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MARCH 2019

Attorneys Chadwick Collings and Thomas Schneidau successful in defense of law enforcement officials.

On Tuesday, February 19, 2019, the United States Supreme Court denied a petition for certiorari in the matter of *Shane M. Gates v. Walter Reed, et al.* Shane Gates had brought a federal lawsuit against a multitude of public officials, including Milling's client, St. Tammany Parish Sheriff Randy Smith, alleging civil rights violations stemming from his 2006 arrest and subsequent prosecution in St. Tammany Parish. In 2016, Milling Benson Woodward L.L.P. took over defense of the case on behalf of the Sheriff and his deputies. In 2017, firm attorneys Chadwick Collings and Thomas Schneidau led a coalition of counsel representing the various defendants in securing a dismissal of the entire suit, with prejudice. That dismissal was affirmed in 2018 by the United States Court of Appeals for the Fifth Circuit. With the United States Supreme Court's recent certiorari denial, Mr. Gates has exhausted all of his appeal rights.

Firm attorney to serve as Treasurer of the Health Law Section for the Federal Bar Association.

Thomas Schneidau of the firm's Mandeville office was recently selected to serve as Treasurer of the Health Law Section for the Federal Bar Association.

Milling Benson Woodward L.L.P. is successful in having Trial Court denial of Motion for Summary Judgment overturned on appeal.

In Sanchez v. Sigur, LIGA moved for Summary Judgment arguing that no coverage was afforded for an automobile accident due to prior cancellation of an insurance policy. The matter involved two (2) separate cancellation notices sent to the alleged insured: 1) a ten (10) day cancellation notice for failing to pay policy premiums; and, 2) a thirty (30) day notice for failure to complete and return a policy application. Plaintiff argued that since the two (2) different cancellation notices listed two (2) different cancellation dates, it was unclear to the insured when her policy was cancelled and therefore neither cancellation notice was effective. The Trial Court agreed and denied LIGA's Motion for Summary Judgment. Firm attorney Jacob Chapman argued on appeal that since the accident occurred two (2) months after the latest possible cancellation date, if either cancellation was proper, then the policy was not in effect at the time of the accident. The Louisiana Fifth Circuit Court of Appeal agreed, reversed the Trial Court's decision, and dismissed LIGA from the case with prejudice.
http://www.fifthcircuit.org/dmzdocs/OI/PO/2019/72C32E58-D76B-47F5-A84A-0313072F65E7.pdf

Court finds that a Motion to Strike is a proper procedural vehicle to object to an untimely Opposition to Motion for Summary Judgment.

In *Bond v. Your Mom's Restaurant and Bar*, the Defendant filed a Motion for Summary Judgment under the merchant liability statute. Plaintiff filed an Opposition with attached exhibits four (4) days before the hearing. Defendant filed a Motion to Strike on the morning of the hearing arguing that Plaintiff's Opposition was untimely pursuant to LSA-C.C.P. Art. 966. The Trial Court granted the Motion to Strike and refused to consider Plaintiff's late filed Opposition. Plaintiff argued on appeal that Defendant waived its objection to timeliness because it did not raise the issue in a timely filed Reply Brief as required by LSA-C.C.P. Art. 966(D). The First Circuit acknowledged that LSA-C.C.P. Art. 966 typically requires evidentiary objections to be raised in a timely filed Opposition or Reply Brief. However, when the objection is to the timeliness of the opposing party's Opposition (as opposed to the substance of the Opposition) the objection may still be properly raised through a Motion to Strike.
http://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%200924%20Decision%20Appeal.pdf

Court of Appeal finds board member entitled to coverage under the auto liability coverage section of a policy.

In *Jourdan v. Allmerica Financial Benefit Inc. Co*., a board member was hit by a vehicle after attending a mandatory board meeting. After the meeting, the decedent rode with another board member to a nearby restaurant. The two (2) board members parked and were walking across the street to a restaurant, when the decedent was struck. Testimony introduced at the Trial Court indicated that the post-board meeting dinners were a tradition, but they were not mandatory. The Plaintiffs, who were heirs of the deceased, filed a lawsuit against several parties, including Federated, the board's insurance carrier. The Trial Court granted Plaintiffs' Motion for Summary Judgment, finding UM coverage was available. The Court of Appeal initially noted that Plaintiffs could not recover under the policy's UM endorsement, which only provided coverage for persons "occupying" a covered vehicle. Nevertheless, the Court of Appeal found that the decedent would have been insured under the auto liability coverage section of the policy, assuming he was within the scope of his duties as a board member. The Court of Appeal reversed the Motion for Summary Judgment in favor of Plaintiffs and remanded the matter back to the Trial Court to determine the course and scope issue.
http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%201630%20Decision%20Appeal.pdf

A Motion to Dismiss as a discovery sanction is an absolute nullity if not tried via a contradictory hearing.

In *Brooks v. Shamrock Construction, Co., Inc.*, the Defendant filed a Motion to Compel production of documents which was granted. Plaintiff provided some documentation in response, but according to Defendants, did not provide a complete response. Defendant filed an ex parte Motion to Dismiss, which the Court granted. Thereafter, Plaintiff filed a Motion to Vacate Order of Dismissal and argued that since Defendant did not request a contradictory hearing, the Judgment was an absolute nullity. The Trial Court granted Plaintiff's Motion to Vacate Order of Dismissal and found the original dismissal was an absolute nullity. The Court of Appeal relied on LSA-C.C.P. Art. 963, which states in pertinent part: "[i]f the order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion shall be served on an tried contradictorily with the adverse party". Since Defendants were challenging the sufficiency of the responses, instead of alleging a complete lack of responses, LSA-C.C.P. Art. 963 required a contradictory hearing.
http://www.fifthcircuit.org/dmzdocs/OI/PO/2018/ED50762C-F8B2-4934-B531-5EA8C00655A1.pdf

Expansion joint in parking lot was "open and obvious".

There have been several recent Court of Appeal decisions regarding the "open and obvious" defense. In *Taylor v. Chipotle Mexican Grill, Inc., et al*., the Plaintiff fell after stepping into an expansion joint in a parking lot with her wedge shoe. The Court in *Taylor* relied heavily on the Louisiana Supreme Court case of *Reed v. Wal-Mart Stores* 97-1174 (La. 3/4/98) 708 So.2d 362, which recognized that "surfaces are not required to be smooth and lacking in deviations, and indeed, such a requirement would be impossible to meet". *Reed* at 363. The Court then held that the expansion joint in this particular case was "open and obvious" and thus did not create an unreasonable risk of harm. In reaching this conclusion, the Court considered the width and height of the expansion joint, the contrast between the sealant material and the adjoining concrete, and the lack of prior accidents in the area.
http://www.fifthcircuit.org/dmzdocs/OI/PO/2018/58683485-9019-462E-AC23-5D3DD86D9F60.pdf

Vinyl transition strip between two (2) flooring services was "open and obvious".

In *Degree v. Galliano Truck Plaza, LLP,* et al. a casino patron sued the casino after she tripped and fell on a vinyl transition strip. The transition strip separated tile and carpet flooring in the casino. The Trial Court granted a Summary Judgment in favor of the casino after finding that the transaction strip constituted an open and obvious condition. The First Circuit upheld the Trial Court ruling, noting specifically that the dark transition strip contrasted with the light colored tile and carpet flooring. The Court also considered the lack of prior reported incidents.
http://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%200663%20Decision%20Appeal.pdf

Sanitation hose suspended over a sidewalk was "open and obvious".

In *Lafaye v. Ses Enterprises, LLC, et al.,* Plaintiff tripped and fell over a sanitation hose. The hose was connected to a sanitation truck which was servicing a portable toilet on a construction site. The hose itself was approximately three (3) inches in diameter and was suspended approximately eight (8) inches off the ground. The Trial Court denied Defendant's Motion for Summary Judgment and the Fourth Circuit reversed, finding that the hose was an "open and obvious" condition. A local ordinance prohibiting anyone from obstructing public passage was criminal in nature and did not automatically result in civil liability.
http://www.la4th.org/opinion/2018/459256.pdf

Mailbox rule applies to medical malpractice filing fees.

After filing a request for a medical review panel with the Patient's Compensation Fund, a claimant has forty-five (45) days to pay their statutorily required filing fees. Here, the claimant sent her payment to the Patient's Compensation Fund via certified mail. The payment was sent within the forty-five (45) day deadline but was not received until after the deadline. While LSA-R.S. 40:1231.8(A)(2)(b) specifically recognizes that the mailbox rule applies when determining whether a request for a medical review panel is timely, the statute is silent on whether the mailbox rule also applies for determining whether payment of filing fees is timely. The Louisiana First Circuit found that the mailbox rule should apply in both situations, and overturned the Trial Court, which had previously dismissed claimant's action. The First Circuit decision represents a potential circuit split on the issue. The First and Second Circuit have both held that the mailbox rule applies for determining whether a filing fee is timely. The Fifth Circuit however, has seemingly ruled on both sides of the issue. http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%201576%20Decision%20Appeal.pdf

Request to serve state physicians in their individual capacities was improper, and thus did not comply with LSA-C.C.P. Art. 1201(C) requiring Plaintiff to request service on all Defendants within 90 days.

In *Wright v. The State of Louisiana, et al*., a medical malpractice Plaintiff requested service on three (3) state-employed physicians in their individual capacities. The physicians argued that although service was requested within ninety (90) days, as required by LSA-C.C.P. Art. 1201(C), it was not a proper request for service, since physicians employed by the state must be served in the manner specified under LSA-R.S. 13:5107. The physicians filed an Exception of Insufficient Service of Process. The Trial Court denied the Exception of Insufficient Service of Process after finding that Plaintiff's request for service, although improperly requested, was timely. The Fourth Circuit reversed and held that a request for service is only timely if there is a proper request for service. "To hold otherwise would be to allow a Plaintiff to request service *on anyone* within 90 days of filing an action and technically comply with the requirement of the article". The Fourth Circuit granted the Exception of Insufficient Service of Process and dismissed the case, without prejudice. http://www.la4th.org/opinion/2018/455917.pdf

$5,000 per month general damage award upheld for exacerbation of soft tissue back injuries.

In *King v. National General Assurance Company, et al*., the Plaintiff was involved in two accidents, approximately six (6) months apart. The Trial Court determined that the second accident resulted in an exacerbation of pre-existing soft-tissue back injuries and mental anguish. The Trial Court awarded $35,000 for seven (7) months of treatment, which was affirmed by the Fifth Circuit. http://www.fifthcircuit.org/dmzdocs/OI/PO/2018/EABD9700-7A6B-40D2-85DA-D0BCED10A598.pdf

Adding additional Plaintiff's to a lawsuit through an Amended Petition does not necessarily relate back to the original Petition.

In *Carter v. Pointe Coupee Parish School Board*, several students filed a lawsuit alleging that the Defendant, a school resource officer, forced them to kneel on a gravel road for an extended period as a punishment. Approximately four and a half years (4 ½) after the alleged incident, several more students were added as additional Plaintiffs. Defendants filed an Exception of Prescription; however, the Trial Court denied the exception after finding that the claims of the newly added Plaintiffs related back to the original, timely filed lawsuit. The First Circuit reversed. Typically, when an Amended Petition adds new claims that arise out of the same conduct, transaction or occurrence as set forth in the original pleading, the Amended Petition will relate back to the date of filing the original pleading. *See* LSA-C.C.P. Art. 1153. Additionally, adding joint tortfeasors as additional Defendants in an Amended Petition will relate back to the filing of the original pleading. *See* LSA-C.C.P. Art. 2324. There is no statutory authority allowing additional Plaintiffs to be added in an Amended Petition if their claims would otherwise be prescribed. However, there is a jurisprudential rule allowing for additional Plaintiffs to be added. In order for the claims of the newly added Plaintiffs to relate back, the following criteria must be met: 1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; 2) the Defendant either knew or should have known of the existence and involvement of the new Plaintiff(s); 3) the new and old Plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; and, 4) the Defendant will not be prejudiced in preparing and conducting his defense. The third criteria, that the new and old Plaintiffs are "not wholly new or unrelated", typically requires some sort of close family relationship between the new and old Plaintiffs, such as husband / wife, parent / child, etc. Here, the addition of new students did not meet the third criteria and the newly added Plaintiffs were dismissed.

http://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%201035%20Decision%20Appeal.pdf

A prescribed claim cannot be revived.

Pursuant to LSA-C.C.P. Art. 2324, a timely filed suit against one joint tortfeasor interrupts prescription as to all other joint tortfeasors. Nevertheless, once a claim has prescribed, it cannot be revived. Here, the Plaintiff filed a lawsuit approximately fifteen (15) months after the accident against the tortfeasor, the tortfeasor's liability insurer, and her own uninsured motorist provider. Although the claim against her uninsured motorist provider (which is subject to a two (2) year liberative prescription period), was timely, it could not revive the claim against the tortfeasor and the tortfeasor's liability carrier, which prescribed one (1) year after the accident. Accordingly the Trial Court granted an Exception of Prescription filed by the tortfeasor and the tortfeasor's liability carrier and the First Circuit upheld the Trial Court's ruling.

http://www.la-fcca.org/opiniongrid/opinionpdf/2018%20CA%200433%20Decision%20Appeal.pdf