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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2010:3 March 1, 2010

UPCOMING MEETINGS

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

LAST CALL FOR THE ANNUAL MEETING: Buenos Aires, Argentina, April 11-16, 2010. A few rooms are still available for a limited period, and you are urged to register as soon as possible to confirm 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.

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.

LADC TRIAL ACADEMY: The twenty-sixth annual LADC Trial Academy is scheduled for Thursday, Aug. 5-Saturday, Aug. 7 at Loyola Law School.

2010 MEMBERSHIP DUES: You should have received your 2010 LADC dues notice. If you have not received the notice, please contact us at ladefensecounsel@aol.com or 225-928-7599. Please renew before April 1st to avoid a late fee. Thank you for your continuing membership in and support of the LADC.

Louisiana Association of Defense Counsel
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2010 LADC BOARD ELECTION: The LADC Board of Directors amended the bylaws in 2005 regarding the election of directors. Each year, eleven directors rotate off the Board and eleven continue. Before the 2005 amendments, the Nominating Committee nominated candidates for the director vacancies, and the members attending the Annual Meeting voted on the candidates. Under the 2005 amendments, the list of nominees will be sent out to the entire membership, and members will have thirty days in which to vote for the nominees or to write in candidates. You should receive a ballot via the LADC listserve in March.

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

Michael D. Bass, Opelousas
Erin F. Lorio, Covington

KEY DEVELOPMENTS

Arbitration

A judgment compelling arbitration is a non-appealable interlocutory judgment, not subject to being designated immediately appealable under CCP art. 1915(B). However, it may be reviewable under supervisory writs. Reaching this conclusion, the court pretermits a determination of whether the Federal Arbitration Act (see 9 USC Sec. 16b) preempts the application of Article 1915(B) to certify a judgment as immediately appealable. A & B Valve and Piping Systems, LLC v Commercial Metals Company, Third Circuit, No. CA 09-1535 (1/27/10)

Evidence

Evidence of plaintiff's serious pre-accident substance abuse for a prolonged period of time is relevant to the damages she claims from an automobile accident. "The fact that she was addicted to the exact prescription drugs she received as part of her treatment for the injuries sustained in this accident, as well as the depth of that addiction, is completely relevant to the veracity of her claims of pain following the accident." Young v Joy, Third Circuit, No. CA 09-756 (2/3/10)

In a suit for damages sustained in an earlier accident, evidence of plaintiff's settlement of a subsequent accident, and the amount he received in that settlement, are relevant to establishing that he was not seriously injured in that subsequent accident. Alexander v Tate, Third Circuit, No. CA 09-844 (2/3/10)

Evidence; Summary Judgment

Deposition testimony filed in the record in connection with an earlier exception may be considered on a subsequent motion for summary judgment; Article 966B does not require that deposition testimony already filed in the record be introduced into evidence at the hearing on the motion for summary judgment. Gatlin v Kleinheit, First Circuit, No. 2009 CA 0828 (12/23/09) (Guidry, J, concurs)

Insurance

An insured may cancel his policy without written notice; R.S. 22:885(A), providing that cancellation by the insured "may be effected by written notice," is permissive, and not mandatory. Erdey v Progressive Security Ins. Co., First Circuit, No. 2009 CA 1115 (12/23/09) (Downing, J, concurs)

Insurance; UM Coverage

The exclusion of government owned vehicles from uninsured/underinsured motorist coverage thwarts the expressed public policy of the UM statute and is unenforceable. Thus the trial court errs in using the policy language (coverage does not include a vehicle owned by any government or any of its political subdivisions or agencies) to deny coverage. Mednick v State Farm Mut. Auto. Ins. Co., Fifth (La.) Circuit, No. 09-CA-183 (1/26/10) (five judge court; Rothschild, J, dissenting)

Negligence

Defendant "blacked out" and crossed into the plaintiff's lane of travel. Plaintiff, in an effort to avoid a collision, applied her brakes and lost control of her vehicle before coming to a stop. As a result of having to take this evasive action, plaintiff allegedly sustained personal injury. There was no impact between the two vehicles or between plaintiff's vehicle and any other vehicle or object. Held, the trial judge erred in sustaining summary judgment for defendant solely because "there was no contact"; "there is no statutory or jurisprudential requisite of a physical impact or contact between vehicles for the imposition of liability in a motor vehicle accident." Tyson v King, Third Circuit, No. CA 09-963 (2/3/10) (Thibodeaux, CJ, dissents in part)

Res Judicata

A compromise settlement between the plaintiff and the driver, owner and insurer of the offending car provided that plaintiff released "all other persons, firms and corporations" and did not expressly reserve plaintiff's rights against other defendants. Held, the settlement released the driver's employer and the employer's insurer, where there is no allegation that the plaintiff was aware that the driver was in the course and scope of his employment when the accident occurred. Palmer v Walker, Fifth (La.) Circuit, No. 09-CA-756 (1/12/10)

OTHER SIGNIFICANT DEVELOPMENTS

Attorney's Fees; Civil Rights

Defendant does not have to prevail over an entire suit in order to recover attorney's fees for a frivolous Sec. 1983 claim; however, defendant is only entitled to such fees for work which can be distinctly traced to plaintiff's frivolous claims. Fox v Vice, ___ F 3d___ (5th Cir. 2010)

Class Actions

In Pollard v Alpha Technical, the Fourth Circuit affirms denial of a class action to landowners allegedly affected by "toxic dust" from a nearby industrial property, finding "numerosity" although 3,748, out of a maximum of 4,000, had "opted out" of the class, but finding a lack of "commonality," typicality" and "adequacy of representation." No. 2008-CA-1486 (1/28/10)

Compromise

Where the litigant's attorney was clearly acting as his agent in approving a judgment, the litigant may not appeal therefrom. Although there was no open court recitation and litigant did not sign the judgment, it was undisputed that litigant was represented by counsel in submitting the judgment. Daffin v McCool, First Circuit, No. 2009 CA 0785 (12/23/09)

Court Rules

The Supreme Court has adopted amendments and additions to the Rules for Louisiana District Courts, effective 1/1/10. Most of the changes are stylistic, but among those of interest to counsel are Rule 9.4, designed to prohibit judge or forum shopping, and Rule 9.9, omitting the requirement of a clerk's certificate in confirmation of default.

Damages; Pro Se Plaintiffs

In Dowl v Redi Care Home Health Association, the Fourth Circuit imposes upon a medical malpractice plaintiff who continued to pursue a claim, after settling with some of the defendants, a penalty of $1,000, together with an award of $1,500 for frivolous appeal. No. 2009-CA-1300 (2/3/10)

Discovery

In Cantuba v The American Bureau of Shipping, the appellate court reverses a judgment dismissing wrongful death claims by Filipino plaintiffs for failure to appear at depositions (they were unable to obtain visas in the wake of terrorism and natural disasters) but remands for imposition of sanctions against their counsel, pursuant to CCP Art. 1473. Fourth Circuit, No. 2008-CA-0497 (1/13/10) (Gorbaty, J, dissents)

Evidence; Hearsay

A declaration against interest is admissible hearsay if the declarant is unavailable (LCE Art. 804B3). The proponent of the declaration does not meet the burden of satisfying "unavailability" by merely showing that the declarant resides outside the state. Finch v ATC/Vancom Management Services Limited Partnership, Fifth (La.) Circuit, No. 09-CA-483 (1/26/10)

Forum Non Conveniens

A district court has discretion to decide a forum non conveniens issue without first determining whether venue is proper. Brumley v Akzona, Inc., Fourth Circuit, No. 2009-CA-0861 (1/13/10) (Belsome, J, dissents)

Insurance

Where the policy was received nearly seven months after it was issued and was accompanied by a letter that did not point out there was a major change in the business interruption coverage but merely instructed the insured to review the policy, whether insured should have reviewed the policy upon receipt from the agent and explicitly discovered the policy provision is an issue over which reasonable minds could differ. Under the circumstances, summary judgment in favor of the insurance agent and intermediate broker is improper. C's Discount Pharmacy, Inc. v Pacific Ins. Co., Ltd., Fifth (La.) Circuit, No. 09-CA-217 (1/26/10)

At the time of the accident, husband was driving wife's car and she was a passenger and injured therein. Held, husband was not covered by the policy covering his own car because her car did not qualify as an insured vehicle under the terms of the policy governing his car. It was not a newly acquired vehicle, a temporary substitute, or a non-owned vehicle (one not owned by... "you, your spouse"). Baehr v Bonner, Fourth Circuit, No. 2009-C-0151 (1/13/10) (five judge court; Armstrong, CJ, concurs; Belsome, J, dissents)

A construction defect may constitute an "occurrence" under a CGL policy. Martco Limited Partnership v Wellons, Inc., 588 F 3d 864 (5th Cir. 2009)

Jury Trials

Question No. 2 of the special interrogatories asked whether defendant (DOTD) was responsible for any hazardous conditions on the date of the accident, and No. 3 asked whether those hazardous conditions caused or contributed to the accident. Held, (l) the failure of the interrogatories to direct the jury that a "no" answer to questions No. 2 and 3 and permitted it to skip to the end, and (2) the supplemental instruction the judge gave (based on these answers, you must complete the verdict form), likely misled the jury, interdicted the fact finding process and tainted the verdict. Abney v Smith, First Circuit,

No. 2009 CA 0794 (2/8/10)

Jury Trials; Voir Dire

Defendant claimed the trial judge erred in failing to sustain repeated objections to statements made by opposing counsel during voir dire which it claimed had no purpose other than to demonize a party in the case (the insurer) in a post-Katrina environment hostile to the insurance industry. Statements included (1) "propaganda" to brand people who come to courts of law as somehow frauds and fakes, and lawsuits as frivolous; (2) ads from insurance companies attempting to portray personal injury lawyers as animals, and (3) the McDonald's "coffee cup" story was promulgated by the insurance company people. One prospective juror stated he was against insurance companies because of the hurricane damage claims, but was rehabilitated by plaintiff counsel and answered "yes" whether he would be able to put aside his biases and apply what the court required as a "fair American." The Fifth (La.) Circuit holds that the trial judge did not abuse his broad discretion in allowing the statements. Schouest v Burr, No. 09-CA-356 (1/12/10) (Wicker, J, concurs)

Medical Malpractice

A party in whose favor the Medical Review Panel opinion is rendered must pay the costs of the proceeding. If any issues of fact regarding liability preclude the medical review panel from rendering a decision in favor of the claimant or the health care provider, then the costs are to be split equally between the parties. Where the panel finds that the physician breaches the appropriate standard of care, but the panel is unable to render an opinion as to whether the conduct was a factor in the resulting damage, it in essence finds that there is a material issue of fact bearing on liability, and the trial court errs as matter of law in failing to assess the claimant with a portion of the costs with regard to its claims against that physician. Allen v Baton Rouge General Medical Center, First Circuit, No. 2009 CA 1120 (12/23/09) (Downing, J, concurs)

Negligence

A sports bar does not owe a duty to protect a patron from attack in the middle of an adjacent street after closing hours where (1) the injured patron did not have any contact or communication with the attackers while in the bar, (2) patron left the bar and went to a truck in a city-owned parking lot, where he was told that one of his friends was being attacked, and (3) patron left the truck to help the friend and was attacked in the middle of the street. Arkell v Lafayette City-Parish Consolidated Government, Third Circuit, No. CA 09-918 (3/3/10)

Prescription

Where defendant's building is damaged and leaning over plaintiff's property line, defendant's failure to repair or remove the building is a continuing tort and prescription does not begin to run until the building is demolished. Lopez v House of Faith Non-

Denomination Ministries, Fourth Circuit, No. 2009-CA-147 (1/13/10)

Prescription; Medical Malpractice

Where the claimant fails to pay the medical panel filing fee within 45 days after receipt of notice of the filing for a panel, his request for review of a medical malpractice claim is invalid and without effect and does not interrupt prescription on the claim. In Re Berry, Fourth Circuit, No. 2009-CA-0752 (1/27/10) (Bonin, J, concurs)

Products Liability

State imposition of duties to warn on generic drug manufacturers neither renders compliance with federal regulation impossible nor obstructs the goals of that regulation. Thus state law failure to warn claims are not preempted against name brand drug manufacturers. DeMahy v Actavis, Inc., ___ F 3d ___ (5th Cir. 2010)

Service of Process

Under FRCP Rule 4(m), when a plaintiff fails to serve a defendant within 120 days, a court may extend the time for service if the plaintiff shows "good cause" for the failure. Determination of good cause turns on the plaintiff's efforts to serve the defendant and whether the defendant will be prejudiced by a delay in service. "Good cause" is a substantial reason, one that affords a legal excuse the finding of which lies largely in the discretion of the officer or court to which decision is committed. Louisiana v Kition Shipping Co., Ltd., 653 F Supp 2d 633 (MD La 2009)

Torts; Immunity

A "special master" appointed by the trial court is a court-appointed expert performing in a quasi-judicial capacity and is entitled to absolute judicial immunity from damages allegedly caused by him in the performance of his duties. Palmisano v Tranchina, Second Circuit, No. 44,948-CA (1/27/10)

Worker Compensation

Defendant appealed a WCJ ruling favorable to the claimant's insurer. After both sides complied with the appellate court's briefing schedule but prior to oral argument, defendant voluntarily dismissed its appeal. Held, under these circumstances, the insurer is entitled to attorney's fees for work performed on the appeal. Central La. Ambulatory Surgical Center v McDonald's of Pineville, Third Circuit, No. WCA 09-823 (3/3/10)

We knew it would come to this! In Burns v Interstate Brands Corp., the employer was penalized $2,000 for failure to approve payment of Viagra prescribed by a physician for an erectile dysfunction problem associated with covered surgery. Third Circuit, No. WCA 09-705 (3/3/10)

Observes the First Circuit: the credibility of the plaintiff is especially significant when a physician must relate a medical condition to an accident and it is the plaintiff who provides the physician with a history of his symptoms. A claimant's lack of credibility on factual issues can serve to diminish the veracity of his complaints to a physician. In many cases the credibility of the history given by the claimant to his physician becomes as important as the medical opinions based in part on that history. Williams v Temple Inland, Inc., No. 2008 CA 2153 (12/23/09)

Even if employer's delay in seeking or obtaining emergency medical treatment for a heart attack in progress decreases the worker's chance of survival, a cause of action for worker compensation death benefits does not exist on that basis alone. However, by mandating that worker continue to engage in physical labor despite the onset of heart attack symptoms and purposefully delaying the worker's admittance to emergency treatment, the employer may be liable for benefits. Simmons v Task Force Staffing Services, Inc., Fourth Circuit, No. 2009-CA-1384 (1/13/10)

Worker Compensation; Penalties

Employer and its insurer were on notice that worker had suffered an on-the-job injury and that he and his doctor believed his continuing back problems were caused by the incident; however, they provided no evidence of their investigatory reasons for denying his claim. Held, the WCJ's denial of penalties and attorney's fees is manifest error. Delatte v Pala Group, First Circuit, No. 2009 CA 0913 (2/10/10) (McDonald, J, dissents)

Worker Compensation; Res Judicata

An award of benefits for six weeks is not res judicata to a subsequent request, on the basis of a change in condition, for modification of the award for benefits after the satisfaction of the six week period. Fox v Reynolds Industrial Contractors, Second Circuit, No. 44,938-WCA (1/27/10) (Brown, CJ, dissents in part)

Wrongful Death

A great grandchild is excluded from the first class of beneficiaries in wrongful death and survival claims. Estate of Mayeaux v Glover, First Circuit, No. 2008 CA 2031 (1/12/10)

MARITIME MATTERS OF NOTE

Limitation of Liability: The First Circuit concludes that a state court has jurisdiction over a limitation of liability defense where the vessel owner does not institute a separate limitation of liability procedure in the federal district court under 46 USC Sec. 30511(a). The court also determines that the vessel owner has the privity or knowledge that will defeat limitation where it did not exercise reasonable diligence in inspecting the vessel after buying it. Graham v Offshore Specialty Fabricators, Inc., No. 2009 CA 0117 (1/8/10) (McDonald, J, concurs)

Unseaworthiness: In Smith v Weeks Marine, Inc., the Third Circuit affirms an award against a shipowner to a seamen who was viciously attacked by two other seamen. The fact that one of the attacking seamen may not have participated in the beating was not material with regard to the seaworthiness of the vessel; "one bad apple ruins the whole barrel." No. CA 09-980 (2/3/10)

WRIT GRANTS OF INTEREST

Hawkins v Redmond, No. 2009-C-2418 (2/5/10) Appellate court held that named driver exclusion agreement which excluded a driver from coverage at mother's request was invalid, where father was listed as applicant on insurance. Opinion below: 19 So 3d 1252 (3d Cir. 2009)

S. J. v Lafayette Parish School Board, No. 2009-C-2195 (2/2/10) Appellate court found school board breached its duty of reasonable supervision over a 12 year old student who was raped while walking home from school. Opinion below: 16 So 3d 615 (3d Cir. 2009)