and outrageous conduct to recover for intentional infliction of emotional distress); *LeJeune*, 556 So. 2d at 569 (articulating limitations on recovery for bystander damages); *see also* LA. CIV. CODE art. 2315.6 (codifying *LeJeune* and placing additional limitations on recovery for bystander damages). There is no principled reason to place less stringent criteria on the recovery of speculative emotional damages for NIED.

Further, this Court’s historical approach to limiting emotional distress damages aligns with the approaches adopted in the Restatement (Third) and other jurisdictions, which have adopted duty-based limiting principles for NIED claims. For example, the Restatement (Third) instructs that “[a]n actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct occurs in the course of specified categories of activities,

---

<sup>3</sup> As cogently articulated by the Industry *Amici*, the policy reasons for applying a limiting principle in cases involving pure emotional distress claims are clear—it will foster certainty and uniformity in the law, avoid *ad hoc* decision-making, and promote economic stability by minimizing the risk of businesses being subject to indefinite liability from an unlimited number of individuals.

undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.” Restatement (Third) of Torts: Phys. & Emot. Harm § 47(b) (2012).<sup>4</sup> Additionally, in *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 810 (D.C. 2011), the District of Columbia Court of Appeals undertook a comprehensive historical analysis of the development of NIED claims and ultimately adopted the same rule advocated by the Industry *Amici*—recovery for NIED is permitted if the plaintiff can establish that “the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff’s emotional well-being.” The *Hedgepeth* court cited the following illustrative examples of special relationships that may implicate a plaintiff’s emotional wellbeing: (1) the relationship between a therapist and a patient; (2) certain other doctor-patient relationships; (3) the relationship between a funeral home and its customers to properly handle human remains; and (4) the relationship between guardians and counsel who are appointed to represent vulnerable individuals, such as children, the elderly, or those with disabilities. *Id.* at 813–14.

**Finally**, “protect[ing] the court’s time and limited resources” is an underlying policy goal of limiting recovery for NIED claims without physical injuries. *Covington v. Howard*, 49,135 (La. App. 2 Cir. 8/13/14), 146 So. 3d 933, 937, *writ denied*, 2014-1927 (La. 11/21/14), 160 So. 3d 973. Tying NIED claims to a defendant’s duty is not only consistent with Louisiana’s duty-risk analysis under Civil Code article 2315, it also has the practical effect of promoting judicial efficiency. *See id.* The threshold inquiry in any Louisiana negligence action is whether the defendant owed the plaintiff a duty. *Meany v. Meany*, 94-0251 (La. 7/5/94), 639 So. 2d 229, 233. “It is axiomatic that the issue of whether a duty is owed is a question of law,” which is decided by the judge. *Broussard v. State ex rel. Office of State Bldgs.*, 2012-1238 (La. 4/5/13), 113 So. 3d 175, 185. “Absent a duty to the plaintiff, there can be no actionable negligence and hence no liability.” *Palmero v. Port of New Orleans*, 2004-1804 (La. App. 4 Cir. 1/19/07), 951 So. 2d 425, 434, *writ denied*, 2007-0363 (La. 6/13/07), 957 So. 2d 1289. Thus, by properly reframing the NIED analysis in terms of a defendant’s duty, Louisiana courts can serve a critical gatekeeping function by determining as a threshold legal question whether the defendant owes the plaintiff a duty under the circumstances.

---

<sup>4</sup> This Court has previously relied on prior versions of the Restatement of Torts to adopt fault-based principles that are consistent with Civil Code article 2315. *See White v. Monsanto, Co.*, 585 So. 2d 1205, 1208–09 (La. 1991) (relying on Restatement (Second) of Torts as guidance in determining that Louisiana recognizes cause of action for intentional infliction of emotional distress).



In industrial occurrences like the one here, this could potentially obviate the need for hundreds or thousands of individual trials on the severity of emotional distress if a court were to find no legal duty extending to the protection of a plaintiff's emotional wellbeing in the first place.

For instance, a clear duty-based analysis could fulfill the express purpose of Louisiana's summary judgment procedure, which the Legislature has stated in no uncertain terms "is designed to secure the just, speedy, and inexpensive determination of every action." LA. CODE CIV. PROC. art. 966(A)(2). In contrast, the amorphous standard adopted by the Fourth Circuit in this case—which does not consider the relationship between the plaintiff and defendant and provides no guidelines for what constitutes genuine and serious emotional distress—actively undermines that purpose and promotes the inefficient and costly determination of thousands of claims.

These policy considerations are precisely what led the court in *Hedgepeth* to conclude that "the rule based on undertakings or special relationships . . . squarely addresses the concern . . . that compensable emotional injuries could be infinite if courts do not impose limitations on duty beyond the concept of mere foreseeability . . . [and] draws a finite and circumscribed area of liability, to identifiable claimants." 22 A.3d at 818–19. The duty-based rule to NIED adopted in the Restatement (Third) and *Hedgepeth* alleviates "the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 552 (1994). For the same reasons, this rule should be adopted in Louisiana.

### **III. CONCLUSION**

Based on the foregoing, and for the reasons stated in the brief filed by the Industry *Amici*, the Court should use this case as an opportunity to adopt and articulate a bright-line, duty-based approach to NIED claims for Louisiana. Such an approach will maintain a consistent, cautious framework within Louisiana with respect to any and all claims for emotional distress damages.

Respectfully submitted,

/s/ Kelly Brechtel Becker

Kelly Brechtel Becker (Bar #27375)  
kbbecker@liskow.com  
Mark R. Deethardt (Bar #34511)  
mrdeethardt@liskow.com  
LISKOW & LEWIS, APLC  
Hancock Whitney Center  
701 Poydras Street, Suite 5000  
New Orleans, Louisiana 70139-5099  
Telephone: (504) 581-7979

*Attorneys for International Association of  
Defense Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2022, a copy of the above and foregoing Brief of *Amicus Curiae* has been duly served upon the Honorable William Martin McGoey, Judge, 34<sup>th</sup> Judicial District Court, Division “A”, 1101 W. St. Bernard Hwy, Chalmette, LA 70043, Phone No. (504) 278-4414, Case # 21-0225 c/w 21-0226 and 21-0227; to the Honorable Justin I. Woods, Clerk of Court, Louisiana Court of Appeal, Fourth Circuit, 410 Royal Street, New Orleans, LA. 70130, Case No. 2021-C-0383, Phone No. (504) 412-6001 via Federal Express; and upon all counsel of record via email, postage prepaid and properly addressed, at the business addresses listed below.

Raymond P. Ward, # 20404  
Roland M. Vandenweghe, Jr., # 25283  
Taylor E. Brett, # 36392  
**Adams and Reese LLP**  
701 Poydras Street, Suite 4500  
New Orleans, LA 70139-4596  
(504) 581-3234  
(504) 566-0210 fax  
[ray.ward@arlaw.com](mailto:ray.ward@arlaw.com)  
[roland.vandenweghe@arlaw.com](mailto:roland.vandenweghe@arlaw.com)  
[taylor.brett@arlaw.com](mailto:taylor.brett@arlaw.com)

Jacque R. Touzet, # 26535  
**Jacque Touzet, Attorney at Law**  
900 Camp Street, Floor 3  
New Orleans, LA 70130  
(504) 569-8689  
(504) 524-6335 fax  
[jacque@touzetlaw.com](mailto:jacque@touzetlaw.com)

*Counsel for defendant-applicant  
Valero Refining Mereaux, LLC*

Lance V. Licciardi, # 26384  
**Licciardi Law Office, LLC**  
1019 W. Judge Perez Drive  
Chalmette, LA 70043  
(504) 279-1000  
[lance@licciardiandnunez.com](mailto:lance@licciardiandnunez.com)

David C. Jarrell, # 30907  
**Law Offices of David C. Jarrell**  
9101 W. St. Bernard Highway  
Chalmette, LA 70043  
(504) 598-5500  
(504) 598-5501 fax  
[dcj@jarrell-lawfirm.com](mailto:dcj@jarrell-lawfirm.com)

Michael C. Ginart, Jr., # 18910  
**Law Office of Michael C. Ginart, Jr. &  
Associates**  
2114 Paris Road  
Chalmette, LA 70043  
(504) 271-0471  
(504) 271-6293  
[mginart@ginartjones.com](mailto:mginart@ginartjones.com)

*Counsel for plaintiff-respondent,  
Brittany Spencer*

James C. Percy, #10413  
[jpercy@joneswalker.com](mailto:jpercy@joneswalker.com)  
C. Parker Kilgore, #31219  
[pkilgore@joneswalker.com](mailto:pkilgore@joneswalker.com)  
Jones Walker, LLP  
445 North Boulevard, Suite 800  
Baton Rouge, LA 70802  
Telephone: (225) 248-2000  
Facsimile: (225) 248-3080

*Attorneys for the Louisiana Association of  
Business and Industry, Amicus Curiae*

Karen Eddlemon, #17548  
[Karen.eddlemon@bblawla.com](mailto:Karen.eddlemon@bblawla.com)  
4210 Bluebonnet Blvd.  
Bienvenu, Bonnezaz, Foco & Viator, LLP  
Baton Rouge, LA  
Telephone: (225) 388-5612  
Facsimile: (225) 388-5622

*Attorneys for the Louisiana Coalition for  
Common Sense, Amicus Curiae*

/s/ Kelly Brechtel Becker