LOUISIANA ASSOCIATION OF DEFENSE COUNSEL

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LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2014:12 December 1, 2014

UPCOMING MEETINGS

Dec. 12	**LADC Defense Lawyers' Seminar, Windsor Court, New Orleans**	**7.0*#**
Jan. 30, 2015	**North Louisiana Seminar, Petroleum Club, Shreveport**	**7.0*#**
Feb. 16-20, 2015	**Winter Meeting and Ski Trip, Silverado Lodge Park City, Utah**	**10.0*#**
May 13-17, 2015	**Annual Meeting, Place D'Armes, Montreal**	**8.0*#**

(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

2015 MEMBERSHIP DUES: Dues renewal for 2015 will begin the first week in December. All members will receive an email with a link to the renewal payment form. Members can easily renew online and pay by check or credit card. We value you as a member of the LADC—one of the largest state defense organizations in the nation. The LADC is in its 51st year because of members like you. Thank you for renewing your membership.

DECEMBER DEFENSE LAWYERS' SEMINAR: There is still space available to register for this seminar on December 12th at the Windsor Court in New Orleans. Speakers include Justice Greg Guidry, Judge Guy Holdridge, Professor Mike Green of Wake Forest Law School, Alston Johnson, President Tom Galligan, Professor John Church, Pam Carter, Skip Philips, Mike Walsh, and others. There will be a cocktail hour with members of the Judicial College immediately following the seminar. Registration is open on the LADC website. The cost of the seminar is $350 for members and $375 for non-members. **Please note that our room block at the Windsor Court has sold out.**

NORTH LOUISIANA SEMINAR: The annual seminar returns to the Petroleum Club in Shreveport on Friday, Jan. 30 with a slight variation in format, changing to a one-day seminar. Registration is now open on the LADC website.

Montreal, May 13-17. This trip will combine our usual high-quality CLE with an equally high-quality travel experience, but at a very affordable price. Join your colleagues for four fabulous days in one of North America's finest cities—or be truly adventuresome and add a few days to travel to Quebec City on the extension. Registration is now open on the LADC website.

QUESTIONS REGARDING SEMINARS OR TRIPS: We are working with Kimberly Zibilich at Event Resources New Orleans: phone 504-208-5510; email Kimberly@eventresourcesnola.com.

NEW MEMBERS

Joshua Dara, Jr., Alexandria
James Garner, New Orleans
Charles Giordano, Metairie
Marne Jones, New Orleans
Lance Ostendorf, New Orleans
Jairo F. Sanchez, Gretna
Jameson Taylor, New Orleans

KEY DEVELOPMENTS

Judicial Interest

The rate of judicial interest for the calendar year 2015 will be 4.00%.

Maritime; Punitive Damages

The U.S. Fifth Circuit held that a seaman's recovery for unseaworthiness under the Jones Act or general maritime law is limited to pecuniary losses, not including punitive damages. The court held that the case was controlled by the Supreme Court's decision in Miles v Apex Marine Corp., 498 U.S. 19 (1990) that a seaman's recovery for an unseaworthiness claim under the Jones Act is limited to pecuniary damages. McBride v Estis Well Service, LLC, 768 F 3d 382 (5th Cir. 2014) (en banc)

Service

A chief of police has not expressly waived his right to timely service by written waiver, as required by La. R.S. 13:5107, by his earlier filing of exceptions without including his exception of insufficient citation and service of process. "The specific statutory provisions of La. R.S. 13:5107 require an express, written waiver of the 90–day service requirement in suits against political subdivisions and their employees. The Louisiana Supreme Court has held that filing pleadings does not constitute an express, written waiver for purposes of La. R.S. 13:5107." Davis v Carraway, No. 14-CA-264, 2014 WL 5462711, 2014 La. App. LEXIS 2589 (La. App. 5th Cir. 10/29/14)

Worker Compensation

Because claimant did not notify defendants of her claim for SEBs prior to filing her disputed claim, employer did not breach any duty to investigate the nature and extent of claimant's disability for purposes of her claim for SEBs. It is not enough for claimant to assume that defendants have knowledge of her demand for SEBs by the mere fact that they paid for lumbar surgery and subsequent treatment. Rather, the law provides that the injured employee has the initial burden of proving by a preponderance of the evidence that she is unable to earn wages equal to ninety percent (90%) of her pre-injury wages in order to receive SEBs. Thus, claimant is not entitled to an award of penalties and attorney's fees under La.R.S. 23:1201(F) for failure to pay SEBs. Quigley v Harbor Seafood & Oyster Bar, et al, Fifth (La.) Circuit, No. 14-CA-332, ___ WL ___, 2014 La. App. LEXIS 2486 (La. App. 5 Cir. 10/15/14)

Worker Compensation; Compromise

WCJ questioned claimant as to his understanding of the settlement as being a resolution of all matters involving the workers' compensation claim, and he indicated he did. Claimant stated that he had a twelfth grade education and was not on any medication. The negotiations took place before a mediator, and claimant's wife was present. Claimant stated that he did not wish to have counsel and that he wanted the judge to approve the settlement. There was nothing in the transcript of the hearing that indicated claimant had mental issues which would render his acquiescence in the settlement suspect. The medical records showed that claimant had cognitive problems, exhibited irritability, and had difficulty with spelling and math, but all of these symptoms were long standing, and evidently had not prevented claimant from being gainfully employed for years with employer. An oral settlement agreement was read in open court and approved by the WCJ. In regard to uncounseled settlements, La. R. S. 23:1272(C) provides that an order approving a settlement "shall not thereafter be set aside or modified except for fraud or misrepresentations made by any party." WCJ denied employer's subsequent exception of res judicata, noting that had either of the parties made her aware of claimant's mental issues, she would not have approved the oral settlement. To the extent the WCJ found the failure of employer's counsel to pursue further the claimant's mental state (because counsel did not question claimant at the hearing about mental issues) to constitute a misreperesentation the court of appeal disagreed. The employer provided the court with all information in its possession regarding claimant's mental state. Finding no fraud or misrepresentation, the court reinstated the settlement agreement. Bussalati v Sysco Food Service of New Orleans, Fifth (La.) Circuit, No. 14-CA-83, ___ WL ___, 2014 La. App. LEXIS 2482 (La. App. 5th Cir. 10/15/14)

OTHER SIGNIFICANT DEVELOPMENTS

Abandonment

A party waived the right to plead abandonment of a claim under La. R.S. 48:452.1A by attending the deposition of its own expert witness. City of Baton Rouge/Parish of East Baton Rouge v Smuggy's Corp., Inc., No. 14-CA-0134, 2014 WL 5285709, 2014 La. App. LEXIS 2507 (La. App. 1st Cir. 10/16/14)

Damages

Eye: $500 in general damages for corneal abrasion resolved in two months. Mack v Imperial Fire & Casualty Ins. Co., No. 14-CA-0597, 2014 WL 5793816, 2014 La. App. LEXIS 2693 (La. App. 1st Cir. 11/7/14)

Default Judgment

Where the record contains appropriate documentation of the claims made, the failure to include the certificate described in La. Code Civ. P. art. 1702.1(B) is not fatal to the default judgment. Sun Coast Contracting Services, Inc. v Dien's Auto Salvage, Inc., No. CA 14-307, 2014 WL 4851829, 2014 La. App. LEXIS 2649 (La. App. 3d Cir. 10/1/14)

Insurance

Interpretation of an insurance policy usually involves a legal question that can be resolved properly in the framework of a motion for summary judgment. An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Louisiana Civil Code. If the language in an insurance policy is clear and unambiguous, it must be enforced as written. Courts should not strain to find ambiguity where none exists. However, if there is any doubt or ambiguity as to the meaning of a provision in an insurance policy, it must be construed in favor of the insured and against the insurer. Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. Whether a policy is ambiguous is a question of law. Unless an insurance policy conflicts with statutory provisions or public policy, it may limit an insurer's liability and impose and enforce reasonable conditions upon the policy obligations the insurer contractually assumes. Most insurance policies expressly define words or phrases which may be understood in different senses. Where a policy of insurance contains a definition of any word or phrase, then that definition is controlling. The Louisiana Supreme Court has not held that Louisiana law prohibits an insurance company from excluding a guest passenger from UM coverage. Nielson v Shelter Mutual Ins. Co., No. 2014-CA-0614, 2014 WL 5793843, 2014 La. App. LEXIS 2695 (La. App. 1st Cir. 11/7/14)

The insured husband shot his wife and then killed himself, and the wife's son filed a wrongful death and survival action against the husband's homeowner's insurer. Insurer filed a motion for summary judgment based on policy exclusions for "bodily injury…(1) which is either expected or intended by the insured; or (2) which is the result of willful or malicious acts of the insured." Plaintiff argued the exclusions did not apply, relying on his expert's report that the insured was unable to appreciate the inpact and consequences of his actions. The trial court granted the motion, criticizing the plaintiff's expert for not having personally made a determination of insured's intent prior to his suicide. The court of appeal reversed, finding that there are no such requirements that the expert psychologist meet with the insured, or that an intent determination can only be made on personal evaluations prior to death. Because a person who cannot understand the consequences of his acts, cannot at the same time inflict intentional injury, the court of appeal found the expert's testimony, by a preponderance of the evidence, created a

genuine issue of material fact as to insured's intent. Gutierrez v State Farm Fire and Cas. Ins. Co., No. 14-CA-236, __ WL __, 2014 La. App. LEXIS 2481 (La. App. 5th Cir. 10/15/14)

Judgments

Even if a partial summary judgment does not qualify as a final judgment under La. C.C.P. art. 1915(A)(3), it may still constitute a final judgment for the purpose of an immediate appeal if it is designated as a final judgment by the trial court after an express determination that there is no just reason for delay under La. C.C.P. art. 1915(B)(1). In the absence of such a designation, a judgment is not a final judgemnt for the purpose of an imemdiate appeal, pursuant to La. C.C.P. art. 1915(B)(2). Matherne v Lemoine Industrial Group, LLC, No. 14-CA-572, ___ WL ___, 2014 La. App. LEXIS 2483 (La. App. 5th Cir. 10/15/14)

Negligence

Plaintiff alleged that large cups of coffee he ordered from a drive-thru fell out of cup holder, spilling hot coffee onto his foot, ankle and groin. Plaintiff claimed that the coffee cups were not properly secured in the cup holder by the employee. A restaurant has the duty to use reasonable care in protecting its patrons. This duty encompasses proper use of "to go" paper products by a restaurant's employees when serving food or drinks from the window of a drive-thru so as not to expose patrons to unnecessary and unreasonable danger. However, the evidence failed to demonstrate that plaintiff could carry his burden of proof at trial that the restaurant breached its duty by failing to properly secure the coffee cups in the tray holder. Triche v McDonald's Corp., No. 14-CA-318, 2014 WL 5463304, 2014 La. App. LEXIS 2604 (La. App. 5th Cir. 10/29/14)

Plaintiff alleged that when mass was over she "suddenly and without warning" fell as she exited the church onto the outside steps. She argued that she could prove, with her deposition testimony, that the steps were defective "because they were not level and did not have a rail where she exited." Plaintiff did not survive summary judgment because she could not prove that the conditions that caused the injury existed for such a period of time that those responsible, by the exercise of ordinary care and diligence, must have known of their existence in general and could have guarded the public from injury. "Even if [plaintiff's] testimony alone was sufficient to establish that there was some slant to the step such that it could be considered defective, there is no reason to conclude that such defect, which is not discernable from the photographs, should have been discovered by the defendants by reasonable inspection." Boutin v The Roman Catholic Church of the Diocese of Baton Rouge, No. 14-CA-313, 2014 WL 5463296, 2014 La. App. LEXIS 2588 (La. App. 5th Cir.10/29/14)

Plaintiff slipped and fell in grocery store and alleged that one of the managers told her that the floor had been waxed and too much wax may have been used. Manager denied making statement. Evidence amounted to mere specualtion as to cause of the fall and did not satisfy plaintiff's burden under La. R.S. 9:2800.6(B). "[E]ven if the manager stated that the floor had just been waxed and speculated that wax could have caused [plaintiff's] fall, there is no evidence that anyone actually saw any wax buildup or any other foreign substance was on the floor." The factually unsupported speculation regarding wax buildup was insufficient to defeat sumamry

judgment. Trench v Winn-Dixie Montgomery LLC, No. 14-CA-152, 2014 WL 4723866, 2014 La. App. LEXIS 2275 (La. App. 5th Cir. 9/24/14)

Negligence; Comparative Fault

One non-negligent plaintiff is pursuing a recovery against two parties under an intentional tort theory and against two other defendants under a theory of negligence. Under La.Civ.Code art. 2324, these two sets of parties, because they did not conspire to commit an intentional act, are jointly liable rather than solidarily liable. As such, the joint tortfeasor may not be held liable for more than his portion of the fault. Turner v Shop Rite, Inc., No. CA 14-315, 2014 WL 4851833, 2014 La. App. LEXIS 2365 (La. App. 3d Cir. 10/1/14)

Negligence; Damages

In suits involving allegations of police use of excessive force in dealing with suspects, a number of factors are to be considered, if applicable to the totality of the circumstances, including 1) the character of the suspect, if known; 2) the risks faced by the officers; 3) the nature of the offense involved; 4) the possibility of escape; 5) the existence of alternatives to the force used; 6) the size of the suspect and whether or not he may be armed; and 7) the exigencies of the moment. Matthieu v Imperial Toy Corp., 94-952 (La. 11/30/94), 646 So.2d 318. Applying the above factors, the deputy used excessive force while conducting the investigative stop. However, plaintiff's damages were reduced from $35,000 to $10,000 because there was no medical testimony to substantiate his claim that his pre-existing back injury was aggravated in the incident or that he sought treatment for his claimed mental distress. Turner v St. John Parish Sheriff, No. 14-CA-245, __ WL __, 2014 La. App. LEXIS 2713 (La. App. 5th Cir. 10/29/14)

Trial; Notice

Actual notice of the trial date at least ten days prior to trial remedied the failure of the clerk to provide written notice required under Seventh Judicial District Court Rule 9.14. The party had at least ten days to prepare for trial, the same as he would if the clerk of court had given written notice within the same time frame. Barlow v Barlow, No. CA 14-361, 2014 WL 4851870, 2014 La. App. LEXIS 2370 (La. App. 3d Cir. 10/1/14)

UM Coverage

An insurer may establish by affidavit that an employee is authorized to reject UM coverage on behalf of a corporation. In the instant case, insurer produced an affidavit from insured president which stated that a certain employee "was duly authorized to act as [insured's] agent for the purpose of rejecting and waiving UM coverage on the aforesaid policy on behalf of insured…." In opposition, plaintiff simply argued the insurance agent testified in his deposition that he did not discuss UM coverage with the company's owners and was not aware of any document which existed to show he had authority to sign the UM waiver. This testimony does not establish he lacked authority to execute the UM rejection. Writ granted, judgment of the district court reversed, and summary judgment rendered in favor of insurer. Voinche v Capps, No. 14-CC-1498, 2014 WL 5509673, 2014 La. LEXIS 2266 (La. 10/24/14) (per curiam)

Worker Compensation

The Supreme Court issued its opinion in Church Mutual Insurance Co. v Dardar, 13-2351, p. 24 (La. 5/7/14), 145 So.3d 271, 287-88, holding that the medical treatment guidelines and Medical Director procedures outlined in La.R.S. 23:1203.1 are procedural and "apply prospectively to all requests for medical treatment and/or disputes arising out of requests for medical treatment arising after the effective date of La. R.S. 23:1203.1 and the medical treatment schedule, regardless of the date of the accident." The WCJ's review of whether there is clear and convincing evidence that the Medical Director's determination is in contravention of the medical treatment guidelines is necessarily fact-intensive. Thus the appropriate standard of review is manifest error. The Court will not overturn the findings of the WCJ unless it finds there is no reasonable basis to support the decision. Here, the Medical Director had sufficient reasonable basis to deny the request for continued treatment based on the applicable medical treatment guidelines, and the WCJ's decision not to overturn the Medical Director was not clearly wrong. Mouton v Lafayette Parish Sheriff's Office, No. WCA 13-1411, 2014 WL 5151386, 2014 La. App. LEXIS 2489 (La. App. 3d Cir. 10/15/14)

There can be no settlement of a workers' compensation claim in the absence of compliance with the procedure prescribed by La. R.S. 23:1272. However, once the procedural requirements of the workers' compensation law have been complied with and an order approving a compromise settlement has been entered by the OWC, the judgment is conclusive, and it cannot be set aside except for fraud, misrepresentation, or ill practices. McCarroll v Livingston Parish Council, No. 13-CA-2120, 2014 WL 5439624, 2014 La. App. LEXIS 2489 (La. App. 3d Cir. 10/27/14)

The policy language contained in the UM policy specifying that the UM coverage does not extend to the "direct or indirect" benefit of workers' compensation insurer precludes the LWCC from claiming a credit for future workers' compensation benefits payable. Cole v State Farm Mut. Automobile Ins. Co., No. CA 14-329, 2014 WL 4851843, 2014 La. App. LEXIS 2349 (La. App. 3d Cir. 10/1/14)