Louisiana Civil Law and Procedure
NEWSLETTER

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PROCEDURAL DEVELOPMENTS

Appeals

A party who confessed judgment in a trial court proceedings or who voluntarily and unconditionally acquiesced in a judgment—here a stipulation—may not appeal from that judgment. See La. C.C.P. art. 2085. Cordon v Parish Glass of St. Tammany, Inc., First Circuit, 2015-CA-1078 (4/15/16). http://www.lafcca.org/opiniongrid/opinionpdf/2015%20CA%201218%20Decision%20Appeal.pdf

In a real estate case, the court dismissed a suspensive appeal of an eviction order but maintained the appeal as a devolutive appeal based on the judgment in its entirety; the issues involved were inextricably intertwined. Martinez v Rivet, Third Circuit, 16-100 (4/13/16).
http://www.la3circuit.org/Opinions/2016/04/041316/16-0100opi.pdf

Evidence

In hearing on an exception of prescription, the plaintiff objected to the defendant's use of excerpts from a doctor's deposition because the defendant did not establish the doctor was unavailable, lived more than 100 miles away, or that there were exceptional circumstances warranting use of the deposition. La. C.C.P. art. 1450. The trial court overruled her objection. The plaintiff then offered excerpts of the same deposition; in doing so, the plaintiff waived her right to challenge the admissibility of the deposition excerpts. Lapuyade v Rawbar, Inc., Fifth Circuit, 15-CA-705 (4/13/16).

http://www.fifthcircuit.org/dmzdocs/OI/PO/2016/7605ED30-2DA7-4780-ACFC-AC0EC2D7FD24.pdf

Intervention

An intervention must be filed prior to filing of a motion to dismiss of the main demand in order to be unaffected by the dismissal of the main demand; the intervention cannot be maintained as an independent action. High Tech Steel Products, LLC v United States Environmental Services, LLC, Fourth Circuit, No. 2015-CA-0652 (4/7/16).
http://la4th.org/opinion/2015/398288.pdf.

Jury Trials; Jurors

A juror, who had worked as a nurse for the defendant in the malpractice action, informed the trial judge ex parte that (1) she was having physical and financial problems because her employer was not cooperating with her service as a juror; (2) she was uncomfortable with continued service because of her relationship with her friends who had been involved in the treatment of a child which was the basis of the suit, and (3) she did not feel her continued service was appropriate. The juror saw her name on medical records placed into evidence regarding the complained-of medical treatment and was in fact a potential witness in the underlying trial. The trial judge did not inform the parties of the communication and instructed the juror to continue to serve and not to inform her fellow jurors of her concerns. Upon discovery of the communication following trial, the plaintiffs sought to have the judgment annulled for fraud and ill practice under La. C.C.P. art. 2004(A). Both sides moved for summary judgment in the nullity action and the trial court granted the defendant's motion. Held: Factual issues precluded summary judgment. The communication was not merely managerial, as the trial judge should have informed counsel of the ex parte and communication and inquired whether juror could still impartially serve. The court on remand must determine whether the facts show the deprivation of legal rights and whether enforcement of the judgment would be inequitable and unconscionable. Landry v Pediatric Services of America, Inc., Third Circuit, 15-899 (4/6/16).
http://www.la3circuit.org/Opinions/2016/04/040616/15-0899opi.pdf

Judgment

A judgment that states that it is granting either an exception of prescription or preemption and does not state what claims are dismissed does not contain sufficient decretal language. Holland v Holland, Third Circuit, 16-117 (4/6/16).

http://www.la3circuit.org/Opinions/2016/04/040616/16-0117opi.pdf

Summary Judgment; New Trial

A judgment denying a motion for summary judgment is an interlocutory, non-appealable judgment that is not susceptible of being certified by a trial court as final for purposes of immediate appeal under La. C.C.P. art. 1915. When a motion for summary judgment has been denied, the proper procedure for obtaining a reconsideration of the interlocutory judgment is for the moving party to re-urge the motion itself by re-filing it prior to trial. The trial court erred as a matter of law by reconsidering, on its own motion, its prior judgment denying the plaintiffs' motion for partial summary judgment and setting aside the judgment. Condon v Logan, Fourth Circuit, No. 2015-CA-0797 (3/30/16). http://la4th.org/opinion/2015/397730.pdf

Venue; Direct Action Statute

An en banc Fourth Circuit, addressing an issue recurrent in its court, holds that the 1988 and 1989 changes to the venue provision of the Direct Action Statute are procedural and relate back to causes of action that arose before the enactment of the amendments to the statute. Blow v OneBeacon America Insurance Co. No. 2016-C-0301 (4/20/16) (en banc court; McKay, Lombard, Belsome, and Jenkins, JJ, dissenting). http://la4th.org/opinion/2016/399054.pdf.

SUBSTANTIVE DEVELOPMENTS

Attorneys; Discipline

The Supreme Court imposes the following discipline: (1) disbarment, where the attorney neglected legal matters, failed to communicate with clients, failed to account for or refund unearned fees, failed to properly withdraw from representation, and engaged in dishonest conduct, in In Re Gilbert, No. 2016-B-0044 (3/4/16), at http://www.lasc.org/opinions/2016/16B0044.pc.pdf; (2) suspension of one year and a day, where attorney neglected her client's legal matters, failed to communicate with her clients, failed to refund unearned fees, and failed to cooperate with the ODC in its investigation, in In Re Brown-Manning, No. 2015-B-2342 (3/4/16), at http://www.lasc.org/opinions/2016/15B2342.pc.pdf; (3) a suspension of two years, where the attorney failed to provide her client with an accounting after termination of representation, failed to refund unused court costs paid by the client, and failed to provide her client with a copy of her file, in In Re Guste, No. 2016-B-0077 (3/4/16), at http://www.lasc.org/opinions/2016/16B0077.pc.pdf; and (4) a suspension of one year and a day, with six months deferred, where respondent neglected her client's legal matter and allowed it to prescribe, failed to communicate with her client and failed to timely disclose her malpractice, and misled her client regarding the status of her case, in In Re Bullock, No. 2016-B-0075 (3/24/16) (Clark, Hughes, and Crichton, JJ, dissenting), at http://www.lasc.org/opinions/2016/16B0075.pc.pdf.

Attorneys; Sanctions

Article 863 authorizes a court to impose sanctions upon an attorney (or a represented party) who signs pleadings without making an objectively reasonable inquiry into the facts and the law. Subjective good faith does not satisfy the duty of reasonable inquiry. Among the factors to be considered in determining whether a reasonable factual inquiry has been made are: (1) the time available to the signer for investigation; (2) the extent of the attorney's reliance on his client for the factual support for the document; (3) the feasibility of a prefiling investigation; (4) whether the signing attorney accepted the case from another member of the bar or forwarding attorney; (5) the complexity of the factual and legal issues; and (6) the extent to which development of the factual circumstances underlying the claim requires discovery. Factors for determining whether reasonable legal inquiry was made include: (1) the time available to the attorney to prepare the document; (2) the plausibility of the legal view contained in the document; (3) the pro se status of a litigant; and (4) the complexity of the legal and factual issues raised. Skannal v Jones, Odom, Davis & Politz, L.L.P., Second Circuit, No. 50,502-CA (4/13/16).
http://www.la2nd.org/archives/docs/60de2e.pdf.

Contracts

Statement in a petition that the plaintiff-supplier had no contract with the subcontractor could not be deemed a judicial admission pursuant to La. C.C. art. 1853, because such a conclusion would require ignoring all the facts the plaintiff-supplier asserted prior to and subsequent to that statement in its supplemental and amending petition. Patriot Construction & Equipment, LLC v Rage Logistics, LLC, Third Circuit, 15-1136 (4/6/16).
http://www.la3circuit.org/Opinions/2016/04/040616/15-1136opi.pdf

Damages

The plaintiff, who had a doctorate in music with a

concentration in opera, was injured in an auto accident. She claimed her injuries caused her to lose earning potential because she missed out on opportunities, particularly an audition in New York where opera representatives from all over the world attend and which took place one or two months after the accident. She claimed that missing the audition left her unable to work the entire 2013 opera season. However, she was not guaranteed employment from attending the audition, had not purchased tickets to the audition at the time of the accident, and could not present documentary evidence that she had registered. Held: The trial court had no reasonable factual basis upon which to award damages for lost income opportunity. Woods v Hall, First Circuit, 2015-CA-1162 (4/20/16). http://www.la-fcca.org/opiniongrid/opinionpdf/2015%20CA%201162%20Decision%20Appeal.pdf

Defamation, Malicious Prosecution, and False Imprisonment

The plaintiff alleged that the defendant maliciously filed a report with the Lafayette Police Department accusing the plaintiff of unauthorized use of an access card. The defendant moved to strike pursuant to La. C.C.P. art. 971, which provides relief from a cause of action arising from a person's exercise of his or her constitutional rights of petition or free speech in connection with a public issue. The trial court granted the motion to strike and dismissed the plaintiff's claims with prejudice. Held: Good-faith reporting of criminal activity to the police is protected speech. The plaintiff did not prove malice, which is required for both defamation and malicious prosecution. Bohn v Miller, Third Circuit, 15-1089. http://www.la3circuit.org/Opinions/2016/04/040616/15-1089opi.pdf. *See also* Dauzat v Dolgencorp, LLC, Third Circuit, 15-1096 (4/6/16). http://www.la3circuit.org/Opinions/2016/04/040616/15-1096opi.pdf

Eminent Domain

How do the 2006 amendments to La. Const. art. VI, § 42, and La. Const. art. I, § 4, which purportedly conformed Louisiana takings law with federal law, apply in cases where the property is taken for levee and hurricane protection purposes? The First Circuit holds that "it is readily apparent that every statutory and constitutional reference regarding the proper measure of 'just compensation' for property taken or damaged pursuant to a permanent levee servitude for a hurricane protection project…has been legislatively restricted and shall not exceed that which is required by the Fifth Amendment." The compensation required by the Fifth Amendment is the fair market value of the property at the time of the taking for public use. Damages for economic and business losses are not recoverable as just compensation for the taking. South Lafourche Levee District v Jarreau, First Circuit, 2015-CA-0328 (3/30/16) Pettigrew and Drake, JJ, concurring; Crain, J, concurring and part and dissenting in part; Guidry, J, dissenting in part). http://www.la-fcca.org/opiniongrid/opinionpdf/2015%20CA%200328%20Decision%20Appeal.pdf

Immunity

The plaintiff, an inmate housed at the parish prison, was injured while in the course and scope of his work release employment. He sued, *inter alia*, the sheriff, alleging that he failed to provide the defendant with a safe workplace. Held: La. R.S. 15:711 authorizes the work release program for certain inmates and specifies that it is to be administered by the sheriff of the parish where the inmate is housed. Work release inmates are not deemed to be employees of the state, but are considered the employees of their private employer and are entitled to workers' compensation benefits. Where the plaintiff cannot produce any evidence to show that the sheriff was responsible for maintaining a safe workplace for the plaintiff at the time of his injury, summary judgment in favor of the sheriff was appropriate. Thomas v Morehouse Parish Waste Management, Second Circuit, No. 50,597-CA (4/13/16). http://www.la2nd.org/archives/docs/9c0c5b.pdf. *See also* Perkins v Roy O. Martin Lumber Co., LLC, Third Circuit, 15-571 (4/6/16). http://www.la3circuit.org/Opinions/2016/04/040616/15-0571opi.pdf

The plaintiff, who was working for a contractor, suffered injuries when he fell through an open hole at the defendant's facility. In response to the defendant's claim that it was the plaintiff's statutory employer under La. R.S. 23:1032 and 23:1061, the plaintiff argued that the contract between the defendant and the employer was illegal because it contained an improper indemnification provision under La. R.S. 9:2780.1, and thus the statutory employer defense was barred. Held: The defendant was the plaintiff's statutory employer; even if a clause of the contract violated La. R.S. 9:2780.1, the statutory employer issue is separate and distinct. Blanks v Entergy Gulf States Louisiana, LLC, Third Circuit, 15-1094 (4/6/16). http://www.la3circuit.org/Opinions/2016/04/040616/15-1094opi.pdf

Immunity; Equine Activities

The plaintiff visited an equestrian facility in New Orleans City Park for the purpose of visiting with and feeding the horses. While the plaintiff was attempting

to feed one of horses, the horse knocked the carrot out of her hand, and when she and the horse both reached for the carrot, the horse bit her thumb off. Held: The district court erred in deciding as a matter of law that the plaintiff was a "participant engaged in equine activity" under the Equine Immunity Statute, La R.S. § 9:2795.3(A)(7). Larson v XYZ Ins. Co., Fourth Circuit, No. 2015-CA-0704 (3/23/16) (Lobrano, J, concurring). http://la4th.org/opinion/2015/397308.pdf

Insurer moved for summary judgment, claiming the insured rejected UM coverage; insurer relied upon a form insured executed in March 2009. Appellate court held that factual issues precluded summary judgment. On remand, insurer again moved for summary judgment, this time relying on a form executed in June 2004. Held: Summary judgment in favor of the insurer is reversed; the insurer is not entitled to pick and choose which one of the selection forms to enforce. Draayer v Allen, First Circuit, 2015-CA-1150 (4/15/16) (Pettigrew, J, concurring). http://www.lafcca.org/opiniongrid/opinionpdf/2015%20CA%201150%20Decision%20Appeal.pdf

Insured provided generators to a hospital shortly prior to Hurricane Katrina. The generators failed within hours of the outage caused by the hurricane. After various suits were brought by patients for injuries sustained because of the heat at the hospital, the insurer brought a motion for partial summary judgment, seeking a declaration that a separate $50,000.00 per occurrence retained limit applied for each plaintiff with similar lawsuits pending against the hospital. Held: The district court erred in granting the insurer's motion for summary judgment. Based on the clear language of the policy, the retained limit was to be applied per occurrence; because the case involved a single occurrence, the insured was responsible for only one retained limit of $50,000.00. Thebault v American Home Assurance Co., Fourth Circuit, No. 2015-CA-0800 (4/20/16). http://la4th.org/opinion/2015/398949.pdf

Insurance; Summary Judgment

In a case involving an off-road four wheeler, the Second Circuit holds that: (1) a non-family, first-time, weekend houseguest is not a "resident" of the household as defined in the host's homeowner's insurance policy, and (2) an accident occurring a half mile from the host's home is not an accident occurring at an "insured location" as set forth in the insurance policy. Schelmety v Yamaha Motor Corp., Second Circuit, No. 50,586-CA (4/13/16) (Bleich, J ad hoc, concurring). http://www.la2nd.org/archives/docs/fb7437.pdf

Medical Malpractice

Applying the law of the case doctrine, the court finds that the determination that the particular claim of negligent credentialing before it did not constitute malpractice under the MMA. Billeaudeau v Opelousas General Medical Center, Third Circuit, 15-1034 (4/6/16).
http://www.la3circuit.org/Opinions/2016/04/040616/15-1034opi.pdf

Medical Malpractice; Prescription; Contra Non

The date of the death of the patient, and not the date that the plaintiff's expert determined the cause of death, was the date on which prescription on the malpractice claim as to the specific treating physician began to run. Kelly v Christus Schumpert, Second Circuit, No. 50,557-CA (4/13/16). http://www.la2nd.org/archives/docs/c93169.pdf

Negligence

Plaintiff-driver was in a one-car accident in which he drove through an intersection and off the road. He sued the police jury and the DOTD, alleging that the stop sign controlling the intersection was bent, twisted, and not visible. The defendants moved for summary judgment, which the trial court granted. Held: The police jury did not have custody of the stop sign and the DOTD did not have actual or constructive notice of the alleged defect. Vague statements in the plaintiff's affidavit that there had been other accidents at the same intersection did not raise material issues of fact. Myers v Acadia Parish Police Jury, Third Circuit, 15-976 (4/6/16).
http://www.la3circuit.org/Opinions/2016/04/040616/15-0976opi.pdf

Negligence; Duty

The plaintiffs brought suit against the manager of the daily operations of the Superdome and the State of Louisiana (through the Board of Commissioners of the Louisiana Stadium and Exposition District) for injuries suffered when an elevator malfunctioned. Following a bench trial, the district court found in favor of the plaintiffs against both defendants. Upon the plaintiffs' motion for a new trial, in which they sought that only the manager be cast in judgment as the sole tortfeasor, the trial court found that the accident was the result of the elevator being loaded beyond capacity, and it was the negligence of the manager in failing to properly control the operations of its elevators and control the number of people getting on the elevators after events. Held: Affirmed. The manager knew or should have known that the elevators had malfunctioned due to being overcrowded; therefore, the risk of harm was foreseeable. To hold the plaintiffs responsible for monitoring the number of occupants entering the elevator after they had already boarded would be "both unrea-

sonable and impractical." Burch v SMG, Fourth Circuit, No. 2014-CA-1356 c/w 2014-CA-1357 and 2014-CA-1358 (4/7/16). http://la4th.org/opinion/2014/398254.pdf

The plaintiff alleged that he became ill with food poisoning after eating fruit cups that were contaminated with mold. He sued the grocery stores from which he had purchased the fruit cups, claiming that it was negligent in selling a product unfit for consumption and in failing to ensure that all the food products were safe for their intended purpose. Held: Although the general rule in a deleterious food condition case is that the plaintiff must prove only that the product was in a deleterious condition when purchased and that the condition caused his illness, a special rule exists where the seller of the food was not the manufacturer of the food. In such cases, a plaintiff cannot recover damages from the seller in the absence of proof that the seller took part in the preparation, processing or manufacturing of the product sold, or that the seller subjected the product to improper care. Simmons v Brookshire Grocery Co., Second Circuit, No. 50,521-CA (4/13/16). http://www.la2nd.org/archives/docs/90b8a3.pdf

Negligence; Trees

The plaintiff was injured after a large pine tree fell across the roadway onto his car on a highway. The plaintiff sued the landowner, her insurer, and the Department of Transportation and Development, and the jury returned a verdict in favor of the defendants. The plaintiff appealed, alleging that the jury verdict was manifestly erroneous, because the evidence showed that the above ground roots and rotted areas of the tree would have been evident to anyone looking at the base of the tree before the fall. Held: The jury could have concluded, from the evidence adduced at trial, that neither the landowner or the DOTD should have known of any problem with the tree; the tree was green and healthy from the ground up and not leaning, and any problem with the tree's tap root was underground and unknown before the tree fell. Mitchell v State of Louisiana, DOTD, Second Circuit, No. 50,432-CA (3/23/16)

Negligence; Slip and Fall

In an appeal of an adverse ruling on a summary judgment motion, the plaintiff argued that she created a genuine issue of material fact based on the following: (1) the restaurant's failure to produce records relating to its yearly floor refurbishing and its daily maintenance logs; (2) the discrepancy in employee testimony as to when the floors were last refurbished; (3) the testimony that the employees were required to wear non-slip shoes and that they noticed a difference in the floors before and after refurbishing, and (4) the plaintiff's export report, which concluded that the restaurant failed to meet industry standards for the proper maintenance of the floors based on the testimony of the restaurant's cleaning practices at the time of the accident. Held: Summary judgment is reversed. Tomlinson v Landmark American Ins. Co., Fourth Circuit, No. 2015-CA-0276 (3/23/16) (Love, J, concurring part and dissenting in part). http://la4th.org/opinion/2015/397024.pdf.

Prescription

The plaintiff developed salmonella after eating at Restaurant A. Her treating doctor told her that in his opinion she had contracted the disease from eating at Restaurant A. The plaintiff sued Restaurant A. More than one year later she added three other defendants—Restaurant B, where she had eaten "tuna scrape" about one week before she ate at Restaurant A, the manufacturer of tuna scrape, and the distributor of tuna scrape. Her doctor testified most salmonella poisoning cases have an incubation period of three days although it can have an incubation period of up to 16 days. Trial court granted exception of prescription. Held: Reversed. The plaintiff had no reason to doubt her treating physician upon whom she reasonably relied. Lapuyade v Rawbar, Inc. d/b/a Acme Oyster House, Fifth Circuit, 15-CA-705 (4/13/16).
http://www.fifthcircuit.org/dmzdocs/OI/PO/2016/7605ED30-2DA7-4780-ACFC-AC0EC2D7FD24.pdf

The plaintiff brought an action in city court against City, its employee, and an insurer in state court for injuries sustained in a school bus accident. The action was filed within the one-year prescriptive period, but the defendants were not served within that period. After answering the complaint, the defendants moved to transfer the action to city court on the basis that the city court lacked jurisdiction. Following the transfer, the defendants moved to dismiss the action on the basis that the claims were prescribed because they had not been filed in a court of competent jurisdiction and because the defendants had not been served within the one-year period. The district court granted the defendants' motion, and the plaintiff appealed. The Second Circuit reverses. Louisiana C. C. P. art. 4847 provides that a parish court or city court has no jurisdiction over a case in which the state, or a parish, municipal, or other political corporation is a defendant. However, the article does not include employees of such entities, and thus the city court was a court of competent jurisdiction as to the bus driver. The bus driver, by answering the plaintiff's complaint in city court, waived any objection to venue, and thus the claim was filed in a court of competent jurisdiction and venue. Thus interruption of prescription against the bus driver also

served to interrupt prescription against and the city. Moody v Murray, Second Circuit, No. 50,398-CA (4/6/16) (five-judge panel; Calloway and Moore, JJ, dissenting). http://www.la2nd.org/archives/docs/2ddd2c.pdf. *See also* Shepard v Coleman, Third Circuit, 15-922 (4/6/16) http://www.la3circuit.org/Opinions/2016/04/040616/15-0922opi.pdf.

Public Lease Law

Under Louisiana Public Lease Law, La. R.S. 41:1215(A)(1), public entities that employ a competitive bidding process are required to accept only the highest bid submitted to it by a person who meets all conditions set forth in the Request for Proposals. However, the text of La. R.S. 41:1215(A)(1) explicitly carves out an exception to the "highest bid" requirement for the lease of public property by public benefit corporations—i.e., non-profit corporations formed by a political subdivision for the purposes of owning, leasing, developing, and operating properties owned by such political subdivision or by such public benefit corporation. A public benefit corporation is neither required to "advertise for and receive bids" as provided in La. R.S. 41:1211 et seq., nor required to accept only the highest bid when awarding leases for property it controls. Instead, a public benefit corporation is required to negotiate and let property in accordance with objective criteria relating to a balance of factors, including but not limited to highest rent or highest percentage of gross profits, quality control of products, financial stability, architectural design, uniqueness of operation, and overall economic importance to the primary objective of stimulating other industrial or commercial activity within such development. Two Canal Street Investors, Inc. v The New Orleans Building Corp., Fourth Circuit, No. 2015-CA-0924 (4/20/16), http://la4th.org/opinion/2015/398997.pdf

Spoliation

Following the Supreme Court's decision in *Reynolds v Bordelon*, 172 So.3d 589, an essential element of the spoliation claim is the intent of the party alleged to be the spoliator, which must be greater than the general negligence standard. Where the surveillance video in a slip-and-fall case was erased pursuant to a routine business practice, the record lacks factual support for a finding of intent beyond negligence. Tomlinson v Landmark American Ins. Co., Fourth Circuit, No. 2015-CA-0276 (3/23/15) (Love, J, concurring part and dissenting in part). http://la4th.org/opinion/2015/397024.pdf

The plaintiff tripped and fell at the defendant's place of business. The plaintiff claimed that the defendant, in violation of its own policies, neither preserved videotape of its inspection of the area nor obtained witness statements from witnesses at the scene. As a result, the plaintiff claimed that the trial court should have given an adverse presumption charge to the jury requiring the defendant to rebut the presumption that the evidence would have been unfavorable to it. The trial court refused to give the requested instruction and the jury found for the defendant. The Third Circuit reverses. The court noted that the Supreme Court in *Reynolds v Bordelon*, 172 So.3d 589, rejected the tort of negligent spoliation but recognized that Louisiana recognizes the adverse presumption against litigants who had access to evidence and did not make it available or destroyed it. In this case, the defendant had a policy in place to gather and maintain control of the evidence and thus the defendant assumed the duty to gather and control evidence; the defendant had knowledge of the potential litigation, and managed to preserve four minutes of surveillance tape showing the fall and the immediate time thereafter, but deleted the thirty minutes before and most of the thirty minutes after the fall. Under the circumstances, the plaintiff was entitled to the adverse presumption that the missing evidence would have been unfavorable to the defendant. Sayre v PNK (Lake Charles), LLC, Third Circuit, 15-859 (3/23/16). http://www.la3circuit.org/Opinions/2016/03/032316/15-0859opi.pdf. *See also* Dauzat v Dolgencorp, LLC, Third Circuit, 15-1096 (4/6/16). http://www.la3circuit.org/Opinions/2016/04/040616/15-1096opi.pdf

Stipulation Pour Autrui

There are three requirements for a stipulation pour autrui: (1) the stipulation for a third party is manifestly clear; (2) there is certainty as to the benefit provided the third party; and (3) the benefit is not a mere incident of the contract between the promisor and the promise. A contract between a city and a demolition contractor that provided that the contractor would repair damage caused during demotion provided a stipulation pour autrui in favor of a property owner whose house was wrongfully demolished. Williams v City of New Orleans, Fourth Circuit, No. 2015-CA-0769 (4/20/16). http://la4th.org/opinion/2015/398943.pdf

Worker's Compensation

Claimant was working as a caregiver for a home health company when her client's dog bit her on her thigh; the dog bite caused claimant to jump backwards in a twisting motion, resulting in injuries to her right leg and back. Because the onset of back pain did not manifest itself until several days following the accident, the

employer denied that a work-related accident caused her back injury. The OWC found in favor of claimant. Held: The OWC did not manifestly err in determining that the claimant's back injury was caused by the work-related dog-bite "accident," or in finding that the claimant proved by clear and convincing evidence that she was medically incapable of performing any type of employment. Gaines v Home Care Solutions, LLC, Fourth Circuit, No. 2015-CA-0895 (4/6/16) (Tobias, J, dissenting in part).
http://la4th.org/opinion/2015/397903.pdf

Member of a small cabinet company, which had no employees, was approached by a man at a hardware store and asked if he had any work to do. The member offered to give the man $300/day for two to three days' work in helping the company move off its premises and clean up the property following termination of a lease. The worker fell while performing these duties and filed a worker's compensation claim. Held: the worker was neither an employee of the cabinet company nor was he an independent contractor, because the work performed by him was not a part of the principal's trade, business, or occupation. Maldonado-Mejia v Eversound Kitchen & Bath, LLC, Fourth Circuit, No. 2015-CA-0859 (4/20/16).
http://la4th.org/opinion/2015/399048.pdf

Employer's payment for a second medical opinion examination by the employer's physician, who is not the claimant's treating physician, is not the payment of a medical benefit for purposes of prescription under La. R.S. 23:1209(C). Kennedy v Washington/St. Tammany Regional Medical Center, First Circuit, 2015-CA-1099 (4/7/16). http://www.lafcca.org/opiniongrid/opinionpdf/2015%20CA%201099%20Decision%20Appeal.pdf

Worker's Compensation; New Trial

The Worker's Compensation Judge dismissed a pro se claimant's compensation claim on May 13, 2015, and the claimant delivered his letter, which was considered a request for a new trial, to the OWC on May 22, 2015. The WCJ denied the pro se claimant's motion for new trial as untimely because it was filed outside the seven-day period for filing such motions. The Second Circuit reverses. The governing provision, La. Adm. C. 40:I:6317, makes the new trial procedure in the OWC subject to La. C.C.P. art. 1974 *et seq*. Under Article 1974, the seven-day period excludes legal holidays, which includes all Saturdays and Sundays. Gilley v Gilley Enterprises, Inc., No. 50,562-WCA (4/13/16).
http://www.la2nd.org/archives/docs/8faaa8.pdf

MARRIAGE AND FAMILY LAW

Custody and Visitation

Trial court properly awarded the maternal grandmother visitation, pursuant to La. C.C. art. 136(B), where the daughter was deceased and the daughter had visitation rights prior to her death. The visitation ordered was not a violation of father's constitutional right to parent his child. A grandparent seeking visitation need not show extraordinary circumstances but must show visitation is reasonable and in the child's best interest. McGovern v McGovern, Fifth Circuit, 15-CA-737 (3/30/16).
http://www.fifthcircuit.org/dmzdocs/OI/PO/2016/3F24CED8-BAB7-4CA0-8AC6-ED4DC67E714D.pdf

Trial court did not err in terminating father's parental rights where he repeatedly showed that he was unable to meet his children's most basic needs and there was no reasonable expectation that he would change in the near future. He visited his children four times over a two-year period, did not attend parenting classes, did not make parental contributions, and did not maintain contact with the Department of Children & Family Services. State in the Interest of D.E.C. & N.E.C., Third Circuit, 15-1138 (4/6/16).
http://www.la3circuit.org/Opinions/2016/04/040616/15-1138opi.pdf

Filiation

Action to nullify authentic act acknowledging paternity was untimely when filed more than two years after the preemptive deadline in La. R.S. 9:406(B)(2). Webb v Brown, First Circuit, 2015-CA-1594 (4/15/16). http://www.lafcca.org/opiniongrid/opinionpdf/2015%20CA%201594%20Decision%20Appeal.pdf

Separate Property

Creditor had obtained a $3,428,000 judgment against husband and others for breaching fiduciary duties and committing unfair trade practices in conjunction with the sale of a business. Between the trial court's issuance of written reasons for judgment in the underlying litigation, but before the ultimate signing of the judgment, the husband began proceedings to terminate his and his wife's community property regime. The judgment terminating the matrimonial regime and creating a separate property regime also partitioned the former community property. The creditor (now judgment debtor) filed a petition to revoke the judgment terminating the community property regime and establishing a separation of property regime because it was in

violation of La. C.C. art. 2036. The creditor/judgment debtor also sought to annul the underlying agreement between the husband and wife that created a separate property regime. In its motion for summary judgment, creditor/judgment debtor argued, for the first time, that the husband did not strictly follow the requirements of La C.C. art. 2329, which contemplates a joint petition for the termination of the property regime as opposed to the husband filing suit against the wife. The trial court revoked the judgment terminating the community property regime on the basis that the husband's failure to follow the procedural requirements of Article 2329 rendered the judgment void *ab initio*. An en banc panel of the First Circuit held that because the defendants knew the nature of the claims against them from the petition and knew of the 2329 claim for a year and a half before trial, they were not prejudiced when the trial court ruled on the issue. However, the court was unable to reach an executable majority judgment on the other issues raised on appeal. Radcliffe 10, L.L.L. v Burger, First Circuit, 2014-CA-0347 (3/28/16). http://www.lafcca.org/opiniongrid/opinionpdf/2014%20CA%200347%20Decision%20Appeal.pdf