LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2011:1 Jan. 1, 2011

UPCOMING MEETINGS

Jan. 28-29, 2011	LADC North Louisiana Defense Lawyers' Seminar, University Club, Shreveport	10.0*#
March 9–13, 2011	LADC Winter Meeting, The Charter, Beaver Creek, CO	10.0*#
April 10-17, 2011	LADC Annual Meeting, Southern France	8.0*#

(A registration form may be downloaded at www.ladc.org if registration is open at this time.)

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

BULLETIN BOARD

HAPPY NEW YEAR, LADC MEMBERS

NORTH LOUISIANA SEMINAR: This popular seminar will be held at the University Club in Shreveport on Friday, Jan. 28-Saturday, Jan. 29. Speakers include Professor Dane Ciolino, Dallas-based employment lawyer Michael Maslanka, a judges' panel, a young lawyers' panel, and more.

BEAVER CREEK WINTER MEETING 2011: The winter meeting and ski trip to The Charter at Beaver Creek will be during Mardi Gras week, Wednesday, March 9 - Sunday, March 13. Because flights book early during Mardi Gras week, you may want to make flight arrangements soon. Contractual reductions in our room block at the Charter must be made by January 7th. To insure the rooms that you want, please contact Peter McLean at ptmclean@hotmail.com. Tel. 985-246-6828. Our discounted LADC reserved units and suites at The Charter at Beaver Creek are all tax free for LADC members. Any non-LADC friends, relatives, etc. who may wish to join their friends may also receive the LADC unit/suite discount and tax exemption. The more, the merrier! Discounted ski/snowboard rental equipment and discounted ski lift tickets will also apply to relatives and guests. Please be sure to book directly through Peter McLean in order to receive our LADC group discount.

LADC ANNUAL MEETING 2011: Join us April 10-17 in Lyon and Nice, France. During our stay we will tour the city, visit the 800 year-old city of Perouges and dine at Michelin 3-star restaurant Paul Bocuse. In Lyon we have changed hotels

and are now in the 4-star Sofitel Lyon Bellecour in the Presque Isle district. We are near the pedestrian zone with the good shops and many of the fine restaurants that have earned the city the title of Gourmet Capital of France. The hotel has a Michelin star restaurant on the top floor, a brasserie and fitness center, and one can walk to nearly everything. In Nice our hotel on the Promenade des Anglais faces the blue-green waters of the Mediterranean and is adjacent to the pedestrian zone and the old quarter. We will enjoy street life, museums, shops and galleries second only to Paris, explore the flower market, venture to the hilltop town of St. Paul de Vence, and have a farewell dinner overlooking the harbor in Villefranche-sur-Mer. Post trips will be available to Paris. There are very few rooms remaining. For details, contact Peter McLean at ptmclean@hotmail.com. Tel. 985-246-6828.

DIVERSITY CONCLAVE: The LADC is co-sponsoring the LSBA Fourth Annual Conclave on Diversity in the Legal Profession at the New Orleans Marriott at the Convention Center on March 18, 2011. For more details, contact Kelly McNeil Legier at 504-619-0129.

DRI CIVIL RIGHTS AND GOVERNMENTAL TORT LIABILITY SEMINAR: Jan. 26-28, 2011, at the Ritz Carlton Hotel in New Orleans. Information is available at www.dri.org.

SHARING SUCCESS-A SEMINAR FOR WOMEN LAWYERS: This DRI conference will be held at the Fontainebleau Miami Beach on Thursday, Feb. 3-Friday, Feb. 4, 2011. For more information and registration, visit http://www.dri.org/open/SeminarDetail.aspx?eventCode=20110208 or contact Somer G. Brown, Tel. (337) 436-9491.

DUES NOTICES: You should have received your 2011 dues notice. Please renew your membership. The LADC is one of the three largest state defense lawyers' organizations in the nation. We are proud of this, and we hope you are proud to be a member of the LADC. It is our goal to continue growing. Thank you for your continued membership, and please let us know how we can better serve you

KEY DEVELOPMENTS

Damages; Punitive Damages

The Supreme Court has ruled that the co-owner of timberland is not liable to his fellow co-owners for treble damages under R.S. 3:4278.1 when he cuts and sells the timber without the co-owners' consent. Sullivan v Wallace, No. 2010-C-0388 (11/30/10) (Knoll, J, dissenting)

Jurisdiction; Subject Matter

Where plaintiffs limited their demands to "an amount less than the jurisdictional maximum...yet within the jurisdictional limits of" a city court, that court has subject matter jurisdiction. The amount demanded by the plaintiff and not the amount otherwise in dispute is the test for subject matter jurisdiction of a city court. Thompson v State Farm Mut Auto. Ins. Co., Supreme Court, No. 10-C-1244 (11/19/10) (Knoll, J, dissents in part)

Worker Compensation

The Supreme Court resolves one of the important issues in payment of worker compensation services pursuant to a PPO contract. The Court concludes that payment to a healthcare provider in an amount below the Louisiana Worker's Compensation Act's reimbursement schedule for medical services pursuant to a valid PPO contract does not violate state law. Agilus Health v Accor Lodging North America, No. 2010-C-0800 (11/30/10)

For recent Third Circuit opinions discussing other aspects of the relationship between the medical provider and the employer/worker compensation insurer, see Agilus Health v Dresser, Inc., Nos. WCA 10-313, 10-315 and 10-317; Lake Charles Memorial Hospital v Hobby Lobby Stores, Inc., No. WCA 10-261; Thomas Medical Group, APMC v Stine, LLC, No. WCA 10-580 (Gremillion, J, dissenting in part); Lake Charles Memorial Hospital v Al Copeland Investments, Inc., No. WCA 10-784.

OTHER SIGNIFICANT DEVELOPMENTS

Appeals

A trial court's findings of fact may not be set aside if there is a reasonable factual basis for the findings and the fact finder is not clearly wrong or manifestly erroneous. Thus where resolution of a case depends on whether there was a valid sale of a vehicle, and there are differing versions of the act by witnesses, the appellate court may not decide the matter as a legal question but must apply the manifest error standard of review. Allerton v Broussard, Supreme Court, No. 20-C-2071 (12/10/10)

In Interdiction of Jones, the Fifth (La.) Circuit concludes that a contempt judgment is a final judgment which is subject to immediate appeal. No. 10-CA-66 (11/9/10)

Class Actions

In a comprehensive opinion discussing and applying the 1997 amendments to the Code of Civil Procedure provisions on class actions (CCP Art. 591, et seq), the Supreme Court reverses the lower court and rejects certification of a class action in which class members were the homeowners' insureds of property in Southeast Louisiana which was damaged by Hurricane Katrina winds and who were victims of alleged improper adjusting practices. Dupree v Lafayette Ins. Co., No. 2009-C-2602 (11/20/10) (Johnson, J, dissents in part)

Compromise

A party may not rely upon a putative mandate to compromise a claim. Express authority must be given to enter into a compromise, and when an act, such as a compromise, requires an authentic act or written form, the mandate giving authority for such an act also must be authentic or in written form. Amitech U.S.A. Ltd. v Nottingham Construction Company, First Circuit, No. 2009 CA 2048 (10/29/10)

Damages

Leg: $937,500 in future pain, suffering, emotional distress and mental anguish to manual laborer in his mid-40s who lost his leg below the knee in an industrial accident is "at the high end of the scale," but not an abuse of jury discretion; plaintiff encountered an abnormal surgical result which causes repeated infections and painful boils, lost his primary source of self-esteem in his job, and is facing a future in a wheelchair. Johnson v Lee, Fifth (La.) Circuit, No. 10-CA-439 (11/23/10)

Damages; Loss of Chance of Survival

In Braud v Woodland Village L.L.C., the Fourth Circuit, observing that a claim of loss of chance of survival is a distinct compensable injury caused by a defendant's negligence and is distinguishable from the loss of life in a wrongful death case. The court concludes that the district court committed clear legal error in failing to allow the jury in a medical malpractice claim to quantify that potential loss of survival damage award as a separate and distinguishable claim. No. 2010-CA-0137 (12/8/10) (Murray, J, concurring)

Discovery; Penalties

Two appellate courts recently reversed trial courts for dismissing claims because of failure to comply with discovery. In Duffy v Pendleton Memorial Methodist Hospital, the Fourth Circuit reversed the trial court's dismissal of plaintiffs' claim for failure to comply with court-ordered discovery. There the court did not notify the plaintiffs or their counsel that the claims would be dismissed in the event of noncompliance with court ordered discovery. The court emphasized that less drastic sanctions would be effective and there was no evidence that the client participated in, or was aware of, the violation of the court's order. No. 2010-CA-0660 (12/8/10) (Tobias, J, concurs). In Mascaro v Parish of Jefferson, the attorneys signed a consent judgment which ordered plaintiff to provide discovery during a certain time period, and which provided that if plaintiff failed to provide discovery within the designated time the plaintiff consented to the case being dismissed with prejudice. However, the consent judgment did not contain the signature of the plaintiff. The Fifth (La.) Circuit concluded that since there was no evidence that the plaintiff participated in violating the discovery orders and there was no willful violation or intent by counsel for plaintiff to disregard the deadline, dismissal with prejudice was not warranted. No. 10-CA-488 (11/23/10)

Evidence; Privileges

Where a party commits himself to a course of action that requires disclosure of conversations with his counsel (such as the validity of the client's waiver of trial by jury), disclosure is not barred by the attorney-client privilege. State v Dominguez, First Circuit, No. 2010 KW 1868 (12/8/10)

Insurance

Refusing to follow a Fourth Circuit decision (First Mercury Syndicate, Inc. v New Orleans Private Patrol Service, Inc, 600 So 2d 898, (1992)), the First Circuit holds that there is no statutory or jurisprudential bar that prevents an injured party, solely because he is also an insured, from

recovering under a liability policy based upon the fault of another insured. Muller v Colony Insurance Co., No. 2010 CA 0688 (12/19/10) (five judge court; McClendon and McDonald, JJ, dissent in part on other grounds)

Under R.S. 22:1335, the insurer is required to manifest its unwillingness to renew a homeowner's policy in order to avoid automatic renewal of the policy. An insurer has a prima facie burden to prove that it mailed a required renewal notice, which creates a presumption the insured received the notice. The insurer may prove mailing of the renewal notice without testimony from a person who actually mailed the notice. The Code of Evidence expressly permits the use of records of regularly conducted business activities as exceptions to the hearsay rule (LCE Arts 803(6) and (7)). Where the trial court finds that the renewal notice was sent, the court of appeal must follow the manifest error rule in overturning the trial court's factual finding that the insurer properly mailed the renewal notice. Nolan v Mabray, Supreme Court, No. 10-C-0373 (11/30/10)

Insurance Assignment of Rights

The prevailing rule nationwide is that an insurance policy provision that prohibits the policy's assignment or the assignment of any rights under the policy after loss, except with the insurer's consent, is against public policy. Louisiana jurisprudence is divided on this question. See Geddes & Moss Undertaking & Embalming Co v Metro. Life Ins. Co., 167 So 209 (Or. App. 1936), and compare R. L. Lucien Tile Co. v Am. Sec. Ins. Co., 8 So 3d 753 (4th Cir. 2009). The U.S. Fifth Circuit has certified, and the Louisiana Supreme Court has granted certification on, the question. In Re Katrina Canal Breaches Litigation, ___ So 3d ___ (La. 2010). TCC Contractors, Inc. v Hospital Service District No. 3 of the Parish of Lafourche, First Circuit, No. 2010 CA 0685 (12/8/10) (Carter, CJ, concurring in the result only)

Insurance; Penalties

In Long v American Security Ins. Co., insurer fully complied with the appraisal clause of its policy and tendered the policy limits within 30 days of the umpire's ruling, but did not tender any amount during the appraisal process. Held, insurer is not liable for penalties under R.S. 22:658 or 22:1220. Fourth Circuit, No. 2010-CA-0026 (11/17/10)

Where the jury could have reasonably concluded that the insurer was in good faith when it questioned the extent and causation of the UM claimant's ongoing complaints and whether the need for surgery was causally related to the accident, and could have reasonably concluded that the insurer was justified in relying on this good faith belief to defend the claim and refuse to make a timely tender, the trial judge errs in granting a JNOV, and the appellate court errs in affirming. Lastrapes v Progressive Security Ins. Co., Supreme Court, No. 2010-C-0051 (11/30/10)

Insurance; Prescription

Act 43 of 2007, extending the applicable prescriptive period on a homeowner's policy from 12 months to 24 months, applies retroactively to a cause of action which had not prescribed at the time of Act 43's effective date in mid-2007; "(t)o be clear, we do not hold that Act 43 has retroactive

applicability to all claims that arose before Act 43's effective date." Holt v State Farm Fire & Cas. Co., ___ F 3d ____ (5th Cir. 2010)

Insurance; UM Coverage

Selection of a lower amount of coverage by someone other than the insured invalidates an otherwise properly filled out form. Thus selection of a lower rate of coverage is not valid where the insurance agent does not discuss with the insured the limit of lower coverage but unilaterally fills in the amount of the limit. Ware v Gemini Ins. Co., Third Circuit, No. 10-594 (11/24/10) (Pickett. J, dissenting)

A UM policy which excludes coverage to self-insured vehicles is not contrary to Louisiana public policy. Mednick v State Farm Mut. Auto. Ins. Co., 31 So 3d 1133 (5th Cir. 2010), distinguished. Sumner v Mathes, Fourth Circuit, No. 2010-CA-0438 (11/24/10) (Bonin, J, dissents)

Interest; Medicaid Reimbursements

Legal interest is payable on tort damages under R.S. 13:4203, under CCP Art. 1921, and under the Medical Malpractice Act (R.S. 40:1299.47(M). Neither the statutes nor the jurisprudence interpreting them provide an exception for the portion of the plaintiff's damages paid by and reimbursed to Medicaid. Duplechain v Jalili, Third Circuit, No. 10-736 (12/8/10) (Amy, J, concurring in the result)

Judgments; Nullity

In Duckworth Properties L.L.C. v Williams, the plaintiff took a default judgment in city court without notice to defendant's attorney although the defendant's suit against plaintiff on the same contractual dispute was pending in district court. The Fourth Circuit annuls the default judgment, holding that the enforcement of the default judgment would be unconscionable and inequitable. No. 2010-CA-0244 (11/24/10)

Medical Malpractice

In Hamilton v Baton Rouge Health Care, the majority of a five judge court concludes that a claim against a nursing home for negligence of employees while transferring a woman from her wheelchair to her bed, and "otherwise performing custodial duties," is a medical malpractice claim subject to mandatory review by a medical review panel under the Medical Malpractice Act. First Circuit, No. 2009 CW 0849R (12/8/10) (Whipple and Hughes, JJ, dissent)

In Oliver v Magnolia Clinic, a five judge panel of the Third Circuit ruled that the "cap" on damages provided by the Louisiana Medical Malpractice Act (R.S. 40:1299.42) does not apply to nurse practitioners. Two of the judges based their decision on constitutional grounds, and two decided the issue on statutory grounds. No. CA 09-439 (11/17/10) (Saunders and Painter, JJ, concurring in the result; Gremillion, J, dissenting)

Pleading; Affirmative Defenses

An immunity which constitutes an affirmative defense should be pleaded in the answer; neither the peremptory exception of immunity nor the exception of no cause of action is procedurally proper in such case. Mouton v Hebert's Superette, Inc, Third Circuit, No. CA 10-787 (12/8/10)

Summary Judgment; Evidence

A deposition taken in another proceeding may not be used in a motion for summary judgment. Edwards v Larose Scrap & Salvage, Inc., Third Circuit, No. CA 10-596 (12/8/10)

The trial court does not abuse its discretion in striking the untimely opposition and affidavit of a party opposing a motion for summary judgment where (1) the hearing on the motion occurred four months after the motion was filed, (2) the opponent had been granted a continuance, but (3) filed his opposition and affidavit three days before the hearing. Phillips v Lafayette Parish School Board, Third Circuit, No CA 10-373 (12/8/10)

Torts; Vicarious Liability

Louisiana has not adopted the more liberal "continued product line" on successor liability. Thus when a corporation sells all of its assets to another, the latter is not responsible for the seller's debt or liabilities unless the purchaser assumes the obligation, or the purchaser is merely a continuation of the seller, or the transaction is entered into to escape liability. Pichon v Asbestos Defendants, Fourth Circuit, No. 2010-CA-0570 (11/17/10) (Belsome, J, dissenting)

Worker Compensation

Reversing an imposition of penalties for failure to timely pay worker compensation benefits, the Supreme Court observes that "we find no prohibition in statute or jurisprudence to prevent an employer from showing surveillance video to the claimant's treating physician or to the physician who provided a second medical opinion for the employer." Iberia Medical Center v Ward, No. 2009-C-2705 (11/30/10) (Knoll, J, dissenting in part)

The WCJ's finding that the claimant did not willfully make misrepresentations about his neck and back injuries was proper where in an interview, taken shortly after the alleged accident, the claimant admitted directly to the adjuster to having neck arthritis and prior back injuries. Thibodeaux v Mechanical Construction Co., LLC, Third Circuit, No. WCA 10-739 (12/8/10)

Worker Compensation; Evidence

Under R.S. 23:1317(A), the workers' compensation judge is not bound by technical rules of evidence. A WCJ does not abuse his discretion in refusing to admit phone records that had not been timely produced and in admitting a letter from a doctor indicating his belief that the claimant was malingering. Lestage v Nabors Drilling Co., Third Circuit, No. WCA 10-728 (12/8/10)

Worker Compensation; Penalties

R.S. 23:1201(F) provides that the mandatory penalty available to a claimant consists of a percentage of the unpaid compensation and a reasonable attorney fee. With regard to the penalty, the WCJ is vested with discretion to impose the 12% penalty as provided for by the statute and/or a separate reasonable attorney fee based upon actual hours worked. While the WCJ's discretion to award the 12% penalty is still subject to the "reasonably controverted" requirement of (F)(2), the attorney fee award is similar to that awarded in an open account collection action. Central Louisiana Ambulatory Surgical Center, Inc. v Rapides Parish School Board, Third Circuit, No. 10-461 (11/3/10)

MARITIME MATTERS

Seaman: A worker injured while in a basket suspended over the Mississippi River from a crane, and cutting pilings that were holding the crane spud barge in place, is entitled to trial on the merits on his Jones Act claim. Richard v Mike Hooks, Inc., 799 So 2d 462 (La. 2001), distinguished. Navarre v Kostmayer Constr. Co., Inc., Fourth Circuit, No. 2010-CA-0490 (11/24/10)

LHWCA: 33 USC Sec. 928(b) provides for a claimant's recovery of attorney fees if there as been an informal conference, a written recommendation from the deputy or Board, the employer's refusal to adopt the written recommendation, and the employee's procuring the service of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation. In Carey v Ormet Primary Aluminum Corporation, the U.S. Fifth Circuit concludes that the section is satisfied, and claimant is entitled to attorney fees, where the employer actively argues it owes an employee one amount, but voluntarily pays the employee a second, higher director-recommended amount, the ALJ then rules against the employer, but awards a third, middle amount, greater than the amount the employer concedes it owes, but lower than the amount recommended by the director. __ F 3d ___ (2010)