



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2013:4

April 1, 2013

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UPCOMING MEETINGS

April 14-19, 2013	LADC 2013 Annual Meeting, Barcelona, Spain	8.0*#
May 9, 2013	Associate Skills Set #8 Seminar, Lucy's Retired Surfers Bar, New Orleans	2.0
Aug. 1-3, 2013	LADC 2013 Trial Academy, Loyola College of Law, New Orleans	21.0*#
Aug. 16, 2013	LADC 2013 Sizzlin' Summer Seminar The Roosevelt Hotel (Save the Date)	7.5*#
Aug. 16, 2013	LADC 50th Anniversary Dinner The Roosevelt Hotel, New Orleans (Save the Date)	
Dec. 13, 2013	LADC 2013 Defense Lawyers Seminar, Windsor Court, New Orleans (Save the Date)	7.0*#

(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



50th ANNIVERSARY: The planning meeting to establish the LADC was held on Nov. 22, 1963. The LADC will be 50 years old in 2013. A special dinner will be held to celebrate the 50th Anniversary on Friday evening, Aug. 16, after the Sizzlin' Summer Seminar. The dinner will be in the Waldorf Astoria Ballroom of the Roosevelt Hotel. Invitations and reservation forms will be sent to all LADC members soon. Please mark your calendar, make reservations, and plan to join us for this celebratory dinner.

2013 LADC ANNUAL MEETING: April 14-19 in Barcelona. Last chance to sign up for the 2013 annual meeting in Barcelona, Spain. The 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 Palace Hotel, we can walk to much of the cuisine, history and magnificent architecture of the city. Barcelona promises to be 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.

LADC FACEBOOK PAGE: Launched the last week of March at www.facebook.com/ladc.org.

CONDOLENCES: The Honorable Frank J. Polozola, United States District Judge for the Middle District of Louisiana, passed away on February 24, 2013. The organization expresses its members' sincere sympathy to the family and friends of Judge Polozola.

NEW MEMBERS

Kelly Dugas, Metairie
G. Marty Johnson, Shreveport

KEY DEVELOPMENTS

Compromise

In Chiasson v Progressive Security Insurance Co., the Fifth (La.) Circuit observes that a letter signed by a plaintiff's attorney which indicates he has specific authority to settle a case may satisfy the writing requirement to effect a valid compromise under CC Art. 3072. CC Art. 2997 provides that "[a]uthority also must be given expressly to: ... [e]nter into a compromise or refer a matter to arbitration." No. 12-CA-532 (2/21/13)

Evidence; Depositions

A party's own self-serving and false deposition statement that he was receiving some sort of medical treatment does not satisfy the requirement of his "unavailability" for the purposes of using his deposition at trial. The defendant's own statements about his inability to leave a post-drug-treatment transitional program (which was voluntary and served no medical purpose) were insufficient to establish unavailability. Cawthorne v Fogleman, Third Circuit, No. CA 12-870 (2/6/13)

Medical Malpractice

The Medical Malpractice Act's limitation on recovery (the "caps" of \$100,000/\$500,000) are constitutional. "In Oliver (v Magnolia Clinic, 85 So 3d 39 (2012)), the supreme court 'maintained the constitutionality of the statute without qualification.'" "Both Butler (v. Flint Goodrich

Hospital, 607 So 2d 571 (1992)) and Oliver are broad constitutional statements by the supreme court which included evaluation of a variety of policy considerations attendant to the Medical Malpractice Act.” The Third Circuit stated that as an intermediate appellate court, it would not deviate from the Supreme Court’s holding. Arrington v ER Physician Group, Inc., Third Circuit, No. CA 12-995 (2/6/13)

Act 759 of 2012 makes significant changes in claims of medical informed consent, including: (1) the formation of the Louisiana Medical Disclosure Panel (RS 40:1299.39.6) in the Department of Health and Hospitals; and (2) making compliance with the panel disclosure or non-disclosure rules a rebuttable presumption of either adequate disclosure or negligent failure to conform to the duty to disclose. Effective 6/12/12.

Prescription

Notice to the defendant within the prescriptive period is an essential element when an untimely plaintiff seeks to defeat prescription based on another plaintiff's timely filed suit (in this case, plaintiff's brother, in suit for death of their father). Defendant was not named in the first suit and did not know about second brother's existence within a year of decedent's death. Calbert v Batiste, Third Circuit, No. CA 12-852 (2/6/13)

The essence of acknowledgment sufficient to interrupt prescription is not its form but the debtor's recognition of the creditor's right to the debt claimed by him. Sufficient acknowledgment may be made verbally, in writing, by partial payment or payment of interest, by pledge and in other ways. In this case, the email correspondence indicated that more information was needed before authority could be sought and settlement negotiations could begin. Even if there were a settlement offer, however, a settlement offer does not evidence an acknowledgment unless the offer is tendered unconditionally. Safeco Insurance Co. v Norcold, Inc., First Circuit, No. 2012 CA 0755 (2/25/13)

Vicarious Liability; LLCs

In Ogea v Merritt, the Third Circuit emphasizes that the personal liability of a member of an LLC for the debts, obligations and liabilities of the LLC is limited to those resulting from the member's personal actions, whether the member be a professional or non-professional. No. CA 12-1028 (2/6/13)

OTHER SIGNIFICANT DEVELOPMENTS

Abandonment

A motion to substitute counsel of record is not a step in the prosecution or defense of an action so as to avoid dismissal for abandonment. Gambino v Standard Fire Insurance Co., Fifth (La.) Circuit, No. 12-CA-474 (2/21/13)

Attorneys

In Waste Management of Louisiana LLC v Penn-America Ins. Co., the Third Circuit reviewed the facts and concludes that defendant attorney's continued representation of client was not a clear conflict of interest for which he should have withdrawn from representation. Defendant attorney voluntarily kept defendant's separate, independent counsel apprised of the efforts of his representation; attorney clearly relied on the silence and acquiescence of client who did not object to defendant attorney's representation of the insurer of defendant's co-defendant-subcontractor. No. CA 12-1033 (2/6/13)

Compromise

CCP article 4392 states that a court shall order the filing of a final account upon application of the former minor after the expiration of the tutorship. Execution of a document which was titled and intended to release the surety is not a compromise and does not preclude minor from bringing claim against tutor. Farris v Kolb, Second Circuit, No, 47,886-CA (2/27/13)

Damages

Back: \$47,462 in general damages; court held plaintiff sustained ruptured disc, and plaintiff was still experiencing pain about 27 months after accident. Assuming he sustained a soft tissue injury without a disc injury diagnosis, an award of \$67,500 (\$2,500 per month) could have been in court's discretion. Sanchez v Dubuc, Fifth (La.) Circuit, No. 12-CA-526 (2/21/13)

Leg: \$65,000 in general damages and \$24,183 in special damages to patient who suffered fractured tibia during her transfer from wheelchair to bed, in In Re Brown, Fourth Circuit, No. 2011-CA-1824 (2/20/13)

Damages; Restitution

C Crim P Art. 883.2 requires a district court to order restitution to the victim as part of the defendant's sentence when the victim suffers a pecuniary loss. If the record does not establish that defendant is truly indigent, criminal court does not abuse its discretion in setting the amount as the amount of damages awarded by the civil court, although that civil court judgment subsequently is discharged in bankruptcy. State v Meredith, Fourth Circuit, No. 2012-KA-0885 (2/20/13)

Discovery; Penalties

Dismissal for failure to comply with discovery is generally reserved for those cases in which the client, as well as the attorney, is at fault. Where the record does not contain sufficient evidence of client's willful disobedience, bad faith or fault, the trial court abuses its discretion in applying the "draconian penalty that should be applied only in extreme circumstances." Anderson v Tangipahoa Parish School Board, First Circuit, No. 2012 CA 0996 (2/22/13)

Exceptions

No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action. Where the trial court considers facts outside the face of the pleadings and allows defendant to penetrate the allegations of the petition, the procedure is a function of a motion for summary judgment, not an exception of no cause of action. Koch v Covenant House New Orleans, Fourth Circuit, No. 2012-CA-0965 (2/6/13)

Forum Selection

Reference on invoice to website is small, but in boldface print, and forum selection clause on website is in plain view. The two parties had contracted on similar matters for a quarter of a century. Where this was “not a first-time contract between a multinational corporation and an unsophisticated hayseed, [and] [t]here is no fine print; nothing was hidden, and there is no unequal bargaining position,” the clause is enforceable. Fidelak v Holmes European Motors, LLC, Second Circuit, No. 47,915-CA (2/27/13)

Insurance

Where insurance provided homeowner's policy treated as an “insured” any other person under the age of 21 who is in the care of the named insured, a minor child who is living with the named insured under a foster parent agreement with the state Department of Social Services is an insured under the foster parent's policy for injuries sustained while in the foster parent's custody. As an insured, his bodily injury came within a policy exclusion. Schafer v Summers, First Circuit, No. 2012 CA 0730 (2/15/13)

Insurance; UM Coverage

The UM form was otherwise identical to that of the insurance commissioner except the header with language advising of the prohibition against altering or modifying the form was absent, and there was no material discrepancy as to the named insured on the policy and the UM form. Held, the form satisfies the Duncan requirements for valid waiver of UM/UIM coverage. Scarborough v Randle, Third Circuit, No. CA 12-1061 (2/6/13)

Judgments; Default Judgment

Failure of the defendant to account for his non-appearance is not fatal to a claim to overturn a default judgment. Cameron v Roberts, Second Circuit, No. 47,789-CA (2/27/13)

Medical Malpractice

Hospitals are held to a national standard of care; the locality rule does not apply to hospitals. Nurses who perform medical services are subject to the same standards 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 to the case. Richardson v Christus Schumpert Health System, Second Circuit, No. 47,776 -CA (2/27/13)

Negligence

In a trip and fall case the duty is not solely with the landowner. The pedestrian has a duty to see that which should be seen and is bound to observe whether the pathway is clear. Where pedestrian tripped and fell over exposed bolts when leaving a designated bus stop but she knew for several months that the bolts were protruding from the concrete and she walked near the bolts without watching where she was stepping and never expressed concern about the existence of the bolts to the owner contractor or custodian of the bus stop, summary judgment dismissing her claim is proper. Babino v Jefferson Transit, Fifth (La.) Circuit, No. 12-CA-468 (2/21/13)

Offer of Judgment

In Hendrick v Patterson, Second Circuit, No. 47,668 CA (1/16/13), the appellate court chooses not to follow the ruling in Abushanab v St. Charles Gaming Co., Inc., 103 So 3d 1197 (3rd Cir. 2012), that ambiguities in an offer of judgment are to be construed against the offeror and that extrinsic evidence is not to be considered in determining the offer.

Louisiana's rule on offer of judgment (CCP Art. 970) is significantly different from the federal rule (Rule 68). For example, Article 970 specifies that an offer of judgment is not an admission of liability; Rule 68 does not contain such language. Article 970 states that an offer of judgment shall specify whether the offer is inclusive or exclusive of costs, interest, attorney fees and any other amount which may be awarded pursuant to statute or rule; Rule 68 requires that all offers of judgment include "costs then accrued," i.e. all costs that are properly awardable in an action. "Because Louisiana's rule on offer of judgment is significantly different from Rule 68, as applied to this case, we find that federal jurisprudence regarding the award of attorney fees when an offer of judgment is accepted is not applicable here." Hendrick v Patterson, supra

Worker Compensation

Where employee's claim for benefits in Louisiana is completely conditional upon his having sustained his alleged injury while working in North Dakota, and the North Dakota administrative tribunal has already ruled on the fact and found that employee did not sustain such an injury, the Louisiana OWC is required to dismiss the claim; it is compelled by full faith and credit to give preclusive effect to the fact findings of the North Dakota tribunal. Early v R and J Technical Services, Inc., Third Circuit, No. WCA 12-686 (2/13/13)

Worker Compensation; Fees

The amount of medical bills to be paid totaled almost \$11,000, and claimant's attorney stated she had spent "a heck of a lot of time on this," but there was nothing in the record indicating the amount of time she spent working to enforce payment of the medical expenses after the settlement. Held, court must remand to determine reasonable fee. Simons v Brand Staffing Services, Inc.

Fifth (La.) Circuit, No. 12-CA-588 (2/21/13)

Worker Compensation; Indemnity

A statutory employer's fault, if any, does not create its liability for compensation benefits, and does not preclude its right of indemnity granted by R.S. 23:1061.B and 23:1063 to a statutory employer against the primary employer for liability to an injured employee. Westgate LLC v Eaton Corporation, First Circuit, No. 2012 CA 1098 (2/15/13)

Worker Compensation; Penalties

LIGA cannot be assessed with penalties and attorney fees for purposes of worker compensation statutes because penalties are not “covered claims” under the Louisiana Insurance Guaranty Law, R.S. 22:2051. Hollingsworth v Steven Garr Logging, Second Circuit, No. 47,884-WCA (2/27/13)

Worker Compensation; Prescription

After a work-related injury, employer allowed claimant machinist to return to work in a modified duty position. Thereafter, claimant became a salaried employee, holding the position of supervisor, working more than 40 hours a week on average and earning significantly more than he had as a machinist or in the modified duty position. Claimant contended that the prescriptive period was interrupted because the employer paid him wages in lieu of compensation. “Wages in lieu of compensation are deemed applicable when services rendered by a disabled employee after an accident are not commensurate with the wages paid and the employee does not actually earn all of his pay.” The evidence did not support that claimant was paid wages that he did not earn. Held, claimant's compensation wages are prescribed; the prescription was not interrupted by the payment of wages in lieu of compensation. Dupre v Surbo Tubular Services, Inc., First Circuit, No. 2012 CA 1131 (2/15/13)

Worker Compensation; Res Judicata

Res judicata does not bar re-litigation of claims subject to the OWC's modification jurisdiction, as set forth in R.S. 23:1310.8(A) and (B). This modification power exists for the purpose of modifying awards due to a change in the worker's condition. Res judicata thus cannot preclude litigation seeking a change in the amount of compensation benefits based upon a change in disability. Gabriel v Lafourche Parish Water District, First Circuit, No. 2012 CA 0797 (2/25/13)

MARITIME MATTERS

Protection and indemnity insurance is ocean marine insurance and does not cover damages caused by failure to properly maintain hurricane protection levees. Burmaster v Plaquemines Parish Government, Fourth Circuit, No. 2012-CA-1091 (2/20/13)