2012 WL 1078464 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

Derek PAGE, Plaintiff/Applicant/Appellant,

v.

H. Cookie BENSON, Bobby Benson, Monica Roger, Sterling Grove Housing Authority Development, Inc. d/b/a ED Washington Place Apartments and C.S. Management, Inc., Defendants/Appellees.

No. CA 12-244.
March 28, 2012.

Appeal of Rulings of the Fifteenth Judicial District Court
Parish of Lafayette, State of Louisiana Docket No. 2009-4470
Honorable Edward Broussard, District Court Judge
Civil Proceeding

Original Brief for Appellant, Derek Page

The Glenn Armentor Law Corporation, Glenn J. Armentor, Bar Roll No. 2541, John Paul Charbonnet, Bar Roll No. 19308, 300 Stewart Street, Lafayette, Louisiana 70501, Tele. (337) 233-1471 Fax (337) 233-5655, Attorney for Plaintiff/Applicant/Appellant, Derek Page.

***ii** INDEX OF BRIEF

EXHIBITS TO ORIGINAL BRIEF

EXHIBITS
Ex. 1 Amended Judgment granting Appellee's Motions to Strike and Summary Judgment
Ex. 2 Transcript of Hearing on Motions to Strike and Summary Judgment
Ex. 3 249 page previous Appeal Record assigned Docket No. CA-11-936 (not attached as Clerk's office will supply same to panel in separate bound volume)

***iii** JURISDICTIONAL STATEMENT

Jurisdiction over this matter is granted by La. Const. Art. V, § 10(A).

STATUS OF THE CASE

There is currently no trial date, hearing date, or any other matters pending regarding this action in the 15th Judicial District Court.

STATEMENT OF THE CASE

This action arises from torts sustained by Derek Page (referred to as "Derek" or appellant herein) by appellees stemming from a landlord-tenant relationship. Appellees filed a motion for summary judgment (actually seeking only ***partial*** summary judgment) that was considered at a hearing on ***May 12, 2011.*** Before taking up that matter, the trial court considered and *granted* appellees' "Motion to Strike [Derek Page's Opposition] for Untimeliness", and thereby refused to consider the appellant's memorandum and exhibits opposing the summary judgment. Thereafter, the Trial Judge Edward Broussard permitted argument and ultimately granted the appellees' motion for (partial) summary judgment. Derek initially sought review via writ application. Upon determining that an appeal was more appropriate, a Petition for Devolutive Appeal timely filed with this Court **(CA 11-936).** However, a panel of Judges consider the matter premature because of the wording of the original Judgment signed by the trial judge granting appellee's Motion for Summary Judge was unclear. The matter was remanded for modification/ clarification of the disposition by the Trial Judge. (8-11) An Amended Judgment was presented and signed on October 18, 2011. (Ex. 1) Derek timely filed a Petition for Devolutive Appeal, but it was lost in route between the Lafayette Clerk of Court's office and the trial judge's office in Abbeville. Once it was detected that the original Petition for Devolutive Appeal was literally lost in the mail, a second Petition for Devolutive Appeal was filed and ultimately the record was prepared for the instant appeal.

***iv** *Exhibits 1, 2 and 3.* Exhibit 1 and 2 reflect the Amended Judgment (pp. 2-3) and the transcript which indicates the reason for judgment are directly appended hereto. (Ex 2, which also appears in Exhibit 3, pp. 215-247) Please note that the "Civil Jurisdictional Index" of the instant appeal **CA 12-244** confirms that the "First Appeal Record is Exhibit", and undersigned counsel has confirmed that this first appeal record **(labeled CA 11-936)** will be provided for this Court's review by the Clerk's Office. References to the initial appeal record, CA 11-936, record is incorporated *in extensio* as Exhibit 3. Most of the references below appear in Exhibit 3 and are referenced as "Ex. 3/p. ".

Defendants/Appellees will be identified by their proper names ("Cookie Benson", "Bobby Benson" and/or "Monica Roger" or "appellees" collectively). This appeal seeks review and reversal of ***both*** the granting of the "Motion to Strike for Untimeliness" and the respondent's "Motion for Summary Judgement".

***v** ISSUES AND QUESTIONS OF LAW RELATING TO APPELLEES' MOTION TO STRIKE

1. Is a motion to strike ***ever*** a ***lawful*** sanction when one party files an opposing memorandum and exhibits to a motion for summary judgment after the deadline set forth in the Uniform Rules of District Court?

2. Is there any authority in legislation or in the Uniform Rules of District Court for striking the entire opposition and/or opposing affidavits to a motion for summary judgment?

3. Is a motion to strike a ***justified*** sanction in the circumstances of this case where the plaintiff was not at fault for his opposition being filed untimely and there is no prejudice to the party who filed a motion for summary judgment?

4. When a party's ***lawyer*** is distracted due to personal matters unrelated to the case or his client, and that distraction causes a pleadings deadline to be missed, should the sanction be directed to the party's lawyer or the party, himself?

5. In the exercise of his discretion, must a trial judge first determine whether and what prejudice was caused by a tardy opposition to a motion for summary judgment before sanctioning an attorney or party?

6. Did counsel for the appellees "open the door" to the use and review the Derek Pages opposition to the motion for summary judgment given the argument of appellee's attorney at the hearing on their motion for summary judgment?

ISSUES AND QUESTIONS OF LAW RELATING TO APPELLEES' MOTION FOR SUMMARY JUDGMENT

7. What is peaceful possession of leased premises?

8. Do landlords fail to provide “peaceful possession” if they (1) wrongfully threaten the tenant with eviction or (b) wrongly prevent a tenant's caregiver access to the premises or (c) enter the leased premises without authority when the tenant is sleeping, (d) repeatedly over five months refuse to replace the toilet such that it is safe for a disabled tenant and/or (e) physically attack the tenant?

9. Were the premises at issue negligently maintained in violation of the lease and the law?

10. Did the appellees' conduct intentionally and/or negligently inflict emotional distress on appellant?

11. Did appellees tortiously interfere with the relationship between appellant and his caregiver, by (a) refusing the caregiver access onto the leased premises and (b) attempting to discredit the caregiver to her employer?

12. Did the appellees breach an obligation owed to the tenants of a residential facility whose rents are subsidized by the Department of Housing and Urban Development by engaging in nepotism and/or should more time have been permitted to explore this issue?

***vi** ASSIGMENTS OF ERROR

1. The Trial Court erred by granting appellees' motion to strike Derek Page's opposition to a motion for summary judgment, notwithstanding the fact that Derek Page's opposition was not timely filed.

2. The Trial court erred by granting appellees' motion for summary judgment and dismissing the majority of the claims pursued herein.

STANDARDS OF REVIEW

When reviewing whether a Trial Judge applied an appropriate sanction upon a party for filing a tardy response to a motion for summary judgment, the Appeals Court evaluates whether the Trial Judge abused his or her discretion. *Brown v. State, 942 So. 2d 721 (La. App. 3 Cir. 2006).*

When reviewing a Trial Court's grant of summary judgment, the Appeals Court conducts a *de novo* review. *Independent Fire Insurance Company v. Sunbeam Corporation, 755 So.2d 226, 230 (La.2/29/00)*. The judgment sought on a motion for summary judgment shall be rendered ***after adequate discovery*** or if the matter is set for trial if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 (B) and (C). The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant'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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. See LSA-C.C.P. art. 966C(2); LSA-C.C.P. art. 967(B); *Robeis v. Exxon Mobile, 844 So.2d 339, 341* (La.App. 1 Cir.2003).

***1 INTRODUCTION**

Derek Page is a young man in his twenties who suffers with "Friedreich's Ataxia", a disorder affecting his heart and his muscles. This disease impacts motor skills, balance and strength. It does not impact a person's intellect or reasoning. In Derek, it causes abnormal speech, an unsteady gait, and uncoordinated movements. Derek is wheelchair bound and caregivers assist him in many activities of daily living.

There are five appellees. Two are corporate entities: Sterling Grove Housing Development, Inc. (Sterling) and C.S. Management, Inc. (CSM). Sterling owns an apartment complex in Lafayette, Louisiana named Ed Washington Place Apartments. Rent at this apartment complex is subsidized by the Department of Housing and Urban Development (HUD). Ed Washington Place Apartments is a multi-family dwelling that is supposed to serve the **elderly** and disabled.

The three remaining appellees are all family members. Harriet "Cookie" Benson is married to Bobby Benson. Monica Roger is Cookie Benson's biological daughter and Bobby Benson's step daughter. The family relationship is a key point in this case, as will be explained in more detail below. Monica Roger acts as the manager of the apartment complex; Bobby Benson acts as its maintenance man; Cookie Benson is believed to be their boss and/or part owner of the complex.

SUMMARY OF PERTINENT FACTS UNDERLYING THIS CLAIM

Derek Page lived at Ed Washington Place Apartments from November 2008 until May 2009. When he first moved in, his toilet was serviceable and stable. Over time it began to wobble and become unsteady. The reports of the toilet needing to be stabilized began as early as December 2008. Over the remaining months of Derek's occupancy, the appellees (and primarily Bobby Benson) made multiple efforts to stabilize the base of the toilet but each of them failed.

For reasons that are still unclear to Derek, this toilet repair created a tremendous amount of conflict with Cookie Benson, Bobby Benson, and Monica Roger. Most of the conflict was verbal but it did eventually boil over into a physical ***2** attack upon Derek. Every incident was witnessed, and most were observed by Derek's caregiver, Tina Richard. Matters escalated to the point that Derek was repeatedly ridiculed and cursed. Derek was warned if he continued to complain about his toilet he would be evicted. His caregiver, Tina Richard, who assisted with activities of daily living was personally threatened and even told not to come back onto the property. Cookie Benson phoned Tina Richard's employer in an obvious effort to discredit her and have her re-assigned. Appellees applied bars onto the already unstable toilet that Derek warned them had not worked before in another residence and caused him to fall, but appellees placed them on the toilet anyway. Unfortunately but predictably, these bars caused Derek to fall in this apartment as well. Bobby Benson even physically attacked Derek because Derek tried to take pictures of the repairs being RE-attempted on the toilet.

Derek Page wanted a working toilet. Appellees could not accomplish this, and rather than get a new toilet they got enraged and eventually lost it. It is asserted that the appellees' handling of this matter gave rise to various civil actions, including one that faults them for having ***only*** family members involved in this transaction, and asserts that had there been an independent unrelated person in the management team, this escalation would likely not have progressed to the point of violence. Ultimately, Mr. Page sought the assistance of Congressman Boustany's office given the operation of Ed Washington Place Apartments falls under the federal jurisdiction of HUD. The toilet repair that appellees attempted to perform over five months was accomplished after one letter to Congressman Boustany's office. It simply required replacing.

The toilet was finally secure. Derek was not. He was extremely frightened of the Benson-Roger team and left Ed Washington Place Apartments in favor of another residence so he did not need to interact with them. Derek's physical wounds healed much faster than his anxiety. Even seven months after leaving Ed Washington Place Apartments (at the time his deposition was taken), Derek was still concerned about the appellees wanting to get retribution and the potential that they may seek to harm him.

***3** DEREK'S LAWSUIT

Derek sued appellees for:

1) The failure to provide peaceful possession of his apartment;

2) Negligently maintaining the premises;

3) Intentionally and negligently inflicting emotional distress;

4) Tortious interference with the relationship between he and his caregiver; and

5) The failure to have independent oversight of the Benson-Roger family members.

Derek also sued Bobby Benson for intentionally, physically attacking him. Appellees asserted they were entitled to summary judgment of the 5 claims enumerated above. Undersigned counsel filed a memorandum in opposition asserting (A) that there is sufficient evidence already creating genuine issues of material fact on most if not all claims asserted and (B) that, especially as to Claim No. 5, the matter should not be disposed of until the appellees themselves are deposed.

Unfortunately, because of a serious medical condition of an immediately family member of appellant's attorney, the routines and practice of undersigned counsel were greatly disrupted. Mention of this was made at the hearing before the Trial Court (Ex.3/pp. 217,221). In sum, undersigned counsel overestimated his ability to meet deadlines in this case notwithstanding his family needs which required a great deal of time in New Orleans. Thus, the opposition (which undersigned counsel submits would have been successful had it been considered), was stricken because it was filed the day before the hearing. Derek seeks review of two rulings: the first, the trial court's decision to strike the opposition filed on his behalf; and the second, for granting the summary judgment. (Both of the ruling are reflected in the Amended Judgment, pp. 2-3.)

APPLICABLE LAW AND ARGUMENT REGARDING THE LATE OPPOSITION

La. C.C.P. art. 966(B) states in pertinent part:
***** The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 within the time limits provided in *District Court Rule 9.9*....** (Emphasis supplied)

***4** Uniform Rule of District Court *9.9 (b)* states:

> A party who opposes an exception or motion shall concurrently furnish the trial judge and serve on all other parties an opposition memorandum at least eight calendar days before the scheduled hearing. The opposition memorandum shall be served on all other parties so that it is received by the other parties at least eight calendar days before the hearing, unless the court sets a shorter time.

Uniform Rule of District Court 9.9 (d) states:

> Parties who fail to comply with paragraphs (a) and (b) of this Rule may forfeit the privilege of oral argument. If a party fails to timely serve a memorandum, thus necessitating a continuance to give the opposing side a fair chance to respond, the court may order the late-filing party to pay the opposing side's costs incurred on account of the untimeliness.

Appellant's counsel acknowledges that his opposition memorandum and exhibits were not filed before 8 days of the hearing date. Appellant further acknowledges that he was very tardy and did not get the brief and exhibits to the trial judge and opposing

counsel until the day before the hearing. And, appellant acknowledges that there are many reported cases where appellate courts have approved a trial judge's decision to strike untimely oppositions to motions for summary judgment. But, *why?*

Derek poses this question respectfully and submits that under *no circumstances* is a trial court permitted to grant a motion to strike a party's opposition to a motion for summary judgment. One basis for this argument is that the legislature set out the particular consequence of a party's tardiness and granting a motion to strike was not included among them. As noted above, La. C.C.P. art. 966(B) incorporates by reference Uniform Rule of District Court, 9.9. This Rule lists only two courses of action for the trial judge: (1) deny oral argument and/or (2) continue the hearing if it is required to give the other party "a fair chance to respond". If path number 2 is chosen, the trial judge may assess costs incurred by the mover due to said continuance. NOTE: Striking the opposition altogether is NOT an option listed in Rule 9.9. Derek submits that by reason of traditional statutory interpretation, a motion to strike and the granting of one cannot be added to that Rule or to La. C.C.P. art. 966(B).

***5** In *Filson v. Windsor Court Hotel, 04-2893, p. 11 (La. 6/29/05), 907 So. 2d 723, 728,* the Supreme Court explained, "The settled rule of statutory construction that the mention of one thing in a statute implies the exclusion of another thing, i.e., the doctrine of *Expressio Unius est Exclusio Alterius,* dictates that when the legislature specifically enumerates a series of things, the legislature's omission of other items, which could have easily been included in the statute is deemed intentional."

Here, the legislature incorporated Rule of Court 9.9 into La. C.C.P. art. 966(B), knowing full well that the Rule enumerates a series of things (the forfeiting oral argument and/or a continuance). Courts must resist adding to La. C.C.P. art. 966(B), by supplying more consequences to the series of penalties already enumerated in Rule 9.9. Instead, courts should interpret the lists of consequence in Rule 9.9 as intention and purposeful on the legislature's part. If the legislature intended for trial judges to to strike the evidence filed into the record after the 8-day rule, it would have included it in La. 966(B) or elected not to limit it to those penalties specifically enumerated, and incorporated by reference, in Uniform Rule of District Court, 9.9.

Another rule of statutory interpretation requires overturning the decision of the trial judge to grant the motion to strike. The text at issue in La. C.C.P. 966(B) and Rule 9.9 is penal in nature. Louisiana courts have a long tradition of strictly construing penalty provisions in the law. Statutes authorizing the imposition of a penalty are to be strictly construed. "We will not construe penal statutes as extending powers not authorized by the letter of the law even if such powers would be arguably within its spirit." *Gibbs Const. Co., Inc. v. State, Dept. of Labor,* 540 So. 2d 268, 269 (La. 1989) and International *Harvester Credit Corp. v. Seale,* 518 So.2d 1039 (La. 1988). A provision that "forfeits" oral argument or authorizes the imposition of costs for violating a rule is punitive or penal in nature. Thus, **the letter of the law** must be strictly applied. A motion to strike is not among the penalties in La. C.C.P. art. 966(B) or Rule 9.9. Thus, the trial court erred in granting a motion to strike under these circumstances because that is not an enumerated penalty under the law.

***6** Should the court conclude that Derek is not correct and that a motion to strike pleadings is among the penalties available to the trial judge, it is nonetheless not an appropriate sanction in this case. La. C.C.P. art. 964 sets forth the criteria when a motion to strike is warranted. That criteria is not met in the instant case. Article 964 states, "The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter." Derek's opposition (Ex.3/pp. 75-206) is not redundant or immaterial or impertinent or scandalous. It was just late. That does not make the pleading redundant, immaterial, impertinent, or scandalous. Therefore, the trial court was not authorized to strike Derek's opposition.

In the instant matter, the trial judge struck the ***pleadin's*** but permitted ***oral argument.*** While undersigned counsel appreciated the opportunity to address the trial court, this still prevented ***evidence*** from being considered. Under the circumstances, that was an abuse of the judge's discretion. It is axiomatic that the argument of counsel is not evidence. *Streeter v. Sears, Roebuck & Co., Inc., 533 So. 2d 54 (La. Ct. App. 1988) writ denied, 536 So. 2d 1255 (La. 1989).* Indeed, this is likely the reason Rule 9.9 ***preserves*** the introduction of an opposition and exhibits - but permits the loss of oral argument in those circumstances where the judge deems it appropriate. While penalizing the late-party, allowing the evidence but disallowing argument completes the

record and makes it more likely that a case which should not be dismissed on summary judgment - will not be dismissed on summary judgment.

Another ***alternative*** argument posits that, if a trial judge does have the authority to strike pleadings, that penalty should be imposed only if there is actual prejudice that cannot be cured by additional time for the opposing party to file a response or for willfully disrespecting the court. The 8-day timeframe for oppositions to be filed is mandatory, but Rule 9.9 penalties are not as rigid and provide choices (discretion) to the trial judge. For this reason, courts have determined that trial judges have ***7** discretion to fashion a remedy the particular circumstances justify. *Debrun v. Tumbleweeds Gymnastics, Inc., 900 So.2d 253, 259 (La. App. 2 Cir. 2005).*

Appellant submits that in the exercise of their discretion, trial judges should ***first confirm*** whether there is any prejudice by way of surprise due to an opponent's late-filing. If surprise does result because of a party's untimeliness, then it should be determined whether a continuance would fairly permit all parties to be heard on the matter. If a continuance must be granted, then the trial judge may order the costs incurred be borne by the one who was tardy. Yet, influencing all of these considerations should be (1) the ***cause*** of the delay and (2) the ***consequence*** of the delay. If a party, himself, is responsible or contributed to the problem, then a more severe punishment may be in order. If a party's attorney is using delay tactics only to gather more evidence or expert affidavits, then there may be prejudice to the mover.

When a trial judge prohibits the filing of an opposition to a motion for summary judgment, it nearly guarantees dismissal of the entire case. This is an extreme result, especially if the party-himself had nothing to do with the untimely filing. Derek submits that the cases cautioning against dismissing claims for violating discovery orders are instructive here. The propriety of a court's dismissal of the plaintiffs case, insofar as it unduly and harshly penalizes the plaintiff for the failures and inadequacies of his counsel was discussed in *Horton v. McCary, 635 So.2d 199, 203 (La. 1994).* In *Horton*, the Supreme Court stated the penalties of dismissal and default provided by Article 1471 are “draconian penalties which should be applied only in extreme circumstances.” One of the four factors to consider before taking such a drastic measure is “whether the client participated in the violation or simply misunderstood a court order or innocently hired a derelict attorney.” *Horton, 635 So.2d at 203.* Furthermore, the court noted that dismissal is generally reserved for those cases in which the client, as well as the attorney, are at fault. *Id. In re Med. Review Panel*, 775 So. 2d 1214 (La. App. 1 Cir. 2000).

8** Here, Derek Page was completely innocent and did not contribute to the delay. It was his *attorney* who was distracted from his practice for family health concerns in a city other than where he practices that caused the late-filing. Would that undersigned counsel not have underestimated what his family member's medical needs would require, and extended out-of-town requirements not have occurred. Yet, it did; requiring much more time than anticipated. However, ***please note: once the opposition was ultimately filed, the predominant sources of evidence were appellees' Answers and the two deposition transcripts that appellee's counsel took and had in his possession for *over 17 months.*

Appellant submits that under these circumstances, something much less drastic than striking the pleadings was in order. Derek Page was completely free from fault. His lawyer was tending to a family crisis. The surprise to the appellees by the late filing was *de minimis* or *nil.* At the hearing appellees' counsel never once specifically identified how he or his clients were prejudiced by the argument or evidence submitted on Derek's behalf. In fact, appellees' counsel suggested to the trial judge that receiving Derek's opposition just three or four days before the hearing would probably have prevented him from filing a Motion to Strike in the first place. (Ex.3/p. 223). Derek submits that if that is all that was required in order to permit a “fair chance to respond”, then that amount of time should have been extended to appellees and they could have in fact responded to Derek's evidence.

It is submitted that this case should be decided like *Brown v. State, 942 So. 2d 721 (La. App. 3 Cir. 2006)*, where this court approved a trial judge's decision to admit a defendant's untimely affidavits filed in opposition to a motion for summary judgment. Among the reasons why it was appropriate in *Brown* was because there was no prejudice to the mover. One of the affiants had been deposed, that deposition transcript was attached by the mover to his memorandum, and the affidavit was consistent with the earlier deposition testimony. Moreover, all of the other affiants were known to the party moving for summary judgment. Because

the mover was not ***9** unfairly prejudiced by the acceptance of the late-filed affidavits, this court affirmed the trial judge's ruling admitting the evidence. In Derek Page's case, the evidence submitted with his opposition was long known to appellees, and primarily asserted facts in the ***appellees'*** Answers and the depositions their own lawyer had taken ***over a year-and-a-half*** before the hearing on the motion for summary judgment. Under these facts, how can appellees show genuine prejudice or surprise? In fact, they cannot. If there is no prejudice and just three or four days would have provided sufficient chance for the appellees to respond, Derek submits it is an abuse of discretion to effectively dismiss the case by striking his opposition altogether.

Another argument justifying the reversal of the trial court's decision to strike Derek's opposition is based upon the words used by appellees' counsel himself. The statements made by appellees' attorney at the hearing in favor of their motion for summary judgment included repeated assurances of what “discovery” “revealed” about the facts of this case. For example, when discussing appellant's allegations that movers caused intentional infliction of mental distress, appellees' counsel set out the three-prong test necessary to meet the burden of proof for this claim then stated:
“Judge, we're talking about a toilet that wobbles. And the failure to properly remedy a toilet that wobbles. There is nothing in this record; **there is nothing in discovery that even suggests that the defendant's conduct was extreme or outrageous.** So they fail on prong one.

Prong two, the emotional distress must be severe.... Mr. Page is not going to anything.... He's not seen a psychiatrist, a psychologist, social worker, nothing. **He's not taking medication,** nothing with regards to this. Your Honor, the evidence is lacking for prong two.” (Ex.3/p. 231)

For the conduct under this analysis to be severe our courts have held that the distress has to be of such a nature that no reasonable person could be expected to tolerate it. **We're talking about a wobbly toilet**

There is no evidence either in the record ***or that has been revealed through discovery*** which would satisfy any of those three prongs, Your Honor.” (Ex.3/p.232)

Moreover, appellees' counsel repeatedly suggested to the Trial Judge that the reason Derek's toilet became unstable was because he “threw himself” onto the toilet ***10** while transferring his body from his wheelchair. (Ex.3/pp. 225-226) As will be specifically outlined below, this case is not just “about a wobbly toilet”, Derek Page did require medication because of the conduct of Cookie Benson, Bobby Benson and Monica Roger, and the evidence AMPLY show extreme behavior of the defendants and the emotion and physical reactions Derek had to it. Moreover, the only discovery taken in the case about the technique used by Derek to transfer onto a toilet was described by his caregiver (Tina Richard), and himself in their discovery depositions taken by appellee's counsel. Both specifically denied that Derek threw himself onto the toilet, and the suggestion that this simply “wobbly toilet case” was a result of Derek's spasticity when getting on a commode is a flat out distortion of what had “been revealed through discovery”. NO discovery was attached to appellees' memorandum in support of a summary judgment. The only discovery attached to any memoranda was submitted by ***appellant;*** thus because the judge had thrown out Derek's opposition there was no deposition discovery for the trial court to verify his representations unless he reconsidered his ruling on the motion to strike.

Later in this brief, excerpts will be referenced that *clearly prove* that (1) the defendants' conduct was extreme and outrageous, (2) that because of that conduct appellant had to begin taking the anti-anxiety drug Valium, and (3) that the instant case was about appellees' behavior toward appellant not about a toilet. When appellees' counsel relied upon what discovery “revealed” as support for his clients' motion, he opened the door for the trial judge to confirm that in fact appellee's counsel was correct about what it showed. Appellant alerted the trial judge what was happening saying, “And for him [appellees' counsel] to stand here and argue knowing that you will not look at these deposition because of my errors and say the exact opposite of what it says I think opens the door for you to reverse your ruling and at least look at the excerpts that were submitted to you.” (Ex.3-p. 243) It was error for the trial court NOT to reconsider his earlier ruling striking Derek's opposition and to refuse any review the deposition testimony at this point in the hearing.

***11** Appellant's final argument is that the Trial Court could have and should have considered any exhibits that a court may take judicial notice of and any facts admitted to in the pleadings. Appellee's counsel introduced and the judge accepted "the entirety of the Clerk's record in the file of these proceedings - - into the record of these proceedings." (Ex.3/p.247) Even though a party files an opposition late, a trial judge should nonetheless take into account those facts admitted to and that are readily ascertainable from the record, as well as materials the court is permitted to take judicial notice of. Appellant submitted both types of this evidence in his brief but most of these arose from the verified petition for damages and admissions contained in appellees' answers but the trial judge refused to consider same. Had the trial judge considered those facts, it should have been apparent that there are genuine issues as to material fact justifying a trial on the merits and/or that inadequate discovery had been obtained to date and that the motion for summary judgment was premature.

In conclusion, the Trial Court erred in striking appellant's opposing memo and exhibits because (1) this sanction is not authorized by either La. C.C.P. art. 966(b) or Rule 9.9(d), (2) this sanction was not appropriate per the terms of La. C.C.P. art. 964, (3) appellees were not surprised by the opposition or its exhibits, the late-filing was appellant's lawyer's fault, and appellees never identified any actual prejudice to the tardy opposition; (4) appellees opened the door to consideration of Derek's opposition and particularly the exhibits of deposition excerpts by relying on "discovery" submitted by Derek in his argument, and (5) the trial judge had authority to consider facts that were established by the pleadings and/or matters of judicial notice prior to ruling on appellee's motion for summary judgment. If a very harsh penalty has to be fashioned, it should be borne by undersigned counsel - not Derek Page. Appellant had ***nothing*** to do with undersigned counsel's filing of documents, and it does not serve the ends of justice that ***appellant*** be prejudiced by his attorney's late-filing especially when ***appellees*** were not prejudice by that same late-filing.

***12** For the same reasons appellant believed it was appropriate for the trial court to review his opposition and exhibits, Derek Page submits it is appropriate for this court to do likewise. Thus, now appellant will turn to the merits of the case and argue why there are genuine issues as to material fact justifying the denial of appellee's motion for summary judgment. Appellant proffered the evidence submitted to the trial court stricken by the trial court (Ex.3/p. 247).

THE OPPOSITION TO APPELLEES' MOTION FOR SUMMARY JUDGMENT

THE 5 CLAIMS APPELLEES GOT DISMISSED STEM FROM THE SAME FACT PATTERN, THE FACTS ESTABLISHED BY APPELLEES' ANSWERS IN THE RECORD, THE DEPOSITION TESTIMONY, THE LEASE, AND MATERIALS FROM HUD, ARE SET OUT BELOW.

DEREK SUBMITTED 7 EXHIBITS IN OPPOSITION TO THE APPELLEES' MOTION:

1) The Verified Original Petition for Damages (Ex.3/pp. 2-9)
2) The Answer filed by all five appellees (Ex. 3/pp. 10-24)

3) The Answer filed solely by Bobby Benson (Ex.3/p. 25)

4) Excerpts of the deposition of Derek Page (PP. 116-141)

5) Excerpts of the deposition of Tina Richard (PP. 142-182)

6) HUD pamphlet entitled *Residents Rights & Responsibilities* which was attached to the lease signed by Derek Page. (Ex.3/pp. 183-190)

7) HUD Public Housing Authority Ethics Reference Manual (Ex.3/pp.191-206)

SIGNIFICANT ADMISSIONS BY THE RESPONDENTS IN THEIR ANSWERS

Appellee-Bobby Benson filed 2 Answers. The first was filed jointly responding only as regards the allegations of negligence. He filed a separate Answer to address the assault and battery allegations specific to him, though he incorporated all the admissions made in his earlier Answer. (Ex.3/p. 24) Admissions are contained in both. The following chart sets out what facts the defendant ADMITTED are true in their pleadings. ***Again, please note the entire record was introduced by appellees and appellant proffered his opposition pleadings in the Trial Court.*** (Ex.3/p. 36)

Appellees admitted the following allegations to Derek's verified suit:

Plaintiff's Original Petition for Damages	**Answers**
Paragraph No. 3. Ed Washington Place Apartments is a housing development that services the **elderly** and disabled. (Ex.3/p. 2)	ADMITTED (Ex.3/p.11)
Paragraph No. 14. Defendant-Bobby Benson attempted multiple times to repair the toilet. (Ex.3/p. 3)	ADMITTED (Ex.3/p.13)
Paragraph No. 16. Derek Page requested that a licensed plumber be contracted to repair the problem once and for all. (Ex.3/p.3)	ADMITTED (Ex.3/p.3)
Paragraph No. 17. H. Cookie Benson advised Derek Page “that the buck stops here”. (Ex.3/p.3)	ADMITTED (Ex.3/p.13)
Paragraph No. 21. On information and belief, Bobby Benson is the husband of H. Cookie Benson and the step-father of Monica Roger. (Ex.3/p.3)	ADMITTED (Ex.3/p.14)
Paragraph No. 22. On information and belief, H. Cookie Benson is the wife of Bobby Benson and the mother of Monica Roger. (Ex.3/p.3)	ADMITTED (Ex.3/p.14)
Paragraph No. 28. Mr. Page decided to take photographs and video of the toilet and bathroom area to document the nature of the problem. (Ex.3/p.4)	ADMITTED (Ex.3/p.15)
Paragraph No. 29. On April 9, 2009, Derek Page returned to his apartment with his caregiver, Tina Richard, to discover Bobby Benson in the apartment working again on the toilet. (Ex.3/p.4)	ADMITTED (Ex.3/p.15)
Paragraph No. 30. Wanting to document who was making the repairs, Derek Page took pictures of Bobby Benson. (Ex.3/p.4)	ADMITTED (Ex.3/p.15)
Paragraph No. 55. Derek Page advised Bobby Benson that this apparatus had been tried at an earlier residence without success. (Ex.3/p.4)	ADMITTED (Ex.3/p.18)
Paragraph No. 69. After the police officer spoke with Monica Roger outside of Derek Page' apartment, the police	ADMITTED (Ex.3/p.20)

officer returned and advised my client and Tina Richard that Tina Richard had to vacate the premises and she was not allowed to return. (Emphasis in original) (Ex.3/p.6)

***13 PERTINENT TESTIMONY FROM DEPOSITIONS OF DEREK PAGE**

1) Derek Page was diagnosed with "Friedreich's Ataxia" at age 11, a condition that causes among other things muscle deterioration and made him wheel chair bound before moving into Ed Washington Place Apartments. (Ex.3/pp. 117-121)

***14** 2) While disabled, Derek does not throw his body onto the toilet. His transfers are difficult but he is "careful and gentle" when moving from his wheelchair to the toilet (Ex.3/pp. 124-126)

3) Derek did not give permission to the appellees to enter his apartment while he was not there. (Ex.3/pp. 133,138)

4) Derek never made it impossible or impractical to give him notice. Derek always has his cell phone handy and with him at all times. (Ex.3/p. 141)

5) Derek's concern about getting his toilet actually fixed and whether Bobby Benson had expertise to perform that repair was met with threats that Derek "was going to get a bedside commode and [he] was going to like it." Bobby Benson claimed competency to make these plumbing repairs because "he's been doing that kind of work since before [Derek] was shitting in [his] drawers." (Ex.3/p. 122)

6) Cookie Benson came to Derek's apartment to discuss the problems with the toilet repair and she became irate and told Derek that "...the buck stops here. You talk to me if you have any more problems." (Ex.3/p. 127)

7) Cookie Benson never told Derek who her boss was. Monica Roger never advised Derek who her boss was. Neither did Bobby Benson. He understood that "Ms. Monica was somewhat of a co-manager and her mother oversaw her and Mr. Benson was a repairman of sorts." (Ex.3/p. 136)

8) In paragraph 76 of his petition, Derek alleged that, "During this conflict regarding the toilet, Derek Page became aware that some of the appellees entered his apartment uninvited and without his knowledge while he slept." The appellees' Answers admit that "Bobby Benson entered Plaintiff's apartment for the purpose of performing maintenance. Bobby Benson announced his arrival and was unaware that Plaintiff was sleeping in his bedroom. The remaining allegations contained in paragraph 76 of Plaintiff's Original Petition for Damages are denied for lack of sufficient information to justify a belief therein." Derek had become so frighten by the appellees entering his apartment unannounced and without his permission, **he began placing tape on his apartment door to tell if the door had been opened while he slept.** (Ex.3/p. 131)

9) The appellees attempted to interfere with his relationship with Tina Richard by having the police instruct her not to come back on the property after the incident with Ms. Roger and her husband. (Ex.3/p. 130)

10) When Derek tried to photograph Bobby Benson, Benson grabbed Derek's right shoulder and left bicep and tried to wrestle the camera away from him. Tina Richard was present. Benson's grip was released only after Derek managed to raise his leg and try to kick Benson in the groin. (Ex.3/p. 128)

11) Derek did not provoke or touch Bobby Benson and never gave Bobby Benson permission to touch him. (Ex.3/p. 138)

12) Derek stayed at a hotel following the attack because he was very, very scared and because his toilet was unusable (given that Bobby Benson never completed the work he was doing before the attack.) (Ex.3/p. 129)

***15** 13) Fear existed before the attack by Bobby Benson, ala how he threatened to have only a bedside commode available for Derek, (Ex.3/p. 132) He became more fearful when he realized they entered his apartment while he was asleep, and this intensified with the assault. (Ex.3/p. 133)

14) Derek experienced nausea and vomiting as a result of his anxiety over how the appellees treated him. (Ex.3/p. 133)

15) A new toilet was delivered only AFTER Congressman Boustany's office was contacted. (Ex.3/p. 141)

16) Derek didn't want appellees to know his address even at the time of his deposition, because he was scared that they may harm him. This fear is a result of the appellees conduct toward him, of course, but also because of Derek having been hurt by "people with power who are more physically capable" than him. (Ex.3/pp. 137)

PERTINENT TESTIMONY OF THE DEPOSTION OF TINA RICHARD

1) Friedreich's Ataxia makes Derek limited and unable to walk. (Ex.3/p. 149)

2) Derek required assistance with meals, some toileting, bathing and showering. (Ex.3/pp. 144-145)

3) Derek's "arms become his legs basically." (Ex.3/p. 151)

4) Tina Richard was Derek's caregiver 7 days a week while Derek was at Ed Washington Place Apartments. (Ex.3/p. 151)

5) Derek could transfer to the toilet by himself and when he was able he "wouldn't drop himself" or his body onto the toilet. The seat was higher than normal, so Derek would simply "place himself on the toilet." (Ex.3/p. 170)

6) The toilet was good at the beginning of lease, but eventually the base became unstable and toilet would move. (Ex.3/pp. 153-155)

7) Derek has his cell phone with him all the times. (Ex.3/p. 179)

8) After Bobby Benson's initial attempt to repair the toilet, it leaked water into the apartment. Even after a second attempt to stabilize it, the toilet still shifted. (Ex.3/pp. 156-157) There were multiple reports of shifting and of flooding. (Ex.3/p. 158)

9) Later, Monica Roger's husband came to look at toilet. Monica Roger's stayed by the front door with it open while the air conditioning running. Derek asked Tina Richard to close the door and when she did, Monica Roger's husband ran up to her and said ***"If you touch my fucking wife I will break your face or I'll kill you."*** The police were called and Tina Richard was instructed to leave the premises and told not to return. (Ex.3/pp. 159-160)

10) Tina Richard had to remain off the property for approximately 5-7 days, and did not return until Congressman Boustany became involved so that she could begin caring for Derek again. (Ex.3/pp. 161-162)

***16** 11) Tina Richard was present when Cookie Benson and her husband came by Derek's apartment to inspect the toilet. Bobby Benson told Derek that he was placing bars on the toilet. Derek objected. Benson replied, "It's not what you want, it's what you are going to get, whether you like it or not." When Derek said he did not want those bars, Benson told Derek he was going to get him a bedside commode then. Later, Cookie Benson returned to the apartment and warned Derek that he would be evicted if he continued to complain about the toilet. (Ex.3/pp. 173-174)

12) Tina Richard was present and witnessed Cookie Benson's "buck stops here" comment and her threat of eviction if Derek continued to complain of the toilet not being repaired. (Ex.3/p. 182)

13) Cookie Benson phoned Tina Richard's employer and advised the employer that Tina had worked in a restaurant and questioned how the employer felt comfortable having someone with that level of experience being a caregiver. (Ex.3/p. 181)

14) Tina Richard personally observed and heard Bobby Benson react to Derek taking photographs. Benson told Derek that he had been doing this type of work since Derek was able to "poo in his drawers". Then, Bobby Benson attempted to grab the camera from Derek, but the camera strap was around Derek's arm. Benson began twisting Derek's arm and wrist. Tina Richard asked Bobby Benson to stop, but he would not comply, so she ran to a neighbor's home to phone the police. (Ex.3/pp. 166-167)

15) Derek did not threaten Mr. Benson or curse at Bobby Benson before Benson physically attacked him. (Ex.3/pp. 180)

16) Derek was fearful because the defendant had keys to his apartment and he began to have physical reactions to his anxiety, for example diarrhea and vomiting. These physical symptoms started on the night of the Benson-attack, and lasted about one week. (Ex.3/pp. 175-177)

17) Derek required Valium (and at the time Tina Richard's deposition seven months after these incidents, Derek still required Valium) in order to sleep. Tina Richard knows that Derek did not require Valium before this attack. (Ex.3/p. 178)

NOTE: Even in light of this testimony learned at discovery depositions that appellees' counsel conducted himself, Trial Court was assured at the hearing on the motion for summary judgment that "there is nothing in discovery that even suggests that the defendant's conduct was extreme or outrageous", that Derek threw himself on the toilet and that he's "not taking medication."

HUD PAMPHLET: RESIDENTS RIGHTS & RESPONSIBILITIES.

Attached to appellant's opposition is a document produced by HUD entitled *Residents Rights &* Responsibilities (Ex.3/pp. 183-190). This document is published by the Secretary of Housing and Urban Development and its title page bears the seal of the secretary of that department. Moreover, it was ***attached to the lease*** signed by ***17** Derek Page when entering a rental contract with the appellees. (Derek's brief noted for the Trial Court that "Exhibit A" of the appellees' brief is the lease (Ex.3/pp. 46-53), and that the last page of that exhibit lists attachments appended to the lease at the time of signing. The HUD pamphlet was "Attachment No. 9" to the lease. (Ex.3/p.53)

This document is relevant not only because it forms part of the contract between the parties, but because appellees admitted in their brief to the Trial Court that **"HUD mandates that CSM strictly adhere to the practices and policies promulgated by its department."** (Ex.3/p. 31) Appellees admitted that Monica Roger is an employee of defendant-C.S. Management (CSM) (Ex.3/p. 71), and that Bobby Benson is employed by CSM as the maintenance supervisor at Ed Washington Place Apartments (Ex.3/p. 71). Thus, Ms. Roger and Mr. Benson as agents of CSM and also must comply with HUD's policy and procedures. This HUD Pamphlet sets forth some of the policies and procedures CSM, Ms. Roger and Mr. Bobby Benson were required to honor and enforce. Pertinent parts of this document include:
"Management agents and property owners communicate with residents on any and all issues.

Owners and managers give prompt consideration to all valid resident complaints and resolve them as quickly as possible." (Ex.3/p. 184)

As a resident of a HUD-assisted multi-family housing project, you should be aware of your rights.... [These include]

The right to live in a decent, safe, and sanitary housing....

The right to have repairs performed in a timely manner, upon request, and to have a quality maintenance program run by management.

The right to be given reasonable notice, in writing, of any nonemergency inspection or other entry into your apartment....

The right to equal and fair treatment and use of your building's services and facilities, without regard to ...disability.... (Ex.3/ p. 185; Emphasis added)

The rights enumerated in the HUD pamphlet are NOT very different than what the law requires already. Among these tenant rights in HUD subsidized housing is that ***repairs*** are made timely per a **quality maintenance program** and that non-emergent inspections are made only after written notice is given.

***18** Neither Ms. Roger's affidavit nor Mr. Benson's affidavit filed in support of their motion for summary judgment contained any information about a "quality maintenance program", nor do they delineate the basis of Mr. Benson's qualifications to perform plumbing repairs. (Ex.3/pp. 63-70) Derek asserts that if such "quality maintenance program" existed at Ed Washington Place Apartments (and the same had been complied with) the incidents that spawned the instant controversy would have been avoided altogether. This addendum/HUD pamphlet forms a part of the basis of the appellees' duties to Derek, and gives rise to genuine issues as to material fact by which a jury may find that appellees **neglected** their duties and caused appellant harm. Moreover, a jury may find that a "quality maintenance program" would require competent repairmen to address plumbing issues. Bobby Benson's affidavit is silent regarding his credentials to make plumbing repairs, and given that he attempted to make the same over FIVE months, a jury could very probably find that a quality maintenance program would have detected that a new toilet needed to be installed so that the issue was resolved.

Derek submits three reasons the HUD pamphlet should be considered in opposition to appellees' motion. First, it is a part of the lease which was relied upon by the appellees' in their motion. Second, the appellees ADMIT that they are obliged to comply with the HUD regulations and this pamphlet enumerates same. Third, the Court has the authority to take judicial notice of this document as it is self-authenticating and its introduction is permitted by the Code of Evidence. In *Phillips v. K-Mart Corp.*, 588 So. 2d 142 *(La.App. 3 Cir.,1991)*, this court stated that:
"Plaintiffs final argument concerns an evidentiary matter. Over the objection of counsel for plaintiffs, defendant was allowed to introduce into evidence a pamphlet prepared by the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms entitled "Your Guide to Federal Firearms Regulation 1988-89". We find no error in the admission of the pamphlet into evidence. See La.C.E. arts. 202 and 902. The pamphlet contained federal regulations of an administrative agency of the United States which is entitled to be judicially noticed. Consequently, this argument is without merit."

The pertinent codal provisions relied upon in *Phillips* case are:
***19 LA. C.E. Art. 202. Judicial notice of legal matters**

B. Other legal matters. (1) A court shall take judicial notice of the following if a party requests it and provides the court with the information needed by it to comply with the request, and may take judicial notice without request of a party of:

(e) Rules and decisions of boards, commissions, and agencies of the United States or of any state, territory, or other jurisdiction of the United States which have been duly published and promulgated and which have the effect of law within their respective jurisdictions.

Art. 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

Did appellees comply with the "resident's rights" as defined in the HUD pamphlet (Ex.3/pp. 183-190)? Derek submits this is a genuine issue of fact. According to their own pleadings they must strictly adhere to HUD's practices and policies. Genuine issues as to material fact exist whether appellees complied with the lease and these HUD policies. Derek submits if appellees had complied with his "resident's rights", he would never have been spoken to like he was by the Benson-Roger team; he would never have been attacked; he never would have feared for his safety around the Bensons and Rogers; and he never would have required medical treatment, and required Valium to help him overcome emotional trauma.

Peaceful Possession

Appellees acknowledge their obligation under the law to provide peaceful possession to Derek, but claim they did so because (1) Derek was never evicted and (2) they had a right to enter his apartment to make repairs promptly. (Ex.3/pp. 46-47) Permit Derek to repeat: He was a renter at a complex that supposedly specializes in the housing of disabled people. His physical functioning is severely limited, he is wheelchair bound, and this is known to the management. Yet, they ADMIT to entering his private apartment without his permission while he was sleeping (they just "were not aware he was sleeping"). Derek's request for a working toilet are met with ***20** such vitriol that he is told that he has to settle for bars on the side that have not worked in previous residences (a fact which appellees ADMIT to knowing), yet they move forward and apply them anyway and tell Derek that if he complains he is going to get a bedside commode and like it. His complaints go as far as the managements promises they can go ("the buck stops with Cookie"), a statement appellees admit was said and it is this lady who threatens eviction if Derek continues to complain about his toilet. (Yet, when called to answer for the "buck stops here" comment, appellees take a picture of a policy that is supposedly posted on the wall somewhere in the complex and propose that is the real grievance procedure Derek should have known was available to him). Derek's caregiver is not permitted on the premises even though she never assaulted anyone, and the complex maintenance man (the boss' husband) intentionally attacks Derek when appellant tries to take a picture of the ongoing repairs to his toilet. All of this upsets Derek enough to have nausea, vomiting, and anxiety sufficient to require prescriptive medication. This is peaceful possession? It is submitted that there is a genuine issue as to material fact wheter peaceful possession was provided to Derek Page.

Appellees are likely going to argue that because Derek was never actually evicted, he was thus provided peaceful possession. Yet, by the defendants' own Answers to the lawsuit and by the discovery depositions, the evidence shows that Derek was wrongly threatened with eviction simply for exercising his rights under the lease. That is not "peaceful possession". According to the HUD regulations that appellees acknowledge they must follow, written notice is required before entering premises unless it is an emergency. Appellees did not even call! Derek always had his cell phone and they could have easily contacted him to arrange for a convenient time to enter his premises. It was never impossible or impractical to notify Derek when Bobby Benson or anyone else wanted to attempt a repair. There is a genuine issue as to material fact whether appellees honored Derek's rights as spelled out in the ***21** *Rights and Responsibilities* attachment to the lease. (Ex.3/pp. 183-190) Derek wanted his toilet fixed and he never refused entry at any of appellees' attempts at fixing it.

Yet, there is a larger point not addressed by the appellees' motion. "Peaceful possession" is ***more*** than the right not to be wrongly evicted or the apartment entered lawfully for repairs. The law makes clear that this encompasses not having a lessee's physical boundaries unlawfully violated as well.

La. C.C. art. 2700 states that:
The lessor warrants the lessee's peaceful possession of the leased thing against any disturbance caused by a person who asserts ownership, or right to possession of, or any other right in the thing.

In a residential lease, this warranty encompasses a disturbance caused by a person who, with the lessor's consent, has access to the thing or occupies adjacent property belonging to the lessor. (emphasis added)

The second sentence Article 2700 makes explicit the right of lessees to be free from "disturbances" caused by persons who the lessee gives access to the property. Cookie Benson, Bobby Benson, and Monica Roger (and Monica Roger's husband) all had access to the property with the lessor's permission and each of them either verbally and emotionally *disturbed and/or physically attacked* Derek.

Peaceful possession encompasses a lessee's right to be free from criminal acts of other tenants whose presence on the property a landlord is deemed to control. *Boteler v. Lake Management, Inc , 628 So.2d 86 (La. App. 5 Cir. 1993).* In *Boteler,* one tenant was killed by another. A lawsuit was filed against the landlord regarding security and safety issues. Among the duties allegedly violated by the landlord was the failure to provide peaceful possession to the murder victim and his family. The trial judge granted summary judgment to the landlord, but the appeals court reversed finding genuine issues of fact as to *whether the landlord had reason to know or foresee the potential for criminal activity.*

Interestingly, the court in *Boteler* notes the distinction in the jurisprudence in this types of cases where disturbances are caused by third parties over whom the ***22** landlord had no control (i.e. a trespasser) and those over whom they do have control over (co-tenants at the complex). Derek submits that if landlords have been determined to "control" co-tenants for the purposes of La. C.C. art. 2700, then surely landlords control the *maintenance men and managers* of the complex.

If a maintenance man commits an assault and battery or the managers and their family cause "disturbances", then per the jurisprudence they must answer for it. It is submitted there are genuine issues of fact regarding whether the appellees knew or should have foreseen that the issue regarding the toilet repair had become too emotional for THEM after Monica Roger's mother went through the apartment cursing and proclaiming "The buck stops here", warning Derek he would be evicted if he continued to complain, and Ms. Roger's husband threatened to "kill" Derek's care giver. These are "disturbances . It should have been evident, and it is likely the jury will find that this family was not capable of managing this issue without risk of the matter becoming even more personal and an issue in which they were losing perspective. Ignoring their repeated and unprofessional responses to this situation, the landlord continued to send in family members who ultimately lost it and attack Derek physically. Surely, this is not peaceful possession.

At least two times, the appellees entered the residence without consent and at least one time while Derek was asleep. In fact, Derek became so afraid that the appellees may enter his apartment at night, that he started placing tape on his door to confirm whether it was broken the following morning. Indeed, it was Derek's system that in part revealed the appellees' unlawful and unreasonable intrusion into Derek's apartment. The lease did not permit this entrance. Indeed - this was trespass. Only in cases of emergencies (per the HUD rules - Ex.3/p. 185) are defendant's free from the requirement of providing ***"written"*** advance notice. These conditions did not exist. Frankly as far as Derek is concerned, all they had to do was call him. The appellees had Derek's cell phone number and he had his cell phone at all times.

***23 Negligent Maintenance of the Property**

The defendant claims that, "It is undisputed that the necessary repairs were made on every occasion a malfunction was reported." (Ex.3/p. 35) This fact ***IS*** vigorously disputed by Derek. Indeed, it is unequivocally untrue. No "repairs" were made of this toilet until Derek had to get a Congressman involved to have the entire appliance replaced. This was after the official maintenance man (Bobby Benson) ***tried*** multiple times to fix the problems with the toilet and FAILED; as well as any attempts made by Monica Roger's husband. There is an obligation to ***REPAIR*** the toilet - not "try" to repair a toilet; or "sort repair a toilet; or "doing our best" to repair the toilet; the appellees' obligation was to ***REPAIR*** the toilet. Frankly, after five months of tinkering with the toilet, it remained UNrepaired. Miriam-Webster defines "repair" as "to restore by replacing a part or putting together what is torn or broken: fix" and "to restore to a sound or healthy state: *renew*". This was not done by the defendant-Bobby Benson, Ms. Roger's husband or by anyone else until Congressman Boustany's office became involved. The toilet was finally and appropriately addressed when a Congressman's office started placing calls.

The appellees admitted in their brief to the Trial Court that "it should be noted that actionable negligence results only from the creation or maintenance of an unreasonable risk of harm to others." (Ex.3/p. 37) This is ***exactly*** what the appellees' actions caused in this case, especially after they insisted on placing bars on (the unstable) toilet that Derek had told them had not worked before and would make him fall. Appellees' Answers ***admit*** that Derek advised them that the bars they insisted on placing had been unsuccessfully tried on toilets in other places that he lived. Why then would the appellees insist on placing these bars on the toilet they could not otherwise make stable? Do these circumstances not create genuine issues of material fact for a jury to resolve as to create the defendant unreasonably created risks of harm by the way they maintained the premises? The bars that the defendant forced upon Derek made him fall at Ed Washington Place Apartments and *did not stabilize the* ***24** *appliance to the floor,* leaving him trapped on the floor until his care giver arrived to help him from being sandwiched between the toilet and the wall.

Under the circumstances, Derek submits that there is a genuine issue of fact regarding the competency of workmanship involved in the appellees' repeated repairs. What obviously needed to be done from the beginning - and what Congressman Boustany accomplished - was the ***replacement*** of the entire toilet. Once that was done, the toilet was stable. Derek submits that a jury may well find that the appellees should have figured out this was the true fix of the problem during the 5 months they were trying to contend with this toilet.

Intentional and Negligent Infliction of Emotion Distress

The leading Louisiana case on intentional infliction of emotional distress is *White v. Monsanto, 585 So.2d 1205 (La. 1991).* One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. *White, 585 So.2d at 1209.* Thus, in order to recover, a plaintiff must prove (1) the conduct was extreme and outrageous, (2) the emotional distress of the plaintiff was severe, and (3) the defendant "desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct." *White, 585 So.2d at 1209.*

Derek submits there are ***ample*** facts that meet the *White v. Monsanto* tests even upon the few depositions have been obtained to date. It is important to note that this is not JUST a tenant dispute or a case about a toilet. It is not JUST a matter or unkind words or even a physical attack. Perhaps if this case were ONLY about those things, appellees' seeking summary judgment would be valid. It is all those things and more - and the "more" is what makes it "outrageous". If the torts described above were done to an able-bodied tenant in a typical apartment complex, Derek admits that this case may not meet the *White* test. Yet, these were done to a person who is physically disabled in a complex that the appellees ***admit exists*** to serve the disabled.

25** 1) The appellees are paid money by HUD to ***assist the **elderly** and disabled;

2) The appellees receive money to comply and honor the tenants' rights as set forth by its lease and by HUD, yet they ***threaten*** the disabled by warning Derek that if he does not stop complaining about his toilet being unstable he will be ***evicted;***

3) Derek is forced to have bars placed on his UNSTABLE toilet even though he advises they ***did not work*** before ON A STABLE ONE in an earlier residence (and the appellees acknowledge knowing this) and it caused harm;

4) Regardless of how many grievance policies the appellees can take pictures of for their brief, the realty at Ed Washington Place Apartments is that ***"the buck stops here"*** with Cookie Benson and that there actually is no help outside her family to oversee the incompetent repairman (her husband) and the incompetent manger (her daughter); [*NOTE: the policy was not submitted, only a picture of it was attached to appellees' memorandum.* (Ex.3/p. 43)]

5) In contravention to the HUD *Rights and Responsibilities* pamphlet, the communication used by the appellees was littered with insults and threats, such as the threat by the incompetent repairman that Derek to start having to use a bedside commode *simply because this repairman was frustrated Derek reasonably wanting a working toilet in his unit;*

6) In response to Derek wanting to know what the qualifications are of the complex' repairman to fix the toilet, the most he can learn about Bobby Benson's qualifications is that he has been doing this since Derek's "been shitting in [his] drawers" (Ex.3/ p. 122);

7) ***To ensure that the "buck really DOES stop with Cookie Benson",*** Derek is physically attacked without any provocation whatsoever when wanting to document in photographs what is being done in MONTH NUMBER FIVE to fix this problem; and,

8) The caregiver who is there to provide essential help so that Derek can perform activities of daily living is instructed not to return to the property without ever having violated any law or rule or regulation, and the overseer phones the caregiver's employer to discredit her.

Under the circumstances, it is beyond legitimate dispute the reason that appellees did what they did to Derek was to cause him distress. And the result? Substantial and reasonable fear and the need for Valium even months and months after leaving the Ed Washington Place Apartments.

Derek submits that this is sufficient to meet his burden of proof before a jury, let alone on overcome the appellees' motion for summary judgment. The whole reason Derek qualified for tenancy at Ed Washington Place Apartments is because he is disabled. ***Was he serviced - or terrorized?*** That Derek was treated like a bother is not extreme; to have his plumbing issues handled with such incompetence is a matter of mere tort law; but for ***a severely disabled person*** to be repeatedly insulted and threatened and ultimately attacked as the evidence demonstrates is outrageous. The threshold for negligent infliction of emotional distress is much lower, and it is submitted that if appellees did what they did to Derek simply because they were being "unreasonable" than despicable, then he meets this test as well.

***26 Tortious Interference**

The jurisprudence cautions drawing too strict a test following the case of *9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228 (La. 1989)*, yet there are genuine issues of material fact indicating that Derek Page's case survives under this very strict five-part test. Questions raised by the appellees' motion is whether there are genuine issues of material fact establishing (1) a corporate officer (2) interfered with a contract or legally protected interest (3) with the intention of making performance impossible or more burdensome (4) without justification (5) that caused damage.

In this case, (1) ***corporate officers*** (Cookie Benson and Monica Roger), (2) interfered with a ***legally protected interest*** (ala, Derek's right to reasonable accommodations such as a caregiver due to his disability), (3) with intention to make performance ***impossible or more burdensome*** (by preventing Derek's caregiver from coming on premises and by calling Tina Richard's employer to discredit her credentials), (4) ***without justification*** (as the sworn deposition testimony regarding any disputes between Tina Richard and the appellees prove Tina Richard always comported herself reasonably and did not provoke the Benson-Roger team), and that (5) the appellees' actions ***caused damages*** (ala, interruption of Tina Richards' assistance to Derek and caused Derek heightened stress). Derek obviously did not have to produce enough evidence to obtain a verdict to overcome appellees' motion, but just enough evidence to show that there exists genuine issues as to material fact, to be resolved by a jury.

Failure to Have Independent Oversight of the Benson-Roger Team

***27** Derek also faults the appellees for permitting the "foxes to guard the hen house." It is submitted that under any "reasonable man" standard, it is foreseeable that the lack of independent oversight of a facility of disabled and **elderly** people is absolutely essential. Independent oversight would likely have "nipped this controversy in the bud" and relieved the peculiar pressure brought to bear by the Benson-Roger team. However, there is likely much more to this particular claim that if more time is permitted, will reveal a textual violation of HUD regulations.

The appellees admit that they must comply with HUD policies, procedures and regulations. Such regulations are replete with conflict of interest and **anti-nepotism** rules. (Ex.3/pp. 191-206) *(These rules are published in the Code of Federal Regulations and in HUD materials the types of which the Court is permitted to take judicial notice of and Derek hereby requests the Court do so.)* For example CFR, Title 24, Subchapter B, Chpt IV, Part 401(D) has regulations governing "owner/managers" which Derek has reason to believe applies to the appellees' organization structure. This regulations set out "property management standards" for owner/managers which are approved as "participating administrative entities or referred to as the "PAE". PAE's must per 24 CFR 401.506 (b)(3) **Maintain good relations with the tenants;** and per 24 CFR 401.506 (b)(5) **Take all necessary measures to ensure the tenants' physical safety;** and per 24 CFR 401.506 (b)(6) **Comply with other provisions that are required by HUD, including termination of the management agent for cause.** According to 24 CFR 401.506 (b)(6) (c) **"PAE management standards must also conform to any guidelines established by HUD, and industry standards, governing *conflicts of interest between owners, managers, and contractors."***

In literature published by HUD addressing conflicts of interest, there are prohibitions of hiring "family members" which are defined as both children and even relations that are "step-children" or "step-parents". (Ex.3/pp. 212).

***28** Derek was frank with the trial court in the brief that he was not yet 100% clear that these *specific* provisions prohibit the nepotism in this case where the mother (Cookie) of a manger (Monica) hires Cookie's husband (Bobby) as a maintenance man, but there is a very strong likelihood that they do or that similar proscriptions are contained in other HUD regulations which Derek's counsel has not yet unearthed.

La. C.C.P. art. 966C (1) states that ***"[a]fter adequate discovery or after a case is set for trial,*** a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted." Per La. C.C.P. art. 967, a trial judge has the discretion to issue a summary judgment or allow further affidavits or discovery. The only depositions that have been taken to date are those of Derek Page, Tina Richard and Tina Richard's husband (who helped move Derek out of Ed Washington Place Apartments). None of the appellees have been deposed. Derek submits it is premature to dismiss this claim because there has been insufficient discovery regarding the specific organizational structure and how it fits in the HUD regulations which they admit must be followed.

The strongest case to be made that it is a ***huge*** mistake for HUD complexes filled with the **elderly** and disabled having ***only*** a family team in control of the premises are the circumstances that arose in *THIS* matter. Appellant submitted a picture of papers on a bulletin board and called it a grievance policy, the truth of the matter is that the "buck stops with Cookie", and Derek was attacked when photographs were attempted to document what was going on at the complex (evidence may be sent to someone other than Cookie).

Appellees claimed in the trial court that HUD investigated this matter and took no disciplinary action against the Benson-Roger team. There is no evidence to this effect - and it is not a matter discussed in any affidavit, attachment or deposition. It is unclear what HUD looked into this matter, but the court or a jury is not bound by such determination. Derek wishes to explore is whether there was a textual violation of anti-nepotism rules, as only one part of the evidence supporting this claim.

*VII CONCLUSION

For these reasons, Derek Page seeks review and reversal of the Trial Court's rulings relative to Appellees' Motion to Strike for Untimeliness and Motion for Summary Judgment. Derek submits there is sufficient evidence to deny the appellees motions and/or justify more discovery regarding Derek's claims. Appellees' counsel complained in the trial court that no recent activity was done on this file - and that is true. Yet, La. C.C. P. art. 966(C)(1) is the law for a reason and it is not merely to have a court look at a calendar to see when the last depositions were taken. If appellees are aggrieved by the slow movement of this case, they can request a status conference per La. C.C.P. art. 1551 and have discovery deadlines set. A motion for summary judgment is not the proper took by which a party should be heard to complain that a case is taking too long.

PRAYER FOR RELIEF

Derek Page submits that the trial court erred when granting appellees' motion to strike the memorandum and exhibits filed in opposition to appellees' motion for summary judgment, and also erred in granting appellees' motion for summary judgment. Derek Page prays that this Court overturn these rulings of the trial judge and that this matter be remanded to the trial court for further proceedings and a trial on the merits.

Appendix not available.

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