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## **LOUISIANA TORT LAW UPDATE**

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**Editor's Note**

Dear Friends:

In recent months, there have been a number of cases of note regarding tort law issues--the duty-risk analysis, authority to settle, wrongful death verdict forms, and the reasonably anticipated use requirement under the Louisiana Products Liability Act. But for those dealing with CGL policies and those in the construction industry, take a look at the Louisiana Supreme Court's decision in *Ebinger* regarding the 2003 preemption period amendment to La. R.S. 9:2772.

As always, thanks for your continued support.

Richard J. Petre, Jr.

### **Peremption—New Home Warranty Act**

In *Ebinger v. Venus Const. Corp.*, 2010-2516 (La. 7/1/11), the Louisiana Supreme Court finds that, in a case involving 1997 home construction, the 2003 amendment shortening the preemption period against contractors to five years under the New Home Warranty Act, La. R.S. 9:2772, applies to a 2006 third party action by the general contractor against a subcontractor.

Since its inception, the New Home Warranty Act has had three different preemptive periods. The original preemptive period was 10 years. Under a 1999 amendment, the preemptive period was shortened to seven years, with the amendment stating that the new time period applied only to contracts entered into on or after the Act's effective date. Under a 2003 amendment, the preemptive period was shortened to five years, with the amendment silent as to retroactive or prospective application.

The Supreme Court finds that the 2003 amendment applies retroactively unless it disturbs a vested right. Here, the 2003 amendment became effective before the general contractor was sued. At that time, the contractor had no vested right of indemnity against the subcontractor. As a result, the 2003 amendment applied retroactively.

### **Duty—Risk Analysis**

The decedent operator was killed when, driving a backhoe on a highway shoulder, he attempted at a relatively fast speed to make a sharp turn into a driveway, causing the backhoe to tip over and crush the operator. Plaintiff argued the backhoe overturned because of a two-to-four-inch depression in the shoulder. The backhoe was not authorized for highway use. Finding for the State under a duty-risk analysis, the Louisiana Supreme Court holds that the State's duty to maintain highway shoulders did not encompass the risk of injury that the decedent here encountered. *Brooks v. State of Louisiana Through The Department of Transportation and Development*, 2010-1908 (7/01/11).

### **Negligence—Negligent Hiring**

The mere fact that a contractor lacked the appropriate license at the time of the accident to perform a contract job does not alone mean that the hiring principal was negligent for hiring the contractor. *Certified Cleaning and Restoration, Inc. v. Lafayette Insurance Company*, 10-948 (La. App. 5 Cir. 6/14/2011).

### **Jurisdiction—Damages**

In a case falling into the category of “games that people play,” wife, who was injured in a car accident, and her husband, who was not in the accident, filed suit in Alexandria City Court. The Court's jurisdiction was limited to \$50,000.00 for any individual petitioner's cause of action. A city court judge awarded the injured wife \$50,000.00 in general damages, and then awarded the husband \$20,000.00 for loss of consortium damages as well as \$30,000.00 for the wife's past and future medical expenses, finding that the medical expenses would be a community expense and that the husband could sue to enforcement a community right. On remand from the Louisiana Supreme Court, the Louisiana Third Circuit Court of Appeal vacates in part the judgment, finding that the wife's medical expenses were part of her cause of action and that the husband could recover only for his loss of consortium damages. *Thompson v. State Farm Mutual Automobile*, 58 So.3d 499 (La. App. 3 Cir. 2/9/11).

### **Dangerous Conditions—Football Bleachers**

Plaintiff, who was 69 years old and recovering from hip surgery, attended a high school football game to watch her grandson, who was playing for the visiting team. The bleachers for the home team offered handicap-accessible and disabled seating. The smaller bleachers on the other side of the field used by fans of the visiting team did not. Descending at half time the visiting team bleachers, plaintiff fell and suffered serious injury. Plaintiff claimed the accident occurred because of a 16-inch vertical difference between the first row of seating and the second row of seating in the bleachers. At a bench trial, the trial court found that the bleachers were not defective and ruled in favor of the defendant school board. However, the Louisiana Third Circuit Court of Appeal reversed, finding that there was “no utility or social value in exposing

visiting patrons to an 18-inch vertical differential between the seat boards in question” and found that the school board was 70 percent at fault.

Reversing the Court of Appeal and finding in favor of the school board, the Louisiana Supreme Court holds that the bleachers were not unreasonably dangerous, noting that the bleachers as a whole provided considerable social utility, that the plaintiff could have opted to sit on the other side of the stadium where there were disability access ramps and handicap-accessible seating, and that the 18-inch gap between the seat boards was clearly visible.

In determining whether the condition was unreasonably dangerous, the court, using a risk-utility balancing test, considered (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff’s activity in terms of social utility and whether it was dangerous by nature. It should be noted that in considering “the utility of the thing,” the Supreme Court considered the utility of the bleachers as a whole rather than the utility of the gap between the seat boards. *Pryor v. Iberia Parish School Board*, 60 So.3d 594 (3/15/11).

Further, it is interesting to note that in her concurring opinion, Chief Justice Kimball wrote:

However, I write separately to express my dismay with the policy decision of the Iberia Parish School Board to provide handicap and disabled seating and accommodations only on the home side of the stadium.

### **Products Liability—Reasonably Anticipated Use**

Under the Louisiana Products Liability Act, La. R.S. 9:2800.54, a product manufacturer is responsible only for damages caused by a product characteristic that renders the product unreasonably dangerous “when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.” In this case, a 13-year old claimant climbed onto the moving pendulum of an oil well pump and attempted to “ride” the pendulum. The youngster’s pants became caught in the pump, and the claimant was injured. The trial court granted summary judgment to the oil well pump manufacturer, finding that the youngster’s riding of the pump was not a reasonably anticipated use of the product. The Louisiana Third Circuit Court of Appeal reversed the summary judgment.

However, reversing the Court of Appeal, the Louisiana Supreme Court agrees with the trial court, finding that the riding of the pump like an amusement park ride was not then a reasonably anticipated use of the oil well pump. Further, the court noted that all evidence submitted of such intentional misuse of the pump dealt with incidents that occurred well after the pump in question had been manufactured. *Payne v. Gardner*, 56 So.3d 229 (2/18/11).

### **Expert—Fees**

In *Boudreau v. Boudreau*, 62 So.3d 207 (La. App. 5 Circuit 3/9/11), the Louisiana Fifth Circuit Court of Appeal joins the First and Second Circuits in finding that, to be entitled to an expert fee, the witness must first be qualified as an expert. It should be noted that in the Second and Fourth Circuit Courts of Appeal, an expert fee can be awarded regardless of whether the witness is qualified as an expert.

### **Prescription—Interruption**

In a four-to-three decision, the Louisiana Supreme Court finds that a timely filed suit against plaintiff's statutory employer, which has no liability because of immunity, interrupted prescription as to a third party tortfeasor. In *Glasgow v. Par Minerals Corp.*, 2010-2011 (La. 5/10/11), the Supreme Court also affirms its 1993 ruling in *Williams v. Sewerage and Water Bd. Of New Orleans*, 611 So.2d 1383 (La. 1983), that a timely filed suit for workers' compensation benefits interrupts prescription as to third party tortfeasors.

### **Punitive Damages—Vicarious Liability**

The Louisiana Third Circuit Court of Appeal finds that an employer has no vicarious liability for punitive damages awarded under Louisiana Civil Code Article 2315.4 against intoxicated motorists. In this case, the plaintiff alleged that the intoxication of the employee driver caused the accident. *Romero v. Claritin American Ins. Co.*, 54 So.3d 789 (La. App. 3 Cir. 12/29/2010).

### **Settlement—High-Low Agreement**

In *Ryan v. State Farm Mutual Automobile Insurance Company*, 2010-0961 (La. App. 1 Cir. 12/22/10), the Louisiana First Circuit Court of Appeal finds that, under the definition of "compromise" in then Louisiana Civil Code Article 3071, a 2001 high-low agreement was not a "compromise" that required the written approval of the workers' compensation insurer under La. R.S. 23:1102(C)(1). However, the court noted that because of the 2007 amendment to Civil Code Article 3071, a high-low agreement today would likely require such approval.

### **Settlement—Client Authority**

In *Sims v. U. S. Agencies Casualty Insurance Company*, 2010-1120 (La. App. 1 Cir. 12/22/10), the Louisiana First Circuit Court of Appeal finds that a letter by an attorney accepting a settlement offer without the client's signature is not a binding settlement, absent evidence that the client expressly authorized his attorney to enter into the settlement.

### **Damages—Wrongful Death**

In *Hardy v. Augustine*, 55 So.3d 1019 (2/2/11), the Louisiana Third Circuit Court of Appeal finds that in a wrongful death action, the verdict form should not have contained separate damage lines for "loss of love, affection, and companionship"; and for "grief and anguish". However, though finding the separate lines on the verdict form erroneous, the Court then upheld the total amount of \$300,000 actually awarded by the jury in general damages to each parent (\$200,000.00 for loss of love and affection, and \$100,000.00 for grief and anguish).

### **Summary Judgment—Rear-end Accident**

In *Domingo v. State Farm Mutual Automobile Insurance Company*, 54 So.3d 74 (La. App. 5 Cir. 11/9/10), an automobile accident case involving one vehicle hitting the rear of a second vehicle that then hit the rear of a third vehicle, the Louisiana Fifth Circuit Court of Appeal affirms summary judgment against the insurer of the first vehicle, finding no genuine issue of material fact as to the fault of the first motorist based on the presumption that a following motorist in a rear-end accident is presumed to be at fault.