



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2010:6

June 1, 2010

President
RONALD J. SHOLES
Adams and Reese
701 Poydras St., Suite 4500
New Orleans, LA 70139
504-581-3234 Fax: 504-566-0210
E-Mail: ron.sholes@arlaw.com

President-Elect
BEN L. MAYEAUX
Lafayette, LA

First Vice President
THOMAS G. BUCK
Metairie, LA

Second Vice President
HARRY J. "SKIP" PHILIPS, JR

Secretary-Treasurer
Marta-Ann Schnabel
O'Bryon & Schnabel
504-799-4200 Fax: 504-799-4211
Email: mas@obryonlaw.com

Immediate Past President
F. DRAKE LEE, JR.
Shreveport, LA

DIRECTORS

District 1 - New Orleans
DAN RICHARD DORSEY
JAZMINE A. DUARTE
CHARLES M. LANIER, JR.
TARA L. MASON
HOWARD L. MURPHY
MICHAEL S. SEPCICH

District 2 - Baton Rouge
L. VICTOR GREGOIRE, JR.
BRENT E. KINCHEM
KEITH L. RICHARDSON
GRACELLA G. SIMMONS

District 3 - Lafayette
MICHAEL J. JUNEAU
WARD F. LAFLEUR

District 4 - Lake Charles
SCOTT J. SCOFIELD
JOHN J. SIMPSON

District 5 - Alexandria
RANDALL B. KEISER
RANDALL M. SEESER

District 6 - Shreveport
WM. TIMOTHY ALLEN, III
MARK E. GILLIAM
SARAH A. KIRKPATRICK
MICHAEL D. LOWE

District 7 - Monroe
JOHN B. HOYCHICK, JR.
MARK, J. NEAL

Executive Director
WILLIAM R. CORBETT

Associate Executive Director
DANE S. CIOLINO

Executive Director Emeritus
FRANK L. MARAIST

8982 Darby Avenue
Baton Rouge, LA 70806
225-928-7599 Fax: 225-928-7339
E-mail: ladefensecounsel@aol.com
Website: www.ladc.org

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*#
March 9 -13, 2011	LADC Winter Meeting, The Charter, Beaver Creek, CO (save the date)	10.0*#

(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 TRIAL ACADEMY: The twenty-sixth annual LADC Trial Academy is scheduled for Thursday, Aug. 5-Saturday, Aug. 7 at Loyola Law School. Outstanding lawyers and judges provide excellent training in all phases of litigation for young lawyers, and it is an incredible bargain. 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 second annual 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 Hotel 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 includes the following as well as more to be announced: Insurance Law Update (Shelby McKenzie); Privileges, Liens, Subrogations & Other Snags (Shane Craighead); Ethics (Prof. Dane Ciolino and Phelps Gay); Professionalism; and Recent Developments in Louisiana Law. Registration materials are available at www.ladc.org.

STRATEGIC PLANNING, THURSDAY, AUG. 12: The LADC officers and board of directors will engage in a day-long strategic planning session the before the

Sizzlin' Summer Seminar. The session will be held in conjunction with the board meeting usually held on that day. The purpose of the session is to assess the state of the organization and plan for the future. A key topic will be member services. Everything is on the table, including the following: newsletter; website; online CLE; email blast notices; CLE seminars and training programs; young lawyers' services; expert witness services; participation in government (legislature, courts, and agencies); dues; travel; opportunities for member involvement and participation; and interaction with other national, state, and local organizations. We encourage all members who have ideas to communicate with us by contacting your district director, an officer, or the LADC office (Ladefensecounsel@aol.com or 225-928-7599). This is your organization, and we ask that you help us make it better.

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

BEAVER CREEK WINTER MEETING 2011: The winter meeting and ski trip to the Charter at Beaver Creek will be during Mardi Gras week, Wednesday, March 9-Sunday, March 13. Because flights book early during Mardi Gras week, you may want to make flight arrangements soon.

LADC OFFICER AND DIRECTOR ELECTIONS: The LADC is proud to announce the election of a new secretary-treasurer and 11 new directors. Congratulations and thank you to our new officer and new directors, and thank you to all members who participated in the nomination and election process.

Incoming Officers

The new officers are as follows:

The new secretary-treasurer, from District 1, is Marta-Ann Schnabel (O'Bryon & Schnabel). The other officers move up as follows: Ron Sholes, president; Ben Mayeaux, president-elect; Tom Buck, first vice president; Skip Philips, second vice president; and Drake Lee, immediate past president.

Incoming Directors

The new directors are as follows:

District 1 (New Orleans and Surrounding Area): Michael S. Sepcich (Bradley Murchison); Tara Mason (Lobman Carnahan); Dan Dorsey (Porteous Hainkel).

Dist. 2 (Baton Rouge and surrounding area): Victor Gregoire (Kean Miller); Gracella Simmons (Keogh, Cox & Wilson)

Dist. 3 (Lafayette and surrounding area): Mike Juneau (Juneau David)

Dist. 4 (Lake Charles and surrounding area): John Simpson (Stockwell Sievert)

Dist. 5 (Alexandria and surrounding area): None. (Two were elected in 2009 after a director resigned in 2008 after being elected to the bench.)

Dist. 6 (Shreveport and surrounding area): Tim Allen (Blanchard Walker); Michael Lowe (Cook Yancey); Sarah Kirkpatrick (Bradley Murchison)

Dist. 7 (Monroe and surrounding area): John B. Hoychick (Cotton Bolton)

Outgoing Directors

We also thank our directors who just completed their two-year terms:

Dist. 1: Peter Donovan, Jim Nieset, Trey Paulsen

Dist. 2: Darrell Loup and Dan Reed

Dist. 3: Tim Basden

Dist. 4: Bill Swift

Dist. 5: None

Dist. 6: Edwin Byrd and Gregg Wilkes

Dist. 7: John Saye

NEW MEMBERS

Vanessa W. Anseman, Lafayette
Thomas L. Colletta, Jr., New Orleans
Gregory O. Currier, New Orleans
L. Victor Gregoire, Baton Rouge
Sara A. Kirkpatrick, Shreveport
David M. Stein, New Orleans
Eleanor W. Wall, Baton Rouge
Ronald J. White, New Orleans

KEY DEVELOPMENTS

Abandonment

A request for medical records made directly to a defendant and neither filed in the record nor served on defendant's counsel of record is not formal action before the court or a method of formal discovery authorized by the Code of Civil Procedure. Thus the request does not amount to a step in the prosecution sufficient to preclude a finding of abandonment. Koutroulis v Centennial Healthcare Corp., Second Circuit, No. 38,068-CA (4/14/10)

Class Actions

The United States Supreme Court has ruled that a New York statute prohibiting class actions in suits seeking penalties or statutory minimum damages does not preclude a federal court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23. Shady Grove Orthopedic Associates, P.A. v Allstate Ins. Co., ___ U.S. ___ (2010). There was no unanimity among the justices as to the decision or the rationale; Scalia, J, was the organ of the Court, but Chief Justice Roberts and Justice Thomas joined in portions of the opinion and the chief justice, Justice Thomas and

Justice Sotomayor joined in other portions. Justice Stevens concurred in part and Justices Ginsburg, Kennedy, Breyer and Alito dissented)

Class Actions; Arbitration

The United States Supreme Court also has ruled that class action arbitration may not be imposed on parties where the arbitration agreement otherwise applicable is silent on that issue. Stolt-Nielsen SA v AnimalFeeds International, ___ U.S. ___ (2010) (Ginsburg, Stevens and Breyer, dissenting; Sotomayor, J, not participating)

Concursus

Concursus allows a person subject to the possibility of competing claims to avoid the risk of multiple liability that could result from adverse determinations in different courts. Thus a court errs in imposing a duty on the party provoking concursus to investigate or evaluate the relative strengths and merits of the underlying claims. “The imposition of this duty undermines the purpose of the concursus proceeding. While we do not go so far as to hold that concursus should automatically be granted whenever it is invoked, courts should allow concursus liberally.” Cimarex Energy Co. v Mauboules, Supreme Court, No. 09-C-1180 (4/9/10) (Knoll, J, dissenting)

Products Liability

In Chevron, USA Inc. v Aker Maritime Inc., the U.S. Fifth Circuit, applying Louisiana law, comes to these conclusions: (1) a jury was entitled to determine that the prescriptive period against the manufacturer did not start when the product first broke, where the evidence showed all involved had cause to conclude that the failure resulted from another source; (2) the “apparent manufacturer” doctrine under the Louisiana Products Liability Act applies when the buying public has a basis to assume that the seller may be the manufacturer of a product it distributes, and (3) the LPLA, and not redhibition, applies where the bolt which the buyer purchased damaged its property, the spar on which it was installed; “(t)hat damage is not economic loss.” ___ F 3d ___ (5th Cir. 2010)

Subject Matter Jurisdiction; City Courts

Plaintiff filed suit in city court against insurer A, alleging that its insured was 100% at fault, and then amended to assert that coverage for the accident also could exist against insurer B as a UM provider. B’s UM coverage was \$100,000 per person. Under both petitions the plaintiff alleged that the policies were believed to be inadequate to cover the plaintiff’s damages, requiring insurer B’s presence. Held, since the amount in dispute exceeded the \$50,000 jurisdictional limit, the court was without jurisdiction, and any judgment reducing the damages to the jurisdictional limit did not cure the defect. Accordingly, the city court’s judgment was absolutely null. Thompson v State Farm Mut. Auto. Ins. Co., Third Circuit, No. CA 09-1369 (4/7/10) (Gremillion, J, concurring in the result)

Unfair Trade Practices

The Louisiana Supreme Court has ruled that persons who are neither business competitors nor consumers nevertheless may bring an action for damages pursuant to the Unfair Trade Practices and Consumer Protection Law, R.S. 51:1401, et seq. In the instant case, however, the Court concluded that summary judgment dismissing the claims was appropriate where the evidence showed that the defendant-employees were merely exercising their prerogatives as at-will employees to change the companies for which they worked. Cheremie Services, Inc. v Shell Deepwater Production, Inc., No. 09-C-1633 (4/23/10) (Knoll, Johnson and Guidry, JJ, concurring)

Worker Compensation

R.S. 23:1021(12)(a)(iv)(bb), providing for computation of average weekly wages of an employee engaged in part-time employment, allows determination of wages by both claimant's full time employment and his part time employment. The statute is ambiguous, and should be interpreted liberally in favor of the employee. Where a worker is injured while engaged in her full time employment (as a bus driver), her compensation should be determined by combining her work with that employer with her work with her part time employment (with a fast food restaurant). However, the issue is reasonably controverted, and the employer is not liable for penalties for underpayment. Leger v Calcasieu Parish School Board, Third Circuit, No. WCA 09-1261 (4/7/10)

OTHER SIGNIFICANT DEVELOPMENTS

Abandonment

A defendant's agreement not to take any adverse action against plaintiff without providing 30 days written notice was not an acknowledgment that prevented abandonment. Defendant's letters demonstrated an attempt to achieve a non-judicial resolution of the dispute, which did not waive its right to claim abandonment. In addition, correspondence between plaintiff and defendant did not constitute formal discovery that would bar abandonment, where it was not mailed to a co-defendant and thus was not "formal discovery" served on "all parties." Department of Transportation and Development v Bayou Fleet, Inc., First Circuit, No. 2009 CA 1569 (4/28/10)

Appeals

Does the appellate court have the power to address the propriety of an order of dismissal with prejudice where there is no assignment of error on that issue? A majority of a Third Circuit panel holds that it does not, although the dissenter (Chatelain, J) points out that as, in this case, the entire record was transcribed and thus CCP Articles 2129 and 2164 (the court may render any judgment proper on the record) prevails over Uniform Rules 1-3 of the Courts of Appeal (court will review only issues contained in specifications or assignments of error). Rider v Priola Construction Corp., No. CA 09-1294 (4/21/10)

Attorney's Fees; Civil Rights

The United States Supreme Court has ruled that an award of attorney fees under a federal fee shifting statute in a civil rights matter (42 USC Sec. 1988), based on the "lodestar" (hours worked multiplied by prevailing hourly rates) may include an enhancement for superior performances but only in extraordinary circumstances. There is a strong presumption that the lodestar is sufficient; factors subsumed into the lodestar calculation cannot be a ground for increasing an award above the lodestar, and a party seeking a fee has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified. Perdue v Winn, ___ U.S. ___ (2010)

Bankruptcy

A defendant asserting discharge in bankruptcy as a defense must introduce evidence to establish the plea; the failure to formally admit any evidence is fatal to the exception of res judicata or discharge in bankruptcy. It is not sufficient to attach the bankruptcy order to a memorandum where it is never introduced at the hearing or properly made part of the record. Wilson v Beechgrove Redevelopment, L.L.C., Fifth (La.) Circuit, No 09-CA-1080 (4/27/10)

Class Actions

The Seventh Circuit has ruled that if an expert's report or testimony is essential to certification of a class action, the court should conclusively rule on the challenge to the expert's qualifications or the reliability of his evidence before determining the class certification issue. American Honda Motor Co. v Allen, ___ F 3d ___ (2010)

In Orrill v AIG, Inc., a class action was approved in one jurisdiction, and subsequently a class action in another jurisdiction was approved which included many members of the first class. In the first class, there had been a class notice, and the opt out period had expired. Setting aside an order settling the second class action, the Fourth Circuit points out that (1) the method of notifying the second, newly defined class was grossly deficient, and (2) the settlement offer created a conflict among class members. No. 2009-CA-0888 (4/21/10) (five judge court; Murray, J, concurs in the result; Belsome, J, concurs)

Continuances; Medical Malpractice

In Newsome v Homer Memorial Hospital, the Supreme Court rules that the trial court abused its discretion in granting a motion for continuance solely in order to allow plaintiff's expert affidavit to be filed in compliance with the eight day limitation contained in CCP Article 966, where the alleged malpractice occurred five years earlier, plaintiff requested the continuance just seven days prior to the hearing, and attempted to file the affidavit beyond the eight day limit contained in Article 966(B). Plaintiff's counsel had one year to obtain an expert prior to requesting the medical review panel, a

year to obtain an expert prior to the appointment of an attorney chairperson for the panel, two years during the pendency of the panel, nine months after filing the motion for summary judgment, and two months prior to the scheduling of the hearing on the motion. No. 10-CC-0564 (4/9/10)

Court Costs

The general rule is that the party cast in judgment is taxed with costs of the proceedings, but the trial court may assess costs in any equitable manner and its assessment will not be reversed on appeal in the absence of an abuse of discretion. However, generally, the prevailing party is not assessed with costs, unless in some way he incurred additional costs pointlessly or engaged in other conduct which justified an assessment of costs against him. Where the prevailing party did not incur additional costs pointlessly or engage in other conduct which justified an assessment of costs against him, the trial court errs in failing to assess costs in his favor. Hartz v Indovina, Fifth (La.) Circuit, No. 09-CA-967 (4/27/10)

Court Costs; Offer of Judgment

The offer of judgment, pursuant to CCP Art. 970, authorized consideration of “any other amounts, except judicial interest, which may be awarded pursuant to statute or rule” and did not expressly limit such consideration to those costs incurred through the date the offer was made. Held, the court did not err in adding those costs to the award, and denying offeror costs because the addition boosted plaintiff’s recovery to more than 75% of the offer. Suprun v Louisiana Farm Bureau Mut. Ins. Co., First Circuit, No. 2009 CA 1555 (4/30/10) (McDonald, J , concurs)

Damages

Spine: \$12,000 adequately compensates plaintiff for a five to six month soft tissue injury to the lumbar spine. Moody v Cummings, Fourth Circuit, No. 2009-CA-1233 (4/14/10) (Belsome, J, concurring)

\$45,000 where plaintiff suffered three bulging discs either caused or aggravated by the subject accident; plaintiff suffered neck pain for four years and will likely continue to experience cervical pain for the rest of his life. Moody v Cummings, supra.

\$250,000 (increased from \$25,000) to 24 year old woman suffering protruding discs, and \$25,000 to husband for loss of consortium, in Brown v Shelter Ins. Co., Third Circuit, No. CA 09-958 (4/7/10)

Death: \$450,000 in compensatory damages and \$250,000 in survival damages in death of 42 year old son who had extremely close relationship with his mother and was partially supporting her, and who was killed in a terrible accident in which a trailer came loose from defendant’s truck which was pulling it. Smith v Louisiana Farm Bureau Cas. Ins. Co., Second Circuit, No. 45,013-CA (4/23/10)

Evidence; Expert Witnesses

Trial court does not err in admitting testimony of a chiropractor as an expert in the field of biomechanics of low speed crashes and allowing him to use relevant demonstrative evidence in presenting his testimony. Chiropractor had extensive post-graduate training in diagnosis and treatment of whiplash and spinal trauma and post-graduate training in neurology, and four years of training involving car crashes to study the biomechanics of a person's body subject to such a crash. Taylor v Progressive Security Ins. Co., Third Circuit, No. CA 09-791 (4/7/10)

Louisiana courts have not been reluctant to accept the testimony of registered nurses with regard to the standard of care and alleged negligence of nurses and certified nursing assistants. However, a nurse's affidavit is not admissible where it does not mention alleged negligent acts on the part of the nurses involved; the nurse is not qualified to express an opinion concerning any negligence or breach of standard of care on the part of a physician involved. Reilly v Spinazze, Second Circuit, No. 45,209-CA (4/14/10)

Where four other judges in the Eastern District of Louisiana excluded the proposed expert testimony, another judge does not abuse his discretion in excluding that expert's testimony as an expert witness, even without an explanation of the reasons for his ruling. Nunez v Allstate Ins. Co., ___ F 3d ___ (5th Cir. 2010)

Evidence; New Trial

Defendant submitted reports of its expert engineer; although the plaintiff timely objected to the admissibility of two of the reports as hearsay, the trial court admitted those reports when defendant indicated that the expert would be deposed and subject to cross examination after trial. The deposition was not subsequently taken, and the judge relied heavily on those inadmissible reports in his reasons for judgment. Held, in these circumstances, the judge abused his discretion in denying plaintiff's motion for new trial. Lifetime Homes, Inc. v Sosa, Fifth (La.) Circuit, No. 09-CA-692 (4/27/10)

Indemnity

A contractual provision by which the principal agrees to indemnify the contractor against claims by third persons (an employee of a subcontractor) is void and unenforceable under the Louisiana Oilfield Anti Indemnity Act. Silverman v Mike Rogers Drilling Company, Inc., Second Circuit, No. 45.119-CA (4/14/10)

Where the parties confected rental of property by oral agreement and there was no discussion of an indemnity agreement, the subsequent signing of a shipping receipt (a routine practice between the parties) by the lessee which contained such an agreement is not enforceable. Ledet v Jo-De Equipment Rental Co., Inc., Third Circuit, No. CA 09-1267 (4/7/10)

Insurance

Policy provided coverage for replacement costs through purchase of an existing structure. On the insured structure, insured gutted it, elevated it, and patched the roof, accepted Road Home funds, and resisted the parish's decision to demolish, and insured attested that he intended to someday repair and return to the insured structure. Held, under the "plain meaning of the term 'replace,'" insured as a matter of law could not recover under the replacement provision of the homeowner's policy. Nunez v Allstate Ins. Co., ___ F 3d ___ (5th Cir. 2010)

Insured's personal policy excluded non-covered autos (no coverage for use of any auto, other than an insured auto, which is made available for the regular use of the insured). He was involved in an accident while driving a family LLC truck on a personal mission; he regularly used the truck for the farm-related activities of the LLC and his personal matters. The truck was available for each family member's general use. Held, the trial court did not err in determining that the exclusionary clause applied; the relevant inquiry is whether the driver had general authority of use of the vehicle or was furnished the vehicle for use in steady, uniform course or practice. Whitham v Louisiana Farm Bureau Casualty Ins. Co., Second Circuit No. 45,199-0CA (4/14/10)

Insurance; Arson

In Albert v State Farm Mut. Auto. Ins. Co., the First Circuit reverses a finding of coverage, concluding that the insured was guilty of arson, and awards insurer a judgment against insured for the expenses of investigation, pre-trial attorney's fees, and costs incurred in connection with the claim, including payment for a rental vehicle. "Our review of the entirety of the record leads us to conclude that a reasonable fact finder would not credit (insured's) story, and we find manifest error or clear wrongness, even though the trial court's finding was purportedly based on a credibility determination." No. 2009 CA 1551 (4/30/10)

Insurance; Penalties

In Willwoods Community v Essex Ins. Co., the Louisiana Fifth Circuit imposes penalties upon an excess insurer for failure to pay where although the appraisal process was ongoing that insurer knew that the damage amounts were substantially more than the damage amounts stated in the appraiser's reports. However, the court reverses an award of about \$1.2 million in attorney fees under R.S. 22:658 and remands for an evidentiary hearing to determine a reasonable amount of such fees, pursuant to the factors listed in Ravet v State, 680 So 2d 1154 (La. 1996). No. 09-CA-651 (4/13/10)

The failure of insured to seek or prove "any general or special damages to which a claimant is entitled for breach of the imposed duty" does not ipso facto preclude it from an award of penalties under R.S. 22:1220(C) ("in addition to any general or special damages to which a claimant is entitled for breach of the imposed duty the claimant may be awarded penalties in an amount not in excess of two times the damages sustained or

five thousand dollars, whichever is greater”). Penalties under 1220(C) may be calculated on damages sustained by the insured from the breach of the insurer’s contractual obligation,” such as payment for loss of business income and roof damage. “\$5,000 is not necessarily the maximum penalty awardable under Sec. 1220 when there has been no proof of damages for breach of the imposed duty.” Buffman, Inc. v Lafayette Ins. Co., Fourth Circuit, No. 2009-CA-0870 (4/14/10) (five judge court; McKay, J, concurs; Murray, J, dissents in part; Bagneris and Lombard, JJ, dissent)

Insurance Agents; Prescription

In Seruntine v State Farm Fire & Cas. Co., the Fourth Circuit adopts the position taken in an earlier unpublished opinion in another case and holds that prescription on the insured’s claim against the insurance agent is the date on which the insured should have discovered the problem in his policy, and that date is when he received notice that his damages would not be covered, and not the earlier date on which the policy is delivered to him. No. 2009-C-0230 (4/15/10) (on remand from Supreme Court)

Judgments; Amended Judgments

Defendant timely filed a motion for new trial. After a hearing, the trial judge took the matter under advisement and approximately nine months later, without ever ruling on the motion for new trial, issued a judgment vacating the judgment and entering a new judgment. The second judgment altered the original only with respect to the two legal issues that were raised in the motion for new trial. Held, although the trial court did not expressly grant the motion for new trial, it impliedly granted the motion; thus the second judgment did not constitute an impermissible amendment of the first one. Audubon Orthopedic and Sports Medicine, APMC v Lafayette Ins. Co., Fourth Circuit, No. 2009-CA-0007 (4/21/10) (five judge court; McKay and Love, JJ, dissent in part)

Judgments; Default Judgments

An action of nullity is not intended as a substitute for an appeal or as a second chance to prove a claim which was previously denied for failure of proof. The proper procedure to remedy a failure of proof is through a motion for a new trial and/or an appeal. First Lake Properties, Inc. v Smith, Fifth (La.) Circuit, No. 09-CA-973 (4/27/10)

Jury Trials

Where the jury’s response to the first three interrogatories results in a finding that the sole cause of the accident was the negligence of one of the parties, the interrogatories are erroneous in asking the jury to answer the next interrogatory which asks for an allocation of the percentages of fault between plaintiff and defendant. Brown v Shelter Insurance Co., Third Circuit, No. CA 09-958 (4/7/10)

Prescription

A timely tort suit interrupts the running of prescription against the claimant's worker compensation claim. However, where the defendant withdraws the plea of prescription, he renounces the prescription he originally pleads and, having thus abandoned it, may not thereafter re-urge it. The defendant may not re-urge prescription in the claimant's subsequent worker compensation claim against defendant. Torres v Louisiana Shrimp and Packing Co., Supreme Court, No. 09-C-2792 (4/9/10)

After undergoing an abortion, plaintiff was awake and responsive at least part of the time on that day. By that time she must have known that something had gone wrong with the abortion. Although she may not have known precisely what kind of damage had occurred or the full extent of the damage, she certainly had enough information at that point to know that the problems were very likely caused by some flaw in the abortion procedure. Held, plaintiff's claim began to prescribe at that time. Doe v Delta Women's Clinic of Baton Rouge, First Circuit, No. 2009 CA 1776 (4/30/10)

Removal

Plaintiff sued insurer A in state court; both were residents of Louisiana. Thereafter, plaintiff sued insurer B in federal court, asserting federal question jurisdiction under the National Flood Insurance Program. Insurer A then removed to federal court asserting jurisdiction supplemental to the claim against insurer B under 28 USC Sec. 1367. Held, removal is improper; since there never was subject matter jurisdiction over the suit against insurer A, Sec. 1367 cannot fill the void. That section grants supplemental jurisdiction over state claims, but not original jurisdiction. Halmekangas v State Farm Fire and Cas. Co., ___ F 3d ___ (5th Cir. 2010)

Res Judicata

Plaintiffs first filed a tort claim against principal, but on appeal it was determined that plaintiffs' decedent was a borrowed employee of principal. Plaintiffs then filed a worker compensation claim, which was then dismissed as a non-covered heart attack. Plaintiffs then re-filed the tort action. Held, the principal's exception of res judicata should be denied; "now that it has been definitely determined that the plaintiffs' action is properly brought in civil district court, it would be unjust to bar them from an opportunity to litigate the substantive issues." Simmons v Baumer Foods, Inc., Fourth Circuit, No. 2009-CA-1739 (4/28/10) (Murray, J, dissenting in part)

Torts; Immunity

For a judgment upholding immunity under R.S. 9:2791 and 2795 in a suit by a teenager injured in a four wheeler accident on a pipeline right of way, see Hayes v Burlington Resources Oil & Gas Co., Third Circuit, No. CA 09-1353 (4/7/10). Plaintiff enjoyed the

use of defendant's property for recreational purposes, regardless of whether she was invited to do so.

Worker Compensation

Under R.S. 23:1201.4, a claimant's benefits are forfeited while he is incarcerated. Forfeiture does not mean suspension; thus where claimant was incarcerated for 56 weeks after his injury, he is not entitled to the remainder of his award for benefits; he is not allowed to recoup benefits that would have accrued while he was incarcerated. White v BHB Oil, Second Circuit, No. 45,173-WCA (4/14/10)

Worker's Compensation, Appeals

Under R.S. 23:23:1310.5(C), an employer may not appeal an award of benefits unless it secures a bond approved by the WCJ, and the time limits for perfecting the bond do not commence to run until the appellant is notified by the WCJ as to the amount of the bond. Held, the statute does not distinguish between the types of money judgments for which court approval must be sought in worker compensation cases. Thus an appellant's delay for suspensive appeal does not run until the bond is fixed, although the appellant could have easily computed the amount of the bond based on CCP Art. 2124(B)(1) (when the judgment is for a sum of money the amount shall be equal to the judgment and interest). Agilus Health v Dresser, Inc., Third Circuit, No. WCA 10-315, 317 (4/14/10)

Worker Compensation; Penalties

Although the WCJ was not plainly wrong in finding that claimant sustained a new and disabling injury while working for employer, she abuses her discretion in awarding attorney's fees and penalties where the record shows that the employer had more than reasonable grounds (claimant's serious medical history and inconsistent reports to co-workers and health care providers) to suspect that claimant's injuries predated her employment. Dugan v St. Francis Medical Center, Second Circuit, No. 45,149-WCA (4/14/10)

In Fontenot v Sonnier, the Third Circuit approves the WCJ's award of penalties for failure to timely pay medical expenses after a settlement of the claim, although the settlement provided that the employer was free to negotiate with the providers as long as the negotiated payment satisfied the debt owed in full. Other than those providers that the employer was unable to locate and pay, the delay was within his control and he failed to pay within the 30-day deadline provided by R.S. 23:12001(G). No. WCA 09-1215 (4/7/10)

A WCJ abuses its discretion in reducing an award of attorney's fees because many of the issues involved were settled by stipulation. "Stipulations do not happen. Before they agree to stipulate the parties to a stipulation must be convinced that litigation of the items contained therein would be fruitless. To convince the opposing party that you are right

takes time and a high degree of skill and ability.” Rochester v Southwest Developmental Center, Third Circuit, No. WCA 09-1342 (4/21/10) (Gremillion, J, dissenting in part)

The Third Circuit approves an award of \$6,000 in penalties and \$13,500 in attorney’s fees (plus an additional \$5,000 in defending the appeal) where the employer did not perform any investigation and relied on second-hand accounts that claimant had not suffered a serious hand injury. LeJeune v Bell Tower Corp., No. WCA 09-1222 (4/7/10)

MARITIME MATTERS OF NOTE

Seaman: In Harrington v Atlantic Sounding Inc., the Second Circuit holds that an agreement which promises cash advances to an injured seaman in exchange for his not submitting his claims to arbitration does not violate federal laws governing claims by seamen injured in the course of their employment. ___ F 3d ___ (2010)

LHWCA: A claimant may not bypass the ALJ and appeal directly to the Benefits Review Board a recommendation by the district director on payment of partial disability benefits. The LHWCA grants the ALJ the exclusive authority to create an evidentiary record upon which an appeal must be based. Craven v Director, ___ F 3d ___ (5th Cir. 2010)

LHWCA: An undocumented immigrant employed as a longshoreman has the right to recover workers’ compensation benefits under the LHWCA. Bollinger Shipyards, Inc. v Director, ___ F 3d ___ (5th Cir. 2010)

WRIT GRANTS OF INTEREST

Products Liability Preemption: In Bruesewitz v Wyeth, Inc., the U.S. Supreme Court grants cert where a major question was whether the National Childhood Vaccine Injury Act of 1986 (42 USC Secs 300aa-22-(b)(1)) preempts all vaccine design defect claims, regardless of whether the side effects were unavoidable. (No. 09-152) Opinion below: 561 F 3d 233.

First Amendment: In Snyder v Phelps, No. 09-751, the U.S. Supreme Court grants writs in a case involving whether freedom of speech applies over freedom of religion and the right to peaceful assembly, and whether the application of freedom of speech applies in a tort claim by a private person against another private person in a private matter. Opinion below: 580 F 3d 206 (4th Cir. 2009)