

LEVY'S CITES

A Newsletter Reporting Selected Plaintiff-Favorable Louisiana Personal Injury Opinions — With Some Lagniappe

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There is a special category for attorney fee cases

Lightbulb for helpful attorney fee case



ATTORNEY FEES

Attorney fees — Amount — Contingent fees — Miscellaneous — Penalties and attorney fees — Under the facts, plaintiff's attorney could recover both a 40 percent contingent fee and a federal statutory attorney fee — Plaintiff sued ConAgra, Inc. in state court for her wrongful discharge, claiming that she had been fired for exercising her rights under the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.* A jury awarded her damages of \$10,000 and the court of appeal affirmed the jury's finding, but also found that, because ConAgra did not act in good faith in discharging her, she was entitled to "liquidated" or double damages under 29 U.S.C. §2617. The court then increased the award to \$20,000, but also found that, under the act, a successful plaintiff is also entitled to a reasonable attorney fee. It then awarded her attorney fees of \$5,000. At issue between her and her attorney was whether her attorney was entitled to 40% of the federal attorney fee award or whether he was entitled to 100% of the fee. The attorney argued **that under the contingent fee contract, plaintiff agreed to pay a 40% contingent fee and that any award of attorney fees was the sole property of the lawyer, exclusive of any award**

CASES

Quotations: The newsletter has extensive quotations throughout. Lawyers use the quotations as authority in memos and jury charges. They are not quoting the newsletter. They are quoting the courts.

of the client. Thus, he argued that according to the contract, he was entitled to both the 40% contingent fee and the \$5,000 statutory attorney fee. The plaintiff however argued that if the attorney was allowed to keep the \$8,637.70 attorney fees and costs, plus 40% of the \$27,237.31 damages award and interest, he would recover an attorney fee of \$19,532.63 out of a total award of \$35,875.01. The trial court held the attorney could recover only 40% of the statutory fee, but the court of appeal disagreed and held that he was entitled to 100% of both fees:

"The parties in this case were free to enter into a contingent fee contract regarding Mr. Jones' representation of Ms. Dowles. The contingent fee contract between the parties is valid and provides for a 40 percent attorney fee based upon any recovery obtained and specifies that any award of attorney fees is the attorney's property, exclusive of any award to the client. Terming the statutory attorney fee as an element of Ms. Dowles' damage award, as was done by the trial court, is contrary to the clear terms of the contract which provides that any attorney fee award is the sole property of the attorney, exclusive of any award to the client. Under the terms of the agreement, the trial court erred in treating the attorney fee as an element of damages awarded to the plaintiff, adding that amount to the damage award, and then computing the contingency fee award on the total. Accordingly, we

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Cites provides attorneys with a source of research for finding plaintiff-favorable quotations for use in drafting jury charges and in writing memoranda.

Cites mainly reports selected Louisiana state court appellate opinions in personal injury cases. Non-personal injury and federal cases may sometimes be reported.

Comments and suggestions from readers are appreciated.

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reverse the trial court judgment allocating fees in this manner.” (Emphasis added.) *Dowles v. ConAgra, Inc.*, 44,772 (La. App. 2 Cir. 10/28/09).

ED. NOTE: The court distinguished *McCarroll v. Airport Shuttle, Inc.*, 2000-1123 (La. 11/28/00), 773 So.2d 694, a workers’ compensation case in which the supreme court concluded that the statutory attorney fees awarded to the employee in cases of arbitrary behavior of an employer or an insurer were intended to benefit the employee, and that the employee would otherwise have to pay the contractual attorney fees out of his or her recovery in the litigation. Those fees were not intended to provide additional fees to the employee’s attorney, who received the amount of the statutory attorney fees as full compensation for legal services in the litigation. The court of appeal noted:

“In contrast to *McCarroll*, the federal statute at issue in this case does not limit contingent fee contracts. Further, it does not specify that a statutory attorney fee award extinguishes all or part of the agreement between attorney and client. Therefore, the ruling of *McCarroll* is not controlling here to preclude recovery of both the contingent fee amount and the statutory fee award.”

The court further noted that the total of the attorney fee was reasonable:

“We find that, limited to the facts of this case, the statutory attorney fee award and the contingent fee amount together constitute a reasonable attorney fee. This case concerned complex litigation under federal law and involved a jury trial which lasted several days. The matter obviously required a significant amount of time on the part of Mr. Jones. After receiving a favorable jury verdict, Mr. Jones defended the verdict on appeal on Ms. Dowles’ behalf and was successful in having the jury verdict doubled, as well as securing the statutorily mandated attorney fee award. Given these facts, an attorney fee award of \$13,000, plus interest, is reasonable. The record contains nothing to indicate otherwise. Under these circumstances, the award of the amount due under the contingent fee contract as well as the statutory attorney fee award was reasonable.”⁹

⁹ Mr. Jones also requests additional attorney fees for prosecuting the appeal in this matter. He is not entitled to such recovery. Under Louisiana law, attorney fees are not allowed except where authorized by special statute or by contract. *Shreveport Neon Signs, Inc. v. Williams*, 44,079 (La. App. 2d Cir. 2/25/09), 5 So. 3d 977. In the present case, Mr. Jones filed pleadings against his former client to recover fees due to him based upon the contingent fee contract. Nothing in the contract requires Ms. Dowles to pay additional attorney fees to Mr. Jones for suing to recover the amounts due under the contingent fee contract. Further, there is no statute granting Mr. Jones the right to recover additional fees. Therefore, his request is denied.”

A symbol for Louisiana Supreme Court opinions

There is also a category for Attorneys

More quotations

ATTORNEYS

S.Ct.

Attorneys — Ethics — The disciplinary board — The board should not make findings based on a cold record —

“As this court recently observed in *In re: Holliday*, 09-0116 (La. 6/26/09), 15 So.3d 82, the board serves an appellate review function under Supreme Rule XIX, § 11(F) and should therefore ‘refrain from making findings based on a cold record.’”

” *In re: Ungar*, 2009-0573 (La. 10/30/09).

Another Supreme Court case

GOVERNMENTAL ENTITIES

S.Ct.

Governmental entities — Miscellaneous — Venue — Domicile of plaintiff, when suit may be filed at — When suit may not be filed at plaintiff’s domicile — Suits against hospital service districts must be filed in the designated domicile of the district — Plaintiff’s filing suit based on where her cause of action arose was not proper. *Black v. St. Tammany Parish Hospital*, 2008-2670 (La. 11/6/09).

ED. NOTE: *See Venue — Governmental entities — Domicile of plaintiff, when suit may be filed at — When suit may not be filed at plaintiff’s domicile — Suits against hospital service districts must be filed in the designated domicile of the district — Plaintiff’s filing suit based on where her cause of action arose was not proper*, p.15.

INSURANCE

Insurance — Miscellaneous — Class action — Lafayette Insurance Company — Court of appeal approves a class certification against Lafayette involving in part plaintiff’s allegations about Lafayette using improper repair estimates, failing to include the cost of general contractor overhead and/or profit, and failing to include the cost of permits and sales tax — The trial court certified the following Katrina-related class action against Lafayette Insurance Company:

“All persons whose property is located in St. Bernard, Plaquemines, Orleans, St. Tammany, Jefferson, St. Charles, Tangipahoa and Terrebonne Parishes Louisiana and covered by a homeowner’s insurance policy issued by Lafayette Insurance Company, sustained wind

damage in connection with Hurricane Katrina on or about the 29th of August 2005 and whose policy for benefits related to wind damage to their property has been denied in toto or partially misadjusted by Lafayette Insurance Company and/or its representatives by:

1. By using repair estimates, whether derived by Xactimate or other means to use pre-Katrina pricing information to adjust claims that are lower than the higher post Katrina prices of goods and services.
2. By excluding in the repair or replacement estimates for roofs damaged by failing to include the cost of overhead and/or profit where a General Contractor is to be used or circumstances require, the inclusion of overhead and profit.
3. By failing to include the cost of permits and sales tax in repair estimates used to adjust claims.
4. By failing to properly adjust additional living expense's (sic) loss when the relocation or displacement resulting from windstorm required the insured to relocate and thereby incurred additional living expense.
5. By failing to properly adjust civil authority claims to recognize that the coverage is available when the damage to adjacent property from wind results in the civil authority to prohibit entry or occupancy of the insured property, whether the insured property itself is damaged by wind or not.
6. By failing to pay claims within the prescribed statutory period of 30 or 60 days after satisfactory proof of loss when such loss [sic] is arbitrary, capricious and without probable cause."

The court of appeal approved the certification except as to the penalty provision of item 6:

"The one problem we find with the trial court's class definition is contained in the definition's last paragraph. We believe that the language 'when such is arbitrary, capricious and without probable cause' should be stricken from the class definition. Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the case. The determination of whether an insurer's failure to pay was arbitrary and capricious must be made at trial and goes to the merits of each individual claim. Moreover, the inclusion of this language creates ambiguity on the part of a potential class member, who may not be aware of whether Lafayette's failure to make timely payment was arbitrary or capricious, or whether Lafayette had a justifiable reason for doing so under the circumstances. The phrase itself calls for a legal conclusion that potential class members may not have the

legal knowledge to make. For these reasons, we direct the trial court to strike this language from the definition while leaving the remainder of the definition intact." Dupree v. Lafayette Insurance Company, 2009-0321 (La. App. 4 Cir. 10/14/09).

Insurance — Miscellaneous — Plaintiff could file suit in his domicile against a non-resident driver even though non-resident drivers appoint the Secretary of State for service of process — A nonresident driver for whom the secretary of state has been statutorily appointed for service of process is not a nonresident who has appointed an agent for the service of process in the manner provided by law. Green v. Auto Club Group Insurance Company, 2008-2868 (La. 10/28/09). Johnson, J., concurs.

ED. NOTE: *See* **Venue — Domicile of plaintiff — When suit may be filed at a plaintiff's domicile — Plaintiff could file suit in his domicile against a non-resident driver even though non-resident drivers appoint the Secretary of State for service of process — A nonresident driver for whom the secretary of state has been statutorily appointed for service of process is not a nonresident who has appointed an agent for the service of process in the manner provided by law, p. 14_.**

There's a topic for Malpractice - Medical. There's also one for Malpractice - Legal

MALPRACTICE – MEDICAL

A skull and Crossbones warning about a dangerous case



Malpractice–Medical— Miscellaneous — State prisoners — State prisoners must submit a medical malpractice claim to administrative review before filing suit — Plaintiff, a state prisoner, filed a petition for damages alleging medical malpractice related to treatment he received at Bogalusa Medical Center, an outside state-operated medical facility. Prior to filing suit, plaintiff had not sought review of his medical malpractice claim either within the prison's administrative review process or before a state medical review panel. The court of appeal, disagreeing with the Third Circuit's opinion in *Yen v. Avoyelles Parish Police Jury*, 2003-603 (La. App. 3 Cir. 11/5/03), 858 So.2d 786, held that the district court was correct in holding that the district court lacked jurisdiction over the claim because of the failure to submit to an administrative procedure. Walker v. Appurao, 2009-0821 (La. App. 1 Cir. 10/23/09).

S.Ct. Malpractice–Medical— Miscellaneous — Venue — Governmental entities — Domicile of plaintiff, when suit may be filed at — When suit may not be filed at plaintiff's domicile — Suits against hospital service districts must be filed in the designated domicile of the

district — Plaintiff's filing suit based on where her cause of action arose was not proper. Black v. St. Tammany Parish Hospital, 2008-2670 (La. 11/6/09). ED. NOTE: See Venue — Governmental entities — Domicile of plaintiff, when suit may be filed at — When suit may not be filed at plaintiff's domicile — Suits against hospital service districts must be filed in the designated domicile of the district — Plaintiff's filing suit based on where her cause of action arose was not proper, p.15.

There's a category for Prescription cases.

PRESCRIPTION

Prescription — Relation back of amendments — Interruption — Plaintiff's amendment renaming a defendant from "Louisiana Superdome" to "State of Louisiana" related back to the date she filed suit against "Louisiana Superdome" — Plaintiff, who alleged a fall in the Louisiana Superdome on January 13, 2007 filed suit against Louisiana Superdome on January 4, 2008. On January 23, 2008, the State of Louisiana, on behalf of the Louisiana Stadium and Exposition District, filed an exception of no cause of action. Subsequently, in January 2009, she filed an amended petition seeking to rename the defendant from the "Louisiana Superdome" to "State of Louisiana." It was not disputed that the State owns the Superdome. The court of appeal held that the amended petition, pursuant in part to *Ray v. Alexandria Mail, Through St. Paul Property & Liability Ins.*, 434 So.2d 1083 (La. 1983), related back to the date of the original suit and that her suit against the State had not prescribed. *Hoff v. Louisiana Superdome*, 2009-0734 (La. App. Cir. 10/14/09). This opinion was "not designated for publication."

Here the court of appeal that an amendment related back to when the plaintiff first filed suit.

A helpful Supreme Court opinion on prescription

Here's an extensive quotation from the Supreme Court's opinion

S.Ct. Prescription — Miscellaneous — Amendments to petition — When a court sustains an exception of prescription, it should permit plaintiff to amend if the new allegations raise the possibility that the claim is not prescribed — This rule applies even if the outcome of the prescription issue is uncertain — "When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, 'the judgment sustaining the exception shall order such amendment within the delay allowed by the court.' La. Code Civ. Proc. art. 934. With particularity to the question at issue in the present case, when a court sustains an exception of prescription, it should permit amendment of the plaintiff's pleadings if the new allegations which the plaintiff proposes raise the possibility the claim is not prescribed, even if the ultimate outcome of the prescription issue, once the petition is amended, is uncertain. *Reeder v. North*, 97-0239 (La. 10/21/97), 701 So. 2d 1291, 1299; *Whitnell v. Menville*,

540 So. 2d 304 (La. 1989). Considering this well established jurisprudence, we find the court of appeal erred in failing to allow the [plaintiffs] an opportunity to amend their petition. . . ." *Wyman v. Dupepe Construction*, 2009-0817 (La. 12/1/09).

S.Ct. Prescription — Interruption — Payment of medical expenses only, with no other acts by an insurer, does not constitute an acknowledgment of general liability for damages and therefore does not interrupt preemption —

"We granted certiorari in this case to determine whether a defendant insurance company's payments, pursuant to the no fault medical payment coverage provision in a commercial general liability policy, qualified as an acknowledgment sufficient to interrupt prescription for all claims arising out of an accident. For the reasons that follow, we hold that the no fault medical payment provision in an insurance policy are due and payable, irrespective of the defendant's liability in tort. Payment of medical expenses only, with no other acts by the insurer, does not constitute an acknowledgment of general liability for damages." *Titus v. IHOP Restaurant*, 09-951 (La. 12/1/09).

DANGER!!!

S.Ct. Prescription — Interruption — Plaintiffs' malpractice suit was prescribed because they sued the wrong defendant — It was no defense that their counsel relied on information in the Secretary of State's website — Plaintiffs' decedent filed suit against a nursing home. However, that nursing home defendant was not operating the home when decedent was a patient or when suit was filed. (Plaintiffs' attorney apparently learned the name of the defendant from the Secretary of State's web site.) The defendant, after prescription had run, forwarded the suit to Metairie Operations, L.L.C., the prior owner, which was not related to it, which then filed an exception of prescription. The court of appeal affirmed the trial court's dismissal of the suit as having prescribed:

Plaintiffs' case was prescribed - Their lawyer should not have relied on the Secretary of State's web site!!

"Plaintiffs . . . argue that their search of the Secretary of State's website prior to filing suit as an attempt to find and identify the correct owner/operator of the facility in question constituted due diligence on their part. They argue that the information on the website was incorrect and misleading, thereby excusing their mistake in naming the correct defendant herein. Defendant Metairie Operations countered that due diligence by the plaintiffs in this particular case required additional relatively non-onerous action on the part of the plaintiffs that could have easily allowed plaintiffs to identify the then-current owner/operator of the facility in question. Plaintiffs would have thus been able to appropriately name the correct party defendant

in this proceeding when they originally filed their petition for damages.

“We agree with Metairie Operations. Under the particular facts and circumstances involved in this case, due diligence in this case required more action and research on the part of the plaintiffs. Phone calls by the plaintiffs to the appropriate public agency which regulates facilities of this type, or to the facility itself, seemingly would have allowed plaintiffs to easily find and accurately identify the then-current registered owner/operator of the facility in question. Such additional action by the plaintiffs would not have been so onerous on plaintiffs so as to be considered unreasonable and inappropriate under the particular facts and circumstances involved in this case.” *Burg v. Living Centers-East, Inc.*, 2009-248 (La. App. 5th Cir. 10/27/09).

SUMMARY JUDGMENT



Summary judgment — Miscellaneous — Procedure — The proper procedure for obtaining a reconsideration of a denial of a motion for summary judgment

is to refile the motion prior to trial — A trial court which had denied defendant’s motion for summary judgment, in response to a party’s motion for new trial regarding the denial, reversed itself and granted a summary judgment. The court of appeal reversed, holding that the trial court acted improperly in granting the summary judgment:

“The proper procedure for obtaining a reconsideration of the motion for summary judgment which has been denied is to re-urge the motion itself by refileing it prior to trial. *Young v. Dupre Transport Co.*, 97-0591 (La. App. 4 Cir. 10/1/97), 700 So. 2d 1156, 1157.

* * *

“This court [has] permitted a motion for summary judgment to be re-urged by the defendants after it had been denied twice previously, noting that previous denials had no res judicata effect. *Francioni v. Rault*, 570 So. 2d 36, 37 (La. App. 4 Cir. 1990). See also *Hargett v. Progressive Ins. Co.*, 08-0293, pp. 6-7 (La. App. 4 Cir. 10/29/08), 996 So. 2d 1199, 1202.” *Magallanes v. Norfolk Southern Railway Company*, 2009-0605 (La. App. 4 Cir. 10/14/09).

VENUE



Venue — Domicile of plaintiff, when suit may be filed at — Plaintiff could file suit at his domicile against

LEVY'S CITES

Helpful Supreme Court case - Plaintiff could file suit at his domicile

a non-resident driver even though non-resident drivers appoint the Secretary of State for service of process — A nonresident driver for whom the

secretary of state has been statutorily appointed for service of process is not a nonresident who has appointed an agent for the service of process in the manner provided by law — Plaintiff, Michael Green, filed suit in Orleans Parish, the parish of his domicile, against a nonresident driver and Auto Club Group Insurance Company, a foreign insurance company not authorized to do business in Louisiana. Plaintiff’s suit was for his injuries from an automobile accident that occurred in 2005 in St. John the Baptist Parish. Green requested service of process via certified mail on the defendants pursuant to the Long Arm Statute. Auto Club was served, but service was not perfected on the defendant driver until 2007. Defendants filed exceptions of improper venue and prescription, arguing that venue was proper only in St. John the Baptist Parish, where the accident occurred or in East Baton Rouge Parish. The trial court denied defendants’ exceptions, but the Fourth Circuit reversed, holding that under the Direct Action Statute, venue was proper under the statute in St. John the Baptist or East Baton Rouge Parishes and was improper in Orleans, and, since service was not perfected on defendants within the prescriptive period, the suit had prescribed under La. C.C.P. art. 3462. The supreme court held that the trial court properly denied defendants’ exceptions and that venue was proper at plaintiff’s domicile:

“The court of appeal found that La. C.C.P. art. 42(5), which would allow venue in the parish of plaintiff’s domicile, does not apply because the insured in this case appointed an agent for service of process by virtue of La. R.S. 13:3474. La. R.S. 13:3474 provides that the acceptance by nonresidents of the privileges of driving a car in Louisiana ‘shall be deemed equivalent to an appointment by such non-resident of the secretary of state of Louisiana . . . to be his true and lawful attorney for service of process . . .’ Thus, the court of appeal held, La. C.C.P. art. 42(6) applies, which only allows the suit to be brought in the parish of the agent for service of process, in this case East Baton Rouge Parish.

“We disagree. A nonresident driver for whom the secretary of state has been statutorily appointed for service of process is not a nonresident ‘who has appointed an agent for the service of process in the manner provided by law . . .’ under La. C.C.P. art. 42(6). The Official Revision Comments make this clear: ‘[p]aragraph (6) does not apply to a nonresident for whom, by operation of law, the secretary of state is made the agent for service of process, for in such a case the nonresident has not ‘appointed’ an agent.’ La. C.C.P. art. 42, Official Revision Comment (d) (1960). Because the insured in this case did not ‘appoint’ an

agent for service of process, La. C.C.P. art. 42(5) applies and allows suit to be brought against the insured in the parish of plaintiff's domicile, which it was in this case. Pursuant to La. R.S. 22:1269, suit can be brought where venue is proper for *either* the insurer or the insured under La. C.C.P. art. 42 only; therefore, as venue was proper for the insured, it was also proper for the insurer. Under La. C.C. art. 3462, because this suit was filed in the proper venue, prescription was interrupted. Therefore, the trial court was correct in denying defendants' Exceptions of Improper Venue and Prescription." *Green v. Auto Club Group Insurance Company*, 2008-2868 (La. 10/28/09). Johnson, J., concurs.

A
dangerous
Supreme
Court case



Venue — Governmental entities — Domicile of plaintiff, when suit may be filed at — When suit may not be filed at plaintiff's domicile

— **Suits against hospital service districts must be filed at the designated domicile of the district — Plaintiff's filing suit based on where her cause of action arose was not proper** — Plaintiff filed a whistleblower action against a hospital district in Washington Parish, where her cause of action allegedly arose. The hospital district argued that venue was improper in Washington Parish and that the suit should, under La. Rev. Stat. § 46:1063, have been filed in St. Tammany Parish, its domicile. Section 1063 provides:

The police jury creating a hospital service district, with corporate powers, shall designate the domicile of such corporation, at which domicile it shall be sued and service of citation made on the director, and in his absence, upon the chairman of the commission, and in his or their absences, then upon the vice chairman of the commission; provided that in fixing the domicile of the district the police jury shall at all times fix the same at some place within the district.

The supreme court held that venue was not proper where the cause of action arose because the specific venue provisions of La. Rev. Stat. §46:1063 governing hospital service districts prevailed over the exceptions of La. Rev. Stat. §13:5104(B). Further, the court overruled *White v. Beauregard Memorial Hosp.*, 02-0902 (La. 6/14/02), 821 So.2d 481 to the extent that *White's* holding conflicted with *Black* and remanded the case to St. Tammany Parish. *Black v. St. Tammany Parish Hospital*, 2008-2670 (La. 11/6/09).

WORKERS' COMPENSATION

Workers' compensation — Exclusive remedy — Claims not barred — Pre-1975 employment — Where plaintiff's mesothelioma was contributed to prior to

the 1975 amendment to the Louisiana Workers' Compensation Act regarding mesothelioma, plaintiff could sue in tort in state court even though his mesothelioma was covered by the federal Longshore and Harbor Workers' Compensation Act — Plaintiff's remedy under the Longshore Act did not preclude his filing for tort damages in state court —

"This appeal presents the issue of whether plaintiff's claims against three of his former employers are barred by the Longshore and Harbor Workers' Compensation Act ('LHWCA'), 33 U.S.C. §901 *et seq.* Plaintiff did not seek

benefits under the LHWCA, choosing instead to file a tort claim in state court.

* * *

"We find that the trial court erred in holding that plaintiff's claims against his former employers are barred by the LHWCA. Even though plaintiff could have claimed benefits under the LHWCA, the federal compensation scheme is not his exclusive remedy.

* * *

"In *Sun Ship [Inc. v. Pennsylvania]*, 447 U.S. 715, 720, 100 S.Ct. 2432, 2436, 65 L.Ed.2d 458 (1980), the plaintiffs chose to file for benefits under their state's compensation act even though the LHWCA, as amended in 1972, also

applied to their injuries. The Court rejected the plaintiffs' employer's contention that the LHWCA was plaintiffs' exclusive remedy, and held that a state may apply its workers' compensation scheme to land-based injuries that also fall within the coverage of the LHWCA. *Id.* at 716-717, 100 S.Ct. 2434.

* * *

"Based on the reasoning in *Sun Ship*, we reason by implication that the plaintiff in this case is not limited to recovery under the LHWCA." *DiBenedetto v. Noble Drilling Company*, 2009-0073 (La. App. 4 Cir. 10/21/09).

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