

**IN RE: MEDICAL REVIEW
PANEL REQUEST OF LIONEL
FAVRET, JR.**

NO. 2017-CA-0464

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COURT OF APPEAL

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FOURTH CIRCUIT

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STATE OF LOUISIANA

CONSOLIDATED WITH:

**LIONEL FAVRET, JR. AND
LYNDA HANNIE FAVRET**

VERSUS

TOURO INFIRMARY

CONSOLIDATED WITH:

NO. 2017-CA-0465

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-13643 C\W 2009-00960, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge

Judge Paula A. Brown

(Court composed of Judge Edwin A. Lombard, Judge Rosemary Ledet, Judge
Paula A. Brown)

LEDET, J., CONCURRING WITH REASONS

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AFFIRMED
JUNE 1, 2018

This is a negligence and premises liability action. Plaintiffs, Lionel Favret, Jr. (“Mr. Favret”) and Lynda Hannie Favret (“Mrs. Favret”) (collectively referenced as “Mr. Favret”), appeal the district court’s judgment which dismissed their claims against defendant, Touro Infirmary (“Touro”). For the reasons that follow, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Mr. Favret was admitted to Touro¹ on August 18, 2005 by Dr. Charles Billings (“Dr. Billings”), his orthopedist, and diagnosed with osteomyelitis—an infectious inflammatory disease of the bone—and back pain.² Mr. Favret was treated with intravenous (“IV”) antibiotics and underwent multi-level back surgery on August 22, 2005.³ After the surgery, Mr. Favret experienced some confusion and delirium. On August 25 and August 26, 2005, during recovery in the intensive

¹ Touro is located in New Orleans, Louisiana.

² Mr. Favret had previously been seen at East Jefferson General Hospital located in Metairie, Louisiana, on July 14, 2005, with similar complaints.

³ The surgeries included a lumbar spine decompression at L2-3; a discectomy at L3-4; a partial vertebrectomy; laminotomies at L2-L3 and L4-L-5; and a posterolateral fusion at L2-L5.

care unit (“ICU”), Mr. Favret “coded,” and both times he was resuscitated. After his discharge from ICU, Mr. Favret was transferred to T-7, a unit in Touro for medical surgical patients.⁴ On August 29, 2005, Hurricane Katrina (“*Katrina*”) struck the city of New Orleans. Mr. Favret’s August 30, 2005 progress notes entered by Dr. Richard Meyer (“Dr. Meyer”), Dr. Billings’ partner, indicated that Mr. Favret was stable; he could use the bathroom with assistance; he had no calf pain; his dressing was dry; and he should continue on IV antibiotics.

In response to the threat of *Katrina*, on August 27, 2005, Touro activated its hurricane preparedness plan to shelter in place. At approximately 3:00 a.m. on August 29, 2005, Touro lost electrical power supplied from Entergy New Orleans (“Entergy”). Touro then relied on backup generators for power, including air conditioning for its first three floors. After some backup generators failed, Touro was no longer able to provide air conditioning to its first three floors. Touro opened windows, put box fans in patients’ rooms, and placed “spot” coolers in the T-7 unit. Touro continued to provide power to its patient headboards and to the dietary kitchen.

On August 30, 2005, Touro lost water pressure when the Sewerage and Water Board (“SW&B”) could no longer pump water because of extensive flooding caused by the levee breaches. On the afternoon of August 30, 2005, Touro’s Chief Executive Officer (“CEO”), Leslie Hirsch (“Mr. Hirsch”), decided to evacuate the building. By the morning of August 31, 2005, Touro lost all

⁴ For purposes of this opinion, the events discussed herein relate primarily to the conditions Mr. Favret experienced while in the T-7 unit and during his evacuation.

running water. Touro had bottled water for drinking and 55-gallon drums of water available to flush toilets.

Touro's employees carried Mr. Favret down several flights of stairs to the parking garage—its staging area for evacuation—on August 31, 2005. The staging area had lights, food, and water. Mr. Favret sat upright in his wheelchair for over twenty-four hours, while waiting to be evacuated. At some point on September 1, 2005, Mr. Favret was transported by van, in a seated position, to Rapides Regional Medical Center (“Rapides”) in Alexandria, Louisiana. He was transported to Rapides with his medical records from Touro.

Mr. Favret arrived at Rapides at approximately 11:22 p.m. He was initially examined by Dr. Claire Coco (“Dr. Coco”). At the time of his examination, Mr. Favret was sweaty and mildly dehydrated, and his surgical incision had separated and reopened by approximately an inch and a half. Dr. Troy Vaughn (“Dr. Vaughn”), a neurosurgeon, consulted with Mr. Favret on September 2, 2005. Mr. Favret was diagnosed with compression fractures in his vertebrae and a recurring infection. On September 5, 2005, Dr. Vaughn performed subsequent back surgery on Mr. Favret—he underwent debridement of his surgical wound to remedy the reoccurrence of the infection, repair of a vertebral abscess, and a repeat discectomy at L-4 and foraminotomy at left L2-3. Mr. Favret was discharged on September 14, 2005, with orders to remain on IV antibiotics for eight weeks.

On August 29, 2006, Mr. Favret petitioned for a Medical Review Panel (“MRP”). In his MRP complaint, Mr. Favret alleged, in part, that: from August

29, 2005 through September 1, 2005, Touro failed to provide him with any antibiotic treatment; he experienced pain when Touro personnel “jostled” him as he was moved from his room to a lower floor for evacuation; Touro lacked personnel to place him in a helicopter that had arrived before the van, which was ultimately used for his evacuation; and, he was forced to remain in a seated position during his painful ten-hour ride to Rapides. Mr. Favret represented that the post-Touro surgical complications he developed, including the debridement of his surgical wound, repair of the vertebral abscess, and a repeat discectomy at L-4 and foraminotomy, were caused by negligent medical treatment from Touro’s nursing and administrative personnel.

On October 30, 2008, the MRP found that Mr. Favret’s evidence failed to prove that Touro did not meet the applicable standard of care. The MRP further opined the evidence did not support the allegation that the prescribed antibiotics were discontinued.

Mr. Favret filed a Petition for Damages (the “Petition”) in Civil District Court for Orleans Parish on January 27, 2009. The Petition alleged that Mr. Favret suffered severe personal injuries, including damage to his back, while being moved about the premises from Touro personnel.⁵ Specifically, the Petition averred that Touro personnel did not properly handle Mr. Favret when they moved him from his hospital bed and placed him in the van for transport to Rapides—all in violation

⁵ The Petition also asserted a loss of consortium claim on behalf of Mrs. Favret.

of the requirements of La. R.S. 40:1299.41(A)(8) of the Louisiana Medical Malpractice Act (“LMMA”).⁶

On January 12, 2010, Touro filed its first motion for partial summary judgment that requested dismissal of Mr. Favret’s medical malpractice claims. Touro argued that Mr. Favret had not offered any expert testimony to prove that Touro breached any applicable standard of medical care. Touro also cited the MRP’s decision in its favor. Mr. Favret did not oppose Touro’s partial motion for summary judgment. The district court granted Touro’s partial motion for summary judgment on June 25, 2010, and ordered “that all claims of Plaintiffs against Touro Infirmary for medical malpractice including, but not limited to, medical malpractice as defined by La. R.S. 40:1299.41(A)(13)” be dismissed without prejudice.⁷

Touro filed a second motion for summary judgment, on November 16, 2011. In this motion, Touro sought dismissal of Mr. Favret’s remaining negligent transportation/premises liability (“premises liability”) claims against Touro in their entirety. The district court heard the motion on May 4, 2012.

⁶ La. R.S. 40:1299.41 is presently La. R.S. 40:1231.1. At the time of Mr. Favret’s Petition, La. R.S. 40:1299.41(A)(8) provided that “[m]alpractice means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.”

⁷ La. R.S. 40:1299.41(A)(13) provides in part:

“Malpractice” means any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and **the handling of a patient, including loading and unloading of a patient.** . . . (emphasis added).

Touro argued that the deposition testimony of Drs. Billings and Vaughn, along with the affidavit of Dr. Meyer, showed that Mr. Favret had not proven the condition of Touro's premises caused him to suffer any injuries. Rather, Touro claimed that the only alleged injuries—increased pain and a possible vertebrae fracture—that *possibly* resulted from the transportation of Mr. Favret in a seated, rather than a supine or recumbent position, arise from the type of claim that falls squarely within the statutory definition of “malpractice” as provided in La. 40:1299.41(A)(13). As such, Touro maintained that these medical malpractice claims should also be dismissed because all medical malpractice claims had previously been dismissed by the district court's June 25, 2010 judgment.

In opposition, Mr. Favret argued that the environmental conditions at Touro caused him to suffer physical and emotion pain. Further, he contended that he was, indeed, injured as a direct result of Touro's premises liability when Touro's personnel mishandled him during Touro's evacuation process. Mr. Favret iterated that although the allegations set forth in his Petition are arguably medical malpractice claims, they also constitute premises liability claims. He contended that Touro was forced to transport him in a van because it had inadequate equipment as a direct result of its lack of preparation for *Katrina*. He further alleged that he was required to undergo a post lumbar fusion and that his damages were substantiated by the testimonies of Drs. Billings, Vaughn, and Meyer.

In open court, Mr. Favret requested leave to file a supplemental and amended petition (“Amended Petition”) to set forth in greater detail the facts

alleging premises liability. At the conclusion of the hearing, the district court took the summary judgment motion under advisement, permitted the parties to submit post-trial memoranda, and orally granted Mr. Favret's motion for leave to file his Amended Petition. On May 8, 2012, the district court partially granted Touro's motion for summary judgment against Mr. Favret "as to those claims related to any alleged injuries sustained in the transport of plaintiff, Lionel Favret." The district court noted that "[t]his claim sounds in medical malpractice and on June 25, 2010, this court dismissed plaintiffs' claim for medical malpractice."

In his Amended Petition, Mr. Favret alleged the following acts, among others, of Touro's negligence and premises defects: (1) failure to use due care under the circumstances; (2) failure to provide premises free of unreasonable risks of harm in preparation for the threats posed by a significant hurricane; (3) failure to provide adequate back-up generators; (4) failure to evacuate its patients to a safe and suitable premises as opposed to sheltering in place; (5) failure to employ a hurricane emergency plan that included a means to safely transport patients out of harm's way; and (6) failure to provide appropriate transportation.

Mr. Favret filed a motion for new trial on May 16, 2012, which the district court denied on August 2, 2012. Mr. Favret timely filed a supervisory writ with this Court for review. This Court denied the writ, and held that Mr. Favret had an adequate remedy on appeal after a trial on the merits and rendition of a final judgment.⁸

⁸ *Favret v. Touro Infirmary*, 2012-1680 (La. App. 4 Cir. 1/24/13).

On February 13, 2013, Touro filed its third motion for summary judgment, alleging that Mr. Favret had not produced sufficient evidence to support his allegations that his injuries were caused by the condition of Touro's premises. Touro sought dismissal of all claims filed by Mr. Favret against Touro. A hearing was held on September 20, 2013. After taking the matter under advisement, the court denied the motion on October 28, 2013.

The district court held a judge trial on May 23 through May 25, 2016, on Mr. Favret's premises liability claims. The pertinent testimony elicited at trial is as follows:

Mr. Favret

Mr. Favret testified that he first began treatment with Dr. Billings for osteomyelitis due to infection in his foot. Dr. Billings performed a debridement and removed a piece of bone in his right foot. Because of his relationship with Dr. Billings, Mr. Favret said he resumed treatment with Dr. Billings at East Jefferson General Hospital when he began having complaints of back pain. Dr. Billings had operating privileges at Touro and referred him there for back surgery, which he underwent on August 22, 2005. After surgery, Mr. Favret was placed in ICU. He recalled that he flat lined and experienced hallucinations. On August 28, Mr. Favret was placed in a room on the seventh floor in the T-7 unit. Mr. Favret testified that during *Katrina*, Touro personnel removed him from his room and placed him in a hallway near the nursing station, and away from windows, to avoid being struck by debris or falling objects. He recalled that Dr. Meyers visited with him on August 30, 2005, and gave him permission to stand.

Mr. Favret described the temperature inside Touro as warm and stated it became progressively hotter. He reiterated that by August 30th, after *Katrina* had passed, the temperature had become unbearable. He likened the conditions at Touro to that of prison camps where prisoners are “miserably soaked and wet.”

Mr. Favret testified that four Touro staff personnel placed him in a wheel chair to move him from the seventh floor to the staging area. He said he did not receive footpads on his wheel chair, which made it “a little bit uncomfortable to sit.” At some point during his wait, Mr. Favret had a bowel movement in his wheelchair, was cleaned by two nurses and placed back in the wheel chair.

Mr. Favret testified that before he was evacuated, he saw a helicopter land. A police or rescue officer gestured towards him, seemingly indicating for him to get onto the helicopter. After he pointed to his wheelchair, the helicopter then left. About forty-five minutes later, a van arrived to evacuate him. Mr. Favret testified that he was the last person to be evacuated, and he probably sat in the staging area for twenty-four or thirty hours. He was upset that he was the last patient to be evacuated. After the van’s arrival, an accumulation of water on the ramp prevented the van from getting closer to the area where Mr. Favret was seated. He said two Touro staffers picked him up by the arms and feet and “flopped” him into the front seat of the van.

Mr. Favret testified that the evacuation process took a psychological toll on him. He described his pain level as a “twelve” upon his arrival at Rapides General. He said he remained in the same hospital gown from August 29, 2005 until he arrived at Rapides.

After his arrival at Rapides, he received a bath and clean clothes. He said he interacted mostly with Dr. Vaughn and a female internist, Dr. Coco. Dr. Vaughn

performed surgery to correct the defects in his back. Mr. Favret testified it took about four or five months for him to become ambulatory; he received rehabilitation therapy until November 2005. Mr. Favret could not recall if he was on antibiotics after he left Touro's ICU or if Dr. Billings had prescribed antibiotics; although he remembered he was on an IV while at Touro.

On cross-examination, Mr. Favret testified that Touro had fans in the T-7 unit and that there may have been a fan in his room at some point. He conceded he had testified in his deposition that the staging area had air-conditioning. He explained that it felt cooler in that area than any other place in the hospital. Mr. Favret acknowledged he had previously testified in his deposition that he may have been provided water while awaiting evacuation in the staging area, and Touro personnel provided the evacuees with nutrient bars and yogurt cups.

Mr. Favret admitted he had signed an informed consent form from Dr. Billings which informed him of the possibility of future surgeries and the risk of re-infection regarding his osteomyelitis. He also confirmed that he experienced hallucinations after his Touro surgery, which he believed ceased on August 27th. When shown Dr. Coco's medical record note that indicated Mr. Favret had been on antibiotics since his surgery at Touro and had not reported any pain complaints on initial evaluation, Mr. Favret denied that he told anyone at Rapides that he was pain-free.

Mrs. Favret

Mrs. Favret testified in support of her loss of consortium claim. She said she visited her husband every day, three times a day, while he was in the hospital at Touro. She visited her husband on August 28th, but assumed Touro would be on lock down afterwards because of *Katrina*. She evacuated with her daughter on the

Sunday before *Katrina* made landfall. Following her evacuation, she was unable to contact Mr. Favret at Touro because the phone lines were consistently busy. With assistance from her niece who was in the Risk Management Department at Huey P. Long Hospital in Alexandria, on September 2, 2005, she learned her husband was in Rapides. Mrs. Favret testified that she experienced anxiety because she had no idea where Mr. Favret was after the storm.

Robert Latham, Jr.

At trial, Mr. Latham, the former executive director of the Mississippi Emergency Management Agency, testified as an expert in general emergency management and preparation through a videotaped deposition. Mr. Latham admitted that he had never worked in health care; was not familiar with the State's standards for a proper hospital emergency management plan; was unaware if Touro's plan had been reviewed by the State; and was not familiar with the damage Touro sustained after the storm. Mr. Latham reviewed five documents relative to Touro's *Katrina* preparedness and emergency plan. He testified the plan lacked operational details and an integrated planning structure to ensure its implementation and the continuation of vital functions. He said Touro was aware from its experience with Hurricane George and a hurricane simulation exercise that it could possibly lose power and water. Mr. Latham opined that Touro was not adequately prepared to evacuate because its emergency plan did not address all the hazards that could develop as a result of the storm.

On cross-examination, Mr. Latham said he did not know if the State of Louisiana required hospitals to have contracts in place to ensure the availability of transportation for patients in the event of evacuation. He noted that pre-*Katrina*, one of the problems with those contracts was that hospitals typically contracted

with the same parties for evacuation services and because of the limited amount of transportation providers, “you can’t fill all of those contracts.” Mr. Latham could not say if Touro’s emergency plan or its method of evacuation violated any established regulation. He testified he was more concerned about the process than the actual plan.

Dr. Kevin Stephens

Dr. Stephens, an obstetrician/gynecologist, was qualified as an expert in emergency management preparedness and general medicine. Dr. Stephens opined that based on the records he reviewed, Touro did not adequately prepare for *Katrina*.⁹ He said Touro was not sufficiently “hardened” to shelter in place due to its lack of adequate back up power/generators, and an inadequate supply of food and water. Dr. Stephens also testified that Touro’s staff was not prepared to know the proper method to transport back surgery patients; Touro failed to ensure patients were evacuated with adequate medical records; and Touro failed to ensure there was a continuation of medical care and services, such as Mr. Favret’s antibiotic therapy. Dr. Stephens opined that Touro did not provide a safe environment for Mr. Favret and more probably than not, Mr. Favret’s need for subsequent surgeries was caused by the environmental conditions to which he was exposed at Touro.

On cross-examination, Dr. Stephens confirmed that Dr. Coco’s September 1, 2005 chart entries indicated Mr. Favret reported that he had been on IV antibiotics since his Touro surgery; Mr. Favret had not missed any dose of medication prior to

⁹ Dr. Stephens said he reviewed Touro’s “incomplete” medical records, some Rapides’ medical records, and the sworn depositions of Messrs. Favret, Hirsch and Latham, and Drs. Kevin Jordan, Vaughn and Billings.

the date of his arrival at Rapides General; and Dr. Coco described Mr. Favret's wounds as "clean." Dr. Stephens conceded that he had not reviewed the testimony of Peter O'Connell¹⁰ ("Mr. O'Connell")—who observed that Touro had a substantial amount food, water, and ice throughout the evacuation—or the testimony of other witnesses¹¹ who also were at Touro throughout the evacuation period who testified they received meals and plenty of water. Dr. Stephens testified he was unaware of any Department of Health and Hospitals ("DHH") regulation that Touro had violated in its preparation for *Katrina*. He admitted that Mr. Favret's treating physician did not order his evacuation pre-*Katrina*, and the State did not mandate hospitals to evacuate before the hurricane made landfall.

Leslie Hirsch

Mr. Hirsch, Touro's CEO at the time of *Katrina*, testified that Touro implemented its disaster emergency plan on Saturday, August 27, 2005, and that Touro discharged those patients who could be safely discharged.¹² He testified that Touro, as with most hospitals, did not consider evacuation in advance of the storm because evacuation potentially posed a greater risk to patients than sheltering in place. After *Katrina* struck, external communications were extremely limited because the hospital's phone system was down and cellphones were inoperable. Touro personnel primarily relied on walkie-talkies to communicate within Touro. He said the loss of water and power compromised the hospital's ability to operate.

¹⁰ Mr. O'Connell was the district manager for Sodexho, Touro's food services provider at the time of *Katrina*. His trial testimony from *Falcone v. Touro* ("*Falcone*"), CDC No. 2008-754 c/w 2006-13644, was admitted into evidence.

¹¹ Touro's trial counsel identified these other witnesses as Dennis Simmons ("Mr. Simmons"), Frank A. Folino, Jr. ("Mr. Folino"), and John Poumaroux ("Mr. Poumaroux"). The testimony of these other witnesses is discussed *infra*.

After consultation with his staff, Mr. Hirsch decided to evacuate on August 30, 2005.

Touro secured vehicles from Terrebonne Parish and aircraft from Acadian Ambulance to assist in evacuation. Mr. Hirsch testified that helicopter evacuations started at a rapid pace; however, they stalled on Wednesday, August 31, 2005 when the helicopters were re-deployed to assist in rooftop rescue operations throughout the City of New Orleans. In response to the stall, Mr. Hirsch and his staff concluded that it would be more efficient to have the un-evacuated patients remain in the staging area, rather than returned to their hospital rooms. Mr. Hirsch testified that Touro completed its evacuation on the afternoon of Thursday, September 1, 2005—less than forty-eight hours after it began—and it was the first acute care hospital to evacuate. Mr. Hirsch admitted the temperature inside Touro was hot and/or warmer than usual and acknowledged that he had given an interview wherein he had described the heat as “unbearably hot, especially for the patients.” Mr. Hirsch verified that spot coolers were placed in the hospital’s units and denied that Touro ran out of food, drinking water, or pharmaceuticals.

John Joseph Kingston, Jr.

Mr. Kingston, Entergy’s Line Supervisor for Uptown New Orleans, testified that Entergy’s core team stayed at the Hyatt until the Tuesday following the storm. On Tuesday, at the instruction of his region manager, the core team left because of the collapse of the 17th Street Canal and London Avenue Bridge. Mr. Kingston said he would not have been able to give Touro a time when services would have

¹² Mr. Hirsch’s depositions taken in *Falcone, supra* and *Serou v. Touro* (“*Serou*”), CDC No. 2006-9095, were admitted into evidence in their entirety in lieu of his live testimony.

been restored even if asked because Entergy had no generators. He did not, however, recall if Touro actually called to ask that question.¹³

John Richard Huerkamp

Mr. Huerkamp, Chief Engineer for the S&WB, testified that the S&WB's loss of its ability to supply and equipment failure was catastrophic and had not happened before *Katrina*. He stated that the S&WB would have been unable to tell any customer when water would have been restored.¹⁴

Jesse L. Arnold

Mr. Arnold, a civil engineer in hydraulics, inclusive of soil and flood water, testified as an expert on behalf of Touro. Mr. Arnold testified that the S&WB's facilities flooded and were rendered inoperable because of breaches in the flood walls and levees associated with the 17th Street Canal, the London Levee, and to a lesser degree, the inner harbor. He said Touro's actions did not contribute to the breach.¹⁵

John Matessino

Mr. Matessino, President and CEO of the Louisiana Hospital Association, testified that he was in constant contact with Mr. Hirsch. He said the Association lent assistance to hospital members. He contacted Acadiana Ambulance Service to assist Touro in its evacuation.¹⁶

Scott Landry

¹³ Mr. Kingston's trial testimony in *Falcone* and *Buggage v. American Home Assurance Co.* ("*Buggage*"), CDC No. 2007-0434 c/w 2014-0436, was admitted into evidence.

¹⁴ Mr. Huerkamp's trial testimony in *Falcone* and *Buggage* was admitted into evidence.

¹⁵ Mr. Arnold's trial testimony in *Buggage* was admitted into evidence.

¹⁶ Mr. Matessino's trial testimony in *Falcone* was is admitted into evidence.

Mr. Landry, Touro's Director of Facilities and corporate representative, testified that he participated in Touro's emergency planning process. It was his responsibility to prepare the hospital for *Katrina* and to implement Touro's response plan. He said that pre-storm, Touro stored bottled water and municipal water. As to electric power, he said Touro had generators in place and had a contract with Aggreko, LLC ("Aggreko") to provide backup generators and fuel.¹⁷ Mr. Landry described the internal environment in Touro as "warm."

Mr. Landry testified that Touro met its obligation to provide ventilation when it deployed two spot coolers, opened and/or broke windows, and placed fans in Mr. Favret's T-7 unit. Mr. Landry cited to the Joint Commission for the Accreditation of Hospital Organizations ("JCAHO") regulations, which required hospitals to provide ventilation, not air conditioning. Mr. Landry admitted that Touro did not have a written evacuation plan and its failure to have a written plan violated JCAHO standards. Mr. Landry testified that, notwithstanding a written evacuation plan, Touro evacuated its patients faster than anybody else in the City of New Orleans and Touro never lost its accreditation.

Mr. Landry stated that FEMA and/or the military halted Touro's Wednesday nighttime helicopter evacuations because the military was the only entity allowed to fly at that time. Mr. Landry, who relayed he was on Touro's premises throughout the evacuation, also disputed testimony that Touro ran out of food and medicine for patients. Mr. Landry identified a medical administration record

¹⁷ The dispute between Touro and Aggreko regarding fulfillment of the contract's terms is outlined in *Serou v. Touro Infirmary*, 2012-0089 (La. App. 4 Cir. 1/9/13), 105 So.3d 1068 *partly reversed o.g.*(La. App. 4 Cir. 1/28/13); 129 So.3d 540 *writ denied* and *Serou v. Touro Infirmary*, 2012-0089 (La. App. 4 Cir. 4/24/13), 115 So.3d 688.

generated by Touro's pharmacy department, which indicated that Mr. Favret received antibiotics through 9:00 a.m. on August 31, 2005.

Cynthia Davidson

Cynthia Davidson ("Ms. Davidson"), the Region I Emergency Preparedness Coordinator for the Louisiana Hospital Association¹⁸ testified as an expert witness in hospital emergency preparedness, with knowledge of JCAHO and DHH standards.¹⁹ Ms. Davidson testified that Touro representatives attended emergency preparedness meetings for *Katrina*. She relayed that there were no actionable gaps in Touro's emergency preparedness plan. She explained that updated changes in emergency preparedness planning made as the result of the Hurricane Pam simulation exercise had not been released in sufficient time to require Touro to put those changes into effect before *Katrina* struck. Ms. Davidson said there were no JCAHO requirements for generated power for air conditioning; the requirements only mandated ventilation. She noted that hospitals typically shelter in place, and hospitals usually discharge patients who can be safely discharged and weigh the health benefits to the patients in sheltering in place against the trauma that might result from an evacuation. She testified that five patients died when West Jefferson Hospital evacuated in advance of Hurricane Gustave. She said Touro's failure to have a written evacuation plan did not result in the loss of its accreditation by JCAHO.

John Poumaroux

¹⁸ Region I includes Orleans, Plaquemines, St. Bernard, and Jefferson Parishes. During real-time emergencies, Ms. Davidson serves as Region I's representative for DHH.

¹⁹ In addition to her trial testimony in the present matter, Ms. Davidson's trial testimony from *Buggage* was admitted into evidence.

Mr. Poumaroux, Director of Support Services at Touro, was responsible for hospital communications, security, patient escort, valet and chairman of the safety committee. Mr. Poumaroux testified that he attended JCAHO meetings with Cynthia Davidson and emergency preparedness meetings.²⁰

Frank A. Folino, Jr.

Mr. Folino, Vice President of Touro, was on the premises from Sunday through Thursday. He testified that Touro had gallons of water and did not run out of food, water, or pharmaceuticals. He discussed the emergency preparedness plans Touro made in anticipation of *Katrina*. He said patients continued to receive clinical care and had oxygen canisters. He admitted some did sweat profusely, especially those on the 9th and 4th floors.²¹

Dennis Simmons

Mr. Simmons, Touro's Director of Pharmacy, testified that he was involved in Touro's emergency preparedness plans. The pharmacy ordered extra pharmaceutical supplies, maintained Medication Administrative Records ("MARS"), and did not run out of medication, including IV fluids. He described the temperature as cool and comfortable in the pharmacy area to maintain the medication. He could not recall if he saw 55-gallon drums of water or spot coolers throughout the building.²²

Alcincio Trevino

Alcincio Trevino ("Mr. Trevino"), a designated essential employee of Touro, said he remained on Touro's premises from August 28, 2005 until

²⁰ Mr. Poumaroux's trial testimony in *Falcone* was admitted into evidence.

²¹ Mr. Folino's trial testimony in *Falcone* was admitted into evidence.

September 1, 2005. Mr. Trevino, a nurse, testified that two spot coolers and box fans were placed in the T-7 unit after the power loss. Although Mr. Trevino could not specifically identify Mr. Favret, he recalled that a fan was placed in the room of the patient who he and other Touro staffers moved down the staircase in a wheelchair. He saw patients continually receive their medications after their removal to the staging area. He specifically remembered seeing IV bags. He also saw that patients had drinking water and food in the T-7 unit before they were removed to the staging area. He observed patients receive water after being brought to the staging area. Mr. Trevino believed they were also fed because food was generally available.

Suzanne Hoffpauir

Suzanne Hoffpauir, Touro's nurse/supervisor of one-day surgery and operating room scheduler, was designated as one of Touro's essential personnel. She attended "command" emergency preparedness staff meetings and was on Touro's premises until the Thursday following *Katrina*. She answered phones and monitored the radios to disseminate information. Ms. Hoffpauir had no first hand memory of Mr. Favret.²³

Denice Eshleman

Denice Eshleman, Touro's Director of Admissions, was deemed essential personnel at the time of *Katrina*. She reported on Sunday, August 28, 2005, near 4:00 a.m. She was primarily "housed" on the first and third floors. She testified that it felt cooler on those floors; she did not traverse the other floors. Ms.

²² Mr. Simmons' deposition testimony in *In Medical Review Panel Claim of Lilitha Landry*, CDC No. 2006-12237 c/w 2008-7529, was admitted into evidence.

Eshleman did not participate in the decision to evacuate. She said she did whatever was asked of her after the evacuation decision was made, such as moving equipment and answering the phone in Mr. Hirsch's office. She made contemporaneous hand-written notes. Sometime well after *Katrina*, she compiled her notes into a document. At some unknown time after litigation had ensued, she gave those notes to Scott Landry. She said no one asked her to create the notes. Although she made notes concerning "critically low food and water supply," she said she ate and drank water every day. She indicated that she may have "embellished" her notations on the amount of food and water supply and the number of people who awaited evacuation to get media attention to assist Touro in its evacuation.²⁴

Expert Medical Testimony

Drs. William Grant ("Dr. Grant"), Billings, Vaughn, and David Martin (Dr. Martin)²⁵ were called to render expert medical testimony on causation. Particularly, each opinion focused on whether Mr. Favret's repeat back surgery at Rapides resulted from conditions at Touro during its evacuation of Mr. Favret.

Mr. Favret retained Dr. Grant, an expert in internal medicine and infectious disease, to review his medical records. Dr. Grant opined that the environmental circumstances at Touro, i.e., the heat, a dirty surgical gown, and Mr. Favret's prolonged seating in a wheelchair, exacerbated Mr. Favret's vertebral osteomyelitis

²³ Ms. Hoffpauir's depositions from July 21, 2016 and August 17, 2016 were admitted into evidence.

²⁴ Ms. Eshleman's deposition testimony in *Favret v. Touro Infirmary*, CDC No. 2006-13643 c/w 2009-0960, was admitted into evidence.

²⁵ As previously referenced herein, Dr. Stephens also offered testimony regarding the conditions at Touro and the medical conditions for which Mr. Favret was treated at Rapides.

and were proximate causes of the treatment he received at Rapides.²⁶ Dr. Grant acknowledged that he had no independent knowledge as to whether Touro changed Mr. Favret's dressing or if Touro provided Mr. Favret with antibiotics during the evacuation process. He did not remember the tissue level location of the osteomyelitis infection at Touro, nor the tissue level where the infection was noted to have returned while Mr. Favret was at Rapides. Dr. Grant also testified that he did not specifically know whether Touro ran out of food or water, or if it provided ventilated air to its patients.

Dr. Billings testified that Mr. Favret's compression fracture may have resulted from him sitting in the wheelchair for some thirty hours and the journey to Rapides. However, he testified that he could not say whether it was more probable than not that the prolonged sitting caused the compression fracture. Dr. Billings also could not confirm that it was more probable than not that prolonged sitting caused Mr. Favret's pre-existing infection to progress. Dr. Billings acknowledged that some cases have a high likelihood of recurrence of infections, which might necessitate repeat surgery. He further testified that he did not think Mr. Favret's subsequent surgery for recurring vertebral osteomyelitis and the resulting treatment at Rapides were related to Mr. Favret's transportation to Rapides. Dr. Billings verified that he did not order Mr. Favret's evacuation in advance of *Katrina*.

Dr. Vaughn testified that he did not think that sitting aggravated Mr. Favret's vertebral osteomyelitis.²⁷ He said that he saw dehiscence or separation of the skin edges on the surgical wound when he examined Mr. Favret. With the exception of the skin separation, Dr. Vaughn did not see other signs of infection.

²⁶ Dr. Grant testified via a video deposition.

Dr. Vaughn noted that he had to go through several layers of subcutaneous tissue before he located the infection. As to the compression fracture, he could not say if it was more probable than not that it was caused by sitting, the environs at Touro, or his transportation to Rapides.

Dr. Martin, Touro's expert in internal medicine and infectious diseases, testified that neither sitting in the wheelchair or the van caused or contributed to any aggravation of the underlying infection in Mr. Favret's back nor did Touro's lack of central air conditioning. Dr. Martin asserted the skin separation had nothing to do with the infection's recurrence. He formulated his opinions in part on Dr. Coco's admitting note of September 1, 2005, which documented Mr. Favret's belief that he had not missed any dosage of medication prior to the date of his admission to Rapides and Dr. Coco's observation that his postoperative bandage appeared clean. He explained that Dr. Vaughn's finding that the renewed infection was located below several levels of muscle tissue and the subsequent testing of cultures indicated that Dr. Billings had not eradicated Mr. Favret's original infection. Dr. Martin opined that it was more medically probable than not that the infection process that Mr. Favret presented at Rapides was the same infection process for which he was treated at Touro and prior to his admission at Touro. He concluded that Mr. Favret's stay at Touro did not contribute in any way to the back infection treated by Dr. Billings or Dr. Vaughn. Dr. Martin considered the alleged failure of Touro staff to wash their hands, the heat level, and the possibility that Mr. Favret missed one round of IV antibiotics in reaching his conclusion.

²⁷ The parties offered Dr. Vaughn's depositions from February 27, 2012 and May 17, 2016, into evidence as joint exhibits.

After the matter was submitted,²⁸ on December 20, 2016, the district court rendered judgment in favor of Touro and dismissed Mr. Favret's claims with prejudice. In its written reasons for judgment, the district court opined that Mr. Favret had not "demonstrated by a preponderance of the evidence that the heat, or any possible lack of water, food, or medical supplies at Touro, caused or aggravated [his] medical condition, resulting in the need for him to undergo additional treatment and surgery at Rapides General."

Mr. Favret filed a Motion for New Trial on December 28, 2016. The district court denied the motion. This appeal followed.

DISCUSSION

In the present matter, Mr. Favret raises two assignments of error. First, he argues the district court erred when it partially granted Touro's motion for summary judgment (Touro's second filed summary judgment motion) and dismissed his transportation claims. Secondly, he argues the district court erred when it rejected and dismissed, with prejudice, his premises liability claims. Before addressing the merits of this case, we will first determine whether summary judgment was properly granted.

Summary Judgment

This Court, in *Chanhasalo v. Deshotel*, discussed the standard of review for a district court's ruling on a motion for summary judgment:

Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. This standard of review requires the appellate court to look at the

²⁸ At the close of oral argument, the district court allowed the parties to supplement the record with the deposition testimony of Messrs. Arnold and Huerkamp and Ms. Eshleman and Hoffpauir. Each witness' testimony is discussed *supra*. The district court also permitted post-trial briefs.

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine if they show that no genuine issue as to a material fact exists, and that the mover is entitled to judgment as a matter of law. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, no need for trial on that issue exists and summary judgment is appropriate. To affirm a summary judgment, we must find reasonable minds would inevitably conclude that the mover is entitled to judgment as a matter of the applicable law on the facts before the court.

2017-0521, p. 5 (La. App. 4 Cir. 12/27/17), 234 So.3d 1103, 1107 (citations omitted).

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

La. C.C.P. Art. 966 D (1).

In the present matter, the underlying facts are not in dispute. Instead, the dispute centers on whether the district court erred when it dismissed Mr. Favret's negligent transportation injury claims as exclusively medical malpractice claims, rather than treating the claims as general negligence claims. In support of his contention that the district court erred in treating his negligent transportation injury claims as medical malpractice claims, Mr. Favret relies principally on *LaCoste v. Pendleton Methodist Hosp., L.L.C.*, 2007-0008 (La. 9/5/07), 966 So.2d 519. In *LaCoste*, the plaintiffs alleged the patient, who was on life support, died when the

hospital's life support systems failed due to loss of electrical power and the hospital lacked any means to transfer the patient to another facility. The *LaCoste* Court set forth the six factors to assist a court in determining whether a claim sounds in medical malpractice as follows:

- (1) whether the particular wrong is "treatment related" or caused by a dereliction of professional skill;
- (2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached;
- (3) whether the pertinent act or omission involved assessment of the patient's condition;
- (4) whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform;
- (5) whether the injury would have occurred if the patient had not sought treatment; and
- (6) whether the tort alleged was intentional.

2007-0008, p. 8, 966 So.2d at 525 (citing *Coleman v. Deno*, 2001-1517, pp. 17-18 (La. 1/25/02), 813 So.2d 303, 315-16)). In utilizing those factors to determine that plaintiffs' complaint sounded in general negligence, rather than medical practice, the *LaCoste* Court reasoned:

the plaintiffs do not allege a "failure to transfer," but rather, they allege that the defendant failed to implement an adequate evacuation plan, failed to have in place a plan to transfer patients in the event of a mandatory evacuation, and failed to have a facility available for the transfer of patients. While a failure to transfer may relate to medical malpractice in another case, a lack of any possibility of transferring a patient because the hospital failed to have in place and to implement an adequate evacuation plan, failed to have adequate emergency power if the decision to shelter in place was made, and failed to design or maintain a building that protected against floodwaters is not "treatment related" or the result of a dereliction of professional medical skill, based on the factual allegations to which our review is limited.

Id., 2007-0008, p. 10, 966 So.2d at 526.

Mr. Favret contends that the district court should have reached the same result as in *LaCoste* based on the allegations raised in his Amended Petition.²⁹ Mr. Favret alleges that Touro was negligent because of prolonged sitting in his wheelchair (twenty-four to thirty hours), and because he had to sit upright in a van for eight to ten hours during his evacuation to Rapides. He maintains that Touro personnel forced him to sit upright—not because they mistakenly believed it was medically appropriate transportation—but because they had no other method to transport him from Touro to Rapides. He further alleges that “deficiencies” in his transportation to Rapides resulted from “administrative” negligence, i.e., Touro’s failure to plan to evacuate patients who needed to be kept recumbent. Mr. Favret represents that his Amended Petition tracked the same language as the *LaCoste* pleadings—that is, his negligent transportation claims were not the result of

²⁹ Specifically, Mr. Favret’s Amended Petition alleges in relevant part:

Petitioner was not evacuated from defendant, Touro, by its personnel prior to the arrival of Hurricane Katrina on August 29, 2005, despite the fact that defendant, Touro, knew or should have known that its facility was not properly prepared to withstand the known effects of hurricanes and that, as such, it would not be able to provide premises free from unreasonably dangerous and defective conditions for those on its premises.

C. Failing to evacuate its patients, visitors, invited guests and/or others on its premises out of harm's way to a safe and suitable alternate facility, e.g., if defendant, Touro, chose to evacuate its patients, visitors, invited guests and/or residents out of harm's way in the face of an approaching hurricane, as opposed to sheltering them in a safe, suitable, and appropriate place, defendant, Touro, failed to execute an appropriate evacuation plan, procedure, and/or protocol that would safely transport its patients, visitors and residents to an alternate, similar, safe facility wherein they would and could receive appropriate lodging and care, free from unreasonably dangerous conditions; and

Further, in addition to the damages sustained by petitioner commencing on August 29, 2005, and continuing day after day thereafter until ultimately evacuated from defendant's, Touro, unreasonable dangerous, defective premises, petitioner sustained damages due to the negligent planning by defendant, Touro, in failing to provide appropriate transportation out of harm's way given petitioner's post-surgery condition.

medical malpractice, but rather, were caused by negligence resulting from Touro's lack of an evacuation plan. As such, Mr. Favret asserts that the district court committed legal error in concluding that his negligent transportation injury claim sounded "purely" in medical malpractice.

The record evidence reveals that the district court orally granted Mr. Favret's motion to amend on May 4, 2012—after it heard argument on the motion for summary judgment and had taken the matter under advisement. Thus, before the Amended Petition was filed, the allegations raised in Mr. Favret's original Petition specifically pled that he suffered severe personal injuries when he was mishandled by Touro personnel while being moved from his hospital bed and placed in a van for transport to Rapides—all in violation of LMMA. The evidence presented at the summary judgment hearing showed that a few days after his back surgery, Mr. Favret was transported to Rapides in a seated position.

Touro sought summary judgment relief, in part, based on its contention that the district court had already dismissed Mr. Favret's medical malpractice claims. Hence, Touro argued that any claims involving injuries allegedly sustained as a result of the position in which Mr. Favret was transported should similarly be dismissed as medical malpractice claims. In our consideration as to whether the negligent transportation claims raised in the original Petition are general negligence or medical malpractice claims, this Court must review the provisions of the LMMA and apply the *Coleman* factors.

As previously discussed, La. R.S. 40:12999.41(A)(13) defines a medical malpractice action in part as including "the handling of a patient, including loading and unloading." When we apply the *Coleman* factors to Mr. Favret's negligent transport claims—that Mr. Favre was allegedly injured when Touro personnel

improperly sat him in an upright position after back surgery while awaiting evacuation during *Katrina*, and transported him in a seated, rather than a supine or recumbent, position during his ride to Rapides—we conclude that these claims fall squarely within the LMMA. Notably, how Mr. Favret should have been transported, whether in a supine or recumbent position, requires: a determination as to whether the alleged wrong was caused by a dereliction of professional skill; and, expert medical evidence to determine if the appropriate standard of care was breached—thus, satisfying the first and second prong of the *Coleman* factors. The necessity of expert opinion is underscored by the fact that the trial record shows a division amongst the physician expert witnesses on this issue. Specifically, Touro, in support of its motion for summary judgment, attached the *Affidavit* of its medical expert, Dr. Melvin Parnell, who attested that based on Mr. Favret’s medical chart, it was reasonable for Touro’s staff to believe that Mr. Favret could be safely transported in a seated position and that transport in such a position did not breach any standard of care. In contrast, Mr. Favret attached the deposition testimony of Dr. Billings who opined that Mr. Favret’s transport in a seated position *may have* contributed to additional injury or increased pain, although Dr. Billings acknowledged that he did not leave any specific chart notes that Mr. Favret should be transported in a recumbent position.

It is unclear as to what “negligent transportation” claims Mr. Favret contends the district court dismissed as medical malpractice claims. Our review of the record, including the fact that the Amended Petition had not been filed at the time the summary judgment motion was filed and argument was heard, suggests that the district court dismissed only those claims arising out of the handling of Mr. Favret by Touro personnel and the position in which he was transported, not any

claims arising out of alleged premises liability.³⁰ We reach this conclusion because the district court only granted Touro partial summary judgment relief. Furthermore, it allowed Mr. Favret to amend his petition to seek recovery for those claims that are alleged to have resulted from the condition of Touro’s premises and Touro’s alleged failure to have properly implemented an evacuation plan “that would safely transport its patients.” As demonstrated by the trial record, the district court did not limit Mr. Favret’s ability to offer liability or medical expert testimony and evidence in support of any injuries allegedly sustained as a result of the allegations made in his Amended Petition.

Accordingly, based on our *de novo* review, as a matter of law, the district court properly dismissed, via summary judgment, the claims arising out of the handling of Mr. Favret by Touro personnel and the position in which he was transported as medical malpractice claims.³¹

Premises Liability

Mr. Favret argues that the district erred by dismissing his premises liability claims with prejudice.

This Court discussed the standard of review for an appellate court to review the trier of fact’s factual findings in *Falcone v. Touro Infirmary* as follows:

Questions of fact as determined by the factfinder, be it a jury or a judge, are reviewed under the manifest error or clearly wrong standard of review. *Sassone v. Doe*, [20]11–1821, pp. 2–3 (La. App. 4 Cir. 5/23/12), 96 So.3d 1243, 1245. Furthermore, “where two permissible

³⁰ See La. C.C.P. art. 966 F (where the article provides that “[a] summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time.”).

³¹ Mr. Favret contends the dismissal of his negligent transportation claim prejudiced the scope of the evidence available to him to prove liability at trial, including the medical evidence. We disagree. The record reveals wide-ranging testimony from Mr. Favret’s experts, Mr. Latham, Dr. Stephens, and his physicians regarding Touro’s alleged “administrative” negligence in its evacuation.

views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong.” *Sassone*, [20]11–1821, p. 3, 96 So.3d at 1245. In order to reverse findings of the factfinder, “an appellate court must undertake a two-part inquiry: (1) the court must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact; and (2) the court must further determine the record establishes the finding is clearly wrong.” *Harold A. Asher, CPA, LLC v. Haik*, [20]12–0771, p. 4 (La.App. 4 Cir. 4/10/13), 116 So.3d 720, 723–24 (citing *S.J. v. Lafayette Parish Sch. Bd.*, [20]09–2195, p. 12 (La.7/6/10), 41 So.3d 1119, 1127). Lastly, we note that questions of law are reviewed *de novo*. See *First Nat. Bank, USA v. DDS Const., LLC*, [20]11–1418, pp. 10–11 (La.1/24/12), 91 So.3d 944, 952.

2013-0015, p. 4 (La. App. 4 Cir. 11/6/13), 129 So.3d 641, 645.

In negligence actions, established Louisiana jurisprudence utilizes a duty-risk analysis. *Roberts v. Benoit*, 605 So.2d 1032, 1041 (La. 1991). In order to prevail in a negligence action, a plaintiff must prove the following five elements:

- (1) the defendant had a duty to conform his conduct to a specific standard of care;
- (2) the defendant’s conduct failed to conform to the appropriate standard of care [breach of duty];
- (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries;
- (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries; and
- (5) the plaintiff was damaged.

Falcone, 2013-0015, p. 4, 129 So.3d at 645. “If a plaintiff fails to prove any one of the five elements, a defendant will not be held liable.” *Jones v. Stewart*, 2016-0329, p. 9 (La. App. 4 Cir. 10/5/16), 203 So.3d 384, 390.

Mr. Favret maintains that the district court erred in not finding Touro negligent, arguing that his case for liability corresponds with the same facts presented by the plaintiffs in *Serou v. Touro Infirmary*, 2012-0089 (La. App. 4 Cir. 1/9/13), 105 So.3d 1068—a case in which Touro was found negligent for the

patient's wrongful death in the aftermath of *Katrina*. Mr. Favret additionally complains that in its dismissal of his negligence action, the district court failed to make an assessment of fault. Instead, he argues it only improperly summarized the evidence on the issue of causation. Upon review, we find these arguments lack merit.

As to Mr. Favret's claim that Touro's fault assessment in *Serou* compels a finding of fault in this case, we note that a similar argument was made in *Falcone*, *supra*. In *Falcone*, the plaintiffs argued that the district court erred in not finding Touro at fault as it had been previously found negligent in *Serou* for breaching its duty to provide adequate ventilation. The *Falcone* plaintiffs averred that the patients in *Serou* and the *Falcone* were each subject to the same conditions. However, the *Falcone* Court rejected plaintiffs' argument, noting that the fact finder decides which risks are unreasonable based upon the particular facts, circumstances, and testimony of each case. *Falcone*, 2013-0015, p. 9, 129 So.3d at 648. Unlike *Serou*, the *Falcone* fact finder (the jury) credited the testimony of Touro's witnesses and experts that substantiated Touro's position and found that Touro was not negligent or liable for plaintiff's injuries. Thus, under a manifest error standard of review, the *Falcone* Court found that the jury had a reasonable basis to determine Touro did not breach its duty of care. 2013-0015, p. 16, 129 So.3d at 651.

When we compare the facts of this case to the facts of *Serou*, we note significant factual differences. In the instant case, Mr. Favret was a Touro patient and under the direct care of Touro personnel; whereas Mr. Serou was a patient of the SHONO—an independently owned, long-term acute care hospital that leased the fourth floor and a portion of the seventh floor at Touro—and cared for by

SHONO staff.³² These differences alone preclude any finding that requires Touro be found at fault in this matter simply because it was found liable in *Serou*. Accordingly, our review of whether the district court erred in finding Mr. Favret did not meet his burden of proof to maintain a negligence action against Touro are based on the facts as presented here.

Duty/Breach of Duty

Duty is a question of law, which inquires whether the plaintiff has any statutory or jurisprudential authority to support his claim that defendant owed him a duty. *Roberts*, 605 So.2d at 1043. Here, the parties do not dispute that Touro owed a duty to Mr. Favret; they dispute whether or not that duty was breached.

Mr. Favret's argument that Touro breached its duty falls primarily within two categories: (1) Touro's pre-*Katrina* hurricane emergency preparation was inadequate; and (2) inadequate planning, including the evacuation process, resulted in unreasonably dangerous premises causing him injury. Mr. Favret relies on: (1) Mr. Latham's opinion that Touro's emergency preparedness plan lacked details to ensure that vital functions would continue and an integrated process of planning; (2) Dr. Stephens' testimony that Touro was not "hardened" to shelter in place and was an unsafe environment in that it lacked backup power, food, water; Touro's staff was unprepared to properly transport patients based on their medical conditions; and it failed to maintain its medical records; (3) Mr. Hirsch's testimony that Touro was unbearably hot; and (4) Dr. Grant's opinion that the bad

³² One of the chief legal disputes in *Serou* was the scope of the duty Touro owed to SHONO patients in its capacity as the lessor of the premises and the difference in the level of care Touro provided to its patients and the care it gave to SHONO patients.

environmental circumstances at Touro proximately caused the recurrence of Mr. Favret's osteomyelitis and the treatment he received in Rapides.

In assessing the adequacy of Touro's preparations, the district court noted in its reasons for judgment that Touro's emergency preparedness plan established a Command Center, addressed hospital staffing; recommended the discharge of medically stable persons, secured Touro's premises; developed a vertical evacuation plan; and discussed patient safety. The district court cited Mr. Landry's testimony that, in advance of *Katrina*, he held meetings with hospital engineers, electricians, and employees of the air condition and maintenance shops and other essential employees. The district court also referenced Ms. Davidson's testimony, who testified that there were no meaningful gaps in Touro's emergency preparedness plan.

The district court, in determining whether Touro's premises were unsafe for its patients, relied on Mr. Landry's testimony that Touro stored municipal water, distributed bottled water, had 55-gallon drums of water available to flush toilets, and maintained an adequate supply of medications. Additionally, the district court cited testimony from Mr. Trevino who confirmed that drinking water, food, and medications were available to patients; Mr. Favret's admission that water and food were in the staging area; Mr. O'Connell's testimony that food and ice were always available to patients and staff; and medical records which showed Mr. Favret received IV antibiotics and pain medications through August 31, 2005. In addressing the heat level inside Touro after *Katrina* made landfall, the district court highlighted that JCAHO standards require only ventilation,³³ not air-conditioning, and that the testimonies of Messrs. Landry, Trevino and Favret established that

Touro opened windows and had box fans and spot coolers to provide ventilation. The district court also recorded Mr. Favret's testimony that it was "cooler" in the staging area and that neither Dr. Stephens nor Mr. Latham cited any specific violation that Touro had breached.

The district court's findings—that Touro had an adequate emergency preparedness plan, food, water, power, medicines to shelter in place, and met its duty to provide ventilation—indicate the district court found that Touro did not breach its duty to provide a safe environment. The district court did, however, find that Touro failed to have a written evacuation plan in violation of JCAHO standards. Notwithstanding, the district court found that Mr. Favret failed to establish a causal connection between the breach of this duty, lack of a written evacuation plan, and his alleged damages. Thus, our inquiry is now to examine whether the district court erred in finding no causation between the damages claimed by Mr. Favret and the breach of this duty.

Cause-in-fact; Legal Causation

To meet the cause-in-fact element, a plaintiff must prove only that a certain conduct was a "necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred." *State Farm. Mt. Auto. Ins. Co. v. LeRouge*, 2007-0918, p. 18 (La. App. 4 Cir. 11/12/08), 995 So.2d 1262, 1275 [citation omitted]. Moreover, the essence of the legal cause inquiry is whether the risk and harm encountered by the plaintiff fall within the scope of protection of the duty. *Id.*, 2017-0918, pp. 18, 995 So.2d at 1275-76.

Falcone, 2013-0015, p. 16, 129 So.3d at 651.

Mr. Favret argues that the district court erred in that it only reviewed the causation elements in deciding Touro was not negligent. However, that argument fails for two reasons. First, as referenced above, the district court did more than

³³See *Serou*, 2012-0089, p. 30, 105 So.3d at 1090.

just review the causation elements, it also reviewed whether Touro breached its duty of care, concluding that Touro did not breach its duty to provide Mr. Favret with a safe environment insofar as water, food, medicine and ventilation.

Second, had the district court determined only that Mr. Favret did not prove the causation elements, that finding alone is sufficient to find no fault on the part of a defendant. It is well settled that a defendant will not be found liable if the plaintiff fails to prove any one of the five elements to maintain a negligence action. *Jones*, 2016-0329, p. 9, 203 So.3d at 390. Although the district court found Touro did not breach its duty to provide a safe environment, as discussed above, we, nevertheless, are compelled to review Mr. Favret's argument that Touro's failure to have a written evacuation plan breached its duty to maintain reasonably safe premises; thus, causing him to sustain physical injuries.

Mr. Favret argues that no one at Touro had any experience evacuating a hospital, and Touro had limited personnel to properly implement the evacuation. However, the record evidence sufficiently supports the district court findings that Touro properly and promptly made the decision to evacuate once the scope of *Katrina's* devastation on the City and its impact on Touro became known; Touro secured vehicles and helicopters to assist in the evacuation; and that Touro completed its evacuation within forty-eight hours after it began. Moreover, according to the uncontroverted testimony of Mr. Landry, Touro completed its evacuation faster than any other hospital. Mr. Favret offered no evidence to contradict this claim or that the evacuation would have been implemented in a safer or quicker manner had a written evacuation plan been in place.

The record evidence further sufficiently supports the district court's conclusion that Mr. Favret failed to prove Touro's alleged "bad" environment and

the manner of his evacuation exacerbated his condition to the extent he required repeat back surgery and follow up treatment at Rapides. In evaluating this claim, the district court considered the testimony of Drs. Billings, Grant, and Martin, and the Rapides medical records. Dr. Billings testified that prolonged sitting in a wheelchair at Touro *could have* aggravated Mr. Favret's symptoms and increased the compression of the vertebral bodies in his spine; however, he could not say it was more probable than not that occurred. Dr. Grant testified that it was "just common sense" that the conditions at Touro—sitting in the hallway, in the heat, with unchanged linen and without antibiotics—either exacerbated his existing infection or his infection was hospital acquired.

The district court noted, however, that Dr. Grant's opinion was countered by Dr. Martin. Dr. Martin testified that Mr. Favret's repeat surgery and treatment at Rapides did not relate to conditions at Touro. Rather, Dr. Martin opined Mr. Favret's infection was a recurrence of the same infection based on the level of the infection and the infection's recurrence rate. The district court also found that Rapides medical records showed that Mr. Favret's post-operative dressing appeared clean and indicated that he had not missed any medication prior to his arrival at Rapides. The district concluded that Dr. Grant's opinion and the Rapides medical records provided sufficient evidence that the infection found during Mr. Favret's September 2005 Rapides surgery was the same infection that Mr. Favret had before his admission to Touro. Based on these facts, the district court found that Mr. Favret did not establish a causal connection between the lack of a written evacuation plan and his damages.

An owner generally has a duty to exercise reasonable care for the safety of persons on his premises and not to expose such persons to unreasonable risks of

injury or harm. *See Falcone*, 2013-0015, pp. 8-9, 641 So.3d at 647. The record here clearly reflects conflicting testimony between Mr. Favret's and Touro's witnesses as to whether the condition of Touro's premises posed any unreasonable risk of harm and whether there was any causal connection between any negligence on the part of Touro and Mr. Favret's claimed damages. As established in *Rossell v. ESCO*, 549 So.2d 840, 844 (La. 1989), where two permissible views of the evidence exists, the fact finder's choice between them cannot be manifestly erroneous. Upon our review, a reasonable factual basis exists for the district court's findings that Touro did not breach its duty to provide reasonably safe premises to Mr. Favret and its determination that Mr. Favret did not prove factual or legal causation between any breach of duty and damages claimed. Consequently, we cannot say that the district court was manifestly erroneous in dismissing Mr. Favret's premises liability claim.

CONCLUSION

Wherefore, based on the foregoing reasons, the judgment of the district court is affirmed.³⁴

³⁴ Mrs. Favret's loss of consortium action is a derivative claim and accordingly, is extinguished by the district court's dismissal of Mr. Favret's negligence action. *See Engles v. City of New Orleans*, 2003-0692, pp. 32-33 (La. App. 4 Cir. 2/25/04), 872 So.2d 1166, 1187.