



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2010:5

May 1, 2010

UPCOMING MEETINGS

August 5-7, 2010	LADC Trial Academy, Loyola School of Law, New Orleans	21.0*
August 13, 2010	LADC Sizzlin' Summer Seminar, Windsor Court, New Orleans	8.0*

(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

LADC ANNUAL MEETING 2010: A group of about 50 enjoyed a wonderful Annual Meeting in Buenos Aires, Argentina April 11-16. Special thanks go out to President Drake Lee and First Lady Margaret Lee and Peter McLean, who did his usual remarkable job in planning and executing the annual meeting. At the closing dinner, President Lee "passed the torch" to incoming President Ron Sholes. The LADC thanks President Lee for his skillful leadership over the past year and wishes President Sholes all the best in 2010-11.

ANNUAL MEETING 2011: Start planning now to attend the 2011 Annual Meeting. After conducting a survey of the membership, President Ron Sholes has announced that the trip will be to southern France. Stay tuned for details.

LADC TRIAL ACADEMY: The twenty-sixth annual LADC Trial Academy is scheduled for Thursday, Aug. 5-Saturday, Aug. 7 at Loyola Law School. Registration materials are available at www.ladc.org.

LADC SIZZLIN' SUMMER SEMINAR, FRIDAY THE 13TH: One of the LADC's most popular seminars is the seminar formerly known as the Attorney-Client Seminar. This year the Sizzlin' Summer Seminar will be at the Windsor Court Hotel on Friday, Aug. 13. Don't take a chance by working on Friday the 13th. Come get 8 hours of CLE credit and enjoy good luck at the seminar. We have a reserved block of rooms and suites at the Windsor Court at a special rate. Additionally, if the hotel offers summer specials better than our rate, we will get the better rate. Make your hotel reservation by calling 1-800-262-2662. The CLE agenda will be announced soon, but one presentation is by popular demand.

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Every seminar, people suggest that we have a presentation on liens. Shane Craighead with Davenport, Files & Kelly has done excellent presentations on the topic at the LADC North Louisiana Seminar, and he has agreed to be on the Sizzlin' Summer Seminar program and present "Privileges, Liens, Subrogations & Other Snags." You will not want to miss this helpful presentation. Registration materials are available at www.ladc.org.

2010 LADC BOARD ELECTION: The results of the election for Board of Directors and Officers will be announced the week of May 3.

NEW MEMBERS

Anne E. Briard, New Orleans
Valerie V. Guidry, Lafayette
Alexander J. Mijalis, Shreveport

KEY DEVELOPMENTS

Compromise; Releases

In Silva v State Farm Mut. Auto. Ins. Co., the plaintiff sued defendant, defendant's liability insurer, and plaintiff's UM carrier. The UM carrier was not served and subsequently was dismissed without prejudice. The plaintiff then settled with the defendant and his insurer; the release dismissed all claims against the defendant, his insurer, and "any and all persons, firms or corporations" from claims "growing out of" the accident. Subsequently, plaintiff sued her UM carrier; however, the court dismisses, holding that the broad language of the release agreement operated as a dismissal of claims against the UM carrier. Fifth (La.) Circuit, No. 09-CA-686 (3/23/10) (Chehardy, J, dissenting)

Evidence; Expert Testimony; Eyewitnesses

In State v Young, the Supreme Court adheres to its pre-Daubert ruling (State v Stucke, 419 So 2d 939, La. 1982) that expert testimony is not admissible on the issue of the reliability of eyewitness identification. In an opinion subscribed to by two other justices, Justice Guidry observes that such testimony will not aid the jury in its deliberations and is inclined to be more prejudicial than probative in value. Three justices concurred. Justice Knoll was of the opinion that the State has more than convincingly demonstrated that an expert's testimony regarding this "field of eyewitness identification psychology" will never be able to satisfy the applicable standard; she would adopt a *per se* bright line rule of inadmissibility. Justice Johnson would not admit the testimony because there were multiple eyewitnesses and ample corroborating evidence to support the conviction. Justice Weimer concurred because there were facts which corroborated the eyewitness identification. Chief Justice Kimball did not participate in the deliberations. No. 2009-KK-1177 (4/5/10)

Medical Liens

A health care provider's lien against settlement of insurance proceeds or payment of a judgment is invalid unless the lien is sent by certified mail and includes the location of the health care provider. Metcalf v Christus Health Southwestern Louisiana, Third Circuit, No. CA 09-869 (3/3/10) (Cooks, J, concurs)

Prescription

A plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription, unless the plaintiff knew or should have known through the exercise of reasonable diligence that his/her problem may have been caused by acts of malpractice. Plaintiff in the instant case clearly had some apprehension something was wrong following her surgery, as she consulted two different doctors regarding her condition. However, both doctors assured plaintiff her condition would continue to improve, with one of the doctors indicating her symptoms might take two years to resolve. When plaintiff's symptoms failed to improve by two years after the surgery, plaintiff performed computer research and learned for the first time her symptoms may have been caused by malpractice. Held plaintiff's complaint filed within one year of her discovery of this alleged malpractice is not prescribed. Williamson v Hebert, Supreme Court, No. 10-CC-0071 (4/5/10)

Torts; Immunity; Worker Compensation

The affirmative defense of statutory employer tort immunity can be urged when the written contract providing for that relationship was not hand-signed by the principal, but was hand-signed only by the contractor. The typewritten signature of the principal's representative on the contract addendum providing the statutory employer relationship was sufficient if it was authorized and intended to constitute a signature. Moreover, the addendum was valid and effective based only upon the signature of the contractor's representative, as the principal was the party who prepared and presented the contract addendum to the contractor. Rainey v Entergy Gulf States, Inc., Supreme Court, No. 09-C-572 (3/16/10)

OTHER SIGNIFICANT DEVELOPMENTS

Appeals

A majority of judges sitting must concur to render a judgment (Art. V, Sec. 8, La. Const.). Where the en banc court numbers 12 and one is recused, six judges concurring compose the constitutional majority. Rainey v Entergy Gulf States, Inc., Supreme Court, No. 09-C-572 (3/26/10)

The granting of an exception of improper venue is a non-appealable interlocutory judgment. The correct action for appellate review is filing an application for supervisory

writs . Farrar v Certified Coatings of California, Inc., Fifth (La.) Circuit, No. 09-CA-920 (3/23/10); Robin v State, Fourth Circuit, No. 2009-CA-1383 (3/24/10)

Where the trial court enters judgment granting a peremptory exception but ordering a plaintiff to amend within ten days, the appeal is premature until there is a proper final judgment dismissing defendant from the action. Taylor v Leger Construction, Third Circuit, No. CA 10-29 (3/17/10)

For a case in which the jury awarded \$88 thousand for future medical expenses, the appellate court increased the award to over \$1.4 million, and the Supreme Court reversed and reinstated the jury award, see Menard v Lafayette Ins. Co., No. 09-C-1869 (3/16/10) (Weimer, J, concurring). The Supreme Court found that two opposing views were presented to the jury by plaintiff and defendants, and the jury decided its award on a reasonable basis. The Court observes that “(t)he proper standard for determining whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence the future medical expenses will be medically necessary.”

Arbitration

If a litigant does not raise, during the arbitration proceeding, the defense that there was no valid agreement to arbitrate, he may not urge such an objection in a suit to confirm the arbitration award. Because the arbitration award is not vacated, modified or corrected, as provided for in 9 U.S.C. Secs. 10-11, the district court is required to confirm the award. FIA Card Services v Weaver, First Circuit, No. 2009 CA 1464 (3/26/10) (Pettigrew, J, dissents)

Attorneys

In Estate of Robinson v Continental Cas. Co., the Second Circuit rejects the claim that an attorney’s alleged negligence in allowing a claim to prescribe was the cause of the client’s suicide; when she learned that the lawsuit had prescribed, client did not mention the matter to her children or her physician, and her physician attributed her depression to other events. No. 44,952-CW (3/3/10)

Attorneys; Discipline

The Supreme Court imposes permanent disbarment upon an attorney who is found to have neglected legal matters, failed to communicate with clients, failed to account for or refund unearned fees, failed to promptly remit funds to a third party medical provider, used client funds for an unauthorized purpose, failed to properly supervise a non-lawyer assistant, and failed to cooperate with the ODC in its investigation. In Re Gomez, No. 09-B-2450 (3/5/10)

Compromise

Insurer sent claimant a check with a letter indicating that it was “full and final settlement of your claim.” Neither the letter nor the check indicated that it was a release of both property and bodily injury damages. The check in “very tiny writing” stated that the endorsement fully released defendant “for property damages and/or bodily injury,” and the check was for the exact amount of the estimate to repair claimant’s car. Held, the trial judge did not err in holding that claimant did not intend to release his bodily injury claim. Signal v Romero, Third Circuit, No. CA 09-1078 (3/10/10)

Damages: Mitigation

Plaintiff did not pursue the testing recommended by the doctor because (1) he has no medical insurance and pays as he goes, (2) he couldn’t get the testing done because of the expense, and the doctor told him there was no use going back for treatment if the tests were not done, (3) although he had retirement savings, plaintiff would have been penalized if he withdrew the money. Held, plaintiff’s actions in not obtaining the testing did not constitute a failure to mitigate damages. Ferguson v Loewer Powersports & Equipment, Third Circuit, No. CA 09-990 (3/17/10) (Amy, J, dissents)

Where evidence of “bad acts” by plaintiff was aimed at challenging his damages and did not touch on the negligence of the defendant, such evidence, even if erroneously admitted, would have affected only the jury’s findings pertinent to damages. Thus a manifest error standard of review regarding the jury’s finding of negligence is appropriate, and the court of appeal erred in conducting a de novo review on that issue. Brewer v J. B. Hunt Transport, Inc., Supreme Court, No. 09-C-1408 (3/16/10) (Guidry, J. dissents in part; Victory, J. dissents; Kimball, CJ, did not participate).

Employment

A claim for damages based on the alleged wrongful removal of a civil service employee cannot be asserted in district court without first successfully appealing the removal before the Civil Service Commission. Where claim before the CSC is not successful and employee fails to timely appeal the referee’s ruling, the CSC’s ruling is a final judgment and employee cannot thereafter claim removal for retaliatory discharge for filing a worker’s compensation claim. Johnson v LSU, Second Circuit, No. 45,105-CA (3/3/10)

Evidence: Depositions

Defendant did not bring the issue of the deponent’s unavailability to the attention of either the court or the plaintiff until the fourth morning of trial, did not offer any evidence of its attempts to subpoena the witness’ presence, and no service returns were introduced. Under these circumstances, the trial court did not abuse its discretion in refusing to admit the deposition. Harvey Canal Limited Partnership v Lafayette Ins. Co., Fifth (La.) Circuit, No. 09-CA-605 (3/9/10)

Insurance

The failure of the insured to disclose defects in his house prior to and at the time he sold the house was not an “occurrence” within the coverage of his homeowner’s policy. Brewster v Hunter, Fifth (La.) Circuit, No. 09-CA-932 (3/9/10)

It is the insured’s burden to prove the existence of the policy and coverage (that the incident falls within the policy’s terms). Thus the failure of the insurer to submit a certified copy of its policy does not bar its contention that it is entitled to summary judgment that there was no coverage under the policy. Brewster v Hunter, supra.

Where the language of the intentional act clause does not specify self-defense/defense of others within its exclusion, summary judgment for insurer is improper where there is a question of whether the insured acted in defense of his son rather than as an aggressor. Baggett v Tassin, Fifth (La.) Circuit, No. 09-CA-803 (3/23/10)

The Property Insurance Association of Louisiana, which is an industry trade group and the primary rating organization for fire insurance in the state, and which entered into contracts to manage and conduct the business of the state’s auto and property insurers of last resort, is a private association and is not a public entity. Property Ins. Assoc. of La. v Theriot, Supreme Court, No. 09-CC-1152 (3/16/10)

Insurance; UM Coverage; Choice of Law

In Wending v Chambliss, insured was a Mississippi resident with a Mississippi address and driver’s license, his UM policy was registered and purchased in Mississippi, his vehicles were registered and principally garaged in Mississippi, the tortfeasor was a Mississippi resident, and tortfeasor’s vehicle was registered in Mississippi. The accident occurred in Louisiana, insured’s post-accident medical treatment was in Louisiana, and suit was filed in Louisiana. Held, Mississippi has a more substantial interest in the case and its UM provisions should apply. First Circuit, No. 2009 CA 1422 (3/26/10) (Downing, J, concurs)

Judgments; Registration

The U.S. Fifth Circuit approves “successive registration,” holding that a judgment which is entered in one federal court and then registered in a second federal court pursuant to 28 USC Sec. 1963 may be re-registered, and enforced, in a third federal court. Del Prado v B N Development Co., Inc., ___ F 3d ___ (5th Cir. 2010)

Jurisdiction Over the Person

An internet merchandiser is not subject to personal jurisdiction in Louisiana where its only contacts are that it sells playing cards on an interactive website (Louisiana residents have the ability to access the website and purchase the merchandise) but the only other

contact with Louisiana is that the plaintiff's attorney purchased a deck of the cards over the internet shortly before filing suit. The court observes that when a website falls within the midrange of the "sliding scale" employed in Zippo Mfg. Co. v Zippo Dot Com, Inc., 952 F Supp 1119, and information is exchanged between the host and user, but not on an ongoing basis, the court must look to the extent of the interactivity and the commercial nature of the exchange of information to determine whether personal jurisdiction should be exercised. Swoboda v Hero Decks, Fourth Circuit, No. 2009-CA-1303 (3/31/10) (Gorbaty, J, dissenting)

Jury Trials

For a Louisiana Supreme Court decision applying the ruling of Thaler v Haynes, 559 U.S. ___, Newsletter 2010:4) upholding the exercise of peremptory challenges against a Batson challenge, see State v Jacobs, No. 2009-K-1304 (4/5/10) (Johnson, J, dissenting)

Lis Pendens

Wife and minor son filed a wrongful death action against X. A major son filed his own wrongful death and survival action against X, DOTD and Lafayette. Thereafter major son sought to intervene in the suit filed by wife and minor son and to add DOTD and Lafayette as defendants. Held, the trial court properly sustained the exception of lis pendens, dismissing major son's intervention. Calbert v Batiste, Supreme Court, No. 09-C-2647 (3/12/10)

Negligence

Plaintiff, traveling on his motorcycle, saw defendant pull up to a stop sign, stop and then pull forward past the white stop line. Plaintiff assumed defendant would not stop, applied his brakes, skidded and was injured. However, defendant proceeded with "extraordinary caution." She did not have a clear view at the stop sign because of hanging vines and poles, pulled forward toward the white stop line and when her view remained obscured, she stopped short of the intersection in an attempt to get a view of oncoming traffic without entering the intersection. At no time did her vehicle even partially enter the intersection or plaintiff's path. Held, the trial court had no reasonable basis upon which to find defendant liable. Walters v Goss, Second Circuit, No. 45,064-CA (3/3/10)

Negligence: Animals

There was no evidence to suggest that the owner had any knowledge that his horse had a previous history of a vicious temperament; thus under the duty/risk analysis the owner did not owe a duty to one who asked to ride the horse and was in control of it at the time of the accident. Everett v State Farm Fire & Casualty Ins. Co., First Circuit, No. 2009 CA 1699 (3/26/10) (Carter, CJ, concurs)

Prescription: Peremption

Under Naghi v Brenner, 17 So 3d 919 (La. 2009), an amended petition adding or substituting plaintiffs does not relate back to the original timely filed petition in a legal malpractice action. Thus a survival action for alleged malpractice filed by the succession representative does not relate back to avoid peremption (R.S. 9:5605) on the claims of the proper parties, the children of the decedent. Estate of Robinson v Continental Cas. Co., Second Circuit, No. 44,952-CW (3/3/10)

Products Liability

Seller labeled the product as “distributed” by Seller, and that it was made in China. There was no other party’s label on the product. Held, seller is the manufacturer, under R.S. 9:2800.53(1)(A), as he “label(ed) a product as his own.” All State Insurance Co. v Fred’s, Inc., Second Circuit, No. 44,508-CA (3/17/10) (five judge court; Peatross, J, dissents)

Res Judicata

A judgment rejecting a class action because the commonality requirement had not been met is not res judicata to an amended class action petition narrowing the class of plaintiffs in the action. Bourgeois v A. P. Green Industries, Inc., Fifth (La.) Circuit, No. 09-CA-753 (3/23/10)

Summary Judgment

Strict compliance with the procedural requirements of the long-arm statute is required; a summary judgment obtained without such strict compliance, such as filing an affidavit of service at least 30 days before the hearing, is an absolute nullity. Fisher v Majestic Trucking, Inc., Fourth Circuit, No. 2009-CA-1398 (3/17/10)

Witnesses; Experts

In Haik v Allstate Ins. Co., the Fourth Circuit affirmed the trial judge’s decision to qualify a state trooper as an expert in accident investigation, based upon his education (a nine week training course in accident reconstruction) and experience. The trial court allowed the trooper to testify regarding his opinion as to the cause of the accident. The appellate court points out that the trooper also was qualified to give the opinion as a lay witness (LCE Art. 701) upon the basis of his perception of the evidence and the witnesses. No. 2009-CA-0860 (3/31/10) (Gorbaty, J, dissents)

Three experts testified but none did more than baldly state that the “target drug” can cause problems gambling. They admitted there was no scientific basis to confirm their conclusions. Held, these admissions drain the expert opinions of probative force. Thus the trial court did not abuse its discretion. The Fifth Circuit characterizes its decision as

“an unremarkable sustaining of the district court’s gatekeeping role under Daubert.” Wells v Smithkline Beecham Corp., ___ F 3d ___ (5th Cir. 2010)

Worker Compensation

A compensation insurer is not entitled to an offset for amounts paid by the claimant’s private health insurer, pursuant to R.S. 23:1212, unless it pleads the offset as an affirmative defense and proves the amount of the offset at trial. Feingerts v American Cas. Co of Reading, Fourth Circuit, No. 2109-CA-1209 (3/10/10)

An employee is entitled to worker compensation benefits when injured on the employer’s premises subsequent to being terminated if he is allowed a reasonable period of time to gather up his belongings before quitting the premises. A delay between Friday evening termination and a Monday morning injury is not a reasonable period of time where employee was terminated at the work center in Opelousas on Friday morning and given permission to return to his office in Eunice the following Monday to collect personal effects. Ardoin v Cleco Power, LLC, Third Circuit, No. WCA 09-1085 (3/10/10) (Cooks, J, dissents)

A “hot shot” driver was involved in an accident while on a “run” for her employer; however, at the time of the accident she was on her way home to change clothes and pick up something to eat before starting for the employer’s destination. Held, driver was in the course and scope of her employment at the time of injury. A “hot shot” driver operates a vehicle in order to make quick deliveries, driver was constantly on call, and her office was basically her vehicle. The nature of her work is the key in determining whether she was within the course and scope of her employment. Williams v Ace Transportation, Inc., Third Circuit, No. WCA 09-1071 (3/10/10)

Claimant’s failure to report the alleged accident to anyone at her employer, her offer of her private medical insurance to cover medical expenses prior to seeking payment through the employer, the lack of any statement to either physician that the injury was work-related, and the lack of testimony from any other individual regarding the alleged injury, all tend to discredit or cast doubt on her testimony that an accident occurred on the job. Thus the WCJ’s decision that claimant failed to carry her burden of proof was not manifestly erroneous. Lowe v Skyjacker Suspensions, Second Circuit, No. 45,058-WCA (3/3/20)

MARITIME MATTERS OF NOTE

Seaman’s Remedies: The seaman’s action for injuries aggravated as a result of failure to pay maintenance and cure is tortious in nature and subject to a limitations period of three years. Claims for maintenance and cure are governed by laches, although the Fifth Circuit has looked to the three year period of 46 USC Sec. 30106 in its laches analysis. Actions for unpaid wages are similarly subject to the doctrine of laches. A seaman’s suit which is dismissed because he failed to participate in it, although it is dismissed without prejudice, does not toll the limitations period. In determining the timeliness of a suit for unpaid wages, a court may look to the analogous state statute which, in Louisiana, is

three years (CC Art. 3494). Powell v Global Marine, LLC, 671 F Supp 2d 830 (ED La 2009).

WRIT GRANTS OF INTEREST

Taranto v Louisiana Citizens Prop. Ins. Corp., No. 2010-C0105 (La. App. 4th Cir. 2009, 28 So 3d 543) (NL 2010:2) – involves prescriptive period of insurance claims.