



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

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2010:2

February 1, 2010

UPCOMING MEETINGS

February 5-6, 2010	LADC North Louisiana Defense Lawyers' Seminar, University Club, Shreveport	10.0*#
April 11-16, 2010	LADC Annual Meeting, Alvear Palace, Buenos Aires	8.0*#
August 5-7, 2010	LADC Trial Academy, Loyola School of Law, New Orleans (save the date)	21.0*#

(A registration form may be downloaded at www.ladc.org if registration is open at this time.)

* - includes one credit for professional responsibility (ethics)

- includes one credit for professionalism

BULLETIN BOARD

NORTH LOUISIANA SEMINAR: Scheduled for February 5-6, 2010 at The University Club in Shreveport. Registration materials are available on the LADC website. Speakers include: Justice Jeff Victory, Judges Roy Brun, Scott Crichton, Jeanette Garrett, Ben Jones, Ramon Lafitte and Parker Self.

ANNUAL MEETING: Buenos Aires, Argentina, April 11-16, 2010. We have only two rooms remaining, and you are urged to register as soon as possible to hold a place. Our host hotel, the Alvear Palace (www.alvearpalace.com), is reputed to be the finest hotel in South America. The American Ambassador, Vilma Martinez, has agreed to greet us at our opening reception. A closing dinner will be held at the private Belgrano Athletic Club, and a private fashion show has been arranged for the spouses during our Monday morning CLE. For the post trip to the Argentine lake district we have three lake view rooms remaining at the distinctive Llao Llao hotel in Bariloche (www.llaollao.com) April 16-19. For further information and registration, please contact Peter McLean at ptmclean@hotmail.com, telephone (985) 246-6828 or fax (985) 249-5938.

DUES NOTICES: You should have received your 2010 dues notice. Please renew your membership. The LADC is one of the three largest state defense lawyers' organizations in the nation. We are proud of this, and we hope you are proud to be a member of the LADC. It is our goal to continue growing. Thank you for your continued membership, and please let us know how we can better serve you.

LADC BOARD OF DIRECTORS MEETING is scheduled for Saturday March 27, 2010. If you know of matters that should be considered by the board, please contact a board member.

CONCLAVE ON DIVERSITY IN THE LEGAL PROFESSION: The LSBA with numerous sponsors, including the LADC, sponsors this important program at the New Orleans Marriott at the Convention Center on Friday, March 5th. For more information, please visit www.lsba.org/diversity.

NEW MEMBERS

Mark Mahfouz, New Orleans
Suzanne W. Miller, Baton Rouge

KEY DEVELOPMENTS

Admiralty: LHWCA

Employer commenced paying seaman worker maintenance and cure, but after further investigating, denied the claim. After the court denied the claim, employer sought to recover from worker the amounts initially paid as maintenance and cure. Held, the employer does not have a cause of action against the worker for restitution of the maintenance and cure payments already made. Cotton v Delta Queen Steamboat Company, Inc., Fourth Circuit, No. 2009-CA-0736 (1/6/09)

Appeals

The United States Supreme Court has ruled that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the “collateral order” doctrine. Effective appellate review of such orders can be had by other means, including post-judgment review. An appellate court can remedy the improper disclosure of privileged materials by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence. In addition, a litigant confronted with a particularly injurious or novel privilege ruling also may ask the district court to certify an interlocutory appeal involving “a controlling question of law,” or may petition the court of appeals for a writ of mandamus, or may defy the disclosure order and then appeal from any contempt order. Mohawk Industries, Inc. v Carpenter, ___ U.S. ___ (2009) (Thomas, J, concurring in part)

Costs

Defendant made an offer of judgment pursuant to CCP art. 970 and subsequently prevailed on the merits of the claim. Held, defendant is not entitled to costs pursuant to Article 970. That article (“if the final judgment obtained by the plaintiff offeree”) applies only to offers made by the defendant and only to judgments obtained by the plaintiff; it is inapplicable to a case in which the defendant obtains the judgment. Cotton v Delta

Queen Steamboat Company, Inc., Fourth Circuit, No. 2009-CA-0736 (1/6/09)

Insurance; UM Coverage

In the case of an offending vehicle operated by its owner, once the insured claimant has proven the existence of the required primary policy of liability insurance for the offending vehicle and damages exceeding in monetary value the applicable limits of that policy, he has established a prima facie case for recovery under underinsured motorist coverage. At that point, the burden rests with the UIM insurer to put forth evidence of other underlying liability coverage, or evidence supporting a legal presumption of such coverage, sufficient to shift the burden back to the insured claimant. Gillmer v Stuckey, First Circuit, No. 2009 CA 0901 (12/23/09) (McClendon, J, dissenting)

Torts; Vicarious Liability

Storage by the employee of his personal property (a handgun) in the employee's home several days after cessation of any work-related activities involving that property is clearly unconnected to the employer's interest, and the employer is not vicariously liable where the employee's son accidentally shoots another 17 year old visitor with the handgun. Drummond v Fakouri, First Circuit, No. 2009 CA 1069 (12/23/09) (Whipple, J, dissents)

Worker Compensation; Penalties

Where there are three separate mileage submissions by the claimant which were either underpaid or paid late for different reasons, multiple penalties, totaling \$9,000, are warranted under R.S. 23:1201(F). Burnett v Village of Estherwood, Third Circuit, No. WCA 09-680 (12/9/09)

OTHER SIGNIFICANT DEVELOPMENTS

Comparative Negligence

75% to landowner who did not warn plaintiff of the extent of the damage to her roof after the hurricane, and 25% to plaintiff-friend, who slipped and fell on a loose shingle after successfully placing a tarp on the roof. Millien v Jackson, Fifth (La.) Circuit, No. 09-CA-56 (12/29/09)

A jaywalking tourist who tripped and fell on a mound of pushed-up asphalt in the street was found innocent of contributory/comparative negligence in Murphy v City of New Orleans, Fourth Circuit, No. 2009-CA-0567 (11/12/09)

Damages

The Fifth (La.) Circuit approves awards of \$25,000 to \$15,000 to tenants for mental anguish, loss of personal property and loss of income in a fire at the apartment building

which they occupied. Shubert v Tonti Development Corp., No. 09-CA-348 (12/29/09)

\$37,500 (lowered from \$45,000) in general damages where plaintiff, a legal secretary, did not seek medical treatment for two days and did not miss any work, and her medical expenses totaled less than \$2,000. Martin v Safeway Ins. Co. of Louisiana, Third Circuit, No. CA 08-1419 (12/30/09)

Damages: Restitution

Pursuant to C Cr P article 895.1, an order of restitution must be determined by the court and not by probation officials, must be based upon the defendant's earning capacity and assets, and must set a payment schedule for restitution. State v Joseph, Fifth (La.) Circuit, No. 09-KA-400 (12/29/09)

Discovery

In a failure to defend case, the trial court does not err in granting a protective order against the insurer's attempt to discover matters concerning specific items on the bill, apparently in an attempt to show that the charges were unreasonable and that the insured's attorney had knowledge to terminate the matter on the grounds of prescription at a much earlier date than was done. Cunard Line Limited v Datrex Corp., Third Circuit, No. CA 09-656 (12/9/09)

Forum Non Conveniens

The sole authority of a court under CCP Article 532 is to stay the proceedings in Louisiana where there is a prior suit pending in another jurisdiction on the same cause of action; the Louisiana court may not dismiss the subsequently-filed Louisiana action. Gulf Coast Mineral, LLC v Grothaus, Third Circuit. No. CA 09-685 (12/9/09)

Insurance

The Second Circuit affirms a ruling that insurer was not liable for penalties where (1) it tendered only the lower UM limits until such time that the higher UM coverage was finally determined in the initial litigation, and (2) it promptly obtained expert opinions that the injury was not the primary cause of the victim's ADD, that with some additional therapy, counseling and medication, victim would not be seriously impaired throughout his work life, and that victim made significant recovery in his school performances after commencement of special tutoring. Delores M. v Southern Farm Bureau Cas. Ins. Co., No. 44,883-CA (1/6/10) (Brown, CJ, concurs)

Insurance: Direct Action

Plaintiff did not attempt service on the insured. However, the insurer filed a formal pleading on behalf of insured making an offer of judgment pursuant to CCP Art. 970, and insured testified at trial. Held, this conduct constituted an appearance in the record by

insured, waiving service and providing plaintiff with a right of action to proceed under the Direct Action statute. Perkins v Carter, Fifth (La.) Circuit, No. 09-CA-673 (12/29/09)

Interest

Under R.S. 13:5112 a party is entitled to legal interest from the date service is requested after the judicial demand. A judge legally errs in awarding interest from date of judicial demand. Dillon v Freeman, First Circuit, No. 2009 CA 0606 (1/5/10)

Judgment

Where a party prevails on the merits but dies before the signing of the judgment, the judgment is an absolute nullity. Succession of Lefort, Third Circuit, No. CA 09-303 (12/16/09)

Jury Trials

In closing argument plaintiff remarked that defendant had submitted an incomplete copy of the fetal heart monitor strips to plaintiff in an effort to “hide something.” However, the court admonished the jury, both at the start of the trial and when all parties had rested, that the statement of counsel were their opinions and nothing more. “While we express great concern over the tactics of plaintiffs’ counsel during his closing argument, we find that these statements by the trial court at the beginning and end of the trial served to counteract the possible adverse effect of plaintiffs’ counsel’s arguments.” Johnson v Morehouse General Hospital, Second Circuit, No. 44,798-CA (12/22/09) (Brown, CJ, dissents in part)

Leases

A waiver of a defect in a building’s electrical system that results in a fire clearly affects health and safety; thus, pursuant to CC Article 2699, waiver of that vice or defect by the tenant is not enforceable. Shubert v Tonti Development Corp., Fifth (La.) Circuit, No. 09-CA-348 (12/29/09)

Medical Malpractice

The jury may infer negligence without expert testimony where the issues are whether the physician arrived timely at the hospital to respond to an emergency, whether he waited too long to perform the C-section, and whether his delay caused the death of the unborn child. Schultz v Goth, Third Circuit, No. CW 09-251 (1/13/09)

Medical Malpractice: Experts

R.S. 9:2794(D)(1) is explicitly clear in that it requires an expert to meet all of the criteria set forth therein. Where a doctor was not practicing medicine at the time of the incident in question, was not practicing medicine when he testified at trial, was not training

residents or students at an accredited medical school, and was not serving as a consulting physician, the trial judge erred in failing to disqualify him as a medical expert and exclude his testimony at trial. Johnson v Morehouse General Hospital, Second Circuit, No. 44,798-CA (12/22/09) (Brown, CJ, dissents in part)

Negligence

The city is not negligent for selecting the location of a bus stop in the middle of a street, in a suit by a bus passenger who was attempting to cross the street after leaving the bus. “Once a passenger freely disembarks at his chosen destination free from harm, his status as a passenger, and the public carrier’s contract to transport for hire, ceases. At that point the public carrier only owes such person the duty of ordinary care and is under no duty to warn the former passenger of a danger which is apparent, obvious and known to every person in good mind and sense, nor to personally transport, convey, or assist the former passenger in crossing the street.” Ricks v City of Monroe, Second Circuit, No. 44,811-CA (12/9/09)

Negligence; Gross Negligence

Teenagers entered an oil, gas and mineral drilling site in a very rural part of the parish. The access road to the property was equipped with a gate, but at the time of the incident the gate was unlocked and open. However, there were signs warning trespassers of danger, and the teens all recognized the potential dangers associated with their presence at the oil tank site. Some of them climbed on top of the tanks, and one of the teenagers was smoking. Held, in a suit by beneficiaries of one of the teenagers killed in the explosion, owners of the site were not guilty of “gross negligence” as required by R.S. 9:2800.4(E). Wall v Kelly Oil & Gas Company, Inc., Second Circuit, No. 44,604-CW (12/21/09)

Prescription

The fact that the insurer’s manual contains a ten year prescriptive period does not preclude insurer’s asserting that the claim has prescribed under the shorter applicable Louisiana statutes, where there is no evidence that the plaintiff was aware of the alleged time period until insurer produced the manual during discovery, and there was no evidence that plaintiff relied upon the ten year period in filing his petition. Tarranto v Louisiana Citizens Property Ins. Corp., Fourth Circuit, No. 2009-CA-0413 (12/16/09)

Proof: “Phantom Tortfeasors”

Witness lived for a short time in insured’s home while he was dating her daughter, and at the time of the trial he had no financial interest in the outcome of the trial. Held, the trial court did not commit error in determining that witness was an “independent and disinterested” witness as required by R.S. 22:1295(1)(f) for recovery of UM benefits for damages caused by a “phantom tortfeasor.” Johnson v State Farm Ins. Co., Third Circuit, No. CA 09-667 (12/9/09)

Torts; Defamation

A statement that defendant “came to find out (plaintiff) has a handful of steady clients, including some ‘nice’ Garden District ladies I know -- and who also have to know perfectly well that they’re buying hot goods,” is not defamatory per se or capable of a defamatory meaning about plaintiff. The statement does not state or imply that plaintiff actually knew anything about the true value of the items he was buying and selling or that he was knowingly selling stolen goods. Heine v Reed, Fourth Circuit, No. 2009-C-0869 (12/16/09) (Armstrong, J, concurring in the result)

Torts; Immunity

The U.S. Fifth Circuit reaffirms that when a state social worker obtains from a judge a temporary emergency custody order that imposes legal duties on the state agency, and the worker has reason to believe the child is within the child’s home, the social worker does not violate the Fourth Amendment by entering and searching the home of the child. Wernecke v Garcia, ___ F 3d ___ (2009)

Worker Compensation; Attorney Fees

The WCJ’s award of \$2,500 for attorney fees was error, and the award should be increased to \$5,000, where claimant’s attorney spent a considerable amount of time pursuing his client’s case and vigorously enforcing claimant’s rights at the trial level, and his efforts on appeal resulted in the imposition of additional penalties. Mitchell v Artcrete, Inc., Third Circuit, No. WCA 09-492 (12/9/09)

Worker Compensation; Penalties

Where the employer makes late, single, lump-sum payments toward the payment of a pharmacy bill, the WCJ does not err in assessing a single penalty. Johnson v Conagra Poultry Co., Third Circuit, No. WCA 09-646 (12/9/09) (Thibodeaux, CJ, dissents in part)

The approval of the worker compensation judge does not constitute a suspensive condition which suspends the 30-day limit for tender of settlement funds. Morrison v Alexandria Commons, LLC, Third Circuit, No. CA 09-652 (12/9/09)

\$15,000 (\$5,000 per plaintiff) in damages as a result of defendant’s failure to pay a settlement as prescribed by RS. 22:658; plaintiff was living below the poverty line and under constant stress, and required that her father relieve her from her financial burden. Morrison v Alexandria Commons, LLC, supra

The case turned almost entirely on the claimant’s credibility at trial; the trial court accepted his version, and awarded attorney’s fees and penalties. Held, the award of penalties and attorney fees should be reversed. Ardoin v Firestone Polymers, LLC, Third Circuit, No. WCA 09-530 (12/30/09) (five judge court; Thibodeaux, CJ, and Painter, J,

dissent)

Worker Compensation: Solidary Liability

If an employee in a worker compensation claim suffers disability due to the combination of two incidents or by virtue of the second incident aggravating the injury suffered in the first incident, both the subsequent compensation insurer and the insurer at the time of the first incident are solidarily liable for compensation benefits and medical expenses. Fuentes v Cellxion, Inc., Second Circuit, No. 44,914-WCA (12/16/09)

Worker Compensation: UM Coverage

Writes the Fourth Circuit: “We read Jackson (v Cockerham, 931 So 2d 1138, Fourth Circuit, 2006) to mean that the exclusive remedy of an employee, injured in the course and scope of his employment, is in workers’ compensation and that such an employee has no cause of action for UM coverage against his self-insured employer.” Bercy v St. Martin, No. 2009-CA-0864 (12/6/09)

MARITIME MATTERS OF NOTE

LHWCA: There is no concurrent jurisdiction between the LHWCA and state worker compensation where the case occurs in a pure maritime setting. If the claimant’s work for defendant was done over navigable waters, claimant’s recovery is exclusively found in the LHWCA; in such a case, the “twilight cases” (see Sun Shipping Inc. v Pennsylvania, 447 U.S. 715, 1980) do not apply. Bourque v Amoco Insulations, Inc., Third Circuit, No. CA 09-693 (12/9/09)