



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2012:12

December 1, 2012

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UPCOMING MEETINGS

Dec. 6, 2012	Associate Skills Set Seminar #7 The Roux House @ Walk-On's, New Orleans	2.0*#
Dec. 7, 2012	LADC Defense Lawyers' Seminar Windsor Court Hotel, New Orleans	7.0*#
Feb. 1-2, 2013	North Louisiana Defense Lawyers' Seminar, Petroleum Club, Shreveport	10.0*#
Feb. 10-14, 2013	LADC Winter Meeting, Beaver Creek, CO	10.0*#
April 14-19, 2013	LADC 2013 Annual Meeting, Barcelona, Spain	8.0*#

(A registration form may be downloaded or you may register online at www.ladc.org if registration is open at this time. For seminars designated "save the date" registration is not open at this time.)

* - includes one credit for professional responsibility (ethics)
- includes one credit for professionalism

BULLETIN BOARD



HAPPY HOLIDAYS!

TWO SEMINARS DURING FIRST WEEK OF DEC.: Start the holidays with CLE. There are two LADC seminars in New Orleans during the first week in December. Register online.

DUES NOTICES: You will receive your dues notice for 2013 membership soon. We sincerely hope that you enjoy and value being an LADC member and that you will renew your membership. The LADC is the third largest state defense organization in the nation, and that is because of you.

ONLINE REGISTRATION: You now can register online for LADC seminars. To register online, visit the LADC website and click the link for the seminar. You will have the option of paying by credit card or having an invoice sent to you by email. For a while, we will preserve the method of downloading a registration form

from the LADC website and mailing it in. The LADC website address is <http://www.ladc.org>.

NORTH LOUISIANA: The annual seminar will be held at the Petroleum Club Feb. 1-2. It features 10 hours of CLE in a day and a half. Speakers will be announced soon.

BEAVER CREEK: The Winter Ski Meeting is Feb. 10-14. The Beaver Creek Winter Meeting enrollment is coming along well, and we are looking forward to a fine turnout for our 30th anniversary at the Charter. We are there at a popular time (Mardi Gras and Presidents' weekend), so you are urged to book now to get the accommodation you want. There is a good chance that the Charter will sell out. Registration is now open on the LADC website.

50th ANNIVERSARY: The planning meeting to establish the LADC was held on Nov. 22, 1963. The LADC will be 50 years old in 2013. Details for the 50th Anniversary celebration will be unveiled as they are planned.

2013 LADC ANNUAL MEETING: April 14-19 in Barcelona. Our 2013 annual meeting will be in Barcelona, Spain. This wonderful capital city of Catalonia is a great assembly of culture (Picasso, Miro and Dali), Architecture (Gaudi and the Modernistas), history (the Gothic Quarter), fine cuisine (the Adria Brothers) and fine local wines. The good news is that from our world-class hotel Palace hotel, we can walk to much of the cuisine, history and magnificent architecture of the city. Barcelona promises to an interesting, informative and fascinating cultural experience. The brochure is on-line at www.ladc.org. It's time to sign up to be assured a place.

“CALLING ALL LAWYERS!!!”: Your LADC has recently instituted a Pro Bono Committee. We are happy to announce our first initiative – “Calling All Lawyers!!!” – a pilot program in conjunction with the Louisiana Civil Justice Center (“LCJC”). We need your help to make it a success. The LCJC receives numerous calls from people from around the state simply looking for guidance on a number of legal issues. That's where we come in! For those individuals wishing to speak with a lawyer, the LCJC staff will obtain their contact information and the nature of their inquiry. That information will be provided to a volunteer lawyer who will call the “clients” to discuss their issue. We, as volunteer lawyers, will accept a 2 hour shift during which time we will attempt to assist between 5–8 “clients.” Don't worry – we will be providing our volunteers with information regarding frequently asked questions and contact numbers for various agencies to provide to the clients. Initially, the 2 hour slots will be from 7 a.m. to 9 a.m. on Tuesdays and 4 p.m. to 6 p.m. on Thursdays. We will not be taking on the clients' cases, so the volunteer's involvement will be limited to the 2 hour session. Once we have assisted the client, we will provide a brief report to the LCJC advising of the advice given. For more information or to volunteer, please contact Will Montz: wmontz@ln-law.com; 337-237-7000.

NEW MEMBERS

Patrick Cole, Shreveport
J. Gregg Collins, New Orleans
Vickie Davis, Columbia, MO
Marcus Edwards, Shreveport

Megan Reaux, Lafayette
Lee Rudin, New Orleans

KEY DEVELOPMENTS

Insurance; Penalties

Although he was apprised that financial information for his proof of claim for partial or residual disability was crucial to the assessment of his entitlement to benefits, plaintiff knowingly and intentionally failed to comply over the years with insurer's good faith efforts to resolve the disability claim. Held, insurer's refusal to pay benefits prior to receipt of insured's economic information was not arbitrary, capricious, or without probable cause under R.S. 22:1821. Hawkins v UNUM Life Insurance Company of America, Supreme Court, No. 2012-C-1490, 99 So 3d 24 (10/12/12)

Interest; Judicial Interest

The judicial interest rate for the calendar year 2013 is 4.0 per cent per annum.

Judges

The Supreme Court, with three justices recusing and being replaced by the three chief judges of the First, Second and Third Circuits, rules that as between Justice Johnson and Justice Victory, Justice Johnson is presently most senior for the purpose of succeeding to the office of chief justice. In Re Office of Chief Justice, No. 2012-0-1342 (10/16/12)

Jury Trials

A public body's resolution waiving the prohibition against jury trials in suits against the public body need not be passed by the public body prior to the plaintiff filing suit; Beauclaire v Greenhouse, 922 So 2d 501 (La. 2006), simply requires each party to have an equal opportunity to request a jury trial. Marcile v Dauzat, Supreme Court, No. 11-CC-1509 (10/16/12) (Knoll, J, concurs in the result)

Worker Compensation

There is no requirement under R.S. 23:1226 that a vocational counselor must agree to certain conditions prior to providing the services. A hearing officer errs in requiring a counselor to comply with the so-called Crain Brothers (842 So 2d 523) conditions (drafted by claimant's counsel) before the counselor could continue to provide services to the claimant, and the hearing officer erred by imposing those conditions ostensibly as prophylactic measures without an evidentiary showing that any of the imposed conditions were reasonably necessary to resolve or rectify a "dispute...concerning the work of the vocational counselor" as provided by R.S. 23:1226(B)(3)(a). Hargrave v State, Supreme Court, No. 2012-C-0341 (10/16/12) (Knoll, J, additionally concurs with reasons)

Wrongful Death

CC Article 198 (action to establish paternity must be instituted within one year from date of death of child) is applicable to actions under CC articles 2315.1 and 2315.2. However, where the putative father has not timely filed an avowal action but files his wrongful death and survival petition asserting his paternity within the preemptive period of Article 198 and his petition contains sufficient material facts to state an avowal action, a court may grant him a judgment of paternity where the petition provides the defendant fair notice of the issue of paternity and plaintiff proves he is entitled to such remedy, Udomeh v Joseph, Supreme Court, No. 2011-C-2839 (10/26/12) (Kimball, CJ, and Guidry and Clark, JJ, dissent)

OTHER SIGNIFICANT DEVELOPMENTS

Appeals

A party may not assert the applicability of prior law (from a different state) for the first time on appeal. “We do not consider contentions raised for the first time in this court which were not pleaded in the court below and which the district court has not addressed.” Brown v Almanza, Fifth (La.) Circuit, No. 12-CA-165 (10/16/12)

Class Actions

The Fifth (La.) Circuit has rejected a class action and sub classes where as many as 240 patients claimed negligence in the operation of a fertility clinic, in Hebert v Ochsner Fertility Clinic, No.12-CA-239 (10/16/12)

Damages

Back: \$17,000 in general damages for youth suffering soft tissue injury resolving in 8 months. Martin v Walker, Second Circuit, No. 47,483-CA (10/10/12)

Damages: Punitive Damages

The U.S. Eighth Circuit has ruled that although beatings to two church followers administered through the requests of a religious leader were deemed “reprehensible,” a 10 to 1 ratio between the punitive damage award and the multimillion dollar compensatory damage award was invalid. The court concluded that although a 10:1 ratio between punitive damage awards and compensatory damage awards may be constitutionally valid when the compensatory award is small, it is improper where the compensatory damage awards were \$3 million each. Given the large compensatory award, court held that punitive to compensatory should not exceed 4:1 ratio. Ondrisek v Hoffman, 698 F 3d 1020 (2012)

JNOV

The standard for granting or denying a JNOV is the same as that for a directed verdict – whether reasonable minds could differ. Ambrose v Walt Disney Parks and Resorts, LLC, Fourth Circuit,

No. 2012-CA-0489 (10/31/12)

Jurisdiction Over the Person

The Third Circuit has ruled that a Louisiana court does not have jurisdiction over the person in two separate cases: (1) against Florida vacation property which advertised on the internet and whose Louisiana guest's property allegedly was stolen by property employee; guest knew property's telephone number "by heart," called toll-free number to make reservation, and only used website to look at potential rooms, in Hensgens v Pelican Beach Resort, No. CA 12-268 (10/10/12), and (2) against North Carolina boat seller who did not do any business in Louisiana and listed boat on internet which was accessible anywhere in the world, in suit by Louisiana buyer where all other parts of transaction, including sale and delivery, occurred in North Carolina, in Canon v Towns, No. CA 12-243 (10/3/12)

Jury Trials

In order to preserve an objection to a jury charge for appeal, a party must specifically object at trial and must state reasons for the objection; a general objection is insufficient. The rule requiring specific objection to jury instructions also applies to jury interrogatories. Ambrose v Walt Disney Parks and Resorts, LLC, Fourth Circuit, No. 2012-CA-0489 (10/31/12)

Medical Malpractice

Expert was identified as an anesthesiologist licensed in California but nothing in his affidavit indicated he was qualified to address the proper standard of care required of a Louisiana surgeon performing a certain procedure. He did not opine that it was a breach of care for doctor to allow a Certified Registered Nurse Anesthesiologist to place a bougie or that a doctor had a duty to properly supervise the placement by the CRNA. Held, expert's testimony failed to establish the applicable standard of care and whether the standard was breached by defendant doctor. Battaglia v Chalmette Medical Center, Inc., Fourth Circuit, No. 2012-CA-0339 (10/17/12) (Bonin, J, concurs in the result)

Negligence

Hired security guard who was carrying out his duty of protecting the area that posed the most risk – the interior of a bingo hall where money was changing hands -- did not have a duty to protect from carjacking late arrivals to the bingo hall. Thomas v Eagle Properties of Alexandria, Third Circuit, No. CA 12-297 (10/17/12)

The duty of the custodian of a pipeline to maintain it in such a condition that a person exercising reasonable care would not be harmed does not extend to a plaintiff who was not exercising reasonable care but riding a four wheeler on the levee in violation of the law with a driver who had ingested alcohol and narcotics. "The custodian cannot be expected to maintain the pipeline to protect against such reckless behavior." Alexander v Parish of St. John the Baptist, Fifth (La.) Circuit, No. 12-CA-173 (10/16/12)

Plaintiff's suit for injury against casino when a swivel chair allegedly moved unexpectedly is dismissed where "there is no evidence in this case that the swivel chair rolled out from under Mr. Smith; the chair simply swiveled. Nor is there evidence of any prior incidents involving the swivel chairs at the Casino." Smith v The Casino New Orleans Casino, Fourth Circuit, No. 2012-CA-0292 (10/3/12)

Agreement between franchisor and franchisee primarily insured the uniformity and standardization of products and services offered in a franchise restaurant, but nothing in the agreement affected franchisee's control of the daily operations within the restaurant. Held, franchisor is not liable to customer for failing to provide safeguards against contaminated food—alleged tip of human finger in salad. Chambers-Johnson v Applebee's Restaurant, Fifth (La.) Circuit, No. 12-CA-98 (10/11/12)

Negligence; Causation

The breach of duty by a pool hall not to sell alcohol to underage persons does not extend to the conduct of a person who would put his cousin, who was drunk, passed out and had vomited on himself, in the back bed of his pickup truck, lock the tailgate of the truck and allow this inebriated person to be driven under those conditions for some four miles before he either jumped or fell out of the bed of the truck, as a result of which he was run over by a hit-and-run driver and died. Kulka v Shag II, Third Circuit, No. CA 12-398 (10/24/12)

Parties

The peremptory exception of no right of action is a procedural device to challenge whether a plaintiff is the proper party to file an action, not whether a defendant is the proper party against whom an action can be filed. Carter v Steak House Steaks, Inc., Third Circuit, No. CA 12-394 (10/3/12)

Prescription

Knowledge that a vehicle spontaneously catches on fire and the driver's own belief that the fire was caused by an engine malfunction commences the running of prescription on a claim against the vehicle's product manufacturer and leads to the conclusion that contra non does not apply. American Zurich Insurance Co. v Caterpillar, Inc., Third Circuit, No. CA 12-270 (10/3/12)

Summary Judgment

A trial court may hear the re-urging of a motion for summary judgment but may grant the reurged motion only if the movant has supplemented the record with meaningful additions which clearly establish that there is no longer any issue of material fact to be determined by a trial on the merits. Alexander v Parish of St. John the Baptist, Fifth (La) Circuit, No.12-CA-173 (10/16/12)

Torts; Immunity; Recreational Lands

The purpose of the property where the subject drain was located was for commercial activity to facilitate landowner's sugarcane farming operations. Prior to the accident in question, property owner knew that the general public traveled on the road at issue and did nothing to stop the recreational use of the property as long as it did not interfere with the sugarcane farming operations, and landowner did not request or receive any compensation for the recreational use of the property. There was no evidence that victim was on the property for anything other than a recreational purpose at the time of the accident. Held, the “recreational purposes” immunity provided by R.S. 9:2795 (A)(3) applies. Fournerat v Farm Bureau Insurance Co., First Circuit, No. 2011 CA 1344 (9/21/12) (Kuhn, J, concurs)

Witnesses; Experts

An expert may provide testimony based on information obtained from others and the character of the evidence upon which an expert bases his opinion affects only the weight to be afforded to the expert's conclusion. Lafayette City Parish Consolidated Government v Person, Supreme Court, No. 2012-C-0307 (10/16/12)

Worker Compensation

Defendant may have reasonably controverted claimant's claim for treatment of his mental illness immediately following his accident but there came a time when the evidence was overwhelming that the disorder was related to the accident, making defendant's controversion of the claim unreasonable; therefore, defendant acted arbitrarily and without probable cause when it disallowed payments for treatment of the mental illness. Janneck v LWCC, Fourth Circuit, No. 2012-CA-0316 (10/17/12)

Rejection of the employee's application for an available job is not an impediment to proving the employee's earning capacity for SEBs. Leonards v Summit Claims, Third Circuit, No. WCA 12-255 (10/03/12)

A physical therapist is not considered a physician but falls under the definition of medical practitioner. Since R.S. 23:1121(B)(1) grants the employee the right to choose the treating physician and does not grant the employee the right to choose a medical practitioner, employee has no right to select a physical therapist. Miller v Christus St. Patrick Hospital, Third Circuit, No. WCA 12-370 (10/24/12)

Once the employer has proven that the employee was intoxicated, the burden of proof shifts to the employee to prove that the intoxication was not a contributing cause of the accident. If he does so, the intoxication defense of the employer is defeated. Spence v Excelsior Endeavors & Development, Inc., Fourth Circuit, No. 2012-CA-0616 (10/17/12)

Employee's unreasonable refusal to submit to a medical examination is sanctionable under R.S. 23:1124 and the OWC judge does not err in suspending the employee's benefits during the time

he agreed to submit and the time it would take to schedule the next appointment with the doctor. Gee Cee Group, Inc. v Thomas, Fourth Circuit, No. 2012-CA-0514 (10/31/12)

Writ Grants of Interest

The Supreme Court has granted writs in a case involving the constitutionality of statutes imposing penalties (one quarter's salary) upon judges who failed to comply with statutes governing the time frame for written judgments. Prejean v Barousse, 98 So 3d 822 (La. 9/28/12). Opinion below 90 So 3d 477, Third Circuit, 3/7/12.

ADMIRALTY AND MARITIME MATTERS

905(b) Actions

The vessel owner's duty of active control recognizes that although the vessel owner no longer retains the primary responsibility for safety in the work area turned over to the stevedore, no cession results as relates to equipment over which the vessel's crew retains operational control. Moreover, the vessel owner owes a duty to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter from such equipment. Viator v LeBeouf Bros. Towing, L.L.C., Fourth Circuit, No. 2012-CA-0314 (10/17/12)

Seamen

A worker who spends less than about 30 per cent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. If the defendant concedes that the work tickets do not reflect with certainty whether plaintiff's employment was land or marine based, defendant is not entitled to judgment as a matter of law on seaman's Jones Act claim. Reed v Devon Energy Production Company, L.P., Fourth Circuit, No. 2012-CA-0544 (10/17/12)