



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2012:7

July 1, 2012

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UPCOMING MEETINGS

| | | |
|-----------------------|---|---------------|
| Aug. 2-4, 2012 | LADC Trial Academy, Loyola Law School, New Orleans | 21.9*# |
| Aug. 16, 2012 | Associate Skills Set Seminar #5, Lucy's Retired Surfers' Club, New Orleans | 2.0 |
| Aug. 17, 2012 | LADC Sizzlin' Summer Seminar, Windsor Court, New Orleans | 7.5*# |
| Oct. 25, 2012 | Associate Skills Set Seminar #6, Location to be announced (save the date) | 2.0 |
| Dec. 7, 2012 | LADC Defense Lawyers' Seminar, Windsor Court, New Orleans (save the date) | 8.0*# |

(A registration form may be downloaded or you may register online at www.ladc.org if registration is open at this time. For seminars designated "save the date," registration is not open at this time.)

* - includes one credit for professional responsibility (ethics)
- includes one credit for professionalism

BULLETIN BOARD

ONLINE REGISTRATION: You now can register online for LADC seminars. To register online, visit the LADC website and click the link for the seminar. You will have the option of paying by credit card or having an invoice sent to you by email. For a while, we will preserve the method of downloading a registration form from the LADC website and mailing it in. The LADC website address is <http://www.ladc.org>.

2012 TRIAL ACADEMY: Registration is now open for the LADC Trial Academy on Aug. 2-4. This is great trial training for our members who have not had much trial experience.

2012 SIZZLIN' SUMMER SEMINAR: This always-popular seminar will be held at the Windsor Court Hotel on Friday, Aug. 17. Speakers and topics will include Insurance Law Update by Shelby McKenzie, Recent Developments in Louisiana Law, Ethics, and Professionalism. A panel of legislators, including Representative Neil Abramson, will provide an overview of the 2012 legislative session. The Honorable Arthur J. Boylan, Chief Magistrate Judge of the federal district court in Minnesota, who

handled the NFL labor dispute in 2011, will participate in a panel discussion on “The Art of Negotiation.” We have a block of rooms reserved at special rates at the Windsor Court Hotel for Thursday, Aug. 16 and Friday, Aug. 17. Please make reservations by calling the Windsor Court at 1-800-262-2662 and referring to the “Louisiana Association of Defense Counsel” seminar. **The room block expires July 16th.** Please use the LADC website to register for the seminar.

FALL ASSOCIATE SKILLS SETS SEMINARS: These popular new 2-hour seminars will continue to be offered every other month, with one in each of the following months: August, October, and December.

“CALLING ALL LAWYERS!!!” Your LADC has recently instituted a Pro Bono Committee. We are happy to announce our first initiative – “Calling All Lawyers!!!” – a pilot program in conjunction with the Louisiana Civil Justice Center (“LCJC”). We need your help to make it a success. The LCJC receives numerous calls from people from around the state simply looking for guidance on a number of legal issues. That’s where we come in! For those individuals wishing to speak with a lawyer, the LCJC staff will obtain their contact information and the nature of their inquiry. That information will be provided to a volunteer lawyer who will call the “clients” to discuss their issue. We, as volunteer lawyers, will accept a 2 hour shift during which time we will attempt to assist between 5–8 “clients.” Don’t worry – we will be providing our volunteers with information regarding frequently asked questions and contact numbers for various agencies to provide to the clients. Initially, the 2 hour slots will be from 7 a.m. to 9 a.m. on Tuesdays and 4 p.m. to 6 p.m. on Thursdays. We will not be taking on the clients’ cases, so the volunteer’s involvement will be limited to the 2 hour session. Once we have assisted the client, we will provide a brief report to the LCJC advising of the advice given. For more information or to volunteer, please contact Will Montz: wmontz@ln-law.com; 337-237-7000.

50th ANNIVERSARY: The planning meeting to establish the LADC was held on Nov. 22, 1963. The LADC will be 50 years old in 2013. Details for the 50th Anniversary celebration will be unveiled as they are planned.

NEW MEMBERS

Elizabeth Bass, Lafayette

Laken Davis, New Orleans

Julianne Echols, New Orleans

Thomas Miller, Covington

Corey Pierce, Baton Rouge

Brian Sevin, New Orleans

Caroline Spangler, New Orleans

KEY DEVELOPMENTS

Concursus

A defendant in concursus may not actually bring reconventional demands and demands for additional relief against a plaintiff in concursus, although defendants in concursus may cross claim against each other. Accordingly, court should not have accorded complete res judicata effect to judgment in concursus proceeding. Plaintiff had sued insurance company not just for policy proceeds, but also for damages, penalties, and attorney's fees. McLean v Majestic Mortuary Services, Inc., Fifth (La.) Circuit, No. 11-CA-1166 (5/22/12)

Insurance; Damages

A vehicle which is parked in compliance with all applicable parking regulations at the time of the accident is exempt from the "No Pay, No Play" rule that bars its owner's recovery of certain damages if he did not carry liability insurance on the vehicle as required by R.S. 32:866. Robinson v Kelly, Fifth (La.) Circuit, No. 11-CA-1135 (5/8/12)

OTHER SIGNIFICANT DEVELOPMENTS

Abandonment

Under CCP Art. 561, a party, and not the trial judge, must take action to move a case to final disposition to avoid abandonment. Thus, a rendition of a judgment by a trial judge does not interrupt the abandonment period. Furthermore, a motion to enroll as counsel of record is not a step in the prosecution of the case and does not interrupt abandonment. Argence L.L.C. v Box Opportunities, Inc., Fourth Circuit, No. 2011-CA-1732 (5/23/12)

Arbitration

Although general jurisprudential law, based on the Federal Arbitration Act, allows a district court to decide a challenge directed only to a contractual arbitration clause, where the parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator. Jasper Contractors Inc. v E-Claim.com, LLC, First Circuit, No. 2011 CW 0798 (5/4/12)

Attorney Fees

In Acosta v B & B Oilfield Services, Inc., the Third Circuit observes that under CCP Art. 863 sanctions may be imposed upon a plaintiff for "the continued pursuit of the litigation" after he brought an action and then subsequently obtained information that indicated the lawsuit was without reasonable basis. Third Circuit, No. CA 12-122 (6/6/12)

An agreement by parents to pay for an attorney's legal services on behalf of their child (custody dispute) is in the nature of a third party beneficiary contract which is not required to be in

writing. Abadie v Bacino, Fifth (La.) Circuit, No. 12-CA-16 (5/22/12)

Comparative Negligence

50% to owner of house damaged by hurricane, and 50% to guest who was aware that repairs were being made at the time of her visit and who fell through the flooring. Lewis v Jones, Fifth (La.) Circuit, No. 11-CA-1117 (5/22/12)

Court Costs

The U.S. Supreme Court rules that only the costs of those who translate orally from one language to another, and not costs of document translation, are covered by 28 USC Sec 1920, and thus recoverable as costs by the prevailing party in federal court litigation. Taniguchi v Kan Pacific Saipan Ltd., ___ US ___, 132 S.Ct. 1997 (2012)

Damages

The Privacy Act (5 USC Sec 552a) makes the US liable to an individual for damages for failure to comply but its liability is for “actual damages,” and that does not extend to mental or emotional distress. Thus, the federal government did not under the Privacy Act waive sovereign immunity with respect to such damages. FAA v Cooper, ___ US ___, 132 L Ed 2d 497 (2012)

Back: \$175,000 to wife in general damages and loss of enjoyment of life; wife suffered pain for over five years and underwent several cervical facet blocks, rhizotomies and epidural steroid injections, and surgery was not an option. Buckheister v United States Environmental Services, L.L.C., Fifth (La.) Circuit, No. 11-CA-1148 (5/31/12)

Consortium: 0 to husband for wife's injury; he testified that the injuries affected their lives and he constantly worried about her, but the testimony failed to show how their lives were disrupted. Buckheister v United States Environmental Services, L.L.C., supra.

Jury erred in finding that plaintiffs suffered no damages from minimal contact between vehicles. Treating physicians testified that plaintiffs' symptoms were caused in part by the accident and there was nothing presented by defendants to dispute this conclusion. (Lowest reasonable amounts fixed by court were \$15,000 to each plaintiff.) Stoll v Allstate Ins. Co., Fifth (La.) Circuit, No. 11-CA-1006 (5/8/12)

In a “close call,” the Second Circuit rules that non-pecuniary damages are not recoverable under CC Art. 1998 by a couple who purchased a recreational vehicle where the primary purpose of the purchase was for transportation and recreational travel. Jones v Winnebago Industries, Inc., No. 47,137-CA (5/16/12)

Damages: Wrongful Death

Punitive damages may not be recovered on a claim for wrongful death. Where the applicability of punitive damages to a survival action is a factual issue to be determined by the fact finders

who will weigh the testimony at trial, partial summary judgment is improper. Williams v Asbestos Defendants, Fourth Circuit, No. 2011-CA-0716 (5/16/12)

Evidence

Trial judge erroneously considered evidence of a video surveillance tape that was not properly offered and introduced at the hearing and relied on that evidence in rendering his judgment. Although CCP Art. 966(B) provides an exception for specific documents a court may consider on a motion for summary judgment without the need to formally introduce such documents into evidence at hearing, generally all other documents or things not enumerated in the article but relied upon by the parties must first be verified or authenticated and officially offered and introduced into evidence. Sheffie v Wal-Mart Louisiana LLC, Fifth (La.) Circuit, No. 11-CA-1038 (5/31/12)

Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. Scheuermann v Cadillac of Metairie, Inc., Fifth (La.) Circuit, No 11-CA-1149 (5/31/12)

Insurance

The form of the standard fire policy provides the insurer is not liable if the insured building is unoccupied for a period of time. Held, a house is “unoccupied” where the owner did regular maintenance and had her mother visit the property but no one was living there on a regular basis. The breach of the occupancy clause in the contract increased the hazard of fire. Doucette v Louisiana Citizens Coastal Plan, Fifth (La.) Circuit, No. 12-CA-52 (5/22/12)

An additional insured provision that restricts coverage to liability “arising out” of the named insured's “work” extends to the additional insured's own negligence. Jones v Capitol Enterprises, Inc., Fourth Circuit, No. 2011-CA-0956 (5/9/12)

Insurance; UM Coverage

Under R.S. 22:1295(1)(a)(i), any insured named in the policy can reject UM coverage. This includes a person who has lived with the insured and has had two children with him and who is listed as an “additional insured” under the policy. Pena v Simeon, Fifth (La.) Circuit, No. 11-CA-1083 (5/22/12)

Jurisdiction; Subject Matter

The U.S. Supreme Court has ruled that federal and state courts have concurrent jurisdiction over private suits arising under the Telephone Consumer Protection Act, 47 USC Sec. 227. Mims v Arrow Financial Services, Inc., ___ U.S. ___, 132 S.Ct. 740 (2012)

Medical Malpractice

The Supreme Court has reiterated its earlier holdings (Oliver v. Magnolia Clinic, 85 So. 3d 39 (2012); Butler v Flint Goodrich Hospital, 607 So. 2d 517 (1992)) that the medical malpractice “cap” is constitutional. Arrington v Galen-Med, Inc., No. 12-CA-0908 (5/22/12)

The Louisiana Fifth Circuit emphasizes that if neither party takes a step to appoint an attorney chairman within the prescribed time frame, both parties waive the use of the medical review panel. Alexander v Shaw-Halder, No. 11-CA-1136 (5/8/12)

An actual examination may require a face to face meeting within 72 hours prior to the involuntary commitment of a patient by a physician or psychologist. Reasonable people, including a medical review panel, could find a failure to conduct a face to face interview within 72 hours before committing her was a breach of the standard of care requiring an “actual examination” of the patient. Schilling v Aurich, Third Circuit, No. CA 11-1325 (5/3/12)

Negligence

Writes the Fourth Circuit, relieving a casino from any duty to identify and recognize compulsive gamblers: “a casino must disseminate information regarding programs to assist persons who recognize themselves as problem gamblers, and to allow those persons to self-report. Once the gambler self-reports and is placed on a list maintained by the casino, only then can a casino be held liable should a compulsive gambler be allowed to patronize that establishment.” NOLA 180 v Harrah's Operating Company, Inc., Fourth Circuit, No. 2012-CA-0072 (5/16/12)

The duty imposed on a car dealer to secure an affidavit from the buyer of a new or used vehicle attesting that the buyer had appropriate insurance coverage on the vehicle extends to protect third persons from injuries suffered in a collision with the vehicle. Hodges v Taylor, Third Circuit, No. CA 12-107 (6/6/12)

Plaintiff, a visitor at the defendant hospital, was injured when the commode chair she was using to assist her mother, a patient, gave way as she was assisting her mother to transfer and the chair fell. Held, plaintiff may not recover from hospital. A hospital would have owed a duty to the patient to protect her from any risk in transferring on and off the commode chair but there is no ease of association between the duty the hospital owed a visitor and the particular risk plaintiff encountered. Cavet v Louisiana Extended Care Hospital, Second Circuit, No 47,141-CA (5/16/12)

A public entity may be held liable for damages under negligence (CC Art. 2315) and strict liability (CC Art. 2317). With the enactment of R.S. 9:2800, the legislature has eviscerated the distinction between claims against public entities by requiring proof of actual or constructive knowledge of the defect which causes the damage under either theory. Casborn v Jefferson Parish Hospital District No. 1, Fifth (La.) Circuit, No. 11-CA-1020 (5/22/12) See also, Carreras v Jefferson Parish Hospital Service District No. 2, Fifth (La.) Circuit, No. 11-CA-1163 (5/22/12) (R.S. 9:2800, and not R.S. 9:2800.6, applies to slip and fall in hospital cafeteria).

Prescription; Legal Malpractice

Legal malpractice actions must be filed no later than one year from the date the plaintiff discovered, or should have discovered, the alleged malpractice but no later than three years from the date of the alleged malpractice, whichever comes first. Dwyer v Binegar, Fourth Circuit, No. 2011-CA-1782 (5/23/12)

Products Liability

The Federal Locomotive Inspection Act (49 USC Sec 20701, et seq) preempts state law design-defect and failure to warn claims against a defendant manufacturing asbestos containing equipment. Kurns v Railroad Friction Products Corp., ___ US ___, 132 S.Ct. 1261 (2012)

Summary Judgment

An allegation by insurer that driver was not the permissive user of insured's vehicle does not shift the burden of production on summary judgment to plaintiff to prove that driver was the permissive user. Berard v Home State County Mut. Ins. Co., Third Circuit, No. CA 11-1372 (5/9/12) (five judge court; Genovese and Ezell, JJ, dissent)

Courts of this state (including the supreme court in Buggage v Volks Constructors, 928 So 2d 536) have indicated that district courts have discretion, in the absence of prejudice, to apply the time limitation for serving affidavits and depositions imposed by CCP Art. 966 and Louisiana District Court Rule 9.9. In view of the discretion vested in the court, the trial court abused its discretion in granting summary judgment. Ultra Pure Water Technologies, Inc. v Standex International Corp., Third Circuit, No. CA 11-1531 (5/16/12) (Amy, J, concurs)

Torts; Defamation

There may be a valid cause of action for defamation by implication or innuendo where a photograph has been posted without any written words. Williams v The New Orleans Ernest N. Morial Convention Center, Fourth Circuit, No. 2011-C-1412 (5/11/12) (on remand from Supreme Court)

Torts; Vicarious Liability

Absolving a corporate officer of a taxi company for damages caused by one of its drivers he hired, the Second Circuit writes: "Anyone behind the wheel, whether driving for pleasure or on business, as an employee, agent or officer of a corporation, owes a personal duty not to rear-end other vehicles. By contrast, a corporate officer making a hiring decision is primarily acting on behalf of his or her company" and owes a duty of reasonable care which does not extend to all torts that all employees might commit. Bloxom v City of Shreveport, No. 47,115-CA (5/16/12) (Lolley, J, dissenting)

Worker Compensation

Where there was no evidence that patient had ever attacked anyone before, attacked employee's claim is that knowing of patient's condition, employer failed to take precautions to protect employee from injury. Held, this is a claim for failure to provide a safe workplace and is recoverable under workers' compensation and not intentional tort. Lloyd v Shady Lake Nursing Home, Inc., Second Circuit, No. 47,025-CA (5/9/12) (five judge court; Lolley and Williams, JJ, dissent)

Worker Compensation; Statutory Employer Relationship

The Louisiana Fifth Circuit has remanded to the trial judge to consider the constitutionality of R.S. 23:1061(A)(3) – a contract may recognize a statutory employer relationship which gives rise to a rebuttable presumption of such relationship. Johnson v Motiva Enterprises, LLC, No. 11-CA-949 (5/8/12)