



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2014:7

July 1, 2014

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UPCOMING MEETINGS

July 11-12	LADC Women's Retreat, Ritz Carlton, New Orleans	4.0*#
July 31- Aug. 2	LADC Trial Academy, Loyola College of Law	21.0*#
Aug. 15	LADC Sizzlin' Summer Seminar, Hyatt French Quarter	7.5*#
Dec. 12	LADC Defense Lawyers' Seminar, Windsor Court (Save the Date)	7.0*#

(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

SUMMER—SUN, SAND, BEACHES, AND THE LADC: Summer has officially arrived. The LADC has a busy calendar of events scheduled for the summer, and as you are making your summer plans, we hope you will include one or more LADC programs. Don't wait until December to fulfill your CLE requirements!

SECOND ANNUAL LADIES WHO LITIGATE LADC WOMEN'S RETREAT: We are pleased to announce that Brigid Schulte has agreed to participate in the 2014 LADC Women's Retreat. The author of the recently published Overwhelmed: Work, Love and Play When No One Has the Time, Ms. Schulte is on leave from her position as a Washington Post staff writer and reporter to serve as a Fellow at the New America Foundation. She was part of the team covering the Virginia Tech massacre which was awarded the 2008 Pulitzer Prize for breaking news journalism. Ms. Schulte will speak at the retreat on Saturday morning.

The retreat will take place at the Ritz-Carlton on July 11-12. The cost to attend this conference is \$279 for members and \$299 for non-members, which includes 4 hours of CLE credit including ethics and professionalism, a cocktail party, dinner, and breakfast. Spa treatments are available. We have negotiated a special room rate with the Ritz-Carlton (\$149 per night), and reservations can be made by calling (800) 826-8987 or using the group link: <https://reservations.ritzcarlton.com/ritz/reservation/availability.mi?propertyCode=MSYRZ&groupCode=RYPYPA>. **Our room block**

has expired but if any space is still available the hotel will honor our rate.

Please contact Kimberly Zibilich at Event Resources New Orleans for any questions regarding the Women's Retreat: Kimberly@eventresourcesnola.com or call 504-208-5510. Registration is now open at the LADC website.

2014 LADC TRIAL ACADEMY: Register now for outstanding trial instruction at a great price. Practice trial skills with real judges and real expert witnesses. July 31-Aug. 2. The Trial Academy provides 21 hours of CLE, including Ethics and Professionalism. It is a great bargain at only \$500. Registration is now open on the LADC website.

2014 SIZZLIN' SUMMER SEMINAR: One of the LADC's most popular CLE seminars moves to a new venue this year. We will be at the Hyatt French Quarter. The LADC has negotiated group room rates (\$129 for a pool or courtyard king room). Please make your reservation by calling 1-888-421-1442 or 402-592-6464 and identify yourself as a member of the Louisiana Association of Defense Counsel or online at <https://resweb.passkey.com/go/>. Our room block expires July 28th. We have outstanding speakers on the CLE program, including the following: Prof. Gabe Feldman (Tulane Law) and Bob Barton (Taylor Porter) speaking on sports law; John Trimble (Lewis Wagner in Indianapolis) on the metrics of the defense practice; Michael Maslanka (Constangy, Brooks & Smith in Dallas) on effective interaction with courts, clients, counsel, and colleagues; Kim Boyles (Phelps Dunbar in New Orleans) on developments in employment law; Christine Lipsey (McGlinchey Stafford) and Prof. Dane Ciolino on ethics; Prof. John Church (LSU Law) and Bill Corbett on recent developments in Louisiana law. Registration is now open on the LADC website. Please contact Kimberly Zibilich at Event Resources New Orleans for any questions regarding this seminar: Kimberly@eventresourcesnola.com or call 504-208-5510. Registration is now open at the LADC website.

LADC BOARD ELECTION: Thanks to all who participated in the LADC Board of Directors election. Congratulations to the new Board members: District 1: Quincy Crochet (McCranie, Sistrunk) and Kathleen Simon (Porteous Hainkel); District 4: Alan Yacoubian (Johnson Johnson Barrios), Heather Cheesbro (Heller Draper), and Natalie Dekaris (Bradley Murchison); District 5: Anne Medo (Hailey McNamara), Christian Bogart (Duplass Zwain), Thomas Cook (Hebblar & Giordano), and Paul D. Palermo (Blue Williams). Because the LADC districts were redrawn to conform with the appellate court circuits, directors were reallocated, and there were no vacancies this year in Districts 2 and 3.

LADC OFFICERS: Congratulations to the officers for 2014-15: President Marta-Ann Schnabel; President-Elect Bobby Gilliam; First Vice President E. Phelps Gay; Second Vice President Ralph E. Kraft; Secretary-Treasurer Mickey S. deLaup; and Immediate Past President Skip Philips.

SPECIAL THANKS: The LADC thanks 2013-14 President Skip Philips for his leadership and hard work. During Skip's term, we enjoyed a successful celebration of the LADC's 50th anniversary and substantially revised the LADC bylaws and reorganized the LADC Board.

DRI APPELLATE ADVOCACY SEMINAR: July 17-18 at the Westin Chicago River North in Chicago, Illinois. The seminar will include a live oral argument on a class action fact pattern before a panel of federal judges, an in-house counsel discussion of their use of appellate lawyers, a federal judge discussing diversity in appellate practice, and discussions of the role of appellate counsel during trial, recent appellate court decisions of importance to litigators, building an appellate practice, and effective motions practice. To view the brochure and to register, click on <http://www.dri.org/Event/20140010>.

NEW MEMBERS

Amanda Clark, Baton Rouge
Mindy Nunez, New Orleans
Maurice Ruffin, New Orleans

KEY DEVELOPMENTS

Insurance

A first party collision coverage exclusion for loss occurring to an insured vehicle while the operator was driving with a blood alcohol content above the legal limit is valid and enforceable. Williams v USAgencies Casualty Insurance Co., Third Circuit, No. CA 14-185 (6/4/14)

Medical Malpractice

A partial summary judgment finding plaintiff's injuries were caused by the fault of a designated doctor (covered by the PCF) is not binding on the PCF on the plaintiff's claim against the PCF for damages exceeding the \$100,000 MMA cap. Khammash v Clark, Supreme Court, No. 13-C-1564 & -1736 (5/7/14)

Worker Compensation

RS 23:1203.1 is procedural and does not affect substantive rights and applies to all requests for medical treatment and/or all disputes emanating from requests for medical treatment after the effective date of the medical treatment schedule, regardless of the date of the work related accident and injury. Cook v Family Care Services, Inc., Supreme Court, No. 2013-CC-2326 (5/7/14) and Church Mutual Insurance Company v Dardar, Supreme Court, No. 2013-C-2351 (5/7/14)

Wrongful Death; Survival

The one year time limitation for asserting the survival action under CC article 2315.1(A) is a period of liberative prescription rather than a period of preemption. See CC article 2315.1(C).

Watkins v Exxon Mobil Corporation, Supreme Court, No. 2013-CC-1545 (5/7/14) (Victory, J, dissents)

OTHER SIGNIFICANT DEVELOPMENTS

Admiralty

Federal admiralty jurisdiction does not extend to claims arising from a fist-fight between recreational visitors on a permanent floating dock surrounded by navigable water. “[S]tate courts have long dealt with similar fistfights under state tort law, without any need for interference from federal courts sitting in admiralty.” Tandon v Captain’s Cove Marina, ___ F 3d ___ (2d Cir 2014)

Damages

Stroke: \$150,000 in general damages where 65 year old had an active life before stroke but was left with inability to talk, and his right arm and leg were basically useless; physician’s fault left victim with one third loss of chance for better outcome and one eighth for loss of chance of full recovery. Coulon v Creel, Fifth (La.) Circuit, No. 13-CA-835 (5/14/14)

Separate awards of general damages of up to \$50,000 to 41 separate plaintiffs suffering from chemical exposure, in Anthony v Georgia Gulf Lake Charles, LLC, Third Circuit, No. CA 13-236 (5/21/14)

False Arrest: \$15,000 in general damages to victim who was in police custody for approximately 16 hours over the course of two days, was forced to spend the night in parish prison, and at trial was upset and crying when she had to testify about those events. Johnson v Montoya, First Circuit, No. 2013 CA 1951 (5/2/14) (McDonald, J, dissents and would reduce quantum)

\$100,000 in general damages to new mother who slipped and fell walking to hospital bathroom, suffering leg fracture which required surgical corrections and subsequent surgical procedure to remove scar tissue, in Aymami v St. Tammany Hospital Service District No. 1, First Circuit, No. 2013 CA 1034 (5/7/14)

\$150,000 in general damages to woman who gave birth to fourth child after failed tubal ligation, together with \$46,550 in woman’s lost wages. Bertrand v Kudla, Third Circuit, No. CA 14-61 & -62 (6/4/14)

Damages where husband-father was killed when crane collapsed and he fell 60 feet to his death: \$300,000 for survival, \$750,000 in wrongful death damages to spouse and \$450,000 for each child and \$330,000 for loss of support, and, in addition \$100,000 in bystander damages to brother of victim. Maldonado v Kiewit Louisiana Co., First Circuit, No. 2012 CA 1868 (5/30/14) (five judge court; McDonald and Guidry, JJ, dissent in part)

Affirming award of \$300,000 in punitive damages, the Third Circuit observes that employer’s failure or refusal to consider the medical evidence of an injury or illness submitted by a seaman

in support of his claim for maintenance and cure is grounds for concluding the employer's fault is arbitrary and capricious. Stermer v Archer-Daniels-Midland Co., No. CA 14-147 (6/4/14)

Evidence; Experts

The fact that a person is a licensed registered nurse does not in and of itself render that person an expert in the prevention and treatment of pressure ulcers. Witness had no special training in wound care and did not work as a wound care nurse. Court did not abuse its discretion in excluding witness as expert. Ladart v Harahan Living Center, Inc., Fifth Circuit, No. 13-CA-923 (5/14/14)

Experts

Reconstruction expert's conclusions are unreliable where he failed to speak to plaintiff, never contacted any of treating physicians or visited scene of accident and did not inspect vehicle or talk with damage appraiser and did not know the body position of the plaintiff at the time of impact. He also did not did not consider the angle of impact or the dimensions of the headache rack in any calculations. Godchaux v Peerless Insurance Co., Third Circuit, No. CA 13-1083 (6/4/14)

Federal Torts

The Federal Tort Claims Act does not require a claimant actually to receive notice of a final denial of an administrative claim for damages in order to start the limitation period for filing a lawsuit. The federal agency does not have a duty to resend a notice officially returned as undelivered even if the agency has an alternate address on file. Jackson v United States, ___ F 3d ___ (6th Cir. 2014)

Insurance

Plaintiff's auto insurance policy covered "expenses incurred," and her coverage under her parents' health insurance policy reduced her hospital charges by an amount agreed to by the hospital and the insurer. Plaintiff paid that reduced hospital charge. Held, plaintiff may not recover the full amount of the hospital bill from her insurer; an expense is "incurred" when one has paid it or becomes legally obligated to pay it. Hoffman v Travelers Indemnity Co. of America, Supreme Court, No. 2013-CC-1575 (5/7/14)

Insurance; UM Coverage

Rejection of UM coverage is valid where insured claimed he did not fully understand what he was doing, but agent communicated with him entirely in Spanish, insured's primary language, and obtained his choice and desire to reject UM coverage in Spanish, and at no time did insured state he did not understand the explanation he was given regarding the availability of that coverage. Garay-Lara v Cornerstone National Insurance Co., First Circuit, No. 2013 CA 2016 (5/2/14)

Medical Malpractice

R.S. 29:771(B)(2)(c) provides that during a state of public health emergency, health care providers are immune except in the event of gross negligence or willful misconduct. Held, the immunity does not provide for a limited set of health care providers, and it does not limit its application to those medical personnel rendering emergency assistance voluntarily due to the emergency in the area. Lejeune v Steck, Fifth (La.) Circuit, No. 13-CA-1017 (5/21/14)

Negligence

The owner/host/promoter of a fair from the public's perspective had a duty to at least ensure that the fair riders had safety measures in place to prevent another child or customer from getting access to the control panel and rides and to keep the rides safe from unauthorized tampering when the rides were in the "off" position. Lewis v Pine Belt Multipurpose Community Acquisition Agency, Inc., Second Circuit, No. 48,880-CW (5/7/14)

Customer could not recover for a slip and fall on a "slippery substance" on the floor of a U-Haul rental facility; plaintiff was unable to satisfy the "constructive notice" requirement of R.S. 9:2800.6(B) by showing that the cooked onion was on the floor for some period of time before her alleged fall. Davis v U-Haul Co. of Louisiana, Fifth (La.) Circuit, No. 13-CA-1004 (5/14/14)

Plaintiff did not show any circumstances that would have required her to act in haste or venture into the hallway despite the condition of the floor where she knew the floor had just been waxed and still could be slippery; thus plaintiff did not show that she satisfied her burden that her fall was caused by defendant landowner's negligence. Hampton v Mid-City Plaza South L.L.C., Second Circuit, No. 48,899-CA (5/15/14)

Prescription

Plaintiff did not exercise reasonable care in ascertaining the identity of defendant as owner of a hotel; even if the documents provided by others could be construed as misleading, reliance on misinformation alone does not satisfy the "reasonable diligence" requirement of *contra non*. Owner's identity was readily available from multiple sources, including a public record search. "[A] plaintiff will be deemed to know that which she could have learned from reasonable diligence." Richards v Choice Hotels International, Inc., Fifth (La.) Circuit, No. 13-CA-973 (5/21/14)

Privilege

The attorney-client privilege protects an internal memorandum written by a corporation's in-house counsel about what data the company should disclose during contract negotiations. Exxon Mobil Corp. v Hill, 751 F. 3d 379 (5th Cir. 2014)

Worker Compensation

An employer's arbitrary denial or delay in treatment, when the employer has knowledge that a significant and life-threatening worsening of an employee's condition is substantially certain to follow the denial, is an exception to the Worker's Compensation Act's exclusive remedy. Allegations in petition did not state such a claim. Adams v Avondale Industries, Inc., Fifth (La.) Circuit, No 13-CA-971 (5/21/14)

Worker Compensation: Borrowed Servant

In McGlothurn v Wade, the Fifth (La.) Circuit applies the nine Ruiz (v Shell Oil Co., 413 F 3d 310 (5th Cir. 1969)) factors to conclude that a security services worker directly employed by Pinkerton was at the time of the accident the borrowed servant of the owner at the Avondale shipyard. No. 13-CA-759 (5/21/14)

Worker Compensation: Subrogation

Under R.S. 23:1102B, an employee is obligated to obtain written approval of the employer or compensation insurer of a compromise with a third person, and if he fails to do so, the employee forfeits his right to future benefits. If the employee secures the required approval, he preserves his right to future benefits but the employer and compensation insurer are entitled to a credit against the payment of future benefits in the amount of the settlement. "Third person" is one who has a legal liability to pay damages. In the absence of a third person's "legal liability to pay damages," an employee's compromise with that person does not invoke the requirements or consequences of Section 1102B. Advantage Personnel and La. Safety Ass'n of Timbermen v Van Cleave, First Circuit, No. 2013 CA 1618 (5/2/14) (Whipple, CJ, concurs)