NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 2359

JERRY LEE BALDWIN

VERSUS

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, THE UNIVERSITY OF LOUISIANA AT LAFAYETTE, NELSON SCHEXNAYDER, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF ATHLETICS FOR THE UNIVERSITY OF LOUISIANA AT LAFAYETTE

Judgment Rendered: JUN 30 2009

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 509,900

Honorable Donald R. Johnson, Judge Presiding

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Eric L. Register
G. Karl Bernard
New Orleans, Louisiana
and
Marshall J. Simien, Jr.
Lake Charles, Louisiana

Counsel for Plaintiff/Appellee
Jerry Lee Baldwin

Lawrence E. Marino
Stephen J. Oats
Robin L. Jones
George O. Luce
Special Asst. Attorneys General
Lafayette, Louisiana

Counsel for Defendants/Appellants
Board of Supervisors for the University of Louisiana System and Nelson Schexnayder

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Welch J. Concurs w/o reasons.
RHP PARRO, J. CONCURS

McCLENDON, J.

Plaintiff, Jerry Lee Baldwin, filed suit against defendants, the Board of Supervisors for the University of Louisiana System (Board), the University of Louisiana at Lafayette (ULL), and Nelson Schexnayder, individually and in his capacity as Director of Athletics for the ULL, alleging several causes of action stemming from termination from his employment. After finding merit in some of the claims, the jury awarded over two million dollars in damages. A judgment in favor of plaintiff was rendered against defendants, with the exception of ULL. All claims against ULL as a separate entity from its supervisor, the Board, were dismissed. The remaining defendants appealed. Finding more than one consequential error that interdicted the fact finding process, we vacate the judgment and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In December of 1998, Mr. Baldwin was employed as the head football coach at ULL. His formal contract was approved by the Board in April of 1999. On November 26, 2001, after three losing football seasons, Mr. Baldwin was relieved of his duties as head coach. However, his salary was paid throughout the remaining term of his contract.

On July 21, 2003, Mr. Baldwin filed a suit alleging breach of contract, intentional and negligent infliction of emotional distress, tortious interference with a contract, and abuse of rights. By an amending and supplemental petition filed on September 17, 2004, Mr. Baldwin alleged racial discrimination.

On March 21, 2005, the defendants filed a motion for summary judgment asking that plaintiff's claims be dismissed. On the discrimination claim, the trial court, in its oral reasons, found "some issues or claims that are disputed, but I'm of the opinion ... that the system of the administration at the university separated its employment relationship with Mr. Baldwin for reasons that are not illegal or unlawful." A partial judgment dismissing the racial discrimination claim with prejudice was signed on November 21, 2005. By an order signed on February 24, 2006, the trial court granted a motion to certify as final the partial judgment dismissing the racial discrimination claim and plaintiff appealed that judgment. Subsequently, the trial court denied defendants'

motion for summary judgment on the claims of intentional or negligent infliction of emotional distress, tortious interference with contract, and breach of contract. The ruling on the claim of abuse of rights was unclear. Mr. Baldwin appealed the grant of the summary judgment dismissing his racial discrimination claim.

On appeal, Mr. Baldwin asserted that ULL's reasons for the firing were pretextual, and that the termination was actually based on race. In reviewing the correctness of the partial summary judgment on appeal, we followed the analysis from **McDonnell Douglas Corporation v. Green**, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Initially, we found that Mr. Baldwin had presented to the trial court a *prima facie* case of racial discrimination. Specifically, he offered evidence to show that he was an African-American, his background as a high school football coach and assistant coach at Louisiana State University (LSU) qualified him for the position of head coach at ULL, he was removed from his duties, and he was replaced by a white male.

We then noted that, to counter Mr. Baldwin's evidentiary showing on the motion for summary judgment, defendants offered what they considered to be legitimate and nondiscriminatory reasons for the removal. Defendants pointed to the three losing seasons comprising Mr. Baldwin's tenure and the significant drop in game attendance, particularly in light of a pending NCAA rule that required a higher level of attendance for ULL to maintain its Division 1-A status. Defendants also argued that the win/loss record and the low attendance combined to create a budget crisis that demanded an immediate change in the head football coaching position.

In response to ULL's counter, Mr. Baldwin argued to the trial court that the reasons offered by ULL were not the true reasons and were merely pretextual. As support, Mr. Baldwin highlighted evidence that he believed undermined ULL's claim of nondiscriminatory reasons.

After our review, this court held that Mr. Baldwin had established that many issues of material fact remained, and thus, the trial court erred in granting the summary judgment dismissing the claim of racial discrimination. We reversed and remanded to the trial court for further proceedings. **Baldwin v. Board of Supervisors for**

University of Louisiana System, 2006-0961, pp. 11-12 (La.App. 1 Cir. 5/4/07), 961 So.2d 418, 424-25.

After a trial on the merits of the claims, which was held between October 9-18, 2007, the jury found as follows:

On the claim of racial discrimination, the jury answered "no" to question 1 concerning whether the Board "terminated Plaintiff, Jerry Baldwin, because of his race." However, the jury answered "yes" to question 2 on whether "Coach Baldwin's race was a determining factor in his termination by the [Board]."

On the claim for breach of contract, the jury found in question 3 that the contract was breached, but found in question 4 that the breach was not in bad faith.

On question 5, whether the claim of abuse of rights had been proved, the jury answered "yes" to questions 5 b, 5 c, and 5 d, three of the valid bases for a finding of abuse of rights. The jury checked "yes" to a summary question appearing at the end of the question 5, which directed the jury to respond affirmatively if it had answered "yes" to any one of the listed grounds in 5 a-d.

On the issue of interference with a contract, the form memorialized a "yes" by the jury to all of the interrogatories outlining the elements necessary for an affirmative finding on the claim, that is, 6 a-c. The verdict form on question 6 also contained a summary interrogatory that directed the jury to answer "yes," if it had answered "yes" to questions 6 a-c. The jury checked "yes."

On the issue of intentional infliction of emotional distress, the jury answered "no" to the interrogatories 7 a-c, comprising the elements of the claim, and "no" to the summary question, which again required an affirmative answer if 7 a-c had been answered in the affirmative.

On the issue of negligent infliction of emotional distress, the verdict form recorded a "yes" vote to all of the elements, questions 8 a-e, and "yes" to the same type of summary question.

Finally, in question 9, the jury answered "yes" to whether the plaintiff suffered damages. Under question 10, listing the various categories of damages, the jury awarded plaintiff a total of $2,002,676.37.[1]

After the jury verdict was read in open court, the defendants asked that the jury be polled. As a result of the poll, some inconsistencies in the verdict form were revealed.

When asked to recall their votes on question 6, the interference with a contract claim, one juror voted "no" to two of the requisite elements for the claim, one juror voted "no" to all of the element questions and to the summary question, and two jurors could not recall how they voted on question 6.

The polling on the negligent infliction of emotional distress claim, question 8, also produced a result inconsistent with the verdict form. Specifically, four jurors voted no to one or more of the requisite elements.

The judgment in "accordance with the jury's verdict" was rendered in "Open Court on October 18, 2007," and signed on April 4, 2008. After rendition, on January 2, 2008, defendants filed a motion to correct the verdict to conform to the jury polling. The motion was denied. Subsequently, defendants also filed a motion for a Judgment Notwithstanding the Verdict (JNOV) or for a new trial. In part, defendants argued that the jury incorrectly found that the defendants had discriminated against Mr. Baldwin based on race. The trial court denied the motion. In the denying the motion, the trial court stated that the case was "almost totally about credibility" and the jury's assessment of the credibility. Defendants appealed.

On appeal, defendant-appellants assigned multiple errors to the jury's finding against defendants on various claims, including confusing or inconsistent responses in finding for plaintiff on the racial discrimination claim, and the lack of nine affirmative votes for the two claims covered in questions 6 and 8 of the verdict form. In addition, defendants assigned the following errors and argued that these errors prevented the

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[1] A copy of the actual jury verdict form is attached as Appendix A.

jury from reaching a fair and impartial verdict, which requires reversal or possibly remand:

1. By allowing Dr. William Davis and Mr. Max Emfinger to testify as plaintiff's experts, the trial court abused its discretion;

2. By excluding testimony sought by defendants on the issue of firing practices at other schools, the trial court abused its discretion; and,

3. A structural error was committed when the trial court refused to grant defendants' peremptory strike to a black prospective juror who had an unresolved belief that she had been racially discriminated against by her white supervisor.

STANDARD OF REVIEW

On appeal, the appellate court uses the manifest error-clearly wrong standard of review for the findings of fact. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La.1993). However, where the fact finding process has been tainted by some material legal or structural error that deprived the verdict or judgment of the presumption of correctness, and the record is complete, the appellate court reviews the record *de novo* and renders judgment on the record. **Jones v. Black**, 95-2530, p. 1 (La. 6/28/96), 676 So.2d 1067, 1067; **McLean v. Hunter**, 495 So.2d 1298, 1304 (La.1986). Notwithstanding the preference for *de novo* review with a complete record, in fact-intensive cases with conflicting evidence, a preponderance of the evidence and a fair resolution of the issues may not be determinable from a cold record and may require a first-hand view of the witnesses presented at trial. See **Jones**, 95-2530 at p. 1, 676 So.2d at 1067; **Savin v. Allstate Insurance Company**, 579 So.2d 453, 457-58 (La.App. 1 Cir. 1991). In those cases, the appellate court must decide whether a *de novo* review or remand for a new trial is more just and proper. **Diez v. Schwegmann Giant Supermarkets, Inc.**, 94-1089, p. 7 (La.App. 1 Cir. 6/23/95), 657 So.2d 1066, 1070-71, writ denied, 95-1883 (La. 11/17/95), 663 So.2d 720; **IP Timberlands Operating Company, Limited v. Denmiss Corporation**, 93-1637, p. 35 (La.App. 1 Cir. 5/23/95), 657 So.2d 282, 304, writs denied, 95-1958, 95-1593, 95-1691 (La. 10/27/95), 661 So.2d 1348; see **Adeola v. Kemmerly**, 2001-1231, p. 9 (La.App. 1 Cir. 6/21/02), 822 So.2d 722, 728, writs

denied, 2002-2354 (La. 11/15/02), 829 So.2d 438 and 2002-2413 (La. 11/22/02), 829 So.2d 1054; **Savin**, 579 So.2d at 457-58.

DENIAL OF PEREMPTORY CHALLENGE

During the questioning of the prospective jurors, one of the candidates stated that she was a black female and that, as a state employee, she had been the victim of racial discrimination by her white supervisor. When asked if she could set aside her discrimination experience, she answered, "yes."

Subsequently, the defendants asserted a peremptory challenge based on a possible conflict stemming from the candidate's unresolved claim of racial discrimination, which was so similar to Mr. Baldwin's. In response, Mr. Baldwin asserted a **Batson** challenge to the defendants' request to have the prospective juror excused. He argued that the candidate was being challenged based on her race. The trial court agreed with Mr. Baldwin and refused to excuse the candidate, who was then seated as a juror.

In **Alex v. Rayne Concrete Service**, 2005-1457, 2005-2344, 2005-2520, p. 15 n.11 (La. 1/26/07), 951 So.2d 138, 150 n.11, our supreme court held that LSA-C.Cr.P. art. 795C, governing **Batson** challenges in criminal cases, was applicable to civil cases.

Louisiana Code of Criminal Procedure article 795C states that:

> C. No peremptory challenge made by the state or the defendant shall be based solely upon the race [or gender] of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race [or gender], and a *prima facie* case supporting that objection is made by the objecting party, the court may demand a satisfactory [race or gender] neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.[2] (footnote added)

Additionally, in **Alex**, 2005-1457, 2005-2344, 2005-2520 at p. 15, 951 So.2d at 150-51, the supreme court provided the following three-step analysis to be used in reviewing a **Batson** challenge to a peremptory strike:

> First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge

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[2] Acts 2008, No. 669, § 1, made the changes shown in brackets. The changes do not affect the case before us.

> on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensive reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.
>
> Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The basis for the peremptory challenge or strike may be less than that required for a challenge for cause, but must be more than mere intuition or a "gut feeling." **Alex**, 2005-1457, 2005-2344, 2005-2520 at pp. 17 & n.12 & 18-19, 951 So.2d at 152 & n.12 & 152-53. The reasons offered should be deemed race-neutral unless a discriminatory intent was inherent in those reasons. **State v. Burns**, 98-0602, p. 20 (La.App. 1 Cir. 2/19/99), 734 So.2d 693, 704, writ denied, 99-0829 (La. 9/24/99), 747 So.2d 1114; **State v. King**, 604 So.2d 661, 666 (La.App. 1 Cir. 1992). Generally, the "possibility of bias in favor of plaintiffs is a racially neutral ground" for the peremptory challenge. **Matthews v. Arkla Lubricants, Inc.**, 32,121, p. 20 (La.App. 2 Cir. 8/18/99), 740 So.2d 787, 801 (citing **State v. King**).

Because these challenges often revolve around factual determinations, the findings of the trial court are due great deference. Thus, the trial court's rulings will not be overturned absent manifest error. **Alex**, 2005-1457, 2005-2344, 2005-2520 at p. 14 n.10, 951 So.2d at 150 n.10. If a **Batson** challenge is denied in error, the trial court commits a structural error, which impedes the right to a fair and impartial trial. **Alex**, 2005-1457, 2005-2344, 2005-2520 at pp. 22-24, 951 So.2d at 155-56. Similarly, if the trial court manifestly errs and wrongfully grants a **Batson** challenge, a defect in the jury selection process also occurs. Through the granting of the challenge, the party asserting a legitimate peremptory challenge may be subjected to juror bias and the same impediment to a fair and impartial trial may be erected as when a prospective juror is denied service. See **Munch v. Backer**, 2004-1136, pp. 4-5 (La.App. 4 Cir. 12/5/07), 972 So.2d 1249, 1251-52, writ denied, 2007-2477 (La. 3/7/08), 977 So.2d 909.

After a review of the record, and the applicable law, it is clear that the peremptory challenge was not based on impermissible race discrimination, but rather on the "possibility of bias" or conflict caused by the candidate's discrimination experience. **Matthews**, 32,121 at p. 20, 740 So.2d at 801. We further note that several other African-Americans were seated as jurors, and we find no evidence that African-Americans were being systematically excluded.

Certainly, the candidate's race was a fact involved in the unresolved claim, as was the race of the white supervisor. However, we find nothing in the record to support a *prima facie* showing that defendants' exercised a peremptory challenge solely on the basis of the candidate's race. It was the similarity of the claim, that is, a black, state employee who asserted unfair treatment by a white supervisor based on race, that raised the question of bias. In light of the similarity of the claims, the defendants asserted more than intuition or an unsupported feeling for their challenge. They had a reasonable basis to believe that the "possibility of bias" remained, despite the candidate's belief that she could put her experience aside during the trial. In addition, even if we assumed a *prima facie* showing, Mr. Baldwin did not sufficiently rebut the race-neutral reason asserted by defendants. Under these particular facts, defendants provided a plausible, specific, and legitimate race-neutral reason for the challenge, and the plaintiff failed to meet his burden to show purposeful discrimination. See **Munch**, 2004-1136 at p. 4, 972 So.2d at 1251-52; **Burns**, 98-0602 at p. 20, 734 So.2d at 704.

Therefore, we find that the trial court was clearly wrong in granting the **Batson** challenge. More importantly, we recognize that, in this particular case, the defect in the jury selection appears to be the type of structural error that taints the fact-finding process and creates the possibility of impermissible prejudice against the defendants. See **Munch**, 2004-1136 at pp. 4-5, 972 So.2d at 1252; **Alex**, 2005-1457, 2005-2344, 2005-2520 at pp. 22-24, 951 So.2d at 155-56.

QUALIFICATION OF EXPERT WITNESS

Defendants assigned error to the trial court's qualification of two of plaintiff's witnesses, Mr. Max Emfinger and Dr. William Davis, as experts. Defendants argue that the trial court "failed to perform its 'gatekeeping' function of excluding unreliable and

irrelevant expert testimony." Specifically, defendants assert that Mr. Emfinger rated only high school players and not college players individually or as a team. Thus, defendants do not believe that Mr. Emfinger was qualified to give his opinion on the competitiveness of the ULL team in question. As to Dr. Davis, defendants admit his expertise in the area of administration, but argue that he was not qualified as an expert in the method of terminating college football coaches or the consequences of firing versus allowing a coach to resign. According to defendants, Dr. Davis' opinion in those areas was a personal one that had not been researched, tested, or analyzed sufficiently to meet the requirements of **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and **State v. Foret**, 628 So.2d 1116 (La.1993), or **Kumho Tire Company, Ltd. v. Carmichael**, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999), which applied **Daubert-Foret** principles to all expert testimony, not only scientific opinion.

In Louisiana, LSA-C.E. art. 702 provides as follows:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Because LSA-C.E. art. 702 is virtually identical to its source provision in the Federal Rules of Evidence, Rule 702, the Louisiana Supreme Court adopted and applied the **Daubert** analysis, which allows a more flexible standard for determining admissibility while recognizing the detailed analysis in which the trial court must engage to satisfy its gatekeeping function. **Foret**, 628 So.2d at 1121-23. Under **Daubert**, the trial court is charged with the duty of performing a "gatekeeping" function to ensure that the expert testimony is not only relevant, but also reliable. **Kumho Tire Company, Ltd.**, 526 U.S. at 152, 119 S.Ct. at 1176; **Devall v. Baton Rouge Fire Department**, 2007-0156, p. 3 (La.App. 1 Cir. 11/2/07), 979 So.2d 500, 502; **Adeola**, 2001-1231 at p. 7, 822 So.2d at 727; see **Daubert**, 509 U.S. at 592-93, 113 S.Ct. at 2796. Although **Daubert** specifically dealt with expert scientific testimony, the United

States Supreme Court determined that the **Daubert** analysis is equally applicable to all expert testimony. **Kumho Tire Company, Ltd.**, 526 U.S. at 147, 119 S.Ct. at 1174.

To ensure reliability, the **Daubert** standard requires that the expert's opinions be grounded in methods and procedures of science, rather than just subjective belief or unsupported speculation. Accordingly, before expert testimony is admitted, the court must make a preliminary assessment that the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue. **Daubert**, 509 U.S. at 589-93, 113 S.Ct. at 2795-96; **Devall**, 2007-0156 at pp. 3-4, 979 So.2d at 502.

In determining whether expert testimony is reliable, the Court in **Daubert** enumerated illustrative considerations to determine whether the reasoning and methodology underlying the testimony is scientifically valid and can properly be applied to the facts at issue, as follows: (1) whether the expert's theory or technique can be and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential rate of error, and (4) whether the methodology is generally accepted in the scientific community. **Daubert**, 509 U.S. at 593-94, 113 S.Ct. at 2796-97; **Devall**, 2007-0156 at p. 4, 979 So.2d at 502-03.

In cases with non-scientific experts, the **Daubert** analysis can be tailored, and the trial court should consider the **Daubert** factors that are reasonably applicable and serve as useful measures in judging the reliability of the expert's opinion. **Kumho Tire Company, Ltd.**, 526 U.S. at 152, 119 S.Ct. at 1176. Whether the expert opinion is based on personal experience and study or on scientific or professional studies, the trial court must ascertain if the witness employed the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field." **Kumho Tire Company, Ltd.**, 526 U.S. at 152, 119 S.Ct. at 1176.

The decision to admit or exclude expert testimony is within the sound discretion of the trial court. Its judgment will not be disturbed by an appellate court unless it is clearly erroneous. **Devall**, 2007-0156 at p. 4, 979 So.2d at 503; LSA-C.E. art. 702, Comments-1988 (d).

Prior to trial, defendants filed a motion *in limine* to exclude the testimony of Dr. Davis. Subsequently, defendants also objected to other witnesses to be called by plaintiff as experts, including Mr. Emfinger. By memorandum in support, and at the hearing on the motion, defendants made essentially the same arguments offered on appeal. At the end of the hearing, the trial court denied the motion *in limine* as to Dr. Davis and Mr. Emfinger, but stated that the court would review the qualifications at trial on *voir dire* and revisit the objections at that time.

MAX EMFINGER

When Mr. Emfinger was called as a witness at trial, the jury was excused and the parties conducted a **Daubert**-style hearing on the issue of Mr. Emfinger's qualifications. In part, Mr. Emfinger testified that he had acted as a scout and had been ranking high school players according to their ability to play college football for several years. He issued opinions through his own business, to which many schools subscribed, and he had offered his opinion on rankings on ESPN and in several sporting magazines. Although he felt qualified to rank the players, he admittedly had never assessed a team as a whole. Plaintiff tendered Mr. Emfinger as an expert in the quality of the college football players and the collective quality of the ULL team that Mr. Baldwin inherited in 1999, the future prospects of success for that team based on the level of the players, and the importance of recruiting. After hearing the questioning and arguments by counsel for both sides, the trial court accepted Mr. Emfinger as an expert in the first category only, that is, assessment of the quality of the players and the collective talent of the team. The jury was then returned to the courtroom and the *voir dire* process was repeated for the benefit of the jury. After questioning by both sides, Mr. Emfinger was only tendered and accepted in the first category: the quality of the football players and the collective quality of the ULL team that Mr. Baldwin inherited.

From our extensive review of the hearing on the motion *in limine*, the *voir dire* at trial, and the questioning of Mr. Emfinger, on direct and on cross-examination, we cannot say that the trial court abused its discretion in accepting Mr. Emfinger as tendered and denying defendants' objections. The witness had (1) extensive experience in the field of ranking high school players, not only on their past

performance, but also on his opinion of their ability and talent for succeeding in college football; (2) his opinions accepted by those recruiting players for college or reporting on recruitment, and (3) been recognized as an expert by others recognized as experienced in the field. Thus, the trial court had sufficient information before it to accept Mr. Emfinger's testimony as adequately reliable, especially considering the non-scientific character of the field, and as providing some assistance to the trier of fact. See **Devall**, 2007-0156 at pp. 2-5, 979 So.2d at 502-03; LSA-C.E. art. 702.

Additionally, the defendants, through questioning, were allowed to attack Mr. Emfinger's opinion by highlighting the speculative nature of any ranking system and the inability to scientifically test such rankings until the player had successfully performed on the college field. Although Mr. Emfinger had not previously done a collective assessment, the questioning by defendants, during *voir dire* in the presence of the jury at trial, and later on cross-examination, exposed the weaknesses in a collective assessment and the unknown effect of variables. While the trial court may have erred in allowing Mr. Emfinger too much latitude in the area of retroactively assessing team performance as a whole, the record does not support a finding that the defendants were unduly prejudiced by Mr. Emfinger's testimony when reviewed *in toto*. See **Devall**, 2007-0156 at pp. 4-5, 979 So.2d at 503; **Rivere v. Union Pacific Railroad Company**, 93-1132, pp. 3-4 (La.App. 1 Cir. 10/7/94), 647 So.2d 1140, 1144, writ denied, 95-0292 (La. 3/24/95), 651 So.2d 295.

DR. WILLIAM DAVIS

Plaintiff requested that Dr. Davis be accepted as an expert in the relationship between an athletic director and a coach; the duties and responsibilities of an athletic director, specifically in a football program; and on the traditional and appropriate manner in which a university terminates a football coach, communicates that news to the coach, and the implications of a particular method of termination. As with Mr. Emfinger, Dr. Davis's specific expertise or qualifications was an issue at the *in limine* hearing, and he was also subjected to a lengthy initial *voir dire*, out of the presence of the jury and again before the jury.

During the trial, plaintiff established that Dr. Davis had an impressive educational background and extensive experience in administration at the college level. While serving as president or chancellor of various colleges, including his tenure as the Chancellor of LSU, he had oversight and ultimate responsibility for the athletic programs, including football, and had worked with the NCAA and the athletic directors at his schools and others. However, he had only served for about one year as an interim college football coach early in his career and had never served as an athletic director on the college or university level. More importantly, in the specific area at issue on appeal, choice and methods of terminations and their ramifications, Dr. Davis testified that he had directly participated in the termination of only three head football coaches during his long career, and that his opinion in that area was his personal view on the subject and was based on common sense. He had conducted no polls and had not directed investigation, or other research, to determine if his opinion was held by a number or a majority of other administrators or athletic directors; he had not conducted, sought, or seen any follow up studies of coaches who had been fired, or of coaches allowed to resign, to determine how they were actually affected by the different methods of termination; and he had not investigated or researched the consequences of the two types of terminations. He testified that he had never been tendered as an expert before in the field of firings versus resignations, or the consequences of those two types of terminations; had no knowledge of any existing studies or writings on the subject; and had not attempted to find any studies.

After the initial *voir dire*, Dr. Davis was accepted by the trial court as tendered, including the question of termination methods and their consequences. After the *voir dire* in the presence of the jury, Dr. Davis was again accepted as tendered.

The record on appeal substantiates Dr. Davis' extensive experience in academia and in general oversight of various athletic programs. However, the dispute is whether his background was sufficient to qualify him as an expert in the process of firing a football coach and the specific effects on a coach from firing versus resignation. To qualify as an expert under the **Daubert-Foret** analysis, the witness's opinion in the area in question must be shown to be reliable. The quality of the factual basis for the

opinion determines the reliability. The opinion must have been subjected to study, investigation, or research, whether scientific or personal, sufficient to render it reliable, and must be more than just his own subjective belief or unsupported speculation. **Carrier v. City of Amite**, 2008-1092, p. 4 (La.App. 1 Cir. 2/13/09), 6 So.3d 893, 897; **Devall**, 2007-0156 at pp. 3-4, 979 So.2d at 502; **Miramon v. Bradley**, 96-1872, p. 6 (La.App. 1 Cir. 9/23/97), 701 So.2d 475, 478; see **Daubert**, 509 U.S. at 590, 113 S.Ct. at 2795 (to be reliable, the opinion must be supported by "appropriate validation-*i.e.*, 'good grounds . . . .'").

In this case, Dr. Davis was a key witness whose testimony was critical to two issues at the heart of the case: whether Mr. Baldwin had been damaged by being fired, instead of being allowed to resign, and whether the firing prevented him from obtaining another coaching position and caused him damage in other ways. His opinion on those highly disputed issues was admittedly his own personal view, without any investigations, or even preliminary surveys or polls, to provide some demonstrable foundation for his conclusions or some indicia of reliability. **Devall**, 2007-0156 at pp. 3-4, 979 So.2d at 502. Such an unsupported opinion can provide no assistance to the trier of fact. **Carrier**, 2008-1092 at p. 4, 6 So.2d at 897; **Miramon**, 96-1872 at p. 6, 701 So.2d at 478.

Unfortunately, the erroneous designation as an expert in the disputed areas placed an unwarranted level of importance on unsubstantiated and admittedly subjective opinions. Where the testimony of a key witness is deemed unreliable, the possibility of prejudice is significantly increased, and the jury's ability to fairly determine the facts is not only negatively impacted, but is interdicted. **Franklin v. Franklin**, 2005-1814, pp. 7-8 (La.App. 1 Cir. 12/22/05), 928 So.2d 90, 94, writ denied, 2006-0206 (La. 2/17/06), 924 So.2d 1021; **Rivere**, 93-1132 at p. 4, 647 So.2d at 1144. In such cases, a remand may well be required.[3] See **Franklin**, 2005-1814 at p. 8, 928 So.2d at 94; **Adeola**, 2001-1231, p. 9, 822 So.2d at 728.

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[3] It is undisputed that the trial court has the right to control the nature, extent, and character of cross-examination; however, the trial court cannot deprive a litigant of the procedural right of cross-examination in the interest of judicial economy and other well-intentioned motives. **Adeola**, 2001-1231 at p. 8, 822 So.2d at 727. Here, based on our ruling on Dr. Davis' qualification as an expert, we need not

JURY VERDICT

Defendants assert two errors based on the jury verdict. First, defendants argue that the jury's answers to the question of racial discrimination were confusing or misleading. Secondly, the trial court erred in failing to recognize the absence of the requisite number of votes for a finding in favor of plaintiff on two of the causes of action.

Louisiana Code of Civil Procedure article 1813 provides as follows:

> A. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.
>
> B. The court shall inform the parties within a reasonable time prior to their arguments to the jury of the general verdict form and instructions it intends to submit to the jury, and the parties shall be given a reasonable opportunity to make objections.
>
> C. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.
>
> D. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.
>
> E. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers or may order a new trial.

Based on the statutory language, when answers to the interrogatories are inconsistent with the general verdict, the trial court has three options. The court may grant a JNOV and render judgment in accordance with the specific answers, order a new trial, or return the matter to the jury for further consideration. The choice of options is within the sound discretion of the trial court. However, if the trial court

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fully examine the argument that the trial court exceeded its authority in limiting cross-examination to protect the privacy of certain individuals. As for the argument directed to another witness, we first note that a trial court's privacy concerns can be protected in other ways, without necessarily limiting cross-examination, but find no undue prejudice. The majority of the information sought by defendants to contradict the disputed opinions was eventually presented through other cross-examination and the testimony of defendants' witnesses.

enters judgment in conformity with the general verdict despite the inconsistency with the answers to the interrogatories, the trial court commits reversible error. **Diez**, 94-1089 at pp. 3-5, 657 So.2d at 1069.

VERDICT: RACIAL DISCRIMINATION

Under Louisiana law, it is unlawful for an employer to "[i]ntentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." LSA-R.S. 23:332 A(1). Racial discrimination is also unlawful under federal law pursuant to Title VII of the Civil Rights Act of 1964 and subsequent legislation. See **St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); **McDonnell Douglas Corporation**, 411 U.S. 792, 93 S.Ct. 1817; **Vaughn v. Edel**, 918 F.2d 517 (5th Cir. 1990). Based on the commonality between federal and state anti-discrimination laws, state courts may appropriately consider a federal court's interpretation of federal statutes to resolve similar questions concerning Louisiana statutes and the proper burden of proof sequence. **Hicks v. Central Louisiana Electric Company, Inc.**, 97-1232, p. 3 (La.App. 1 Cir. 5/15/98), 712 So.2d 656, 658.

The plaintiff claiming discrimination has the initial burden of proof and must establish a *prima facie* case of discrimination. The plaintiff may meet this initial burden by showing that (1) he was a member of a racial minority; (2) he was qualified for the position; (3) he was discharged; and (4) the position was filled by a person who was not a member of the protected minority class. See **St. Mary's Honor Center**, 509 U.S. at 506, 113 S.Ct. at 2747; **McDonnell Douglas Corporation**, 411 U.S. at 802, 93 S.Ct. at 1824; **Vaughn**, 918 F.2d at 521. If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant who "must articulate a legitimate nondiscriminatory reason for its action. If the defendant articulates such a reason, the plaintiff must then show by a preponderance of the evidence that the defendant's reason is mere pretext." **Vaughn**, 918 F.2d at 521; see **McDonnell Douglas Corporation**, 411 U.S. at 802-04, 93 S.Ct. at 1824-26. However, despite the shifting

burdens, the ultimate burden remains with the plaintiff to show that the true reason for the adverse employment action was the impermissible discriminatory factor. **St. Mary's Honor Center**, 509 U.S. at 506-08, 113 S.Ct. at 2747-48.

In contrast to the pure pretext burden of proof requirements, federal jurisprudence interpreting federal statutes has developed a somewhat different analysis for cases where a plaintiff has shown that improper discrimination was one of the motivating factors for the negative employment action, in conjunction with other legitimate factors or motives for the defendant's action. In **Price Waterhouse v. Hopkins**, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the United States Supreme Court found that use of the phrase "because of" in the federal statute did not exclusively refer to cases where the discrimination at issue was the only reason for the adverse employment action. Rather, the choice of words also contemplated consideration and review of all of the reasons, both legitimate and illegitimate, contributing to the employment decision. See **Price Waterhouse**, 490 U.S. at 239-241, 109 S.Ct. at 1785. The Court then outlined the appropriate sequence and burdens to be used in "mixed motive" cases, as distinguished from pure "pretext" cases. The Court held that after plaintiff has met his burden in a mixed motive case to show that discrimination actually "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [discriminatory factor] into account." **Price Waterhouse**, 490 U.S. at 258, 109 S.Ct. at 1795; see **Mbarika v. Board of Supervisors of Louisiana State University**, 2007-1136, p. 17 (La.App. 1 Cir. 6/6/08), 992 So.2d 551, 562, writ denied, 2008-1490 (La. 10/3/08), 992 So.2d 1019. Thus, although proof that discrimination was one of the motivating factors shifts the burden, it does not automatically resolve the case in plaintiff's favor. Only if the defendant is unable to meet its burden to show that the employment action would have been taken regardless of race, can the plaintiff be successful.

In 1991, two years after **Price Waterhouse**, Congress amended the federal Civil Rights Acts of 1866 and 1964 to provide that an illegal discriminatory action is

established when "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). If a party proves a violation under the specific change in the wording of section 2000e-2(m), a limited affirmative defense is available if the employer can show that it "would have taken the same action in the absence of the impermissible motivating factor . . . ." 42 U.S.C. § 2000e-5(g)(2)(B). Although the defense does not excuse liability, it reduces the available remedies and excludes the remedy of damages. 42 U.S.C. § 2000e-5(g)(2)(B)(i-ii). Louisiana, however, chose not to amend its statute to include the 1991 federal changes and maintained only the broader "because of" language.

In Louisiana, this court has traditionally employed the **McDonnell Douglas** type analysis for pretext cases, and, in mixed motive cases, acknowledged use of a **Price Waterhouse** type analysis. See **Mbarika**, 2007-1136 at p. 17, 992 So.2d at 562. However, after a case has been fully tried, the burden-shifting analysis ceases to be of singular or paramount importance to the appellate court. Instead, the inquiry becomes whether the record contains sufficient evidence to support the conclusions reached by the jury or factfinder. **Seagrave v. Dean**, 2003-2272, p. 7 (La.App. 1 Cir. 6/10/05), 908 So.2d 41, 45, writ denied, 2005-2349 (La. 3/17/06), 925 So.2d 543, and cert. denied, 549 U.S. 822, 127 S.Ct. 157, 166 L.Ed.2d 38 (2006).

In its jury instructions on the claim of racial discrimination, the trial court cited the language from LSA-R.S. 23:332, and stated that: "If you disbelieve the reasons that the defendants have given for their decision to take any employment action against the plaintiff, you may infer that the defendants took that action because of the plaintiff's race." The court also notified the jury that the plaintiff need not prove that race was the only reason for the termination, but would "have to prove that his race was a motivating factor causing defendants to take an employment action against him." The jury would then have to consider whether the "defendants proved by preponderance of the evidence that they would have made the same decision even if the defendant had not considered the plaintiff's race." Thus, the court gave instructions for a pretextual case and a mixed motive case.

The first finding in the verdict form was that Mr. Baldwin had not been terminated "because of" his race. Notwithstanding the use of the exact phrase from the Louisiana statute, especially in light of the statement in **Price Waterhouse** that both a pretext case and a mixed motive case arise under the "because of" language, the jury verdict form included a second interrogatory. That interrogatory appears to have been directed toward the theory of mixed motives. If that is the case, the jury's finding that race was "a determining factor" is either an incomplete answer, in the absence of a further finding of whether defendants would have proceeded to termination despite race considerations, or, despite the preliminary finding of "a determining factor," the finding that plaintiff was not terminated "because of" race serves as the final negative determination on the discrimination claim.

No matter which assumption is correct, the result is the same; the jury's answers do not support a finding of impermissible racial discrimination. However, based on the arguments made in the court below on defendants' motion for the JNOV or a new trial and in their briefs to this court, specifically that the finding of racial discrimination should be reversed, all parties seem to exhibit a continued belief that the jury did indeed find in favor of plaintiff on the claim of racial discrimination.[4] Apparently, the parties incorrectly interpreted the singular finding that race was "a determining factor" as sufficient alone to establish a discriminatory claim. That may be the case under the amended federal statute, but not under the Louisiana statute and applicable jurisprudence. In addition, by denying defendants' request for a JNOV or a new trial despite their argument that the jury wrongly found racial discrimination, albeit an argument essentially based on the evidence at trial, the trial court appears to have accepted an affirmative finding by the jury on the issue.

In those beliefs, the parties and the trial court incorrectly interpreted the responses on the verdict form. Although the amended federal statute provides that an

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[4] During the hearing on the motion to conform the verdict to the jury poll, defendants primarily argued the lack of nine votes for some of the causes of action, not whether the jury found in favor of the plaintiff on the issue of race. Only in connection with the issue of attorney's fees did defendants argue that, because the Louisiana statute uses the language "because of," and the jury answered that the termination was not "because of" race, fees could not be awarded under the statute. In the motion for JNOV or new trial, the defendants argued that the finding of racial discrimination should be reversed.

illegal discriminatory action is established when "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice," Louisiana did not adopt the change in language and maintained the more general "because of" language. Certainly, the general language does encompass both types of claims, pretextual and mixed motive, and a party may chose to pursue one claim or make an alternative argument. See generally **Mbarika**, 2007-1136 at p. 17, 992 So.2d at 562. For mixed motive claims in particular, the shifting burden analysis outlined in **Price Waterhouse** is an appropriate guide, not the amended federal statute. Using the **Price Waterhouse** analysis, which was outlined in the trial court's jury instructions, the jury responses to the two questions covering the racial discrimination claim, read separately or together, cannot be read as a finding in favor of plaintiff.

After reviewing the parties' arguments and the trial court's denial of the motion for a JNOV[5] and new trial, we conclude that the actual findings of the jury are inconsistent with the judgment and are akin to a judgment based on a general verdict that is inconsistent with the interrogatories. Thus, based on the inconsistency of the verdict and the judgment, the trial court committed reversible error in denying the motion for JNOV or new trial.[6] See LSA-C.C.P. art. 1972; **Diez**, 94-1089 at pp. 4-5, 657 So.2d at 1069; **IP Timberlands Operating Company**, 93-1637 at pp. 32-34, 657 So.2d at 303-04.

VERDICT: INADEQUATE AFFIRMATIVE VOTES

"If trial is by a jury of twelve, nine of the jurors must concur to render a verdict unless the parties stipulate otherwise." LSA-C.C.P. art. 1797B. The record before us

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[5] After considering the arguments made on the motion for JNOV, pursuant to LSA-C.C.P. art. 1811, we note that the grant of a JNOV is not the proper remedy to correct an error in the trial court's own judgment. See **Pino v. Gauthier**, 633 So.2d 638, 655 (La.App. 1 Cir. 1993), writs denied, 94-0243 (La. 3/18/94), 634 So.2d 858 and 94-0260 (La. 3/18/94), 634 So.2d 859.

[6] Although we decide this assignment of error primarily based on the inconsistency between the judgment and the jury interrogatories, we also noted and considered plaintiff's statement that any confusion in the jury interrogatories could have been objected to and corrected at the time, that is, before the jury was dismissed. However, in this case, to the extent that the interrogatory on "a determining factor" is found to be incomplete or misleading, the error is a patent and fundamental one that misstates the law. Thus, the legal error, especially in light of the motion to conform the verdict to the jury poll, is before the court. See **Berg v. Zummo**, 2000-1699, p. 13 n.5 (La. 4/25/01), 786 So.2d 708, 716-717 n.5.

contains no stipulation rescinding the requirement of nine votes. Thus, nine out of the twelve jurors had to concur to render a verdict in plaintiff's favor.

In this case, polling of the jury demonstrated insufficient support for the affirmative responses shown on the jury verdict form for questions 6 and 8. Four jurors could not confirm the necessary "yes" vote on the elements of the interference with a contract claim. Similarly on question 8, less than nine affirmative votes were counted in the poll for the elements comprising the claim of negligent infliction of emotional distress.

Subsequent to the polling, defendants filed their motion to correct the verdict to conform to the polling. The trial court, after hearing argument on the motion, found at least nine affirmative votes had been cast in favor of the claims of interference with contract and negligent infliction of emotional distress in plaintiff's favor, and denied the motion.

From our review of the record on this point, the trial court was clearly and legally wrong in finding nine affirmative votes. The entry of a judgment that the court found was in favor of plaintiff on questions 6 and 8 was impermissibly inconsistent with the vote of the jury confirmed by the polling. Thus, pursuant to LSA-C.C.P. arts. 1797 and 1813, the denial of the motion to conform the verdict constituted reversible error. See **Diez**, 94-1089 at pp. 4-5, 657 So.2d at 1069.

REVIEW OR REMAND

After our thorough review of the record, and applicable legal precepts, we have discovered more than one reversible error, ranging from juror selection to a judgment not reflective of the jury verdict. More importantly, we found more than one structural and material error: the **Batson** and expert qualification errors. Thus, in this fact intensive case, we find that the fact finding process was tainted and a determination of a preponderance of the evidence cannot fairly be reached based on a review of this cold record. Under these circumstances, a *de novo* review would not be meaningful, and a fair, impartial resolution requires a new trial: one in which the multiple credibility determinations of the type particularly dependent on first hand observation, including those from qualified expert witnesses, can be decided by a competent, impartial jury.

See **Adeola**, 2001-1231 at p. 9, 822 So.2d at 728; **Diez**, 94-1089 at pp. 7-10, 657 So.2d at 1070-72; **Savin**, 579 So.2d at 457-58. Therefore, we must vacate the judgment and remand the case for a new trial.[7]

CONCLUSION

For these reasons, we vacate the judgment and remand for further proceedings consistent with this opinion. The costs of the appeal are assessed to plaintiff, Jerry Lee Baldwin.

VACATED AND REMANDED.

[7] Having found errors necessitating a remand, we pretermit defendants' other assignments of error.

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JERRY LEE BALDWIN	*	**DOCKET NO. 509900**
	*	
VERSUS	*	
	*	**19TH JUDICIAL DISTRICT**
THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, THE UNIVERSITY OF LOUISIANA AT LAFAYETTE, and NELSON SCHEXNAYDER, individually, and in his capacity as Director of Athletics for the UNIVERSITY OF LOUISIANA AT LAFAYETTE	*	**PARISH OF EAST BATON ROUGE**
	*	**STATE OF LOUISIANA**

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VERDICT FORM

I. RACIAL DISCRIMINATION

1. Do you find by a preponderance of the evidence that:

   Defendant, Board of Supervisors for the University of Louisiana System terminated Plaintiff, Jerry Baldwin, because of his race?

   _____Yes ___✓___No

2. Do you find by a preponderance of the evidence that Coach Baldwin's race was a determining factor in his termination by the Board of Supervisors for the University of Louisiana System?

   ___✓___Yes _____No

II. BREACH OF CONTRACT

3. Do you find by a preponderance of the evidence that Defendant, Board of Supervisors for the University of Louisiana System, breached its contract with Plaintiff, Jerry Baldwin?

   (✓ Yes _____ No

III. BAD FAITH BREACH OF CONTRACT

4. If you find by a preponderance of the evidence that Defendant breached its contract with Plaintiff, do you find that any such breach was in bad faith?
   [Do not answer this question unless your answer to Question 3 was yes]

   _____ Yes (✓ No

IV. ABUSE OF RIGHTS

5. Do you find by a preponderance of the evidence that:

   a. Defendant, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder, had a right to terminate Plaintiff, but terminated him solely to harm him or with the predominant motive of harming him?

   _____ Yes ___✓___ No

   b. Defendant, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder, had no serious and legitimate interest to be gained by terminating Plaintiff? If you believe that Plaintiff has proved this by a preponderance of the evidence, mark "yes". If you do not believe Plaintiff has proved this mark "no".

   ___✓___ Yes _____ No

   c. Exercising the right to terminate Plaintiff violated moral rules or elementary fairness, or was in bad faith?

   ___✓___ Yes _____ No

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Appendix A

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d. Defendant, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder, exercised the right to terminate Plaintiff for a different purpose than the purposes allowed under the contract?
✓ Yes ____ No

If your answer to *any* of Questions 5a through 5d was "Yes", then check "Yes" below. If you answered "No" to *all* of the above, then check "No" below.
✓ Yes ____ No

V. INTERFERENCE WITH CONTRACT

6. Do you find by a preponderance of the evidence that:

a. Defendant, Nelson Schexnayder, intentionally lead the Board of Supervisors for the University of Louisiana System to breach the contract or to make performance of the contract more burdensome, difficult or impossible?
✓ Yes ____ No

b. Defendant, Nelson Schexnayder, was acting outside the scope of his authority and did not think that his actions were in the best interests of the University? If you believe that Plaintiff has proved this by a preponderance of the evidence, mark "yes". If you do not believe Plaintiff has proved this mark "no". If you do not believe that Plaintiff proved both parts of this question, mark "no".
✓ Yes ____ No

c. Plaintiff was damaged by breach of the contract or by the fact that performing the contract was more burdensome, difficult or impossible?
✓ Yes ____ No

If your answer to *all* of Questions 6a through 6c was "Yes", then check "Yes" below. If you answered "No" to *any* of the above, then check "No" below.
✓ Yes ____ No

VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

7. Do you find by a preponderance of the evidence that:

a. The conduct of Defendant, Board of Supervisors for the University of Louisiana System through its representative Nelson Schexnayder, was extreme and outrageous at any time?
✓ Yes ✓ No

b. Plaintiff suffered severe emotional distress as a result of that conduct?
____ Yes ✓ No

c. Defendant, Board of Supervisors for the University of Louisiana System desired to inflict severe emotional distress upon Plaintiff, or knew that severe emotional distress would be certain or substantially certain to result from its conduct?
____ Yes ✓ No

If your answer to *all* of Questions 7a through 7c was "Yes", then check "Yes" below. If you answered "No" to *any* of the above, then check "No" below.
____ Yes ✓ No