



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2013:1

January 1, 2013

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UPCOMING MEETINGS

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 NEW YEAR!



DUES NOTICES: Dues notices were mailed out on December 1st. 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. If you have not received a dues notice please contact the LADC office at 225-928-7599 or by email at becky@ladc.org.

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 and topics include Ethics and Professionalism (Prof. Dane Ciolino), Recent Developments in Louisiana Law (Profs. John Church and Bill Corbett), Judges' Panels, and more. Register online at the LADC website.

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 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.

LSBA SIXTH ANNUAL CONCLAVE ON DIVERSITY IN THE LEGAL PROFESSION: The LSBA will host its Sixth Annual Conclave on Diversity in the Legal Profession on March 8, 2013, at the Renaissance Hotel in Baton Rouge, Louisiana. Morris Dees (Founder, Chief Trial Attorney, Southern Poverty Law Center) will serve as the keynote speaker during lunch, and Verna Myers (Verna Myers Consulting Group L.L.C.) will facilitate the morning inclusion workshop. The LADC is a sponsor of the conclave.

“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

Elizabeth Aycock, Shreveport
Jeffrey Clayman, New Orleans
Michael Noonan, New Orleans
Magali Puente Martin, New Orleans
Lauren Masur, New Orleans
Dawei Zhang, New Orleans
Robert Bonnaffons, New Orleans
Katherine Baker, Shreveport

KEY DEVELOPMENTS

Insurance

An insurance agent's mere negligence (depositing clients' insurance coverage requests into the regular mail and then informing clients that their requests would be acted upon) in ensuring that its clients' requests for policy changes were communicated to their insurer did not rise to the level of the "special circumstances" necessary for an award of general damages for mental anguish to the client. Prest v Louisiana Citizens Property Insurance Corporation, Supreme Court, No. 2012-C-0513 (12/4/12) (Victory and Guidry, JJ, dissent in part)

Medical Malpractice; Prescription

The statutory 90 day grace period in which prescription is suspended in a medical malpractice case begins to run when the plaintiff's medical malpractice complaint is dismissed for failure to appoint an attorney-chairman, and not from the date the plaintiff is notified that his complaint has been dismissed for failure to appoint an attorney-chairman. Turner v Willis Knighton Medical Center, Supreme Court, No. 12-C-0703 (12/4/12)

Offer of Judgment

The Third Circuit, following Utility Automation 2000, Inc. v Choctawhatchee Elec. Co-op, Inc., 298 F 3d 1238 (11th Cir. 2002), rules that any ambiguity in the terms of an offer of judgment must be resolved against its drafter. The court refuses to follow the Louisiana First Circuit (Crawford v United Services Auto Assn., 899 So 2d 668 (2005)). Abushanab v St. Charles Gaming Co., Inc., No. CA 12-155 (11/7/12) (five judge court; Ezell and Keaty, JJ, dissenting in part)

Prescription

The Supreme Court rules that (1) the filing of an individual lawsuit after a ruling on class certification does not operate as an “opt out” of a class action and a forfeiture of the benefits of suspension of prescription provided in CCP Article 596, (2) but the provisions of Article 596 do not extend to suspend prescription on claims asserted in a putative class action filed in federal court. Quinn v Louisiana Citizens Property Insurance Corp., No. 2012-CC-0152 (11/2/12) (Victory, J, dissents in part)

The Court also rules that a member of the putative class is entitled to the suspension of the prescription provided in CCP Article 596 when an independent individual lawsuit is filed prior to the ruling on the class certification issue. Duckworth v Louisiana Farm Bureau Mutual Ins. Co., No. 2011-C-2835 (11/2/12) (Victory, J, dissenting)

The Third Circuit concludes that the filing of suit against a fictitious defendant (in this case ABC Insurance Company) does not interrupt prescription against the actual defendant (in this case, the sheriff). The court also concludes that subsequent amendment to add the sheriff does not relate back to avoid prescription under CCP Article 1153; that amendment adds a defendant but does not create a substitute defendant. Benson v ABC Insurance Co., No. CW 12-385 (11/7/12). The same court also rules that *contra non* extends prescription where the plaintiff is not initially certain of the true identity of the tortfeasor (a burglar), and did not have sufficient information until arrests were made. Le v The Bradford Group, LLC, No. CA 12-439 (11/7/12) (Pickett, J, concurring)

Torts; Automobile Dealers

R.S. 32:851 does not impose a duty upon auto dealers which extends to third parties injured in automobile accidents to ensure that the dealer's customers abide by certain automobile requirements, such as requiring a customer to execute an affidavit attesting to the customer's maintenance of vehicle liability insurance. Hodges v Taylor, Supreme Court, No. 12-C-1581 (11/2/12)

OTHER SIGNIFICANT DEVELOPMENTS

Appeals

Even if there are no underlying related issues, CCP Article 2123(B) allows all parties an extended period of time in which to appeal when one party files a motion for new trial. State v Triangle Property, LLC, Third Circuit, No. CA 12-564 (11/7/12)

Comparative Negligence

40% to plaintiff driving at unsafe speed in main travel lane of parking lot to clock in, and 60% to defendant who as she exited was not following the parking lot lines or accepted parking lot discipline. McKinney v Cruz, Second Circuit, No. 47,224-CA (11/14/12)

Contracts

Louisiana courts recognize a claim for tortious interference with business relations, but to succeed with such a claim, the plaintiff must show that defendant acted with actual malice. This type of claim is in addition to any claim for tortious interference with a contractual relationship. Page v Benson, Third Circuit, No. CA 12-244 (11/7/12)

Damages

Arm: \$130,000 in general damages to 63 year old for additional suffering from malpractice following earlier injury, in Collins v National Healthcare of Leesville, Inc., Third Circuit, No. CA 12-502 (11/7/12)

Consortium: \$50,000 to each of victim's two children (one of whom had autism) where victim (two large clocks fell from a wall display and struck her on the head) was an active mother prior to the accident but could no longer be an active and engaged mother as she was before. Savant v Hobby Lobby Stores, Inc., Third Circuit, No. CA 12-447 (11/7/12)

Leg: \$8,500 to plaintiff suffering knee contusion but who was not unable to work as a result thereof, did not require any pain management stronger than Aleve and physical therapy, and was discharged by physical therapist within almost two months of accident. McKinney v Cruz, Second Circuit, No. 47,224-CA (11/14/12)

\$400,000 to 50 year old at time of trial in general damages for dementia from exposure to chemicals; jury erred in failing to award general damages even though it awarded \$600,000 in special damages. Willis v Noble Drilling (US) Inc., Fifth (La.) Circuit, No.11-CA-598 (11/13/12)

Default Judgments

Where defendant timely files a motion for extension of time within which to answer, the trial court should not allow the plaintiff to confirm a default judgment without proof that plaintiff sent the defendant notice by certified mail of the date of entry of the preliminary default. First Bank & Trust v Bayou Land and Marine Contractors, Inc., Fifth (La.) Circuit, No. 12-CA-295 (10/30/12)

In confirmation of default in a personal injury case some type of sworn statement of the treating physician is required – either testimony (which by its nature is sworn, e.g. a deposition) or a sworn narrative report, e.g., an affidavit. CCP Article 1702(D). Mount v Hand Innovations, LLC, Fifth (La) Circuit, No.12-CA-326 (11/27/12)

Discovery

The Third Circuit affirms dismissal for failure to comply with discovery orders (CCP Article 1471); neither client nor her attorney “have taken the discovery orders of the trial court

seriously.” Chark v Thompson Health Services, Inc., No. CA 12-692 (12/5/12)

Discovery; Contempt

The Louisiana Fifth Circuit upholds punishment for constructive contempt (48 hours in jail) for litigant who failed to comply with an order compelling her to answer discovery. Short v Short, No. 12-CA-312 (11/13/12)

Exceptions

Generally, on an exception of no cause of action a court is limited to considering the petition and the documents attached thereto. An exception is recognized when evidence is introduced without objection; this expands the pleadings, at least for the purposes of the exception. St Pierre v Northrop Grumman Shipbuilding, Inc., Fourth Circuit, No. 2012-CA-0545 (10/24/12)

Insurance

Writes the Second Circuit: The policy provisions for assault and battery exclusions are sometimes similar but infrequently identical. “However, the conclusion we draw from the overwhelming majority of cases is that insurers that have assault and battery exclusions in their policies are generally dismissed from suits against their insureds arising from injuries or deaths following an assault or battery. This is true regardless of the theory of recovery put forth by the plaintiff -- whether it be negligence, intentional tort, nuisance, premises defect, or the like.” Hudson v Jager Bomb L.L.C., No. 47,501-CA (11/14/12)

Jury Trials; JNOV

A trial court can grant a JNOV only when a jury's verdict is one which reasonable people could not have rendered; if reasonable people could have arrived at the same verdict given the evidence presented to the jury a JNOV is improper. Atkins v Louisiana Mutual Medical Insurance Co., Second Circuit, No. 47,374-CA (11/7/12)

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)

Medical Malpractice

Where the defendant doctor and a medical review panel member failed to disclose their financial relationship in violation of RS 40:1299.47, the entire medical review process was tainted and the trial court erred in failing to exclude the panel's opinion from evidence. Fanguy v Lexington Insurance Co., Fifth (La.) Circuit, No. 12-CA-136 (11/13/12)

Hospitals are held to a national standard of care; the locality rule does not apply to hospitals. A hospital is liable for its employee's negligence, including doctors and nurses, under the respondeat superior doctrine. Nurses who perform medical services are subject to the same

standard of care and liability as are physicians. The nurse's duty is to exercise the degree of skill ordinarily employed, under similar circumstances, by members of the nursing or health care profession in good standing in the same community or locality, along with his or her best judgment in the application of his or her skill in the case. Crockham v Thompson, Second Circuit, No. 47,505-CA (11/14/12). Stating same principles, see also Farmer v Willis Knighton Medical Center, Second Circuit, No. 47,530-CA (11/14/12).

Negligence

Trial court was manifestly erroneous in finding school board liable for negligent supervision of students on school ground; evidence only showed that the offending student, who had no prior disciplinary history, grabbed a fellow student's ankles and flipped her over the bar of a piece of playground equipment. The incident is neither foreseeable nor preventable absent constant supervision, which is not required by the law in order for the school board to fulfill its duty to provide adequate supervision. Carter v East St. John Elementary School, Fifth (La.) Circuit, No. 12-CA-174 (11/13/12)

In a split decision, a five judge First Circuit court concludes that a food market is not liable for a "dangerous condition" – a "flipped up floor mat," in Brown v Amar Oil Company, No. 2011 CA 1631 (11/8/12) (Gaidry, J, concurs; Welch And Pettigrew, JJ, dissent).

Parties

The attorney general is vested with the constitutional and statutory authority to represent all of the departments and agencies of state government in Louisiana courts, including representing the Department of Wildlife and Fisheries in a suit to recover damages to oyster bed grounds. State v Gulfport Energy Corp., Third Circuit, No. CA 12-356 (11/7/12)

Torts; Immunity

A wrongful death action cannot arise until the date of the victim's death; thus R.S. 23:1032 bars a wrongful death action against an executive officer where the death occurs after the amendment to R.S. 23:1032. Rando v Anco Insulations, Inc., 16 So 3d 1065 (La. 2009), and Bozeman v Union Carbide, 70 So 3d 169 (2d Cir. 1911), distinguished or not followed. Bougere v Northrop Grumman Systems Corp., Fifth (La.) Circuit, No.12-CA-181 (11/13/12)

Worker Compensation

WCJ erred in requiring claimant to prove that his physical work stress was "beyond unusual"; R.S. 23:1021(8)(e) requires that physical work stress from a heart related injury is compensable if "extraordinary and unusual." Noe v Basile Police Department, Third Circuit, No. WCA 12-333 (11/7/12)

A dispute between a statutory employer and a direct employer with regard to which one owes compensation benefits does not constitute a justifiable basis for withholding benefits from an injured worker. Bilquist v Custom Craft Homes Inc., Fourth Circuit, No. 2012-CA-0469

(11/7/12)

The Third Circuit sets an attorney's fee at \$200 per hour and increases lower court's award of attorney's hours from 60 to 104.8 where defendant raised every possible defense imaginable in its answer so as to preclude early resolution of the single issue in the case. "(I)t is clear to this court that the defendants intended to make it as difficult and expensive as possible for (claimant) to pursue his right to medical care." Bihm v Unit Drilling Co., No. WCA 12-569 (11/7/12)

WRIT GRANTS OF INTEREST

Broussard v State, in which First Circuit held that (1) no affidavit was required to meet the verification requirement of CCP Article 1975 where the contentions were both newly discovered evidence and judgment was contrary to the law and evidence, and (2) elevator offset of 1 and 1/2 to 3 inches above lobby floor was not unreasonably dangerous to package delivery driver. Supreme Court, No. 2012-C-1238, 2012 WL 5381527 (10/26/12) (prior report of appellate court not designated for publication)