



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2011:8

August 1, 2011

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UPCOMING MEETINGS

August 4-6, 2011 **LADC Trial Academy, Loyola Law School** **21.0*#**

August 19, 2011 **LADC Sizzlin' Summer Seminar, Windsor Court Hotel** **8.5*#**

(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 TRIAL ACADEMY: The annual LADC Trial Academy is scheduled for Aug. 4-6 at Loyola University College of Law. Even though trials are few and far between, you still have to handle your case as though it will go to trial. If you do not have trials to train your associates, send them to three days of training with some of the best judges and lawyers in the state. A registration form may be found at www.ladc.org.

LAST CALL FOR 2011 SIZZLIN' SUMMER SEMINAR: Don't miss this CLE program! Special guest speaker Prof. Bill Gould is a Stanford law professor and former Chair of the National Labor Relations Board. Prof. Gould will be speaking on "Labor Disputes in Sports: Of Players, Owners and Lockouts." Justice Greg Guidry of the Louisiana Supreme Court will lead a judges' panel discussion. Judge Marilyn Castle will lead a panel discussion on old and established legal doctrines and rules that may be in need of reexamination. Denver attorney and former New Orleans lawyer Bill Kelly moderates a panel of in-house counsel. Plus Shelby McKenzie on Insurance Law Update, Prof. Frank Maraist on Recent Developments in Louisiana Law, Exponent on Cost-Effective Demonstrative Evidence, Ethics, and Professionalism. Quality, quantity, and it is an incredible bargain: \$250 for 8.5 hours of CLE and lunch at the Windsor Court. The seminar is at the Windsor Court Hotel on Friday, Aug. 19. Our room block has expired, but if rooms are still available you may make your hotel reservation by calling 1-800-262-2662. Why are you still reading? Register now. A registration form may be found at www.ladc.org.

BEAVER CREEK WINTER MEETING 2012: Please mark your calendars for the Winter Meeting at Beaver Creek in 2012. The meeting will be during the last week of January 2012 rather than during Mardi Gras week. Due to high room rates and expected large crowds (Presidents' Day weekend is the weekend before Mardi Gras)

week, we have decided to take advantage of favorable room rates and smaller crowds on the slopes at the end of January. Please plan to join us. This meeting is a great opportunity to earn almost all your CLE hours for the year and ski.

LADC ANNUAL MEETING 2012: The 2012 Annual Meeting will be in Costa Rica April 24-29. Plan to be there. Details will be unveiled as plans are finalized.

2011 DRI ANNUAL MEETING: The meeting is in Washington D.C. Oct. 26-30. Registration information is available on the DRI website at <http://www.dri.org/open/AnnualMeeting.aspx>.

CONDOLENCES: The LADC expresses condolences to the family of the Honorable Ralph E. Tyson, Chief Judge of the Middle District of Louisiana.

KEY DEVELOPMENTS

Discovery; Sanctions

A trial judge does not abuse his discretion by sanctioning an attorney for violating CCP Article 1420 by taking a police officer's deposition without notice to the other party. However, the court abuses its discretion by prohibiting the attorney's client from calling the deponent as a witness in future hearings. Moffett v Moffett, Third Circuit, No. CA 10-1364 (6/2/11) (Gremillion, J, dissenting in part)

Insurance

The Supreme Court rules that an insurer does not waive the right to enforce its policy defenses because it has breached its duty to defend. An insurer is entitled to rely on its policy defense limiting its indemnity obligation although it has breached its defense duty. Arceneaux v Amstar Corp., No. 2010-C-2329 (7/1/11)

Insureds' home contained Chinese Dry Wall that released sulfuric gases that caused corrosion and damaged their home and personal property. Held, the losses are not covered under the homeowner's policy because of exclusions for losses caused by inadequate or defective materials and because of the latent defect exclusion, and were caused by corrosion and by a pollutant. Ross v C. Adams Construction & Design, L.L.C., Fifth (La.) Circuit, No.10-CA-852 (6/14/11)

Medical Malpractice

The opinion of a medical review panel is not subject to mandatory admissibility under R.S. 40:1299.47(H) if the panel exceeds its statutory authority and renders an opinion on the basis of its determination of credibility and not on the applicable medical standard. McGlothlin v Christus St. Patrick's Hospital, Supreme Court, No. 2010-C-2775 (7/1/11) (Guidry, J, concurring; Johnson, J, dissenting)

Negligence; FELA

The United States Supreme Court has ruled that in a suit under the Federal Employers' Liability Act the jury should be instructed that the defendant railroad "caused or contributed to a plaintiff's injury if the railroad's negligence played any part in bringing about the injury." The Court rejects the argument that that the "proximate cause" standards in common law tort cases are the proper standard for causation under the FELA. CSX Transportation, Inc. v McBride, No. 10-235 (6/23/11)

Negligence; Maritime Law

R.S. 9:2800.1, the Louisiana dram shop liability act, applies to a victim injured while on a floating gaming boat which is permanently attached to the shore, is not used in navigation, and is not performing a traditional maritime activity. Breaux v St. Charles Gaming Company Inc., Third Circuit, No. CW 10-349 (6/22/11) (five judge court; Thibodeaux, CJ, and Saunders, J, dissenting)

OTHER SIGNIFICANT DEVELOPMENTS

Attorneys; Malpractice

In a legal malpractice claim a defendant cannot be held liable for claims that prescribed prior to the time the attorney's representation of the plaintiff began. Guy v Brown, Fourth Circuit, No. 211-CA-0099 (7/6/11)

Once a claimant has presented a prima facie case of legal malpractice, the burden of proof shifts to the defendant, who, in order to avoid liability, must defeat the client's prima facie case by proving that the client could not have succeeded on the original claim. The trial court correctly cited the principles of Jenkins v St. Paul Fire & Marine Ins. Co., 422 So 2d 1109 (La. 1982), in reaching its conclusion. Semmes v Klein, Fourth Circuit, No. 210-CA-1734 (7/8/11)

Class Actions

Certification of a class action under FRCP Rule 23(b)(2) on the basis of injunctive relief is not appropriate as to claims for monetary relief where such monetary relief is not incidental to injunctive or declaratory relief. Wal-Mart Stores v Dukes, ___ U.S. ___ (2011)

Damages

Ankle: \$50,000 in general damages to victim who tripped and fell, breaking ankle in two places, and who would likely develop arthritis in the future. Broussard v Oak Trace Apartments, Third Circuit, No. CA 11-125 (7/13/11)

Malicious Prosecution and Defamation: \$25,000 in general damages to one plaintiff and \$20,000 to another; they were improperly accused of theft and spent an overnight stay in jail. LeBlanc v Pynes, Second Circuit, No. 46,393-CA (7/13/11)

\$10,000 in general damages to patient for pain and suffering and mental anguish for initial trocar (laparoscopy surgery) and who was hospitalized for a total of 16 days and thought she had cancer. Patten v Gayle, Second Circuit, No. 46,453-CA (6/22/11)

Damages; Loss of Consortium

A spouse's loss of consortium claim which is derived from his wife's civil rights claim cannot be recovered under Title VII. Barker v Halliburton Company, ___ F 3d ___ (5th Cir. 2011)

Damages; Future Medical Care

The Future Medical Care Fund provided by R.S. 13:5106(B)(3) is not subject to a privilege or lien in favor of the plaintiff attorney. Starr v State, Second Circuit, No. 46,226-CA (6/17/11)

Federal Procedure; Evidence

The U.S. Supreme Court has approved amendments to the federal rules, including appellate rules 4 and 40, and the federal rules of evidence (including rules 408 and 804, and restyling rules 101-1103). The amendments have been transmitted to Congress and will take effect Dec. 1 unless Congress enacts legislation to the contrary.

Judgments

A judgment that does not appear in any document other than the docket sheet does not meet the requirement of FRCP Rule 58 that every judgment shall be set forth on a separate document; "(w)e strongly encourage the district court...to comply with Rule 58 when it enters dispositive orders or judgment...." Barber v Shinseki, ___ F 3d ___ (5th Cir. 2011)

Negligence

24% to DOTD for breach of duty to provide adequate warning of the defective curvature of highway, and 76% to driver of truck who, because of alleged alcoholic impairment, inattentiveness or excessive speed, or a combination thereof, was unable to negotiate a sharp left curve on the highway. Starr v State, Second Circuit, No. 46,226-CA (6/17/11)

In Brooks v State, the Supreme Court rules that the highway department's duty to maintain the shoulder of a state highway does not include the risk that the driver of a backhoe which is not authorized for highway use will drive onto the shoulder of the highway, attempt a sharp turn into a driveway at a relatively high rate of speed, hit a 2 to

4 inch depression in the asphalt, and be crushed by the backhoe. No. 2010-C-1980 (7/1/11) (Knoll, J, concurs; Johnson, J, dissents)

Where it was foreseeable that the debris posed an unreasonable danger to motorists, highway department employees were aware daily of the debris, and the highway department's contract with the contractor included debris removal which would not have cost the highway department additional funds, the department is liable to a motorist who inadvertently loses control of her vehicle, leaves the highway and strikes the debris on the right of way. Thibodeaux v Comeaux, Third Circuit, No. CA 11-127 (6/15/21)

Prescription; "Relating Back"

Giroir v South Louisiana Medical Center, 475 So 2d 1040 (La. 1985), did not place any time limits on the relating back of an amended pleading. The passage of time, however, between the filing of the original petition and the amended petition (in this case, eight years) will generally weigh against the relating back of the amendment. Bates v City of Shreveport, Second Circuit, No. 46,432-CA (6/22/11)

Does the "continuing tort" doctrine apply to prescription of claims under the Federal Tort Claims Act? See the discussion in In Re FEMA Trailer Formaldehyde Products Liability Litigation, ___ F 3d ___ (5th Cir. 2011)

Retroactivity; Judicial Decisions

Unless a judicial decision specifies otherwise, it is to be given prospective and retroactive effect. Succession of Clivens, 426 So2d 585 (La. 1982). In Lovell v Lovell, 378 So 2d 418 (La. 1979), the Court has noted the specific factors which should be considered in determining whether a decision should be given retroactive effect. The decision should not be applied retroactively if it establishes a new principle, overrules clear past precedent or decides an issue of first impression, and courts should also consider the merits and demerits of each case and any equity or inequity imposed by retroactive application. Bozeman v Union Carbide Corporation, Second Circuit, No. 46,425-CA (6/22/11)

Service of Process

In a suit against the DOTD, a double request for service upon the attorney general and the proper officer of the department is not necessary. A request for service on the attorney general alone satisfies the service requirements of R.S.13:5107(A). Failure to request service upon the department head and office of risk management within 90 days does not entitle the DOTD to dismissal of the claim, and the trial court should allow service as provided by CCP Article 932(A). Burnett v James Construction Group, Supreme Court, No 2010-CC-2608 (7/1/11) See also Whitley v State, Supreme Court, No. 2011-CC-0040 (7/11/11) (although a plaintiff must serve multiple entities/persons under R.S. 39:1538(4), which applies to tort actions against the state and its agencies, that statutory provision does not require that plaintiff make or request service within a certain period or provide for dismissal.)

Summary Judgment

In Meaux v Wendy's International, Inc., on rehearing the Supreme Court reverses the trial court's summary judgment, finding that genuine issues of material fact exist. The Court observes that any additional statements in the trial court opinion discussing whether plaintiff could recover under certain theories of law and which are not essential to the judgment are purely *obiter dicta* and not binding on the district court on remand. No. 2010-C-2613 (7/1/11)

Torts; Vicarious Liability

The mere fact that a contractor does not possess a contractor's license at the time of an accident is not itself sufficient to make a landowner independently liable under the tort of negligent hiring. Certified Cleaning & Restoration, Inc. v Lafayette Ins. Co., Fifth (La.) Circuit, No.10-CA-948 (6/14/11)

Worker Compensation; Subrogation

The worker compensation carrier is not entitled to the amount of its credit in the injured worker's settlement with a third party which represents the loss of consortium for the injured claimant's spouse. Such part of the settlement is not owed to the injured claimant and is not related to worker compensation in any way. Kenly v Fuller, Second Circuit, No. 46,398-CA (7/13/11)

MARITIME MATTERS

Jurisdiction: Worker Compensation: The state is not immune from a claim brought by a state-employed seaman under the Jones Act. Such a claim is included in the state consent to suit through article XII, Sec.10, and is not prohibited under the LHWCA. Fulmer v State, Supreme Court, No. 2010-C-2779 (7/1/11)

Jurisdiction; Torts; Admiralty

See Breaux v St. Charles Gaming Company, Inc., Key Developments, supra.