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LOUISIANA CASE NOTES - 2012

Class Action/Mass Tort Litigation

In *Doe v. Southern Gyms, LLC*, 92 So.3d 654 (La. App. 3rd Cir. 6/6/12) a defendant appealed certification of a class by the trial court, alleging the trial court had abused its discretion by certifying the class. The suit arose when a female gym patron had sued the gym, an employee, and the gym's insurer after a camera was found in the women's locker room. Other plaintiffs joined in the suit alleging common causes of action. In upholding certification, the Appellate Court reasoned that it will only decertify a class upon the abuse of discretion by the trial judge.

Third Party Criminal Acts

In *Jones v. Johnson*, 2012 WL 3525657 (La. App. 1st Cir. 8/15/12) plaintiff appealed a trial court ruling that granted Summary Judgment in favor of the St. Tammany Sheriff's Department and Fontainebleau State Park. Plaintiff sustained injuries in a rented area of the park where the St. Tammany Sheriff's Department was providing security for a party there earlier that night. A fight broke out after the security shift had ended. The Court held that since the fight was not foreseeable, the defendants did not owe a duty of care to the plaintiff.

In *Ponceti v. First Lake Properties*, 2012 WL 2512752 (La. 7/12/12), plaintiff filed suit against the owner of an apartment complex after her child was injured by an unidentified third party on a bicycle. The Supreme Court reaffirmed the balancing test it previously articulated in *Posecai v. Wal-Mart*, 725 So.2d 762 (La. 11/30/99): a business owner owes its patrons a duty of care only to protect against the reasonably foreseeable criminal acts of third parties. Only when criminal acts are foreseeable does a business owner owe a duty to post security. The most important factors in determining foreseeability are the frequency and similarity of prior incidents of crime at the location. Since there had been no prior complaints of similar crime at the location, the Court found there was no duty of care.

Amusements, Sports & Recreation

In *Zuffa v. Trappey*, No. 11-0006, 2012 WL 1014690 (W.D. La. Mar. 22, 2012), the United States District Court for the Western District of Louisiana held that the corporate officers of a bar and grill could be liable under the Federal Communications Act, for the unauthorized receipt and exhibition of a pay-per-view program, and for copyright infringement under the United States Copyright Act. Zuffa, LLC was the registered copyright holder of a June 12, 2012 Ultimate Fighting Championship event. Defendant Trappey had purchased the event through a residential cable box from his local cable provider, and then brought the residential cable box to the bar to use it to replace the commercial cable box there. An auditor for Zuffa observed the event being played at the bar for an audience of about sixty patrons. None of the defendants had authorization from Zuffa to air the broadcast. Although Zuffa did not register its copyright until two months after the event aired, Zuffa was granted summary judgment on its claim under 47 USC 553 for airing the event without authorization. The individual defendants were vicariously liable as they had a financial interest in the bar. Whether the individuals willfully aired the event for commercial gain was a matter for the jury to consider. Zuffa was allowed to suggest an appropriate amount for statutory damages to the Court.

Hospitality, Entertainment & Leisure

In *Holmes v. Triad Hospitality d/b/a Clarion Hotel*, 89 So.3d 532 (La. App. 3rd Cir. 5/16/12), the Louisiana Third Circuit Court of Appeal held that a guest's amended petition related back to her initial petition, and that the defendant's exception of prescription did not apply. The guest fell on hotel premises, and her initial petition misstated who she intended the defendant to be (She named "Choice Hotels Inc." instead of "Clarion Hotel"). Since the amended petition arose out of the same occurrence as the original petition, the owners of the hotel had sufficient notice of the petition and therefore were not prejudiced in maintaining their defense; they knew that legal action against them was likely; and they were a related party to the original defendants. The fact that the "true" party, Triad Hospitality, was served with the petition fourteen months after the alleged accident did not trigger prescription, because the amended petition related back to the original petition. Louisiana jurisprudence is consistent in that prescriptive statutes are to be strictly construed in favor of maintaining rather than barring actions.

In *Herring v. Microtel Inn & Suites Franchising*, No. 12-40, 2012 WL 521540 (La. App. 3rd Cir. 5/2/12), a hotel employee's heirs brought an action against a hotel after the employee was fatally shot by her boyfriend on the hotel premises. The trial court granted the hotel's motion for an involuntary dismissal. The Louisiana Third Circuit Court of Appeal held that even though the employee was on the premises, while off-duty, before her boyfriend entered the premises and fatally shot her, she was not a guest at the hotel, and, furthermore, that the hotel did not breach its duty of care to the employee. Prior to the shooting, the employee's boyfriend's father had

called the employee to tell her that her boyfriend was going to kill her. The employee's co-workers advised the employee to leave the premises. The employee declined and the hotel then locked its perimeter doors in view of the employee's refusal to leave. The heirs argued that the hotel owed a higher duty to the deceased employee because she was a guest of the hotel. The trial court found that she was not a guest, but an employee who was in the hotel while off-duty. Moreover, the trial court found that the hotel had not offered to guarantee her safety. To the contrary, management, her coworkers, and the police all suggested that she leave.

Pharmacists

In *Vessell v. Fallin Family Dentistry and Wal-Mart Stores*, Inc., No. 2011 CA 1702, 2012 WL 1564659 (La. App. 1st Cir. 5/3/12) the plaintiff alleged that she ingested a wrongly-prescribed antibiotic distributed by defendant Wal-Mart which caused her to become ill. The antibiotic that the plaintiff was given was not prescribed for her, but was for a patient with the exact same name. In November 2005, Dr. Lance Fallin, a licensed dentist for Fallin Family Dentistry, prescribed for his patient (also named Yolanda Vessel), the antibiotic amoxicillin in anticipation of a dental procedure. The plaintiff had never been a patient of Dr. Fallin; however, Dr. Fallin purchased the practice of plaintiff's retired dentist. Accordingly, some of the retired dentist's patient information was co-mingled with Dr. Fallin's patients' information. A Wal-Mart pharmacist noticed that there was an allergy contraindication in the system and called Dr. Fallin. Dr. Fallin's office ordered that the amoxicillin be changed to clindamycin. Plaintiff, nonetheless, ingested the wrong medication and allegedly suffered physical injuries.

The trial court granted summary judgment in favor of Wal-Mart, finding that Wal-Mart accurately filled and dispensed the prescription pursuant to Dr. Fallin's orders. The Louisiana First Circuit Court of Appeal held that under current Louisiana jurisprudence, the physician, rather than the pharmacist, bears the onus to prescribe correct medications for patients, as well as to warn patients of side effects. The pharmacist has a duty to accurately fill a prescription and to be alert for clear errors or mistakes in the prescription, but the pharmacist is not required to make a judgment which should be made by a physician as to the propriety of a prescription, or to warn customers of the hazardous side effects associated with the drug, either orally or by way of the manufacturer's package inserts. Wal-Mart was not required to take additional information regarding the plaintiff, such as her name and date of birth, because the antibiotic prescribed was not a scheduled narcotic. Plaintiff failed to introduce any evidence that Wal-Mart failed to conform its conduct to the appropriate standard of care.

Insurance coverage

In *DuPont Building, Inc. v. Wright and Percy Insurance*, 88 So.3d 1263 (La. App. 3 Cir. 4/4/12), a building owner filed suit against an insurance agent and the insurer alleging that the agent negligently failed to obtain wind and hail damage coverage for the business's personal property which was damaged in Hurricane Rita. The agent and insurer filed an exception of prescription, which was granted by the trial court. Prescription began to run between March 1, 2002 and June 13, 2002, when, if the policies had been read, plaintiff would have been aware that there was no insurance coverage for wind or hail damage to business personal property. The plaintiff testified that he gave the agent authority to obtain insurance coverage that he needed. However, he testified that he never read any of his insurance policies, and he never read any of the declaration pages for the policies. Plaintiff asserted that he had no duty to read or examine the policies because he had a close and trusting relationship with the insurance agent. The appellate court relied on the recent Louisiana Supreme Court case of *Isidore Newman School v. J. Eaves Inc*., 42 So.3d 352 (La.7/6/10), which held that it "is the insured's responsibility to request a certain type of insurance coverage, and the amount of coverage needed. It is not the agent's obligation to spontaneously or affirmatively identify the scope or the amount of insurance coverage needed."

In *Guillot v. Guillot*, No. 12-109, 2012 WL 2016215 (La. App. 3rd Cir. 6/6/12), the Louisiana Third Circuit Court of Appeal held that where the victim of an intentional assault brought an action against his assailants' automobile and homeowners' insurer to contest denial of coverage for property damage and bodily injury, the mobile insurance policy did not provide liability coverage for bodily injury stemming from an assault that did not involve the use of an automobile; the automobile policy did not provide coverage for property damage resulting from intentional acts; and the homeowners' and farm liability insurance policies unambiguously excluded coverage for the victim's injuries resulting from intentional acts. The underlying facts involved a brother and his son who assaulted another brother who was attempting to retrieve a crawfish boat from a family farm operation. The plaintiff asserted that defendants were in the course and scope of their employment at the time of the assault. The court found that the plaintiff's injuries did not arise out of an "accident" nor did they arise out of the "use of an automobile."

In *Bernard v. Ellis*, No. 11-2377, 2012 WL 2512772 (La. 7/2/12), two passengers injured in a car accident filed suit against the UM insurer of the driver after they were denied coverage for their injuries. The insurer denied coverage contending that the passengers were not "users" of the automobile merely by their occupation of the car during the accident. The insurer contended that only members of the driver's household could be considered 'users' of the car for the purpose of UM coverage. The Supreme Court held that as guest passengers in the vehicle they

met the definition of 'users' of the car, as the terms of the policy should be construed liberally to extend coverage broadly. Therefore, the passengers were covered under the UM policy.

Construction Defect

Matherne v. Barnum, No. 11-0827, 2012 WL 909703 (La. App. 1st Cir. 3/19/12) involved an action against a contractor for damages caused by allegedly defective workmanship in the construction of a bulkhead, boat slip with lift, and deck with walkways. The Louisiana First Circuit Court of Appeal found that the evidence supported a finding that the contractor was negligent, which would render him individually liable for breach of a construction contract, even though he was a member of an LLC. The Appellate Court also held that the trial court acted within its discretion to disqualify a licensed civil engineer as an expert witness, and that the homeowners could recover non-pecuniary damages for emotional distress, inconvenience, mental anguish. The defendant argued that the trial court erred in finding he was personally liable since the construction contract at issue was between Matherne and Barnum LLC, not Barnum personally. The trial court found that an oral construction contract existed between Matherne and Barnum on behalf of Barnum LLC. Matherne wrote two checks made payable to Barnum personally and two checks made payable to Barnum LLC. In piercing the corporate veil, the trial court cited La. Rev. Stat. 12:1320 (B), subsection D, which provides a cause of action against a member of an LLC, due to any breach of a professional duty, fraud, or other negligent or wrongful act by such person.

In *BG Real Estate Services Inc. v. Rhino Systems of Canada*, 78 So.3d 285 (La. App. 5th Cir. 11/15/11), a building owner filed suit against the insurer of its roofing contractor after the failure of an installed roof. The trial court held that the CGL policy issued to the roofer did not cover the alleged damages (replacement value of the roof). The Appellate Court affirmed that a CGL policy is not intended as a guarantee of the quality of the insured's work. Although plaintiff argued that the work should have been covered under the Products/Completed Operations Hazard, the Court found that that clause only applied to damages sustained by third parties. Therefore, based on the specific language of the CGL policy, the work was not covered and the insurer was not responsible for the damages.

Merchant Liability

In *Gray v. Wal-Mart Louisiana LLC,* No. 11-30946, 2012 WL 320-5524 (5th Cir. Aug. 7, 2012) on the day that Hurricane Gustav caused severe storms, plaintiff slipped in a puddle of clear liquid while pushing her cart down an aisle at Wal-Mart. Shortly thereafter, a supervisor filled out an internal incident report and identified a hole in the roof as the "source" of the puddle. The manager later testified that the incident report was not based on direct knowledge but instead on an "assumption" which in turn was based on his knowledge of other leaks in Wal-Mart's roof and the heavy rain outside at the time. The District Court granted Wal-Mart's

Motion for Summary Judgment on the ground that the plaintiffs had failed to create an issue of fact as to whether they had satisfied the standard set forth in La. R.S. 9:2800 6(B). This statute requires that a plaintiff asserting a slip and fall claim against a merchant prove that "the merchant negligently created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence." The District Court noted that neither the incident report nor any other evidence presented by plaintiffs showed that Wal-Mart had actual knowledge of the leak before Ms. Gray's accident occurred. The United States Court of Appeals, Fifth Circuit, agreed.

In *Brown v. Wal-Mart Louisiana LLC*, No. 10-1402, 2012 WL 3109785 (W.D. La. Jul. 27, 2012), a Western District of Louisiana case, the plaintiff slipped and fell in a puddle of rainwater which dripped from a leak in the ceiling. Plaintiff claimed two causes of action: (1) a claim under Louisiana Civil Code articles 2317.1 and 2322 against Wal-Mart as the building owner/custodian for failure to repair the roof leak, of which Wal-Mart had knowledge, and (2) a claim under La. R.S. 9:2806 for failure to exercise reasonable care in keeping the premises free from conditions presenting an unreasonable risk of harm to the Plaintiff. The District Court held that the applicable law was R.S. 9:2800.6 because once a patron fell on a merchant's premises due to a condition existing in or on the premises, 9:2800.6 applied and Louisiana courts have determined it is error to also apply articles 2317 and 2322. In other words, once the plaintiff fell in the retail store, whether Wal-Mart was the custodian of the roof was irrelevant; the applicable statutory authority was 9:2800.6. Other evidentiary issues were reserved for trial, including whether the puddle was an open and obvious condition.

Public Entities

In *Casborn v. Jefferson Parish Hospital District No. 1*, No. 11 CA 1020, 2012 WL1880644 (La. App. 5th Cir. 5/22/12), a pedestrian visiting a patient at a Parish Hospital tripped and fell on an uneven concrete section of walkway next to the parking garage. The defendants argued that the uneven sidewalk did not create an unreasonable risk of harm and that there was no notice of the defect. The trial court granted summary judgment in favor of the defendants. The Louisiana Fifth Circuit Court of Appeal affirmed, holding that (1) a deviation of 1/2 to 2 inches in the sidewalk was not an unreasonably dangerous condition and (2) the pedestrian's summary judgment evidence did not sufficiently support that the defendants had actual or constructive notice of the defect. Photographs of the defect and affidavits of a hospital worker which stated that the sidewalk had been in that condition for some time before the pedestrian felt did not create sufficient factual support to show that the pedestrian would be able to satisfy her evidentiary burden of proof at trial on the essential element of the defendants' actual or constructive notice. The defendants produced testimony and documentary evidence to show they had no notice of the difference in height of the concrete sidewalk blocks where the pedestrian fell.

Handy v. City of Kenner, No. 12 CA 135, 2012 WL 2476685 (La. App. 5th Cir. 6/28/12) involved a patron who struck his head on the bottom portion of a stairwell while exiting a food bank. Plaintiff testified that he went to the food bank to get supplies. As he left the premises, he used a passageway which he had not previously used. He hit his head on the stairwell, fell, and became disoriented. He stated that the stairwell looked like an illusion, and he thought he was able to pass through it, but instead he struck his head. He filed suit against the food bank and the City of Kenner, as the owner of the building in which the bank was housed. The trial court entered judgment in favor of defendants upon finding that the stairwell was an open and obvious condition which did not present an unreasonable risk of harm. The Louisiana Fifth Circuit Court of Appeal affirmed. While plaintiff insisted that the stairwell was not open and obvious to him, the fact–finder heard testimony from other witnesses suggesting otherwise. Further, the City presented evidence that there had been no prior complaints regarding that the stairwell being used as a passageway. The stairwell appeared to be large and unobstructed, and there was no indication from the photographs of anything hazardous about the stairwell.

Restaurant Liability

In *Henry v. NOHSC Houma #1, LLC*, No. 2011 CA 0738, 2012 WL 2454957 (La. App. 1st Cir. 6/28/12), a restaurant patron filed a complaint for damages after she fell and broke her ankle. The Plaintiff was seventy-four years old and used a cane or walker as a result of two hip replacements that were necessary to counteract the effects of diabetic neuropathy in her feet. She claimed that her right foot got caught in the restaurant's carpet, and she fell and broke her ankle. She did not notice anything about the carpet to indicate that any danger was there or that any food or other substance was on the floor where she fell. She stated that the carpet was uneven because it had "little squares" that formed its weave. The trial court granted summary judgment in favor of the restaurant and its insurer. The First Circuit Court of Appeal affirmed, holding that the carpet where the restaurant patron fell did not create an unreasonable risk of harm, as commercial grade carpet had been installed one month earlier, there were no worn spots or frayed edges, and the carpet fibers were all one length. Plaintiff claimed that there was a genuine issue of material fact as to whether the carpet contained fibers of varying lengths and therefore constituted a condition that presented an unreasonable risk of harm. In affirming summary judgment, the Court reasoned that the fact that plaintiff maintained that the carpet was uneven did not create a material fact without any evidence that the carpet surface created an unreasonable risk of harm. Many carpets have variations in pile height to create patterns and that, in and of itself, does not make a carpet defective or dangerous.

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