STATE OF LOUISIANA
2021-CQ-00929

LOUISIANA SUPREME COURT

OFFICER JOHN DOE, Police Officer
Plaintiff - Applicant

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED
Defendants - Respondents

OFFICER JOHN DOE
Plaintiff - Applicant

Versus

DeRAY McKESSON;
BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED
Defendants - Respondents

On Certified Question from the United States Court of Appeals for the Fifth Circuit
No. 17-30864
Circuit Judges Jolly, Elrod, and Willett
Appeal From the United States District Court
for the Middle District of Louisiana
USDC No. 3:16-CV-742
Honorable Judge Brian A. Jackson, Presiding

OFFICER JOHN DOE ORIGINAL BRIEF ON APPLICATION FOR REVIEW BY CERTIFIED QUESTION

Respectfully submitted:
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OFFICER JOHN DOE

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CERTIFIED QUESTIONS

1. Whether Louisiana law recognizes a duty, under the facts alleged I the complaint, or otherwise, not to negligently precipitate the crime of a third party?

2. Assuming McKesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

STATEMENT OF JURISDICTION

This Court granted certification by order entered on July 8, 2021, pursuant to Supreme Court of Louisiana Rule XII, §§ 1-2.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On November 7, 2016, Officer John Doe filed *Complaint for Damages/Police Officer hit in face with rock*. [ROA. 9-17][1] The original defendants were DeRay McKesson and Black Lives Matter (hereafter BLM). Officer John Doe specifically alleged that Black Lives Matter is a "national unincorporated association" with "chapters" in many states and that in July 2016 BLM staged a protest, blocked a public highway, looted a Circle K and threw stolen items at police in Baton Rouge. DeRay McKesson was alleged to be a managing member and the organizer. [ROA.10]

With regard to Mr. DeRay McKesson, Officer John Doe alleged that he was a leader and co-founder of the national unincorporated organization known as "Black Lives Matter" and who at all times while in Baton Rouge was acting on behalf of BLM. [ROA.10] Through the Complaint, Officer John Doe made factual allegations that on July 7, 2016, Lakeem Keon Scott shot at passing cars along a Tennessee highway, killing one woman and wounding three others, including a police officer while yelling, "police suck! Black lives matter!" [ROA.10, ¶ 5]

On July 5, 2016, Alton Sterling was shot and killed by a Baton Rouge Police Officer, which started a flurry of activity by DEFENDANTS. [ROA.11, ¶ 6] On July 7, 2016, 12 police officers in Dallas Texas were shot. Activities of BLACK LIVES MATTER was associated with the shooting. The shooting in Dallas occurred around 9:00 p.m., on July 7, 2016, at a "Black Lives Matter" protest/riot during which at least one sniper shot twelve (12) police officers that were on duty to keep the peace at the rally. Five officers were killed and seven were seriously injured. [ROA.11, ¶ 7-8]

On Saturday, July 9, 2016, **OFFICER JOHN DOE POLICE OFFICER** was a duly commissioned police officer, who was ordered to respond to a protest, march, and blocking of a public street organized by Defendants. By July 9, 2016, Defendants were in Baton Rouge for the purpose of staging a protest. Protests in other cites staged by Defendants resulted in violence and

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[1] ROA is a reference to the record on appeal that the 5th Circuit provided to this Court.

property loss. DEFENDANTS conspired to violate the law by planning to block a public highway.[ROA.11, ¶ 9-10]

DEFENDANTS were in Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers. The Defendants announced that they would stage a protest/demonstration at the intersections of Airline Highway and Goodwood Boulevard, which is the location of the Baton Rouge Police Department Headquarters and which is a known public highway. [ROA.11, ¶ 11-12]

The protest was called a demonstration that was organized by the DEFENDANTS. At all time, DEFENDANTS knew police would be called to clear the public highway of protestors. Anticipating violence and property loss Baton Rouge Police Department arranged for a front line of officers in riot gear that formed a shield around officers who were to effectuate arrests and removal of Defendants from the public highway. [ROA.11-12, ¶ 13-15]

OFFICER JOHN DOE was one of the police officers who was ordered to make arrests. At the beginning of the protest was peaceful until activist began pumping up the crowd. DeRay McKesson was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests. The protest turned into a riot. DEFENDANTS and their membership began to loot a Circle K and one of the items taken was plastic full water bottles, which Defendants began to hurl at the police, who were in riot gear, and hurl over the line of police in riot gear to strike the police who were behind the protective shield formed by the officers in riot gear. Officers were struck by the full water bottles. [ROA.12, ¶ 16-18]

Defendant DeRay McKesson was present during the protest and he did nothing to calm the crowd and, instead, he incited the violence on behalf of the Defendant BLACK LIVES MATTER. When the Defendants ran out of the water bottles they were throwing other objects at the Baton Rouge City Police, a member of Defendant BLACK LIVES MATTER, under the control and custody of the DEFENDANTS, then picked up a piece of concrete or similar rock like substance and hurled into the police behind the line that were making arrests. [ROA.12-13, ¶ 19-20]

OFFICER JOHN DOE was struck fully in the face and immediately knocked down and incapacitated. OFFICER'S injuries include loss of teeth, injury to jaw, injury to brain and head as well as lost wages and other compensable losses. In the alternative, these DEFENDANTS have similarly attacked other businesses and other persons while protesting/rioting. Following the violence, DEFENDANTS took credit/blame for the protest and riot. [ROA.13, ¶ 21-23]

On Sunday, DeRay McKesson told the New York Times, "The police want protesters to be too afraid to protest." He suggested that he intended to plan more protests. It was unreasonable for Defendant(s) to use force on an OFFICER when he was not threatening any of them and performing

lawful duties under color of law. During the riot, DeRay McKesson was arrested and the status of those charges are unknown.[2] [ROA.14, ¶ 24-26]

Officer John Doe claimed that the DEFENDANTS knew or should have known that the physical contact and riot and demonstration that they staged would become violent as other similar riots had become violent and thus DEFENDANTS knew or should have known that violence would result especially after they began assaulting police. Based on their pattern, they knew or should have known their actions could cause and/or lead to serious personal injury. Officer John Doe sought relief pursuant to La. C.C. arts. 2315 and 2317 of the Louisiana Civil Code, which injuries were occasioned by the intentional and/or negligent acts and/or omissions of the Defendant(s) herein. Officer John Doe further alleged that pursuant to La. C.C. art. 2317, Defendants were liable for the actions of the BLACK LIVES MATTER membership, which caused the injuries herein. Finally, Officer John Doe alleged that pursuant to La. C.C. art. 2324, the Defendant were liable in solido for the injuries caused to the OFFICER for their intentional actions and for conspiring to incite a riot/protest and other damages.

On January 25, 2017, Mr. DeRay McKesson filed *Motion to Dismiss for Failure to State a Claim*, [ROA.63-76 and ROA.137-141] which was opposed. [ROA.105-109] Officer John Doe filed sur-replies. [ROA. ROA.168–176]

Admissions were sent to Mr. DeRAy McKesson , who responded with objections. [ROA.112-117] An order staying all discovery was entered. [ROA.99-104, ROA.105-111 and ROA.134-135] On March 27, 2017, oral argument was held and the motion to dismiss was taken under advisement.

On April 4, 2017, Mr. DeRay McKesson filed *Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 9(a)* [ROA.187-196], which was opposed [ROA.197-221 and ROA.142 - 153, ROA.168-176] On April 4, 2017, Mr. DeRay McKesson filed *Defendant Deray McKesson's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 9(a)* on behalf of Black Lives Matter. [ROA.187-192] Attached to the motion was an article pulled from the internet, which provided the names of the founders and leaders. A preliminary default was entered against Black Lives Matter. [ROA.230] Oral argument was held on the motions by the founders who described themselves as black queer women, who were basically complaining that the leadership of their organization had been hijacked by "charismatic Black men" [ROA.194-195]. It further states, "This is the Official #BlackLivesMatter Organization founded by Patrisse Cullors, Opal Tometi, and Alicia Garza." [ROA.196]

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[2] This was the status at the time of the filing of the Complaint/Amended Complaint. Since, DeRay McKesson as a class representative filed a class action lawsuit against the City of Baton Rouge over his arrest and the arrest of the entire class of BLM protesters, who were arrseted. That case settled with The City of Baton Rouge paying damages and dismissing the charges.

Officer John Doe opposed the Rule 9 motion. [ROA.197 - 203] Officer John Doe attached a page from the Black Lives Matter website showing that 40% of the proceeds donated to BLM goes to the national chapter and that there are chapters in various cities. [ROA.204] Officer John Doe attached another page pulled from the internet indicating that BLM was soliciting names to start a chapter in Louisiana. [ROA.205] Another page from the BLM website was attached that provided "Official #BlackLivesMatter Organization founded by Patrisse Cullors, Opal Tometi and Alicia Garza." [ROA.205] Another page from the BLM official website was offered to show that BLM was using the name "#Black Lives Matter" to solicit donations. [ROA.206] Another article offered was entitled "Black Lives Matter cashes in with $100 million from liberal foundations," which was offered to show that Black Lives Matter has bank accounts and that they were conducting business for which it had applied for and obtained grants. [ROA.208-9] A Wikipedia article on DeRay Mckesson was offered to show that McKesson is a leader of BLM and provided that he is a "member of the Black Lives Matter movement" who participated in the protest in Baton Rouge where he was arrested. [ROA.211-212] Endnote 24 shows that DeRay McKesson met with President Obama as a representative of Black Lives Matter. [ROA.213] Another document from the BLM website was offered to show that BLM described itself as a "Non-Profit Organization," [ROA.215] which moniker has tax implications for businesses. Officer John Doe also attached a copy of a photograph of the Baton Rouge protesters showing they were holding signs for BLM, while violating the law by blocking a public highway. [ROA216-217] Another photograph attached showed the Baton Rouge police in riot gear. [ROA.218] Other photographs displayed the protestors throwing water bottles and other objects at Baton Rouge Police. [ROA219-221]

Officer John Doe entered a Preliminary Default against BLM when it failed to answer after service of the summons. [ROA.230] Officer John Doe sought to supplement the record with additional information showing that on June 4, 2017, Black Lives Matter Chicago, the Chicago chapter of BLM, filed a lawsuit in federal court in the Northern District of Illinois. [ROA.237-368] This offering tended to show that BLM is a juridical entity.

: On June 18, 2017, Officer John Doe sought leave to file an Amended Complaint for Damages. [ROA.369-376] Officer John Doe attached a receipt from the BlackLivesMatter website after making a donation to Black Lives Matter to determine the name of the entity(s) doing business in the name of Black Lives Matter and/or accepting money in the name of Black Lives Matter. [ROA.377] The receipt states "Thank you for your generous donation to the Black Lives Matter Network" and informed that the donation was "tax-deductible."

The receipt states:

> Your tax-deductible donations and gifts to the Black Lives Matter Network are collected by Thousand Currents (formerly IDEX), a 501(c)(3) non-profit. The Black Lives Matter Network has partnered with Thousand Current to support us with financial and administrative services. . .. IDEX and Black Lives Matter announce global partnership (9/5/16)

This item was offered in support of the motion for leave to show the disclosures of entities doing business under the name of and as Black Lives Matter. At this time, discovery had been stayed in the federal district court. The disclosure indicated that Black Lives Matter was doing business and entering into legal relationships with other entities.

The *Amended Complaint for Damages Police Officer Hit in Face with Rock* named DeRay McKesson, Black Lives Matter, Black Lives Matter Network, Inc., and #BlackLivesMatter. [ROA.380] The allegations were that social movement that started with a hashtag had grown into a business entity.[3] The Amended Complaint made multiple allegations of fact including dates, names and sources to show a conspiracy to harm police officers and/or negligence or gross negligence of the leadership that lead to the injuries of multiple police officers.

BLACK LIVES MATTER was created by Alicia Garza, Patrisse Cullors, and Opal Tometi. Leaders of BLACK LIVES MATTER are JOHNETTA "Netta" ELZIE and DeRAY McKESSON, both of whom were present in Baton Rouge for the protest. [ROA.381, ¶ 4]

To show the pattern and practice of violent conduct during BLM protests, allegations included that the Baltimore unrest and rioting, in the wake of the death of Freddie Gray, on April 18-24, 2015, outside the Western District police station, resulted in the injury of twenty police officer, 250 arrest, 285-300 business damages, 150 vehicle fires, 60 structure fires, 27 drugstores looted. The protesters chanted the mantra "Black Lives Matter." Black Lives Matter took credit for organizing the protest. [ROA.381, ¶ 5]

The McKinney, Texas, unrest on June 12, 2015 was had by persons waving "Black Lives Matter" signs burning flags. Black Lives Matter took credit for organizing the protest. [ROA.381, ¶ 6]

The Ferguson unrest, on August 10-13, 2015, resulted in looting of businesses, vandalization of vehicles and businesses, flag burning, burning of a gas station, broken windows, assault, and burglary. Protesters threw rocks at police. Projectiles were thrown at police including Molotov cocktails. When protests continued through August 18, 2015, the National Guard was called. Black Lives Matter took credit for organizing the protest. [ROA.381, ¶ 7]

In 2015, DeRay McKesson and two other activists created Mapping Police Violence which

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[3] Officer John Doe never indicated that he was suing a "hashtag." Officer John Doe alleged the existence of an unincorporated association doing business as Black Lives Matter the name of which was #BlackLivesMatter.

is listed as one of the biggest moments in Black Lives Matter's biggest moments of 2015. DeRay McKesson participated in the Ferguson protests/riots. [ROA.381, ¶ 8]

On April 28, 2015, DeRay McKesson was interviewed by Wolfe Blitzer on Live CNN about the violence in Baltimore, Maryland, as a Black Lives Matter leader. When confronted with the inexcusable violence, DeRay McKesson justified the violence with a comparison to the deaths of African Americans. DeRay McKesson justified the violence as *looking for justice*.[4] He was prompted several times to say that he did not condone the violence, but he would not. DeRay McKesson gave an interview on FOX news with Sean Hannity as a leader of Black Lives Matter protests. During the interview, DeRay McKesson admitted to being participant in multiple Black Lives Matter protests including those in Ferguson, Baltimore, and McKinney Texas. He tweeted and admitted on the Fox News program that he did not work and intended to have Black Lives Matter registered as a 501 (k) for a tax exempt status. DeRay McKesson tweeted that he wanted to convert the movement, Black Lives Matter, into a 501 (k). [ROA.382, ¶ 9-10]

DeRay McKesson went on CNN and represented himself as a Ferguson Protest organizer of and activist with the Black Lives Matter movement. On August 10, 2015, Black Lives Matter held a protest, over the year-old fatal police shooting of Michael Brown, on Interstate 70 in Earth City, Missouri, blocking rush-hour traffic. DeRay McKesson participated in the St. Louis/Earth City protest/riots. On January 19, 2016, DeRay McKesson was on Stephen Colbert 's t.v. show "The Late Show with Stephen Colbert" during which he admitted to being a leader of Black Lives Matter and to participating in the Ferguson and Baltimore riots. [ROA.382, ¶ 11-13]

By July 5, 2016, a pattern of violent riots by BLM protesters was well established.

On July 5, 2016, Alton Sterling was shot and killed by a Baton Rouge Police Officer, which contributed to a flurry of activity by DEFENDANTS. Later Thursday night through early Friday morning, July 7-8, 2016, more than 1,000 Black Lives Matter activists marched miles upon miles through midtown Manhattan and up into Harlem blocking public highways over three police killings of black men in three different American cities. 42 protesters were arrested. One police officer was injured. [ROA.383, ¶ 14-15]

On July 7, 2016, Lakeem Keon Scott shot at passing cars along a Tennessee highway, killing one woman and wounding three others, including a police officer while yelling, "police suck! Black lives matter!" [ROA.383, ¶ 16]

On July 7, 2016, during a Black Lives Matter protest, 12 police officers in Dallas Texas were

[4] This is the exact same justification "*looking for justice"* McKesson provided after the Baton Rouge riot.

shot. Activities of BLACK LIVES MATTER was associated with the shooting. [ROA.383, ¶ 17]

The shooting in Dallas occurred around 9:00 p.m., on July 7, 2016, at a "Black Lives Matter" protest/riot during which at least one sniper shot twelve (12) police officers that were on duty to keep the peace at the rally. Five officers were killed and seven were seriously injured. [ROA.383, ¶ 18]

On July 8, 2016, DeRay McKesson's twitter account was hacked. His conversations specifically showed an intent to use protests to have "martial law" declared nationwide through protests. The tweets were between Johnetta Elzie and DeRay Mckesson, both of whom are leaders of Black Lives Matter. [ROA.383, ¶ 19]

On Friday, July 8, 2016, Black Lives Matter held a protest in Nashville, Memphis, Knoxville and Chattanooga, Tennessee, blocking traffic on a public highway. There were six arrests. The violence caused massive transit shutdown, particularly on I-40. [ROA.383, ¶ 20]

On Friday, July 9, 2016, in a "week-end of Rage" Black Lives Matter protesters in Phoenix turned violent throwing rocks and other objects at police during a rally and shouted, "We should shoot you!" to officers. [ROA.384, ¶ 21]

On Saturday, July 9, 2016, Black Lives Matter protesters took to I-94 freeway in St. Paul, Minnesota, protesting the police shooting of Philando Castile, attacking police officers who tried to clear the road by throwing chunks of concrete, rebar, rocks, bottles, fireworks and Molotov Cocktails. One officer was injured by the fireworks and two were injured by the thrown objects. A total of twenty-one officers from various Minnesota law enforcement agencies were injured and more than 102 protestors were arrested. [ROA.384, ¶ 22]

By July 9, 2016, a pattern of violent riots by BLM protesters was well established.

On Saturday, July 9, 2016, **OFFICER JOHN DOE POLICE OFFICER** was a duly commissioned police officer, who was ordered to respond to a protest, march and blocking of a public street organized by Defendants. By July 9, 2016, Defendants were in Baton Rouge for the purpose of staging a protest. DEFENDANTS conspired to violate the law by planning to block a public highway in front of the headquarters of the Baton Rouge Police Department. [ROA.384, ¶ 23-24]

Protests in other cites staged by Defendants resulted in violence and property losses. The leadership of Black Lives Matter did nothing to dissuade its membership from past or future violence. Rocks and other items had been thrown during previous Black Lives Matter protest. [ROA.384, ¶ 25]

DEFENDANTS were in Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers. The Defendants announced that they would stage a protest/demonstration at the intersections of Airline Highway and

Goodwood Boulevard, which is the location of the Baton Rouge Police Department and which is a known public highway. The protest was called a demonstration that was organized by the DEFENDANTS. At all times material herein, DEFENDANTS knew police would be called to clear the public highway of protestors and the protest was staged in front of the headquarters. [ROA.385, ¶ 26-29] Anticipating violence and property loss, Baton Rouge Police Department arranged for a front line of officers in riot gear that formed a shield around officers who were to effectuate arrests and removal of Defendants from the public highway. OFFICER JOHN DOE was one of the police officers who was ordered to make arrests. [ROA.385, ¶ 30-31]

At the beginning, the protest was peaceful until activist began pumping up the crowd. DeRay McKesson was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests. Protesters in the crowd told the police and Plaintiff that DeRay McKesson was the leader. Shortly after the protest begin, protestors, in the presence of DeRay McKesson, began throwing objects at police officers. DeRay McKesson did nothing to stop, quell, or dissuade these actions. [ROA.385, ¶ 32-33] The protest turned into a riot. DEFENDANTS and their membership began to loot a Circle K and one of the items taken was plastic full water bottles, which Defendants began to hurl at the police who were in riot gear and hurl over the line of police in riot gear to strike the police who were behind the protective shield formed by the officers in riot gear. Officers were struck by the full water bottles. Defendant DeRay McKesson was present during the protest and he did nothing to calm the crowd and, instead, he incited the violence on behalf of the Defendant BLACK LIVES MATTER.[ROA.386, ¶ 34-35]

Defendant DeRay McKesson lead protesters down Airline Hwy in an attempt to reach I-12 to block that interstate. The protesters were following DeRay McKesson down Airline Hwy further blocking Airline Hwy, but attempting to reach I-12. OFFICER JOHN DOE's squad managed to block the effort of DeRay McKesson to lead the protesters to I-12. DeRay McKesson knew he was in violation of law and actually live streamed his arrest. When the Defendants ran out of the water bottles they were throwing at the Baton Rouge City Police, a member of Defendant BLACK LIVES MATTER, under the control and custody of the DEFENDANTS, then picked up a piece of concrete or similar rock like substance and hurled it into the police that were making arrests.[ROA.386, ¶ 36-37]

OFFICER JOHN DOE was struck fully in the face and immediately knocked down and incapacitated. OFFICER JOHN DOE'S injuries include loss of teeth, injury to jaw, injury to brain and head as well as lost wages and other compensable losses. [ROA.386, ¶ 38]

In the alternative, these DEFENDANTS have similarly attacked other businesses and other

persons while protesting/rioting. Black Lives Matter leadership ratified all action taken during the protest. DeRay McKesson ratified all action taken during the Baton Rogue protest. And in fact, DeRay McKesson was a lead Plaintiff as a class representative in a class action law suit filed in Baton Rouge Federal Court claiming civil rights violations and that the Baton Rouge Police were wrong in enforcing the law and arrest the protesters, who were violating the law. [ROA.387, ¶ 39]

Following the violence, DEFENDANTS took credit/blame for the protest. Following the protests in Baton Rouge, on Sunday, DeRay McKesson told the New York Times, "The police want protesters to be too afraid to protest." This statement suggests that DeRay McKesson intends to have more protest and that he ratified the conduct at the prior protest, including violating the law and throwing objects at police in Baton Rouge. [ROA.387, ¶ 40-41]

It was unreasonable for Defendant(s) to use force on OFFICER when he was not threatening any of them and performing lawful duties under color of law. During the riot, DeRay McKesson was arrested along with numerous other protestors for violating the law. DeRay McKesson, as a leader of Black Lives Matter, incited criminal conduct that cause injury. Black Lives Matter promoted and ratified this conduct. [ROA.387, ¶ 42-44]

On July 11, 2016, DeRay McKesson, who represented himself as a leader of the Black Lives Matter movement, gave a statement to CNN about the rioting/protesting in Baton Rouge clearly indicating that he was a leader and the organizer. [ROA.388, ¶ 45]

On July 11, 2016, another Black Lives Matter activist in Portland, Oregon, advocated for violence against police with no objection from Black Lives Matter. [ROA.388, ¶ 46]

On July 13, 2016, DeRay McKesson meet with President Obama at the Black Lives Matter meeting at the White House. McKesson tweeted that "we are at the @WhiteHouse right now for a 3-hour convening w/ President Obama re: the recent events in #BatonRouge & across the country." [ROA.388, ¶ 47]

On August 14, 2016, it was reported that DeRay McKesson, the prominent leader of Black Lives Matter, was asked about his justification for the violent riots that he referred to as protests and made a statement to the UPROXX that the violent actions of the movement's rioters are justified, since "people take to the streets as a last resort." "So when I think about anything that happens when people are in the street, I always start by saying, 'People should not have had to have been there in the first place,'" stated McKesson. These statements were a ratification and justification of the violence. [ROA.388, ¶ 48]

Late Sunday night, July 10, 2016, Black Lives Matter held a demonstration in Carbondate, Illinois, and marched on the 200 block of East Main Street. A demonstrator jumped on the hood of a vehicle attempting to use the roadway, but the vehicle drove off before stopping a block away. The

demonstrators followed the vehicle, surrounded, it and then punched the driver in the face when he exited his vehicle. [ROA.388, ¶ 49]

Late Saturday night, July 10, 2016, in the wake of the death of Phlando Castile, a black man killed by police during a traffic stop, Black Lives Matter protesters shut down the east - west lanes of Interstate 94 in St. Paul, Minnesota. The protest turned violent and resulted in the arrests of 50 protesters for rioting. The protesters threw rocks and fireworks at police injuring 21 police officers, including one who had a brick dropped on him from an overpass. Black Lives Matter requested donations to cover legal fees.[ROA.389, ¶ 50]

On Monday, July 11, 2016, DeRay McKesson gave an interview to CNN and represented himself as an activist and organizer of Black Lives Matter, and was speaking on behalf of the protesters. [ROA.389, ¶ 51]

On August 5, 2016, Black Lives Matter protesters chained themselves together at a key route leading to London's Heathrow airport during the busy summer period. They were arrested for blocking a public highway and convicted. [ROA.389, ¶ 52]

On Tuesday, September 20, 2016, Black Lives Matter protested in Charlotte, North Carolina following a police officer shooting of a black man by shutting down the eight-lane Interstate 85 and burning the contents of a tractor-trailer. Black Lives Matter protesters threw fireworks, bottles and clods of dirt at police in riot gear. A man was shot to death during the protest, two other people and six police officers suffered injuries. The rock throwing by protesters damaged squad cars. Protesters looted and set fire to a truck. [ROA.389, ¶ 53]

On September 28 and 29, 2016, for two nights in a row, in El Cajon, near San Diego, Black Lives Matter demonstrators attacked cars and at least one motorcycle while protesting the death of 38-year-ord Ugandan refugee Alfred Olango. The Black Lives Matter protesters took over the intersection of Broadway and Mollison Avenue and stopped passing vehicles and broke several windows. Protesters were throwing glass bottles. [ROA.389, ¶ 54]

On September 30, 2016, DeRay McKesson gave a speech as a Key Note Speaker for the Voice of San Diego, at San Diego State University Politifest sponsored by the School of Journalism, where he was introduced as activist leader of BLACK LIVES MATTER and co-founder of Campaign Zero. [ROA.390, ¶ 55]

On Monday, October 10, 2016, Black Lives Matter staged a protest at Indiana University over the death of Joseph Smedly a former IU student, who went missing in October 2015, but whose body was later found. The protesters created a human blockage in front of the East Third Street Bloomington Police Station blocking cars and yelling at motorists and banging on the hoods of cars shattering a windshield and assaulting at least one vehicle. The protest turned violent resulting in

property damages while blocking traffic. [ROA.390, ¶ 56]

On Wednesday, October 12, 2016, Black Lives Matter protesters repeatedly blocked Southwest 5th Avenue in Portland, Oregon, in the wake of the approval of a controversial police contract. A melee erupted when police attempted to remove the protesters who had set up tents outside City Hall. [ROA.390, ¶ 57]

On October 18, 2016, an article was published in Forges Magazine entitled "Black Lives Matter Activist DeRay McKesson Talks Colin Kaepernick, Progress and the Future," where in DeRay McKesson gave an interview as a leader of Black Lives Matter and where he was described as the "public face of Black Lives Mater." [ROA.390, ¶ 58]

Police Officer John Doe asserted claims for negligence, conspiracy and that Black Lives Matter and/or DeRay McKesson were liable individually and/or under the doctrine of respondeat superior for the actions of its leaders and founders and the resulting violence taking place at its protests/riots. Black Lives Matter planned the protest to take place in Baton Rouge on a public highway in front of the police station, which violation of law would require police response. Violence ensued as it had at multiple previous protests injuring Officer John Doe.

On June 30, 2017, Officer John Doe sought to offer additional materials [ROA.414-417] showing that BLM was soliciting grants of money as evidence to show the District Court that Black Lives Matter entered into a partnership with another entity, which Officer John Doe argued supported his assertion that Black Lives Matter is a legal entity with capacity to be sued. [ROA.409-413] An article offered provided, "Black Lives Matter has quickly established a legal partnership with a California charity in a sign of the movement's growth and expanding ambitions. . . . Since November, the nonprofit charity IDEX has been acting as a mostly unseen financial arm of Black Lives Matter, with the ability to receive grants and tax-deductible donations on the group's behalf." [ROA.418] Officer John Doe offered a photo of the woman who manages the financial affairs of Black Lives Matter through IDEX. [ROA.419] Additional articles regarding the partnership between BLM and IDEX were offered to the District Court to prove the capacity of BLM as a juridical entity that may be sued. [ROA.420-421]

Black Lives Matter has quietly established a legal partnership with a California charity in a sign of the movement's growth and expanding ambition." [ROA.418] Officer John Doe offered a photographs of the woman in charge of the financial affairs of BLM through IDEX. [ROA.419] "Black Lives Matter has agreed to make donations to IDEX's partners . . ." [ROA.419] "Black Lives Matter has quietly established a legal partnership with . . ." [ROA.420] "The financial pact signifies the growth and expanding ambition of Black Lives Matter . . ." [ROA.421]

Additional materials were offered to the District Court to show that Black Lives Matter

partnered with another entity, Walter Thompson New York, for the purpose of investing in, and offering funding to, small black businesses. [ROA.422-423] The partnership was hailed as "part of Black Lives Matter's plan for 2017." [ROA.423] "The official Black Lives Matter organization has entered into a strategic and creative partnership . . ." [ROA.428] . . . Patrisse Cullors, one of the co-founders of he official Black Lives Matter organization as well as the larger BLM movement, said, "we're thrilled to partner with . . ." [ROA.429] These materials were offered to the District Court as evidence to show that Black Lives Matter is a legal entity with the capacity to sue and be sued.

Officer John Doe also sought to offer a transcript from an interview between Sean Hannity and DeRay McKesson [ROA.451-455, ROA.481]where McKesson admitted to attending multiple protests prior to the Baton Rouge protest. [ROA.492] Hannity accused Mr. McKesson of being a professional protester who wanted 501(c)(3) tax exempt status for his organization. McKesson failed to disclose who was paying the protesters. [ROA.492-495]

Patrisse Cullors, a founder and leader of BLM, filed an affidavit into the record of this case [ROA.518-519] wherein she states that she Alicia Garza and Opal Tometi are the co-founders of the Black Lives Matter Network, Inc., and they go on to say that the Network, with all the money raised in the name of Black Lives Matter, has no chapter and that DeRay McKesson has no interest in the Network. They cite the BLM website and direct the District Court. The organization is dedicated to "peaceful protest" she wrote. She further admitted BLM made a call for an end to the violence only after the Dallas shootings by releasing a single statement. [ROA.518-519] This affidavit suggest that there is a legal confusion between Black Lives Matter and the Network, which holds more than $50million raised on behalf and by Black Lives Matter.

B. PROCEDURAL HISTORY

1. ACTION OF THE FEDERAL DISTRICT COURT

On September 28, 2017, the District Court entered *Ruling and Order* denying Officer John Doe the right to proceed anonymously [ROA526-530] and a second *Ruling and Order* dismissing the action with prejudice. [ROA.531-554] Police Officer John Doe filed a *Notice of Appeal*. [ROA.555-558]

2. ACTION OF THE FEDERAL FIFTH CIRCUIT

The *Ruling and Order* [ROA.531 -554] was timely appealed to the Fifth Circuit.

Specifically, Police Officer John Doe alleged that the protest was more akin to a riot, than a demonstration, and the protest mimicked riots in other Cities during which Black Lives Matter protesters caused property destruction and personal injury. [ROA.532] The Trial Court wrote, "Plaintiff has failed, however, to state a plausible claim for relief against an individual or entity that both has the capacity to be sued and falls within the precisely tailored category of persons that may

be held liable for his injuries." [ROA.532] This finding was appealed.

The Trial Court found that Black Lives Matter is a "social movement that lacks capacity to be sued." [ROA.535] This finding was appealed.

The Trial Court found that the proposed amended complaint "fails to remedy the deficiencies with respect to claims against McKesson, Black Lives Matter #BlackLivesMatter on the basis that Black Lives Matter and #BlackLivestMatter lack capacity to be sued. The Trial Court further found that Officer John Doe failed to state a cause of action against Black Lives Matter Network, Inc. [ROA.535] The Complaint alleged that Black Lives Matter was an unincorporated association; yet, the Trial Court took judicial notice of the opposite writing, "The Court judicially notices that "Black Lives Matter," as that term is used in the Complaint, is a *social movement* that was catalyzed on social media by the persons listed in the Complaint in response to the perceived mistreatment of African-American citizens by law enforcement officers." [ROA.543] This finding was appealed.

The Amended Complaint alleged that #BlackLivesMatter was a juridical entity. The Trial Court took judicial notice that "the combination of a "pound" or "number" sign (#) and a word or phrase is referred to as a "hashtag."" The Trial Court took further judicial notice that "#BlackLivesMatter" is a popular hashtag that is frequently used on social media websites." [ROA.545] The Trial Court concluded that "Plaintiff therefore is attempting to sue a *hashtag* for damages in tort." [ROA.546-7] While the Trial Court may be correct that #BlackLivesMatter" has been used as a hashtag in social media, the Trial Court erred in finding that "#BlackLivesMatter" cannot also be the name of a juridical entity. On appeal, Officer Doe claimed that the Trial Court erred in finding that Officer John Doe failed to make allegations that DeRay McKesson "authorized, directed, or ratified" the unidentified demonstrator's act of throwing a rock at Plaintiff. [ROA.549] The Trial Court erred in finding that Officer John Doe alleged that Black Lives Matter Network, Inc., was a separate entity from Black Lives Mater, when in fact, Officer John Doe alleged that Black Lives Matter and Black Lives Matter Network, Inc., are one in the same entity. [ROA.551] Officer Doe further asserted that where the Trial Court stayed discovery, the Trial Court erred in finding that the Plaintiff has had "ample opportunity" to amend. [ROA.552]

The Court of Appeals, E. Grady Jolly, Circuit Judge, held (1) organizer could not be vicariously liable under Louisiana law for acts of the unidentified assailant; (2) officer failed to state civil conspiracy claim under Louisiana law; (3) officer's allegations stated a negligence claim against the organizer under Louisiana law; (4) First Amendment did not bar officer's negligence claim; (5) officer's allegations were insufficient to raise plausible inference that the group was an unincorporated association capable of being sued under Louisiana law; and (6) officer was not entitled to proceed anonymously. The decision of the Trial Court was affirmed in part, reversed in part, and remanded.

Doe v. Mckesson, 945 F.3d 818 (5th Cir. 2019), cert. granted, judgment vacated, 141 S. Ct. 48, 208 L. Ed. 2d 158 (2020). The Defendants sought a writ of certiorari to the Supreme Court.

3. ACTION OF THE U.S. SUPREME COURT

The Supreme Court found that this case presents a dispute involving a novel issue of state law calling for the exercise of judgment by the state courts. "To impose a duty under Louisiana law, courts must consider "various moral, social, and economic factors, " among them "the fairness of imposing liability," . . .." The Supreme Court found that "The Louisiana Supreme Court, to be sure, may announce the same duty as the Fifth Circuit. But under the unusual circumstances we confront here, we conclude that the Fifth circuit should not have ventured into so uncertain an area of tort law - one laden with value judgments and fraught with implications for First Amendment rights - without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court." DeRay McKesson v. John Doe, 592 U.S _, 141 S. Ct. 48, 51, 208 L. Ed. 2d 158 (2020).

4. ACTION OF THE FEDERAL FIFTH CIRCUIT

On remand, the Fifth Circuit sought and obtained two certified questions to this Court. Doe v. Mckesson, 2 F.4th 502, 505 (5th Cir. 2021), certified question accepted, 2021-00929 (La. 7/8/21)

C. RELIEF SOUGHT

This Court should find that Officer John Doe has stated a cause of action against Mr. DeRay McKesson and Black Lives Matter under Louisiana law. This Court should enter a ruling finding that DeRay McKesson had to duty to organize and orchestrate the protest in compliance with all traffic laws and that, considering the well established pattern of previous BLM protests turned violent riots, by staging the Baton Rouge protest on a public street in front of the Baton Rouge Police Department, it was foreseeable to a reasonable man in McKesson's position that police officers would be injured in the confrontation and resulting conflict, and that his negligence caused or contributed to the injuries.

This Court should further find that the Public Rescuer Doctrine is not founded in Louisiana law and, even it were, it would not act as a bar to recovery by Officer John Doe.

CERTIFIED QUESTIONS

> Accordingly, we hereby certify the following determinative questions of law to the Supreme Court of Louisiana, by which responses we will be bound for the purposes of this case:
>
> 1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?
>
> 2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint? Doe v. Mckesson, 2 F.4th 502, 504 (5th Cir. 2021), certified question accepted, 2021-00929 (La. 7/8/21).

SUMMARY OF ARGUMENT

The First Amendment does not protect against tort liability for the reasonably foreseeable consequences of one's *own* negligent, illegal, and dangerous *activity*. The Supreme Court did not hold otherwise in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1964). Claiborne involved a lawful boycott (and various accompanying activities), in which certain persons (but not all) engaged in violent activity, and a state court held the whole boycott illegal, based on the violent acts of some, and imposed liability on all involved.

Given First Amendment protections, the Supreme Court in *Claiborne* had to separate constitutionally protected activities and persons from those not protected. In that context, the Supreme Court held that those *not* engaged in illegal acts could not be held liable for *others*' illegal acts, based on their speech, unless the person authorized, directed, or ratified the perpetrator's act, or engaged in or incited violence itself. But here the issue is whether the First Amendment protects one from ordinary tort liability for the reasonably foreseeable consequences of one's *own* negligent, and illegal *activity*, and Claiborne did not find First Amendment protection for that. In fact, Claiborne recognized protection for *peaceful, lawful* activity, *not* for unpeaceful, unlawful activity of the sort at issue here.

A contrary rule would encourage negligent, unpeaceful, and illegal behavior at the expense of others and, in particular, would expose law enforcement officers to serious harm that tort liability is intended to discourage.

The Professional Rescuer's Doctrine is a "judge made rule" not codified in Louisiana law. As a common law doctrine the PRD would not be a bar to recovery in the State of Louisiana where its basis is the "assumption of the risk doctrine," another common law doctrine rejected by the Louisiana Legislature in favor of comparative fault.

ARGUMENT

I. STANDARD OF REVIEW - LEGAL ERROR

Errors of law are subject to *de novo* review.

II. BACKGROUND FACTS

The facts of this case are procedural and set forth above and adopted herein as though repeated herein *in extensio*.

III. Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party? Mckesson, 2 F.4th at 504.

> Does La. C.C. art. 2315 and this Court's decisions, recognize a duty and a state law negligence action for breach of duty making a leader of a protest demonstration personally liable in damages for injuries inflicted by an unidentified person's violent act there, when it is undisputed that the leader organized the protest to be situated in front of the police station on a public highway in violation of law to cause a confrontation with police and where prior protests organized by the same leader resulted in violence, injury and damages to police, business and other property rendering the injuries to a police officer foreseeable.

The Complaint/Amended Complaint do not allege that McKesson authorized or directed the specific act (this specific person to throw this specific object). They do allege that prior violent conduct created a well known pattern of violence at Black Lives Matter protests and that McKesson ratified the violence at the prior protests and at the Baton Rouge protest by taking no action to stop the BLM protestors from throwing objects at police. "By July 9, 2016, Defendants were in Baton Rouge for the purpose of staging a protest. Protests in other cities staged by Defendants resulted in violence and property loss. DEFENDANTS conspired to violate the law by planning to block a public highway." Plt. Comp. ¶ 10. "DEFENDANTS were in Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers." Plt. Comp. ¶11. ". . . . DeRay McKesson was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests." Plt. Comp. ¶17. The Complaint references the looting and throwing objects at police and, "Defendant DeRay McKesson was present during the protest and he did nothing to calm the crowd and, instead, he cited the violence on behalf of the Defendant BLACK LIVES MATTER." Plt. Comp. ¶19. "Following the violence, DEFENDANTS took credit/blame for the protest and riot."Plt. Comp. ¶23. "On Sunday, DeRay McKesson told the New York Times, `The police want protesters to be too afraid to protest.' He suggested that he intended to plan more protests." Plt Comp. ¶24. The Amended Complaint provides greater detail regarding the history of BLM violence against police in multiple protests led by McKesson, who refused to disavow the violence. A clear pattern and practice were established. See e.g., ". . . .When confronted with the inexcusable violence, DeRay McKesson justified the violence as looking for justice. He was prompted several times to say that he did not condone the violence, but he would not." Am.Comp.¶9.

Given First Amendment protections, the Supreme Court in Claiborne had to separate constitutionally protected activities and persons from those not protected. In that context, there the Supreme Court and, here, the Fifth Circuit held that those *not* engaged in illegal acts could not be held liable for *others*' illegal acts, based on their speech, unless the person authorized, directed, or ratified the perpetrator's act, or engaged in or incited violence itself. Here, the issue is whether the First Amendment protects one from ordinary tort liability for the reasonably foreseeable consequences of one's *own* negligent, and illegal *activity*, and neither the Supreme Court in Claiborne nor the Fifth Circuit in this case found First Amendment protection for that. In fact, *Claiborne* recognized protection for *peaceful, lawful* activity, *not* for unpeaceful, unlawful activity of the sort at issue here.

> Furthermore, although we do not understand the petitioner to be arguing that the Baton Rouge police violated the demonstrators' First Amendment rights by attempting to remove them from the highway, we note that the criminal conduct allegedly ordered by Mckesson was not itself protected by the First Amendment, as **Mckesson ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway.** See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (reasonable time, place, and manner restrictions do not violate the First Amendment). As such, no First Amendment protected activity is suppressed by allowing the consequences of Mckesson's conduct to be addressed by state tort law. Doe v. Mckesson, 945 F.3d 818, 832 (5th Cir. 2019), cert. granted, judgment vacated, 141 S. Ct. 48, 208 L. Ed. 2d 158 (2020). [Emphasis added]

Notably, a contrary rule would encourage negligent, unpeaceful, and illegal behavior at the expense of others and, in particular, would expose law enforcement officers to serious harm that tort liability is intended to discourage. This case involves holding McKesson responsible in tort law for the foreseeable consequences of Respondent DeRay McKesson's *own* illegal actions, not his speech or advocacy. As a result, the legal consequences of his *illegal activity* is not shielded by the First Amendment and is not protected by Claiborne and not protected by Louisiana law. Here, against the backdrop of previous violent protests turned riots, McKesson planned and led an unlawful protest situated in front of police headquarter on a public highway for the purpose of "rioting,"[5] and engaging police and this is when the serious harm to Applicant Officer John Doe occurred for which McKesson would be held liable.

The Fifth Circuit found that Officer Doe "plausibly alleged" the elements of tort negligence,[6]

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[5] For example, as the Fifth Circuit described some of the facts alleged in the Amended Complaint (which at this stage must be accepted as true with all favorable inferences to Officer Doe), Mckesson "was the prime leader and an organizer of the protest," he "led the protestors to block the public highway," Mckesson, 945 F.3d at 832 and at 823, he then "led protestors down a public highway in an attempt to block the interstate," "the protestors followed," *id*. at 828, and "he knew he was in violation of the law and livestreamed his arrest," *id*.. In his presence, "some protestors began to throw full water bottles, which had been stolen from a nearby convenience store," and he "did nothing to prevent the violence or calm the crowd, and ... 'incited the violence.'" Mckesson, 945 F.3d at 832 (citation omitted). Moreover, he "traveled to Baton Rouge 'for the *purpose* of ... rioting.'" *Id*. at 832 n.9 (emphasis added by Fifth Circuit) (citing Amended Complaint). Of course, Claiborne made clear that "riot[ing]" lacks First Amendment protection. 458 U.S. at 912.

[6] Mckesson, 945 F.3d at 832 ("We emphasize that this means only that, given the facts that Doe alleges, he could plausibly succeed on this claim. We make no statement (and we cannot know)

Mckesson, 945 F.3d at 827, so under ordinary rules his "claim for relief is sufficiently plausible to allow him to proceed to discovery," *id*. at 828. And if the allegations are proven, McKesson would be liable for Officer Doe's serious physical, economic, and other injuries resulting from being struck in the face by a rock or piece of concrete hurled by a participant in the demonstration that turned into an alleged riot with objects being hurled at police and in which Mckesson was seen and heard to be giving orders that others followed. *Id*.

This Court should adopt that finding.

1. A foreseeable risk of harm

When a protestor threw the rock-like object at Officer Doe striking him in his face, Doe was "knocked to the ground incapacitated." Mckesson at 823. Officer Doe suffered a host of serious physical and financial injuries, including "loss of teeth, jaw injury, a brain injury, a head injury, lost wages, 'and other compensable losses.'" *Id*. While this incident may seem isolated, similar violent activity has been associated with illegal protests that have routinely followed many police-involved shootings of minorities across the country, and have, with repetition, resulted in serious and severe physical and pecuniary losses to police officers doing little else but *protecting and serving the public*. These catastrophic consequences have not been limited to Officer Doe alone, but rather have been visited upon police officers across the United States who are fulfilling a vital *service to their communities*.

On August 9, 2014, Michael Brown was shot and killed by a Ferguson, Missouri police officer. Over the next two weeks, protests quickly turned into riots during which local businesses were both looted and set ablaze, resulting in millions of dollars in damage. Police officers tasked with protecting the public had bottles and rocks thrown at them, and more than 200 protestors were arrested in the first two weeks of unrest. These riots continued for more than a year, eventually leading to the shooting of two police officers. Associated Press, *Man convicted of shooting two officers during Ferguson protest*, Los Angeles Times, Dec. 9, 2016, https://www.latimes.com/nation/nationnow/la-na-ferguson-shooting-20161209-story.html.

Following the police-involved death of Freddie Gray in Baltimore, protests devolved into rioting, leading to the injury of twenty police officers in the course of their official duties. Am. Compl. ¶ 5.[7] During the chaos in early April of 2015, approximately 300 businesses were damaged, over 200 vehicles and structures were set ablaze, almost thirty stores were looted, and 250 rioters were arrested for their conduct. Just days before Officer Doe was attacked, alongside the continued riots

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whether he will.").

[7] Amended Complaint citations herein are to the proposed Amended Complaint for Damages: Police Officer Hit in Face with Rock, which is in the Fifth Circuit record document titled Appellant Officer John Doe's Record Excerpt at 55-72 (No. 17-30864).

in Ferguson, similar violent protests sprang up around the country through the concerted efforts of Mckesson and his Black Lives Matter organization: in St Paul, Minnesota, twenty-one officers were injured when rioters hurled chunks of concrete and other dangerous projectiles at police, and in one instance, a protestor dropped a concrete block on an officer's head, breaking his neck; in Dallas, five officers were killed and nine were injured when a lone gunman opened fire on the police during a Black Lives Matter protest; and four Tennessee highways were blocked by Black Lives Matter protesters, leading to six arrests. Am. Compl. ¶¶ 18, 20, 22; KARE 11 staff, *Officer suffers spinal fracture during I-94 shutdown*, KARE 11 News, July 10, 2016, https://www.kare11.com/article/news/officer-suffers-spinal-fracture-during-I-94-shutdown/89-268434384.

Given the context and events surrounding the Baton Rouge protests following the death of Alton Sterling, the attack on Officer Doe was *eminently foreseeable*. The Baton Rouge Police on the front line, were in full riot gear to protect the officers making arrests. Plt. Comp. ¶15. The roiling tensions between activists and police had become a national focus, and media coverage of these conflicts dominated the headlines. Even then-President Barack Obama emphasized the fact that "Americans should be troubled by the recent shootings" stating "'[t]hese are not isolated incidents. They're symptomatic of racial disparities that exist in our criminal justice system.'" Christine Wang, *Obama: All Americans Should Be Troubled By Recent Police Shootings*, CNBC, July 7, 2016, https://www.cnbc.com/2016/07/07/president-barack-obama-on-deaths-of-philando-castile-and-alton-sterling.html. The risk was so great to police officers nationwide that the FBI New Orleans office issued a warning emphasizing potential "threats to law enforcement and potential threats to the safety of the general public," stemming from the violent protests. Trey Schmaltz, WBRZ, *FBI Warns of Safety Concerns for Public, Law Enforcement This Weekend*, July 8, 2016, https://www.wbrz.com/news/fbi-warns-of-safety-concerns-for-public-law-enforcement-this-weekend/. And on the same day Officer Doe was injured, three foreign governments urged caution when traveling to the United States amid the protests. Jason Lange & Lauren Hirsch, Reuters, *Three Countries Urge Caution Traveling to U.S. Amid Protests, Violence*, July 10, 2016, https://www.reuters.com/article/us-usa-police-travel-idUSKCN0ZQ0RM.

But despite this obvious and known risk, in the wake of the Alton Sterling shooting death, Mckesson nonetheless organized a protest in the heart of an angry Baton Rouge, and lawlessly lead a group of protesters onto a highway in front of police headquarters while broadcasting himself live on the Internet. In the midst of this maelstrom of protestors *clashing with police*, protesters were throwing objects including water bottles at the police. One protestor threw a heavy projectile over the front line and hit Officer Doe in the face, severely injuring him. *That injury was not merely*

foreseeable; it was inevitable.

Several legal actions have been brought by those protesting purported police misconduct that claim immunity from arrest for unlawful acts because these were in association with protests. See, e.g., Black Lives Matter-Stockton Chapter v. San Joaquin Cty. Sheriff's Office, No. 2:18-cv-00591-KJM-AC, 2018 U.S. Dist. LEXIS 130115, at *5 (E.D. Cal. Aug. 2, 2018); Ahmad v. City of St. Louis, No. 4:17 CV 2455 CDP, 2017 U.S. Dist. LEXIS 188478, at *2 (E.D. Mo. Nov. 15, 2017); San Diego Branch of NAACP v. Cty. of San Diego, No. 16-CV-2575 JLS (MSB), 2019 U.S. Dist. LEXIS 13375, at *21 (S.D. Cal. Jan. 25, 2019); Abdullah v. Cty. of St. Louis, 52 F. Supp.3d 936, 943 (E.D. Mo. 2014). McKesson, himself, filed a class action in United States District Court for the Middle District of Louisiana as the representative of a class of persons whose civil rights were violated when he and other protesters were arrested and jailed for blocking a public highway during the protest. Plt. Am. Comp. ¶39. DeRay McKesson, et al v. City of Baton Rouge, et al, 16-520-JWD-EWD (M.D. La. 08/04/16).[8] But as Claiborne made plain, the First Amendment does not shield a protester from liability for *illegal conduct* separate and apart from any speech and expression.

Officer Doe does not seek to hold DeRay Mckesson accountable for his speech or expression, but rather for his *illegal actions* leading a protest unlawfully onto a public highway and the reasonably foreseeable risk of harm to police officers that illegal activity occasion. Given that Mckesson's activity was illegal, unpeaceful, and *dangerous*, a finding that such activity is protected from tort liability by the First Amendment would harm police officers, the public, and the rule of law because it would (1) eliminate valuable tort protection and (2) impose a rule that would lead to broad societal harm in this and similar situations.

First, the loss of tort liability for negligence in this and similar cases would be very harmful. Such liability plays a vital rule-of-law role that should be preserved here and in similar situations. It discourages negligent activity, making even those unconcerned for others think twice about, e.g., allow pit bulls to roam at large, because of the risk of liability. And one who leads angry people onto a public highway, closing the highway and forcing a confrontation with police, should think twice

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[8] In Paragraph 21 of the class action that McKesson filed, Mr. McKesson admitted the intent of the protesters was to violate the law:

> On Tuesday, July 5, 2016, Mr. Alton Sterling was shot and killed by Baton Rouge Police Department officers, leading to Plaintiffs and others protesting the Baton Rouge Police Department's conduct and seeking justice and demanding an independent investigation of Mr. Sterling's death and changes to the Baton Rouge Police Department's policies, procedures and practices.

Similarly, in Paragraph 25, McKesson wrote:

> Defendants ordered class members to walk on the sidewalks, and to not walk in the street. This order was unreasonable and placed citizens walking along Airline Highway and other streets in danger, because those streets do not have sidewalks and the adjacent areas were uneven and not mowed and contained hazards that could not be seen.

before engaging in such illegal and dangerous activity because of the risk of liability. The prudent choice would be have been for McKesson and BLM to lead the protest in the police department parking lot,[9] or at Independence Park, or other legal, safe, non-obstructing place.

Second, tort liability also assigns losses where they belong—on the wrongdoer, not the victim or the public. That is simple justice. Neither Officer Doe nor the government should absorb the damages for Officer Doe's injuries if a finder of fact determines that the injuries were a reasonably foreseeable consequence of Mckesson's own negligent act in planning and leading the protest onto the highway to engage police. The focus should be on Mckesson's own illegal and dangerous activities at issue here. For example, the alleged fact is that "Mckesson led the protestors to block the public highway," Mckesson at 823, which would be his *own* negligent, illegal *action* (not speech or advocacy). The protest was organized and staged on a public highway in front of the police station and McKesson was arrested while leading the protesters to block I-12. All the while Independence Park, a spacious safe outdoor public park facility, was a mere one or two blocks away. The Baton Rouge police station is on the situs of the Old Woman's Hospital. The parking lot is *gigantic*. McKesson could have held the entire protest in the parking lot with a *legal nexus* to the police headquarter. McKesson's choice to violate the law was his undoing considering the legacy of violence that was his and Black Lives Matter's trademark.

Inadvertent straying or veering simply are not at issue here. The law was purposefully violated. Practical alternatives were readily available, being the parking lot and Independence Park. Here, the Fifth Circuit held that where a demonstration leader *himself* violates the law in a negligent manner by leading protestors onto a highway, he may be held liable under the ordinary tort law for negligence.

> Finally, we turn to Officer Doe's negligence theory. Officer Doe alleges that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. We agree as follows.
>
> Louisiana Civil Code article 2315 provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory. This theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and **(5) the risk of harm was within the scope of protection afforded by the duty breached.** Lazard v. Foti, 859 So. 2d 656, 659 (La. 2003). Whether a defendant owes a plaintiff a duty is a question of law. Posecai

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[9] The police headquarters is in the old Woman's Hospital complex, which has a giganit parking area. McKesson could have confronted police in a legal place, but he instead chose to force confrontation and arrests in the street rather than the parking lot. Had the protest started out legal, likely, there would have been no necessity for arrests and McKesson would not have had police responding in riot gear forming a wall of shields to protect those making the arrests. Instead of the parking lot, McKesson choose the busy four lane highway. What is more, Independence Park is little more than a block or two away. McKesson could have staged the protest right there - on public property. Instead, he wanted confrontation.

> v. Wal-Mart Stores, Inc., 752 So. 2d 762, 766 (La. 1999); see Bursztajn v. United States, 367 F.3d 485, 489 (5th Cir. 2004) ("Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.' " (quoting Dupre v. Chevron U.S.A., Inc., 20 F.3d 154, 157 (5th Cir. 1994))). **There is a "universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another.**" Boykin v. La. Transit Co., 707 So. 2d 1225, 1231 (La. 1998). Louisiana courts elucidate specific duties of care based on consideration of -
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> > various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving. Mckesson, 945 F.3d at 826–27. [Emphasis added]

Here, that the injury was foreseeable was properly pled against the back-drop of the staging of the protest turned riot and the legacy of violent protests that was the trademark of Black Lives Matter protests.[10] The pattern was well established. In this case the criminal code created the duty.

2. Standards of conduct

On July 9, 2016, John Doe and other duly commissioned Baton Rouge Police officers arrested McKesson and his followers "putative class members" for Simple Obstruction of a highway of commerce, pursuant to La. R.S. 14:97.[11]

> A. Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.
>
> B. Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both.

Louisiana Civil Code article 2315, provides: "Every act of man that causes damage to another obliges him by whose fault it happened to repair it." " 'Fault' means a type of conduct that a person should not have engaged in–he has acted as he should not have acted or he has failed to do something that he should have done." 18 La. Civ. L. Treatise, Civil Jury Instructions § 3:2 (3d ed.). Delictual

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[10] La. C.C. art. 2324 entitled, "Liability as solidary or joint and divisible obligation," provides the following:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

Regarding a cause of action for civil conspiracy, Louisiana Courts have determined, the following:

> In order to recover under a conspiracy theory, a plaintiff must allege and prove that an agreement existed to commit an illegal or tortious act, which act was actually committed, which resulted in the plaintiff's injury, and there was an agreement as to the intended outcome or result. Crutcher-Tufts Res., Inc. v. Tufts, 07-1556, pp. 3-4 (La. App. 4 Cir. 9/17/08), 992 So. 2d 1091, 1094, writ denied, 2008-2677 (La. 1/16/09), 998 So. 2d 105 (citation omitted).Zeigler v. House. Auth. of New Orleans, 118 So. 3d 442, 456, 2013 La. App. LEXIS 824, *29, 2012-1168 (La. App. 4 Cir. 04/24/13);, 2013 WL 1775057 (La. App. 4 Cir. 2013).

[11] See DeRay McKesson, et al v. City of Baton Rouge, et al, 16-520-JWD-EWD (M.D. La. 08/04/16), at RD 1, at 2 of 23, ¶1.

responsibility in Louisiana is based on fault. Civil Code Article 2315. Fault encompasses not only negligence but also acts which are not morally wrong but are merely violative of laws or legal duties. Generally, under Louisiana law a person's duty toward another can be simply stated as the obligation to conform to the standard of conduct of an average reasonable man under same or similar circumstances.[12] The elements of a cause of action in tort are fault, causation, and damage. Duty of one person to another may be established by custom and law. Here, there were traffic laws in place governing the conduct of the persons using public highways which applied even when the person is engaged in protests. The duty to refrain from staging a protest on a public highway was a duty established by law. The breach of this duty by McKesson accomplished the single minded goal of engaging police, who were duty bound to make arrests.

> As Professor Stone said about Article 2315, which we paraphrase here to include also Article 2316: Hence it becomes clear that in the decision of a case in tort or delict in Louisiana, the court first goes to that fountainhead of responsibility, Articles 2315 and 2316, and in applying those articles it goes to the many other articles in our Code as well as statutes and other laws which deal with the responsibility of certain persons, the responsibility in certain relationships, and the responsibility which arises due to certain types of activities. Just as we have found in the Code many standards of conduct, many statutes and local ordinances also detail standards of conduct which courts may apply *per se*, impliedly or by analogy. **Criminal laws, traffic regulations, zoning laws, health laws, and others may and often do set the standard for lawful conduct in personal relationships, although they are designed for societal protection and incorporate penalties and specific consequences for their mere breach**.[13] [Emphasis added]

Delictual responsibility in Louisiana is based on fault. La. C.C. Art. 2315.2 Fault is a more comprehensive term than negligence, and fault encompasses many acts which are not morally wrong, but are merely violative of laws or of legal duties.[14] Here, the Legislature established regulations that created legal duties on the part of its citizens and those persons visiting this state for the protection of the police and those traveling the public highways in this State.

> While these rights are "fundamentally in our democratic society," the "constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." Cox v. Louisiana, 379 U.S. 536, 554 (1965). Moreover, "[t]he control of travel on the streets is a clear example of governmental responsibility to [e]sure this necessary order." Id.[15]

This court should find that Officer John Doe has made sufficient allegations through the Complaint and/or Amended Complaint of a duty and breach of duty with foreseeable consequences

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[12] Elliott v. Laboratory Specialists, Inc., 588 So. 2d 175, 176 (La. App. 5th Cir. 1991), writ denied, 592 So. 2d 415 (La. 1992). Bass v. Disa Glob. Sols., Inc., 2019-1145 (La. App. 1 Cir. 6/12/20), 305 So. 3d 903, 907, reh'g denied (July 17, 2020), writ denied, 2020-01025 (La. 11/4/20), 303 So. 3d 651.

[13] Langlois v. Allied Chem. Corp., 258 La. 1067, 1077–78, 249 So. 2d 133, 137 (1971) citing, Pierre v. Allstate Ins. Co., 257 La. 471, 242 So.2d 821 (1971).

[14] Morris v. United Servs. Auto. Ass'n, 32,528 (La. App. 2 Cir. 2/18/00), 756 So. 2d 549, 559, citing, Langlois v. Allied Chemical Corp., 258 La. 1067, 249 So.2d 133 (1971).

[15] Doe v. Mckesson, 2 F.4th at 505.

to assert a cause of action under Louisiana law against DeRay McKesson and BLM as the organizer and orchestrator and leader of this protest turned riot that took place in Baton Rouge on July 9, 2016.

IV. Assuming McKesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint? Mckesson, 2 F.4th at 504.

> Does La. C.C. art. 2315 and the statutes of this State recognize a an immunity for Professional Rescuers? If no, did the courts of this state create a Professional Rescuer's Doctrine? If so, did the PRD survive 2323 and Murray, where the PRD is founded upon assumption of the risk? If so, does the PRD act as a complete bar to liability in this case exonerating a leader of a protest demonstration who the Professional Rescuer seeks to hold personally liable in damages for injuries inflicted by an unidentified person's violent act there, when it is undisputed that the leader organized the protest to be situated in front of the police station on a public highway in violation of law to cause a confrontation with police and where prior protests organized by the same leader resulted in violence, injury and damages to police, business and other property rendering the injuries to a police officer foreseeable.

The Professional Rescuer's Doctrine (PDR) does not apply to this case, first, because as the Fifth Circuit recognized it is a "judge made rule" and Louisiana is a codal state, and second, because this Court through Murray[16] explained, on a previous certified question from the Fifth Circuit, that legislative changes to La. C.C. art. 2323 abolished the assumption of the risk doctrine, which is the foundation for the PRD.

Although a near identical question was previously certified to this Court in Murray, this Court is once again faced with a question as to whether the PRD a direct descendent of the assumption of the risk doctrine, is recognized in Louisiana law. Te Professional Rescuer's Doctrine did not survive Murray. If so, may the courts construct its elements under Louisiana law, or should that task be better left to the Louisiana legislature, which has not chosen to enact immunity under the PRD.[17]

This Court should not apply the PRD to this case, because the PRD does not apply, and, even if it did, it would not be a complete bar to liability. See Murray.

The Professional Rescuer's Doctrine, announced in Gann,[18] is an affirmative defense not well founded in, or applicable to Louisiana tort cases, because it is a common law doctrine that relies upon

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[16] Referencing, Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1124 (La. 1988)("Today we are called upon to resolve the role, if any, which the assumption of risk defense continues to play in Louisiana tort law, given the Legislature's adoption of a comparative fault system. The issue has presented itself in a case certified to us by the United States Court of Appeals for the Fifth Circuit, Murray v. Ramada Inn, Inc., 821 F.2d 272 (1987). The certified question is as follows: Does assumption of risk serve as a total bar to recovery by a plaintiff in a negligence case, or does it only result in a reduction of recovery under the Louisiana comparative negligence statute? We accepted certification, 514 So.2d 21 (La.1987), and now answer that assumption of risk does not serve as a total bar to a plaintiff's recovery in a negligence case.").

[17] "Immunity statutes must be strictly construed against the party claiming the immunity." Weber v. State, 93–0062, p.8 (La. 4/11/94), 635 So.2d 188, 193.

[18] Gann v. Matthews, 2003-0640 (La. App. 1 Cir. 2/23/04), 873 So. 2d 701 writ denied, 2004-0761 (La. 6/18/04), 876 So. 2d 804.

"assumption of the risk."[19] Assumption of the risk was rejected by this Court and the PRD was not adopted by the Louisiana Legislature. For example, as recently as 2013, through Broussard v. State ex rel. Office of State Bldgs., 2012-1238 (La. 4/5/13), 113 So. 3d 175, (see also foot note 8) which was a defective elevator/building case, this Court, 113 So. 3d at 188, discussed the application of jurisprudential doctrines of immunity and assumption of the risk writing:

> Our "open and obvious to all" principle is not a hollow maxim. Rather, it serves an invaluable function, **preventing concepts such as assumption of the risk from infiltrating our jurisprudence.** Over 25 years ago in Murray, we recognized that defining a defendant's initial duty in terms of a plaintiff's, versus everyone's, **knowledge of a dangerous condition would preserve assumption of the risk as a defense and undermine Louisiana's pure comparative fault regime**:
>
> > **If accepted, defendants' argument would inject the assumption of risk doctrine into duty/risk analysis "through the back door."** By that, we mean that the argument attempts to define the defendant's initial duty in terms of the plaintiff's actual knowledge, and thereby seeks to achieve the same result which would be reached if assumption of risk were retained as a defense, i.e., a total bar to the plaintiff's recovery. **A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs**. [Emphasis added]

This Court went on to discuss the implications of the fact that Louisiana is a codal state, Broussard, 2012-1238 (La. 4/5/13), 113 So. 3d 175, 191, that utilizes a "pure comparative fault regime." See footnote 8, and writing at footnote 9:

> Professor Maraist opines that Dauzat[20] potentially creates a professional exception to the "open and obvious to all" rule. Maraist, et. al., *Answering a Fool*, 70 LA. L.REV. at 1127, 1130. In his view, Dauzat arguably stands for the proposition that if the **plaintiff is a member of a class of people who, because of their profession or experience, have knowledge of a risk that should be open and obvious to all members of the class, then the defendant may owe no duty to the members of that class "because of the obviousness of the risk vis-à-vis the group**." Id. Although Professor Maraist's exegesis is a cogent attempt to reconcile Dauzat in light of our sometimes divergent open and obvious case law, **we decline to adopt this "open and obvious to all (members of a class)" principle. We find that doing so would implicitly sanction what we fervently cautioned against in Murray,** i.e., reintroducing "through the back door" the subjective knowledge of the plaintiff and his or her assumption of the risk based on that knowledge. 521 So.2d at 1136. [Emphasis added]

This same logic applies to the Public Rescuer Doctrine. The Court should make the same finding in this case.

In Henry v. Barlow, 2004-1657 (La. App. 3 Cir. 5/4/05), 901 So. 2d 1207, 1213, (statutory duty to submit peaceably to a lawful arrest), that court discussed the impact of Murray on Langlois on the PRD. The Henry Court, at 1213–14, found material facts precluded summary judgment on the PRD defense to the claim of a police officer injured while attending a single vehicle crashed into

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[19] See Gann, 873 So. 2d at 705 ("a jurisprudential rule that essentially states that a professional rescuer, such as a fireman or a policeman, who is injured in the performance of his duties, 'assumes the risk' of such an injury and is not entitled to damages.").

[20] Referencing, Dauzat v. Curnest Guillot Logging Inc., 2008-0528 (La. 12/2/08), 995 So. 2d 1184.

a power pole, writing:

> Before considering whether the risks to which the plaintiff was exposed in this case were dependant or independent of his duty as a police officer, or the level of **"blameworthiness" in the defendant's conduct**, we note the second circuit's treatment of the issue in Worley v. Winston, 550 So.2d 694 (La. App. 2 Cir.), writ denied, 551 So.2d 1342 (La. 1989). In Worley, the trial court awarded a police officer damages for a broken finger joint, an injury which he **sustained during the course of a lawful arrest**. The defendant asserted that the plaintiff was not entitled to such damages due to the Professional Rescuer's Doctrine. Although the second circuit noted that an officer "could expect a criminal to resist arrest[,]" and therefore "the risk of being injured while effecting an arrest is a dependant risk," the court also stated the following:
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> > While the professional rescuers rule, similar to the "fireman's rule," has traditionally been discussed in terms of assumption of risk, **under current Louisiana tort theory the rule should, perhaps, be couched in terms of comparative fault or duty/risk.** See Murray v. Ramada Inns, Inc., 521 So.2d 1123 (La. 1988). More precisely, the rule comes into play in determining the **risks included within the scope of the defendant's duty and to whom the duty is owed**. It might be said that a defendant's ordinary negligence or breach of duty does not encompass the risk of injury to a police officer or fireman responding in the line of duty to a situation created by such negligence or breach of duty. **A defendant's particularly blameworthy conduct, especially intentional criminal conduct, does encompass the risk of injury to a policeman or fireman responding in the line of duty.** Further, in the case of injury to an officer by someone resisting arrest, we have stated above that the duty is intended, at least in part, to protect the officer from injury while effecting the arrest in the line of duty. Where a duty is owed, as in this case, to a certain class of persons, recovery cannot be denied to a person of this class because of the very factor that makes the person a member of the class. Id. at 697. [Emphasis added]

Since the second circuit had already noted a statutory duty on the part of the defendant to submit peaceably to a lawful arrest, that court awarded the officer damages. Here, the duty established by law was not to block a public highway.

Here, in this case, the only reason Officer John Doe was on the highway with the protestors was because McKesson organized the situs of the protest to be on the highway in front of the police station blocking a major thoroughfare, all the while a gigantic parking lot was at the situs and a public park was just one or two blocks away. McKesson disregarded his statutory duty not to protest while blocking, or organize a protest to illegally block, a public highway. La. R.S. 14:97. The police would not have been confronting the Black Lives Matter protesters, who were lead by McKesson, their spokes person and they would not have been making arrests while in riot gear if Black Lives Matter protesters did not have a known pattern and history of violence and the protesters were not in violation of the law necessitating their arrests. Officer John Doe was not wearing riot gear. He was behind the line seemingly protected from the violent onslaught by *lawless rioters* throwing objects at police, who were under public duty to make arrests of violators. It is *self-evident* that McKesson had a duty to refrain from violating the law, including traffic laws. He not only violated the law, but he planned the protest so that the out-of-state and local protesters would be in violation of law drawing the police into confrontation. It was completely foreseeable to McKesson that police would

be injured. In Mayeux v. Charlet, 2016-1463 (La. 10/28/16), 203 So. 3d 1030, 1033–34, this Court explained that there is a legal question of whether in general a duty is owed writing:

> Whether this particular priest owed this particular duty to the plaintiffs in this particular factual context is **a mixed question of law and fact**. See Kenney v. Cox, 95–0126, p. 1 (La. 3/30/95), 652 So.2d 992 (Dennis, J., concurring)(noting there is a "distinction between the existence of a general duty of care (a legal question) and the 'legal cause' or 'duty/risk' question of the particular duty owed in a particular factual context (**a mixed question of law and fact**)"); see also Pitre v. Louisiana Tech University, 95–1466, 95–1487, p. 22 (La. 5/10/96), 673 So.2d 585, 596 (Lemmon, J., concurring; joined by Kimball, J.)(**noting "[i]n the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.**' "). Therefore, we find the appellate court erred in dismissing plaintiffs' claims with prejudice as **the question of duty/risk should be resolved by the factfinder at trial, particularly herein where there exists material issues of fact** . . . [Emphasis added]
>
> Similarly, in Broussard, 113 So. 3d at 185, this Court wrote:
>
> It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. E.g., Brewer v. J.B. Hunt Transp., Inc., 09–1408, p. 14 (La.3/16/10), 35 So.3d 230, 240 (citing Mundy v. Dep't of Health and Human Res., 620 So.2d 811, 813 (La.1993)). The judge decides the former, and the fact-finder—judge or jury—decides the latter. "In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.' " Pitre, 95–1466 at p. 22, 673 So.2d at 596.[21]

Despite Murray, Louisiana circuit courts continue to grapple with how to apply the common law PRD. This Court has not directly addressed the question of whether the PRD survived Murray (La. C.C. art. 2323) and, if so, is the PRD a complete bar. Some courts, e.g. Gann, continue applying the PRD as though it were a source of statutory immunity and complete bar, even though its foundation arises from the common law and is founded upon the assumption of the risk doctrine disavowed as non-existent in Louisiana law.

If the Professional Rescuer's Doctrine survived the enactment of article 2323, the questions of fact as to whether the risk was dependent or independent is a jury question, which would preclude dismissal of this case on a no cause of action. Returning to Gann, in an unpublished opinion, the Louisiana First Circuit affirmed *allowing the question of immunity* to go to a jury, writing, "Here, unlike the Gann court, the jury made a factual finding that Mr. Rayburn's conduct was either so blameworthy or the risk was so extraordinary as to impose liability." Brooks v. Shaw Constructors, Inc., 2008-0804 (La. App. 1 Cir. 10/31/08), 2008 WL 4764333.

In Langlois v. Allied Chem. Corp., 258 La. 1067, 1087–88, 249 So. 2d 133, 141 (1971), which predates the amendment to article 2323, this Court discussed the "Firefigher's Rule;" however, it must *again* be noted that the application of assumption of the risk was superceded by the enactment of the comparative fault statute as recognized by the Murray Court, 521 So. 2d at 1126. Nevertheless, in Langlois, this Court addressed the claim of a firefighter who sued for injuries he

[21] Referencing, Pitre v. Louisiana Tech. Univ., 95–1466, pp. 12–16 (La.5/10/96), 673 So.2d 585.

sustained while acting as a firefighter after being exposed to chemicals escaping from a chemical plant and for which he was allowed recovery despite the "Firefighter's Rule." This Court explained, "Any voluntariness on the part of Langlois **could only be found if we assume a waiver because he became a fireman**. Firemen, police officers, and others who in their professions of protecting life and property necessarily endanger their safety **do not assume the risk of all injury without recourse against others**. Briley v. Mitchell, 238 La. 551, 115 So.2d 851 (1959)." [Emphasis added]

> Although Langlois as a fireman possessed more knowledge than many about the nature of gases and the consequences of exposure to gases, he did not here knowingly and voluntarily encounter the risk which caused him harm. He acted in response to duty, and his exposure to the risk in line with that duty was minimal. **Langlois did not embrace a known danger with that consent required by law to bar his recovery for defendant's fault.** The defendants must establish by a preponderance of evidence their affirmative defense. They have failed to discharge this burden.[22]

Thus, even if assumption of the risk had survived the enactment of 2323 and Murray, pursuant to Langlois, Officer John Doe has stated a viable cause of action under Louisiana that is not barred by the PRD.

With regard to the duty to follow the law and the reasonable expectation of being held responsible for the harms caused by violations of law, this Court, Langlois, 249 So. 2d at 137, wrote, "**Just as we have found in the Code many standards of conduct, many statutes and local ordinances also detail standards of conduct which courts may apply per se, impliedly or by analogy. Criminal laws, traffic regulations, zoning laws, health laws, and others may and often do set the standard for lawful conduct in personal relationships, although they are designed for societal protection and incorporate penalties and specific consequences for their mere breach**. Pierre v. Allstate Ins. Co., 257 La. 471, 242 So.2d 821 (1971)." Emphasis added.

The standard care and duty that was breached is found in La. R.S. 14:97.

CONCLUSION

This Court should find that Officer John Doe has stated a cause of action against Mr. DeRay McKesson and BLM under Louisiana law. This Court should enter a ruling finding that DeRay McKesson had to duty to organize and orchestrate the protest in compliance with all traffic laws and that, considering the well established pattern of previous BLM protests turned violent riots, by staging the Baton Rouge protest on a public highway in front of the Baton Rouge Police Department, it was foreseeable to a reasonable man, in McKesson's position, that police officers would be injured in the confrontation and resulting conflict and that his negligence caused or contributed to the injuries.

This Court should further find that the Public Rescuer Doctrine is not founded in Louisiana law and even it were, it would not act as a bar to recovery by Officer John Doe.

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[22] Langlois, 249 So. 2d at 141.

PRAYER FOR COSTS

The Applicant, Officer John Doe, seeks an award for costs.

Respectfully submitted:
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AFFIDAVIT OF CORRECTNESS AND SERVICE

I hereby certify that after having read the foregoing and finding all facts therein to be true and correct to the best of my knowledge and recollection. I have caused the above and foregoing to be served by email on counsel listed below and on the court by placed same in the U.S. Mail postage prepaid and properly addressed to the United States Court of Appeals for the Fifth Circuit, this 11th day of August, 2021.

Donna Grodner

Sworn to and subscribed before me this 11th day of August, 2021, in Baton Rouge, La.

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