



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2013:8

August 1, 2013

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UPCOMING MEETINGS

Aug. 1-3, 2013	LADC 2013 Trial Academy, Loyola College of Law, New Orleans	21.25*#
Aug. 16, 2013	LADC 2013 Sizzlin' Summer Seminar The Roosevelt Hotel, New Orleans	7.5*#
Aug. 16, 2013	LADC 50th Anniversary Dinner The Roosevelt Hotel, New Orleans (deadline to RSVP is 8/1/13)	
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 is 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. This will be a very special occasion. Please mark your calendar and plan to join us for this celebratory dinner. We have a room block for Aug. 15-17 with special rates at the hotel (\$179 for king deluxe rooms, \$209 for king superior rooms, and \$239 for king suites). You may make reservations by calling 504-335-3138 or toll free 1-800-HILTONS and requesting the group rate for Louisiana Association of Defense Counsel. You also may make reservations at the following website: https://secure3.hilton.com/en_US/wa/reservation/book.htm?execution=e1s3.

The room block expired on July 16, but if any rooms are available our discounted room rate will be honored (please note, however that certain room categories have sold out).

INVITATIONS: Invitations and response cards for the 50th Anniversary dinner were mailed out to all members in mid-July. **The deadline for responses is August 1.** Because we must place orders, no reservations can be accepted after that date. We hope you will join us for this special occasion.

2013 LADC SIZZLIN' SUMMER SEMINAR: It is Friday, Aug. 16 at a new venue—the Roosevelt Hotel. Speakers and topics include a federal judges panel with Chief Judge Brian Jackson and Judges Elizabeth Foote and Jane Triche Milazzo; Mike Rubin on ethics of social media usage for lawyers; Dr. John Thompson on stress and depression in the legal profession; John Kouris (DRI Executive Director), Sheryl Willert (DRI Past President), Marc Williams (DRI Past President), and Mark Neal (DRI Southwest Regional Director) on the changing defense practice; Shelby McKenzie on insurance law update; and Tom Galligan (President of Colby-Sawyer College), John Church, and Bill Corbett on Louisiana tort law and the influence of Professor Frank Maraist's work on tort law. Other speakers and topics will be announced as scheduled. Registration is open on the LADC website.

2013 LADC TRIAL ACADEMY: There is no better quality or bargain in trial practice training than the LADC's trial academy. Featuring experienced lawyers, Louisiana judges, and expert witnesses, this program provides 21 hours of instruction and CLE credit for only \$500. There is still space available and you may register online at www.ladc.org.

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

NEW MEMBERS

Henry Bellamy, New Orleans
Marjorie Breaux, Lafayette
Adrien Busekist, Baton Rouge
Scott Higgins, Lafayette
Dorothy Tarver, New Orleans

KEY DEVELOPMENTS

Insurance; Direct Actions

When an action is commenced against both the insurer and insured, the six circumstances enumerated in RS 22:1269(B)(1)(a)-(f) are not implicated regardless of whether the insured tortfeasor is thereafter dismissed. Soileau v Smith True Value and Rental Inc., Supreme Court, No. 2012-C-1711 (6/28/13) (Weimer, J, concurring; Victory, Guidry and Clark, JJ, dissenting)

Prescription; Survival Actions

The 1986 amendment adding CC Article 2315.1 classifies the delay for bringing a survival action as a prescriptive period; it governs over earlier jurisprudence holding that the delay for bringing a survival action is preemptive. Watkins v Exxon Mobil Corporation, Fourth Circuit, No. 2012-C-0477 (5/29/13)

Prescription; Medical Malpractice

A non health care provider could be a joint tortfeasor with health care providers against whom a medical malpractice complaint had been filed so that the suspension of prescription provisions of R.S. 40:1299.47(A)(2)(a) (during pendency of a timely filed medical review panel complaint) would apply to the filing of suit against the non health care provider, a physician answering service. Milbert v Answering Bureau Inc., Supreme Court, No. 2013-C-0022 (6/28/13)

OTHER SIGNIFICANT DEVELOPMENTS

Arbitration

A court's authority under Section 10(a)(4) of the Federal Arbitration Act to set aside an arbitral award where the arbitrator exceeds his authority allows a court to vacate an arbitral award only when the arbitrator strays from interpreting the contract, not when he performs his duty poorly. Oxford Health Plans LLC v Sutter, 133 US 2064 (2013)

Compromise

There is a clear meeting of the minds at mediation when the mediation ends with the execution of a document memorializing an agreement between the parties. Without evidence of duress a mediation agreement signed by the parties constitutes a legal and binding compromise. Feingerts v State Farm Mutual Automobile Insurance Co., Fourth Circuit, No. 2012-CA-1598 (6/26/13)

Correspondence setting forth terms of a settlement offer signed by the counsel's attorney indicating he had specific authority to settle a case satisfies the statutory writing requirements for a valid compromise. However attorney's communication stated he was given authority to settle plaintiff's "claim" for a certain amount. There is no binding agreement with respect to the bodily injury claim where the parties thereafter differ on whether the settlement included the entire claim or just the bodily injury claim. Davis v Garrison Property and Casualty Insurance Co., Fourth Circuit, No. 2012-CA-1673 (6/19/13)

Damages

\$50,000 in general damages (increased from \$17,000) where jury awarded the entirety of plaintiff's medical expenses, past and future, totaling \$45,000, for back injury. Ford v Bituminous Ins. Co., Third Circuit, No. CA 12-1453 (6/19/13)

\$30,000 for loss of enjoyment of life where victim could no longer assist her mother whom she cared for before the accident and needed her son's help in doing household chores and could no longer enjoy dancing and running. Clement v Citron, Third Circuit, No. CA 13-63 (6/19/13)

Damages; Consortium

\$1,000 to wife married to victim for over 30 years; although she testified that they did not experience any loss of love and affection, the injuries husband received had caused a significant change in their lifestyle; husband could not maintain yard or help with many household chores because of back pain. Smith v Escalon, Second Circuit, No. 48.129-CA (6/26/13)

0 by jury (trial judge had increased to \$25,000, saying, "you're going to award this to the kids") to wife where couple was married for only one month at time of accident and wife was employed in a long-term career that was not interrupted or impacted by her husband's injuries; jury was also likely influenced by husband's admitted physical activities and her involvement in husband's perjury. Jury was not unreasonable in awarding 0 for loss of consortium. Guillory v Progressive Ins. Co., Third Circuit, No. CA 12-1284 (7/3/13)

Insurance

A contract between the parties providing that the trust will provide coverage to an autowrecker in the event of an accident is essentially a contract of insurance. While the trust is not subject to the insurance code, it should be interpreted utilizing the general rules of contract interpretation and the jurisprudential rules specifically relating to contracts of insurance. Valencia v A & J Auto Wreckers, Inc., Fourth Circuit, No. 2010-CA-0351 (6/19/13)

"Expenses incurred" within the meaning of the term in an insurance policy is the amount invoiced and billed to plaintiff prior to any discount obtained on account of hospital's contractual agreement with plaintiff's health insurer. Hoffman v Travelers Indemnity Co. of America, First Circuit, No. 2012 CW 0725 (6/7/13) (Higginbotham, J, concurring; McClendon, J, dissenting)

Insurance; Penalties

Initial adjuster hired by insurer failed to properly adjust a substantial amount of damages and repair costs in his report (adjuster did not have the requisite knowledge to adjust the claim or simply chose not to do so.) Held, insurer was arbitrary in failing to tender an undisputed amount due within the statutory time delays; reinspection and subsequent payment was not timely made although it was within 30 days of the second adjuster's report. Aghighi v Louisiana Citizens Property Insurance Corp., Fourth Circuit, No 2012-CA-1096 (6/19/13) (five judge court; Ledet and Jenkins, JJ, dissent in part)

JNOV; New Trial

The language for the standards for a JNOV and new trial is similar, but the important distinction is that the JNOV reverses the jury's award and makes the apparent winner the loser, while a

judgment granting a new trial merely erases the jury verdict or trial court judgment and puts the parties in the positions they occupied prior to trial. Board of Supervisors v 1732 Canal Street, LLC, Fourth Circuit, No. 2012-CA-1370 (6/19/13)

Medical Malpractice

Where a consent form and its attachment meet the requirements of R.S. 40:1299.40A and the jurisprudence, the written consent is entitled to a presumption of validity. The fact that the patient merely "glanced" at the form does not defeat that presumption. Cobb v Mitchell, First Circuit, No. 2012 CA 1032 (6/27/13)

Prescription

Where the legal malpractice suit is filed more than three years after the alleged act, omission or neglect, the date of discovery is irrelevant. The fact that his lawyers were still representing him was irrelevant to the tolling of the three year peremption period. The latest one can file a legal malpractice action is three years from the date of the alleged malpractice or one year from the date of discovery of the alleged malpractice, whichever comes first. Smart v Vazquez, Fourth Circuit, No. 2012-CA-1694 (6/12/13)

Torts; Privacy

A divided panel of the US Fifth Circuit rules that a coach is entitled to qualified immunity because there is no clearly established 14th Amendment right to privacy that would bar a teacher or coach from discussing a student's private matter with her parents (in this case, the student's sexual orientation). Wyatt v Fletcher, ___ F 3d ___ (5/31/13) (Graves, J., dissenting)

Torts; Unfair Trade Practices

The Louisiana Unfair Trade Practices and Consumer Protection Act (R.S. 51:1409) applies where the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious or there is a clear showing of fraud, misrepresentation, or other unethical conduct. General allegations of unscrupulous conduct may fall within the range of the exercise of permissible business judgment or appropriate free enterprise transactions rather than the extremely narrow range of practices prohibited by the Act. Willis v Brooks, Fourth Circuit, No. 2012-CA-1674 (6/12/13) (Bonin, J, concurs)

Worker Compensation

The guidelines for seeking medical benefits contained in R.S. 23:1203.1 (rules, rights and duties upon claimant seeking reimbursement for recommended medical treatment) are substantive and do not apply retroactively in 2011 to claimant's rights acquired when she sustained a work-related injury in 1999. Church Mutual Insurance Co. v Dardar, Fourth Circuit, No. 2012-CA-0659 (6/26/13)

Writes the Fifth (La.) Circuit: "It would go against the legislatively declared policy and intent of the ...law) including R.S. 23:1209(A)(1) and (2), to find that (claimant's) claim for temporary total disability benefits had prescribed when she became temporarily totally disabled as a result of surgery for a condition related to her initial injury that the employer deemed compensable, in light of the fact that she had been receiving indemnity benefits...continuously from the date of her initial injury until the date of the surgery." Paul v Jefferson Parish Public School System, Fifth Circuit, No. 13-CA-132 (7/3/13)

Employee was not entitled to SEBs when he voluntarily left job and later became disabled. Gleason v Lafayette General Medical Center, Third Circuit, No. WCA 12-652 (7/3/13)