LOUISIANA SUPREME COURT REPORTS

# LSCR

A monthly digest of current Louisiana Supreme Court opinions

Vol. 18, No. 7 ❖ Copyright 2010 Krystil Borrouso Lawton* ❖ July, 2010

CONTENTS



## CONTRACTS

## Extension of employment contract not triggered.

***Kathy Prejean v. Walter Guillory, 2010-C-0740 (La. 07/02/10) [11 pp.]***

Plaintiff was the executive director of the Section 8 Housing Program for the Broussard Housing Authority (BHA). By contract, she was employed for 4 years beginning January 1, 2002. The contract could be extended for 4 more years unless the BHA gave plaintiff notice by October 1, 2005, "that it will not extend the contract due to the inadequate performance of [plaintiff]." The BHA's Section 8 program was transferred to the Louisiana Housing Authority (LHA) in April 2004. Plaintiff filed suit against the LHA and its director for damages resulting from the "hostile takeover" of the BHA by the LHA, an injunction against the director, and a declaratory judgment that the LHA was bound to honor her employment contract. She then underwent surgeries for breast cancer and was excused from work by doctor's note for several months. The LHA terminated plaintiff due to excessive absences in May 2005. She amended her petition to allege breach of her employment contract and wrongful termination. After a bench trial, the district court dismissed plaintiff's claims. The Third Circuit reversed, awarding plaintiff damages through December 2009.

The Court granted a supervisory writ. Relying on basic principles of contract interpretation, it found the employment contract expired on January 1, 2006. By the contract's terms, the extension would not take effect if the BHA provided plaintiff written notice prior to October 1, 2005, of its intent not to extend the

***Krystil Borrouso Lawton, editor of LSCR, is an attorney practicing law in New Orleans. She is a 1991 graduate, magna cum laude, of Loyola Law School, where she served on the editorial board of the Loyola Law Review and as a member of the National Moot Court Team. She is a former law clerk to the Honorable Adrian G. Duplantier, United States District Court for the Eastern District of Louisiana..***

contract due to her inadequate performance. In May 2005, the LHA provided plaintiff written notice of its intent not to extend her contract. The phrase "inadequate performance" was not ambiguous, and since plaintiff drafted the contract, any ambiguity would be construed against her. Because the contract expired January 1, 2006, plaintiff was entitled to only 7 months of salary for June through December 2005. Reversed in part and rendered.

**Per curiam (Kimball, C.J. did not participate).**

## Terminated plaintiff not entitled to profit sharing.

***Mark H. Foshee v. Georgia Gulf Chemicals & Vinyls, L.L.C., 2009-C-2477 (La. 07/06/10) [17 pp.]***

Plaintiff filed suit against defendant seeking to recover certain profit sharing distributions denied him after he was terminated, as well as penalties and attorneys fees under La. R.S. § 23:631-32. The district court rendered partial summary judgment in favor of defendant on the issue of penalties and attorneys fees, and the case proceeded to trial. After trial, the district court awarded plaintiff $17,263.35 in profit sharing distributions. On cross-appeals, the First Circuit affirmed the partial summary judgment but reversed the profit sharing award. It found the profit sharing distribution was not an "amount then due" under § 23:631, so that the penalty and attorneys fees provisions of § 23:632 were not triggered. The appeals court also found the district court manifestly and legally erred in awarding plaintiff profit-sharing distributions. The profit sharing plan was an incentive plan used to motivate the employees to help the company reach its targeted goals. The materials specifically stated that there was no guarantee of payment, and the evidence showed plaintiff's individual performance was clearly a problem the year before he was terminated.

The Court granted a supervisory writ. In a 1 page opinion, it affirmed the court of appeal. Justice Knoll wrote a 10 page dissent, opining that defendant's decision to terminate plaintiff did not give it license to take away a bonus he had already earned. Affirmed.

**Per curiam; Knoll, J., dissents with reasons; Weimer, J., dissents; Ciaccio, J., sitting for Kimball, C.J., dissents for the reasons assigned by Knoll, J.**

**TORTS**

## Plaintiffs had constructive knowledge of contamination due to gas leak.

***David Hogg v. Chevron USA, Inc., 2009-CC-2632 (La. 07/06/10) [41 pp.]***

Plaintiffs own property neighboring a gas station in Ruston. The gas station had 3 underground gasoline storage tanks, which were replaced in 1997 after a leak was discovered. In December 2001 and April 2002, the Louisiana Department of Environmental Quality (LDEQ) wrote letters to plaintiffs advising them of the leak and of environmental contamination in the vicinity of the gas station. On September 12, 2006, plaintiffs received correspondence from a company hired by the LDEQ to conduct remediation on plaintiffs' property. On September 6, 2007, they filed suit seeking damages for diminution of the value of their property, the stigma of contaminated property, loss of enjoyment of use of the property, and exemplary damages. Defendants filed motions for summary judgment asserting plaintiffs' claims were barred by the 1-year liberative prescription of La. Civ. Code arts. 3492 and 3493. The district court denied the motions, and the Second Circuit denied writs.

The Court granted a supervisory writ and reversed. It first discussed the concept of constructive knowledge. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard or call for inquiry. It reviewed the LDEQ letters and found that the April 2002 letter informed plaintiffs that the stream running through their property contained contaminants, both in the water and surrounding air. It specifically cautioned plaintiffs to limit their time around the stream, an undeniable indication of unacceptable levels of contamination. The letter clearly provided sufficient information to excite attention and put plaintiffs on guard and call for inquiry, and their inaction in light of such knowledge

was unreasonable. The Court then rejected plaintiffs' argument that the presence of the gasoline on their property was a continuing trespass on which prescription does not begin to run until the trespass is abated by the removal of the gasoline. The operating cause of the injury was the leaking underground storage tanks, not the presence of gasoline on plaintiffs' property. The trespass, if there was one, was not continuing. Finally, the Court rejected plaintiffs' argument that defendants' failure to participate in or cooperate with LDEQ's containment and remediation efforts was a separate act of negligence. The 2001 and 2002 letters provided constructive knowledge of the damage, regardless of its cause. Justice Knoll dissented from the discussion of the continuing tort concept. She would find the existence of an abatable noxious chemical under another person's land constitutes a continuing tort and tolls prescription. Justice Johnson also dissented. Reversed and remanded.

**Per Weimer, J.; Johnson, J., dissents; Knoll, J., dissents and assigns reasons (Ciaccio, J., sitting for Kimball, C.J.).**

## BAR / DISCIPLINARY / ETHICS

# David Bell: record sealed in part; proceedings moot.

***In Re: Judge David Bell, 2010-O-1251 (La. 07/02/10) [4 pp.]***

On June 2, 2010, the Judiciary Commission filed a pleading with the Court recommending that Judge David Bell of the Orleans Parish Juvenile Court be immediately disqualified from exercising any judicial function. The Judiciary Commission recommended that his medical records, contained in Volume II of the Commission's filing, be maintained under seal. By way of a motion for rehearing, Bell urged the Court to seal Volume I in its entirety or to redact medical information contained in Volume I. The Court granted Bell's motion in part and redacted from Volume I all quotations to medical records. The Court ordered Volume I to otherwise remain unsealed and a matter of public record. In addition, because Bell resigned his judicial office effective June 17, 2010, the Court stated that further proceedings against him by the Judiciary Commission were moot. The Court ordered the Commission to provide evidence and information to the Louisiana Attorney Disciplinary Board.

**Per curiam (Kimball, C.J., did not participate).**

## INSURANCE

# Insurance broker had no duty to recommend coverage amounts or determine whether client was underinsured.

***Isidore Newman School v. J. Everett Eaves, Inc., 2009-C-2161 (La. 07/06/10) [14 pp].***

Cornelius Crusel, an insurance broker with J. Everett Eaves, Inc., sold property and casualty insurance to Isidore Newman School from 1989-2005. From 2004-2006 Newman CFO Fred Drew was its authorized representative. Included in the coverage in effect for Newman at the time that Hurricane Katrina struck was "Business Income & Extra Expense Coverage" (BI&EE) in the amount of $350,000. Following Katrina, Newman suffered major damage to its physical structure, which caused the school to be closed for over 2 months. As a result, Newman suffered loss of tuition revenue/income for the school year totaling more than $3 million. Newman sued Eaves and Westport Insurance Corporation (collectively, "Eaves") alleging that Crusel was negligent in failing to advise the school that BI&EE coverage included tuition and that the amount was not sufficient to cover tuition losses. After a trial, the district court found for Newman and awarded damages of $3,166,606.00, plus interest and costs. However, the district court also determined Newman was 70% at fault, comparatively. In a plurality opinion, the Fourth Circuit affirmed. Judge Bonin

dissented, pointing out that Newman was a sophisticated client whose board of directors included 2 insurance executives and at least 1 attorney.

The Court granted a supervisory writ. An agent has a duty of "reasonable diligence" to advise the client, but this duty has not been expanded to include the obligation to advise whether the client has procured the correct amount or type of insurance coverage. The insured is responsible for requesting the type of insurance coverage and the amount of coverage needed. Further, the insured is obligated to read the policy when received, since he is deemed to know the policy contents. Newman was in a far better position than Eaves to calculate its potential business income losses, including the loss of tuition income, should the school close unexpectedly. Drew testified that he failed to review or read the policy until after Hurricane Katrina. At that point, he immediately understood the BI&EE coverage and the $350,000 limit and realized that Newman was grossly underinsured for the loss of tuition. Further, the proposals provided to Newman clearly show that loss of tuition was included in the business income coverage. The Court concluded that Eaves did not breach a duty owed to Newman. Justice Victory concurred in the result, and Justice Guidry concurred with assigned reasons. He explained that increased coverage for tuition loss was never requested by Newman, despite the fact that Newman, a sophisticated client, was informed by the policy as well as the insurance proposal that BI&EE coverage included coverage for tuition loss. Reversed.

**Per Johnson, J.; Victory, J., concurs in the result; Guidry, J., concurs with assigned reasons (Ciaccio, J., sitting for Kimball, C.J.) .**

## Any insured can execute a named-driver exclusion.

***Ella Hawkins v. Andrew John Redmon, 2009-C-2418 (La. 07/06/10) [14 pp.]***

In January 2006, Sandra Redmon, acting as head of the household and with the consent of her husband, Mervin, went to the Cottonport Insurance Agency to obtain auto insurance on 2 of their vehicles. Among the documents that she signed was an excluded driver endorsement expressly excluding her son, Andrew, from coverage under the policy. A policy with Safeway Insurance Company of Louisiana was issued in Mervin's name and was renewed. The endorsement page listed Andrew as an excluded driver. In January 2007, Andrew was involved in an auto accident while operating a vehicle covered by the Safeway policy. Ella Hawkins, the driver of the other vehicle involved in the accident, sued Andrew and Safeway. Safeway contended the policy did not provide coverage to Andrew because of the named-driver exclusion endorsement. The district court found the named-driver exclusion to be invalid because it was signed by Sandra and not Mervin, in whose name the policy was issued. Safeway appealed, and the Third Circuit affirmed.

The Court granted a supervisory writ and reversed. It discussed the history of the named-driver exclusion and the surrounding public policy, including La. R.S. § 32:900(L), which states that "an insurer and an insured may by written agreement exclude from coverage any named person who is a resident of the same household as the named insured." In determining whether the endorsement signed by Sandra was valid, the Court first looked to the words of § 32:900(L). The statute provides that "an insured" may exclude a member of the household of the "named insured." Properly interpreted, the statute allows any insured to executed an exclusion. As an insured, Sandra could sign the endorsement. Safeway was entitled to rely on her completion of the form. It is immaterial that Mervin did not know his son was listed as an excluded driver; this was clearly indicated on the declarations page. Further, the evidence showed that because he was usually out of town, Mervin left all of the insurance procurement to Sandra. He could not retroactively limit Sandra's authority to bargain with Safeway to its detriment. Reversed and remanded.

**Per Weimer, J. (Ciaccio, J., sitting for Kimball, C.J.; Wicker, J., sitting for Knoll, J., recused).**

## All owners of record must receive notice of tax sale.

***C&C Energy, L.L.C. v. Cody Investments, L.L.C., 2009-C-2160 (La. 07/06/10) [11 pp.]***

In 1992 George and Marilyn Gorsulowsky bought residential property in Caddo Parish. After Marilyn died, a 1995 judgment of possession recognized Mr. Gorsulowsky and their 7 children as undivided owners of the property. In May 2000, Mr. Gorsulowsky received notice of unpaid 1999 Caddo Parish taxes, and in July 2000, defendant purchased a 99% interest in the property at a tax sale. The Gorsulowsky children did not receive notice of the unpaid taxes or notice of the tax sale. In May 2008 they conveyed their interest in the property to a third party, who, in turn, conveyed it to plaintiffs. Plaintiffs sued defendant to annul the tax sale because not all owners of record received notice. The district court ruled in favor of plaintiffs and annulled the tax sale. The Second Circuit affirmed.

The Court granted a supervisory writ and affirmed. Failure to provide the requisite notice of the tax sale to each co-owner of record results in a denial of due process afforded by the federal and state constitutions as to all co-owners and renders the tax sale null in its entirety with regard to all co-owners, including the co-owner who received notice. Each co-owner is entitled to individual written notice of delinquent taxes because alienation by tax sale of immovable property, owned in indivision, without notice to each co-owner deprives the owners of due process. Affirmed.

**Per Guidry, J. (Ciaccio, J., sitting for Kimball, C.J.).**

## Fact issues existed in predial servitude case.

***Roger D. Phipps v. Cynthia Nelson Schupp, 2009-C-2037 (La. 07/06/10) [16 pp.]***

In 1978, Richard Katz, the common owner of a parcel of land adjacent to Audubon Park, subdivided the property into 2 lots: 543 Exposition Boulevard and 541 Exposition Boulevard. When 541 Exposition Boulevard was sold separately, it had no direct access to a usable public street other than through 543 Exposition Boulevard to Patton Street, the nearest public road. Katz left in place a paved driveway that extended through 543 Exposition Boulevard to Patton Street. Plaintiff purchased 541 Exposition Boulevard in 1982. He alleged that since then he has used the driveway as a right of passage to Patton Street, although he stopped using the drive for vehicular passage in 2003, when the driveway was blocked by the enclosure of a carport. He continued to use the driveway for walking access to Patton Street until Cynthia Schupp and Roland Lawrence Cutrer, who reside at 543 Exposition Boulevard, began erecting a fence across the pedestrian passage. Plaintiff filed a possessory action seeking to have his right of passage recognized and to have the carport enclosure and fence removed. The district court granted defendants' motion for summary judgment, finding there was no servitude. The Fourth Circuit affirmed.

The Court granted a supervisory writ and reversed. Although not cited by the parties or the district court, La. Civ. Code art. 689 was relevant. It provides: "The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion." Genuine issues of fact existed as to whether plaintiff could claim a right of passage pursuant to article 689. The Court also found a genuine issue of material fact as to whether the existence of the driveway was an exterior sign evidencing Katz's intent to create a predial servitude. The Court also noted plaintiff's testimony that a key from Katz had been passed down to him to unlock a gate that crossed the concrete drive, which was additional evidence of Katz's intent to create a servitude. Finally, the Court rejected defendants' argument that enclosure of the carport was a disturbance in fact of any servitude that existed, which would have triggered the 1-year prescriptive period for plaintiff to bring a possessory action. A partial use of the servitude constitutes use of the whole, so that plaintiff's use of the servitude as a walkway after 2003 constituted use of the entire servitude. His possession

of the servitude was not disturbed until 2006, when he could no longer use the driveway in any capacity. Thus, his possessory action had not prescribed. Summary judgment vacated; remanded.

**Per Ciaccio, J., sitting for Kimball, C.J.**

## STATE AND LOCAL GOVERNMENT

### School did not violate reasonable supervision duty when student was raped while walking home from school.

***S.J. v. Lafayette Parish School Board, 2009-C-2195 (La. 07/06/10) [27 pp.]***

During the 2004-05 school term, Lafayette Middle School operated both a tutoring program and a behavior clinic after school. The programs lasted until around 4:00. A school bus took the tutoring students home, but behavior clinic students were told they had to make other transportation arrangements. C.C., a 12-year-old girl in sixth grade, was required to attend behavior clinic on November 4, 2004. She did not tell her mother, S.J., that morning and did not make transportation arrangements. After behavior clinic ended, C.C. walked with a friend to a fast food restaurant and then walked home alone. She had a sexual encounter with an unknown male and reported that she had been raped. S.J. filed suit individually and on behalf of C.C. against the Lafayette Parish School Board and a teacher who allegedly refused C.C. access to the teacher's personal cell phone. S.J. claimed C.C. was denied a ride home on the after-hours school bus and further denied access to a telephone to call S.J. so that she was forced to walk home through a high-crime area. The district court originally granted summary judgment in favor of the School Board, but the Court, in an earlier decision, reversed and remanded. After a bench trial, the district court found no negligence on the part of defendants and dismissed plaintiffs' claims. A 3 judge majority of a 5 judge panel of Third Circuit reversed and found liability on the part of the School Board, issuing a decision in 6 parts.

The Court granted a supervisory writ and reversed. The primary issue was whether the district court manifestly erred in finding that plaintiffs failed to prove a breach of the School Board's duty of reasonable supervision owed to C.C. in proportion to her age and the accompanying circumstances. The Court found the evidence supported the district court's credibility determinations and factual conclusions that C.C. was not denied access to a telephone and that C.C. never intended to take the after hours bus and failed to avail herself of alternative transportation that was available to her. The school adhered to its policy of making sure that no child would be left on campus by having telephone access, by making available other means of transportation, and by providing an on-campus procedure to make sure that everyone had left the campus before locking it down. The district court reasonably concluded that the school did not violate the reasonable supervision duty it owed to C.C. Justice Johnson dissented, explaining that C.C. was entitled to free transportation by reason of her grade level and the fact that she lived more than 1 mile from school, pursuant to La. R.S. § 17:158(A)(1), regardless of whether she was in the behavior clinic or the tutoring clinic. She opined that the School Board's failure to perform its duty to provide transportation to C.C. encompassed the risk of her being inured while walking home. Reversed; judgment of the district court reinstated.

**Per Guidry, J.; Johnson, J., dissents and assigns reasons (Ciaccio, J., sitting for Kimball, C.J.).**

## WORKERS' COMPENSATION

### Terminated employee injured while cleaning out personal effects entitled to workers' compensation.

***Jerome C. Ardoin, Jr. V. Cleco Power, L.L.C., 2010-C-815 (La. 07/02/10) [4 pp.]***

Plaintiff, a Cleco employee, was discharged on a Friday at Cleco's Work Center in Opelousas. Plaintiff's office was located in Eunice. He requested that he be allowed to go to his office in Eunice the

following Monday to retrieve his personal effects, and Cleco agreed. While clearing out his office, plaintiff slipped and fell, sustaining serious injuries. He filed a claim for compensation seeking wage benefits, medical treatment, penalties, and attorney fees. The OWC granted Cleco's motion for summary judgment and denied plaintiff's. The Third Circuit affirmed.

The Court granted a supervisory writ, finding the lower courts erred as a matter of law. If an injury occurs during the reasonable time period for an employee to wind up his affairs, the employee is considered to be within the course and scope of employment. Here, Cleco permitted plaintiff to go to his office on Monday, following his termination in another city on Friday, to remove his personal effects. Whether he went to retrieve his personal property or property that he needed to return to Cleco was not material. As a matter of law, plaintiff sustained his injuries within a reasonable period of time to wind up his affairs. Reversed and remanded to the OWC.

**Per curiam (Ciaccio, J., sitting for Kimball, C.J.).**

## Video surveillance should be given to IME physician.

***Jesse Bazile v. Bayou Steel Corporation, 2010-CC-0982 (La. 07/06/10) [2 pp.]***

In this case, Bayou Steel Corporation filed a motion with the Office of Workers' Compensation (OWC) to submit certain evidence to the physician conducting an independent medical examination (IME) of claimant. The OWC ruled Bayou could not submit surveillance video and correspondence from claimant's treating physician. The Court granted a supervisory writ and reversed. Surveillance materials serve an important function in the search for truth. The IME physician should have access to all relevant information, including surveillance material, to render an accurate opinion. Reversed and remanded.

**Per curiam (Ciaccio, J., sitting for Kimball, C.J.).**

# CRIMINAL

## Death sentence upheld for heinous murder.

***State v. Dustin Dressner, 2008-KA-1366 (La. 07/06/10) [54 pp.]***

A jury convicted and sentenced defendant to death for the first-degree murder of Paul Fasullo. Evidence at trial revealed defendant spent the afternoon of June 6, 2002, driving around while drinking and smoking marijuana with 2 other men, Kellen Parker and Troy Arnaud. One of their stops was the apartment of Arnaud's girlfriend. There, defendant took 2 knives from the kitchen. At approximately 10:30 p.m., they stopped at the home of Paul and Sharon Fasullo in Westwego. Defendant had attended parties at the Fasullo home involving alcohol and drug use. Arnaud remained in the car while defendant and Parker knocked on the door. Paul was asleep in the Fasullos' bed with their 2 year old daughter. Sharon answered the door and declined defendant's request to come in and buy drugs. What followed was a horrific scene of defendant and Parker attacking Paul and Sharon with the knives. Paul suffered stab wounds, lacerations, and abrasions, including a fatal stab wound to the chest. Sharon managed to call 911, so that the mayhem was recorded on tape, including Sharon's screams, her baby's frightened cries, and defendant's own voice saying "this bitch won't die." Sharon suffered over 20 stab wounds, including wounds inflicted when defendant sliced her throat 3 or 4 times and slit her face open from her forehead, over her left eye, and down to her lip. Police found defendant at home, cleaning blood from his car. After police advised him of his rights, which he waived, he admitted he was involved in the home invasion murder and had inflicted the fatal stab wound to Paul Fasullo's chest. Sharon survived and testified at trial. Following his conviction, defendant appealed.

The Court exercised its appellate jurisdiction in death penalty cases. It addressed 5 of defendant's 26 assignments of error in this published opinion and the others in an unpublished appendix. It first addressed defendant's argument that the district court erred in excluding evidence of the Fasullos' alleged sexual misconduct with his girlfriend 2 months prior to the murder. The Court rejected defendant's

contention that such evidence could have supported a manslaughter defense. Likewise, exclusion of the evidence did not impinge on defendant's Sixth Amendment right to confront the witness against him, Sharon Fasullo. Second, the Court rejected defendant's argument that his due process rights were violated by the State's inconsistent prosecutions of him and Parker and by the district court's ruling that he could not bring the inconsistencies to the jury's attention. Nothing in the record demonstrated inconsistent prosecution theories. The testimony and evidence showed both defendant and Parker were armed with knives and both actively participated in the savage attack on the Fasullos. Third, the Court rejected defendant's argument that he should have been allowed to introduce evidence of his diminished capacity to negate the voluntariness of his confession. Even assuming the district court should have admitted evidence of his mental deficiency to explain the confession, exclusion of the evidence was harmless. Fourth, the Court found that the cruel and brazen manner in which defendant inflicted extensive injuries to the victims, the fact that he did so in front of their 2 year old baby, and the horrific 911 recording more than sufficiently supported the aggravating circumstances of heinousness. Likewise, the Court found sufficient evidence of defendant's specific intent to kill more than one person, including his recruitment of Parker, the fact that he took 2 knives, and his statements on the 911 tape. Finally, the Court reviewed the sentence and found it was not constitutionally excessive.

**Per Knoll, J. (Ciaccio, J., sitting for Kimball, C.J.).**

## Probable cause existed for public intoxication arrest.

***State v. Thomas Wells, 2008-K-2262 (La. 07/06/10) [29 pp.]***

On March 3, 2007, NOPD Officer Parker noticed defendant staggering along the sidewalk on North Galvez Street near Canal Street. Defendant appeared to be intoxicated. Officer Parker arrested him for public intoxication, advised him of his *Miranda* rights, and conducted a search incident to arrest. Officer Parker found 2 pieces of crack cocaine in a clear, plastic bag in defendant's pants pocket. Defendant told Officer Parker that he had purchased it at a nearby gas station. Defendant later filed a motion to suppress the statement as well as the physical evidence. Officer Parker testified that he arrested defendant because he was intoxicated in a high-crime area and needed to be removed for his own safety. The district court granted the motion to suppress the statement but denied the motion to suppress the physical evidence. Defendant entered a *Crosby* plea and was sentenced to 3 years at hard labor. The Fourth Circuit reversed the conviction and sentence.

The Court granted a supervisory writ. On appeal, defendant did not argue that he was not intoxicated; he argued he should not have been arrested because he was not a danger to himself or others. The Court explained that the Fourth Circuit erred in 2 respects: (1) failing to employ the proper standard of review, which was the abuse of discretion standard; and (2) requiring the State to satisfy an improper burden of proof by conclusively showing the violation of the relevant ordinance. Under the circumstances, Officer Parker had probable cause to arrest defendant, who was very intoxicated and presented a danger to himself and/or others. His level of intoxication, combined with his location, created that danger. The Court reversed the Fourth Circuit, deferring to the district court, which had the opportunity to observe Officer Parker while he testified. Justice Johnson dissented and would have affirmed the Fourth Circuit. Reversed; conviction and sentence reinstated.

**Per Weimer, J.; Johnson, J., dissents and assigns reasons (Ciaccio, J., sitting for Kimball, C.J.).**

## Inventory search of pill bottle was reasonable.

***State v. Porfirio Escoto, 2009-KK-2581 (La. 07/06/10) [13 pp.]***

On December 26, 2008, Covington Police Department officers stopped defendant for speeding on Highway 190. He was unable to produce a valid driver's license or proof of his legal status in the U.S. The officers arrested him for operating a motor vehicle in the U.S. without lawful presence and read him his

*Miranda* rights. His car was parked near the start of a turning lane into Covington High and could not remain safely in that location. He indicated he had no cell phone and no number to contact anyone to retrieve his car. The officers called for a tow truck and then conducted an inventory search of the car. Officer Maricelli found an opaque, non-prescription, blue pill bottle in the center console cup holder. Inside he found a variety of pills, some of which required a prescription. Defendant indicated he did not have a prescription and had purchased some of the pills from a co-worker. Both the tow truck and defendant's girlfriend, who was looking for him, arrived at the scene. The car was released to defendant's girlfriend. Because the vehicle was not towed, the inventory form was never executed. Defendant was charged with possession of illegal narcotics. The district court granted his motion to suppress. The district court found the officers were probably in good faith in commencing the inventory search, but had exceeded the scope of a true inventory search by opening and searching the blue pill bottle. The First Circuit denied the State's writ application.

The Court granted a supervisory writ and reversed. The U.S. Supreme Court has recognized inventory searches of automobiles pursuant to standard police procedures as an exception to the warrant requirement. The issues presented were (1) whether, under the totality of the circumstances, the inventory search was conducted in good faith; and (2) whether the officers exceeded the scope of a valid inventory search. The inventory search in this case was commenced in good faith. Defendant's vehicle posed a potential danger for traffic. He had the opportunity to contact someone to retrieve the car. The search was conducted after the tow truck had been called, and Officer Stevens testified he filled out the standard wrecker inventory sheet while Office Maricelli conducted the search. Further, the officers did not exceed the scope of a valid inventory search. Because searches of closed containers were required by the department during legitimate inventory searches, the search of the pill bottle was sufficiently regulated and not unreasonable in light of Supreme Court precedent. Reversed and remanded.

**Per Ciaccio, J., sitting for Kimball, C.J.**

## Maximum sentence upheld for vehicular homicide.

***State v. Marlyn A. LeBlanc, 2009-K-1355 (La. 07/06/10) [14 pp.]***

In the early evening of April 21, 2007, Michael Hardy; his wife, Genevieve; and their children, Kyle and Cristi, were traveling southbound on Highway 274 in a caravan of vehicles to a family reunion in Lafayette Parish. Defendant, who was driving erratically on northbound Highway 274, veered into the edge of a ditch, emerged from it, and abruptly crossed into the southbound lane. She struck Mr. Hardy's car, sending it out of control and into a ditch. Genevieve Hardy died in the accident, and Cristi suffered serious injuries. Defendant continued to drive erratically until she was stopped by units of the Lafayette Parish Sheriff's Office. Officers on the scene found cocaine and marijuana in her car. Physical samples taken from defendant detected the presence of 8 drugs, legal and illegal. She was charged with, *inter alia*, vehicular homicide, vehicular negligent injuring, driving while intoxicated, possession of marijuana and cocaine, and several traffic offenses. She faced a maximum sentence of 50 years imprisonment. Pursuant to a plea bargain, she pleaded guilty to 1 count of vehicular homicide and 3 counts of negligent injuring, and the State dismissed the remaining charges. On the vehicular homicide conviction, the district court sentenced defendant to the maximum sentence of 30 years imprisonment at hard labor, 3 years without benefit of parole, probation, or suspension of sentence. It also imposed maximum sentences of 6 months each on the vehicular negligent injuring convictions, to run concurrently with the 30-year sentence. Defendant appealed her conviction and sentences to the Third Circuit, which vacated the 30-year sentence as excessive and remanded for resentencing. Judge Amy dissented.

The Court granted a supervisory writ and reversed, reinstating the 30-year sentence. The district court noted that defendant was a first offender without any prior record and the mother of 2 adolescent boys who depended on her for guidance and support. Nonetheless, it also found she had shown a reckless disregard for her own life and the lives of others. As Judge Amy pointed out in his dissent, the "cocktail" of drugs in

defendant's system included not only prescription drugs but also illegal controlled substances. She also fled the scene and stopped only after a police chase. The Court took note of the legislature's steady increase in the punishment for vehicular homicide over the years, which reflects a growing awareness of the carnage caused by intoxicated drivers. The Court agreed with Judge Amy's conclusion that the decision of where to place defendant's conduct on the sentencing continuum fell within the discretion of the district court. The Court noted the possibility defendant could secure release on parole after serving only 1/3 of her term and could earn early release on good time credits after serving 15 years. The sentence also afforded her incentives for rehabilitation within the prison system. Given the existence of ameliorative alternatives and the extreme circumstances surrounding the crime, the district court did not abuse its broad sentencing discretion. Reversed; sentence reinstated; remanded.

**Per curiam (Ciaccio, J., sitting for Kimball, C.J.).**

## Probable cause existed to search closed containers in car.

***State v. August Jackson, 2009-KK-1983 (La. 07/06/10) [13 pp.]***

On November 11, 2008, NOPD officers stopped a vehicle for traffic violations. Moments before the car was pulled over, Officer McIver saw defendant, in the front passenger seat, reach down to the floorboard of the car. After the car was pulled over, the driver and passengers were directed out of the car. Officer Diel went into the glove compartment to retrieve paperwork for the car and pulled out an Enterprise rental agreement, which listed neither the driver nor the 2 other occupants as renter or authorized user. Officer Diel detected the odor of burning marijuana. Although a canine unit called to the scene failed to alert on the car, Officer Diel went back into the vehicle after placing the driver under arrest and, in a protective sweep of the vehicle before it was towed, retrieved a can of bug spray from the floorboard of the front passenger side. He opened the can through a false bottom, pulled out 13 bags of marijuana, and placed defendant under arrest. Defendant filed a motion to suppress. He did not challenge the initial stop. He argued that because all 3 occupants had been removed from the vehicle before Officer Diel searched the car, the warrantless entry of the car exceeded the scope of a search incidental to a lawful arrest of the driver for traffic violations and was otherwise unsupported by any reasonable belief the vehicle contained evidence of a crime. The district court denied the motion, finding that the search was a logical extension of a typical inventory search conducted before the officers returned the vehicle to Enterprise. The Fourth Circuit reversed.

The Court granted a supervisory writ. As a matter of both federal and Louisiana law, an individual knowingly in possession of a stolen vehicle does not have standing to contest the legality of a seizure and search of the vehicle because neither he nor any of his passengers has an objectively reasonable expectation of privacy in the car. Officer Diel's entry into the car used in violation of the contract between Enterprise and the renter clearly did not violate any privacy rights of Enterprise. With respect to the driver, the defense made no attempt to show that he had permission to use the vehicle so that he arguably had acquired a reasonable expectation of privacy in the vehicle that defendant, as his passenger, could assert derivatively under Louisiana law. Defendant thus had no claim of any reasonable expectation of privacy in the car and no basis for challenging Officer Diel's opening the glove compartment. At that point, because the officers had lawfully stopped the vehicle, Officer Diel acquired probable cause to search any closed containers he found inside when he smelled marijuana. Reversed; judgment of the district court denying motion to suppress reinstated; remanded.

**Per curiam (Ciaccio, J., sitting for Kimball, C.J.).**

LOUISIANA SUPREME COURT REPORTS, P. O. Box 8303, Metairie, Louisiana 70011-8303
phone: (504)258-3570; email: lasupremecourtreports@cox.net
*Please inform us of any change in mailing or email address*