LOUISIANA SUPREME COURT REPORTS

LSCR

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BAR / DISCIPLINARY / ETHICS

Lawyer sanctioned for improperly billing time and expenses.

In re: Joseph B. Morton, III, 2022-B-00029 (La. 03/15/2022) [11 pp.]

Respondent was formerly a partner of the Forman Watkins firm in New Orleans, where his primary responsibility was the defense of Ingersoll Rand and its subsidiary, Trane, in asbestos claims matters. In 2015 respondent and other attorneys departed Forman Watkins and joined the Delaware firm of Maron Marvel Bradley Anderson & Tardy, LLC (MMBAT). Respondent continued to represent Ingersoll Rand and Trane. In September 2017 MMBAT learned respondent had billed those entities for depositions that he either did not attend or that he attended by telephone but

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nonetheless billed for travel. MMBAT terminated respondent and ultimately determined he had improperly billed $10,316.27 in travel time and expenses for 13 depositions. MMBAT filed a complaint against respondent with the Office of Disciplinary Counsel (ODC).

In answer, respondent admitted he had adopted a practice of "pre-billing" for depositions based on projected time for preparation and participation, and of submitting requests for anticipated travel expenses. When he was forced to instead attend by phone or depositions were cancelled, he had no process for reconciling his pre-billed time to account for those changes, leading to overcharges of fees and travel expenses. He conceded poor judgment but denied any intentional overbilling. The ODC charged respondent with violating Rules of Professional Conduct 1.5(a) (making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses), 8.4(a) (violating the Rules of Professional Conduct), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The hearing committee and disciplinary board both found respondent had violated the rules as charged and recommended he be suspended from the practice of law for six months, fully deferred, subject to a six-month period of probation and payment of all costs of the proceeding.

The Court agreed with that recommendation. The hearing committee made a finding that respondent's conduct was negligent, and it appeared his explanations were accepted as credible. That finding was not clearly wrong. There was no evidence respondent had engaged in any type of "scheme" in submitting erroneous bills or that he intended to obtain any personal gain. To the extent he received financial gain for the improper billing of travel expenses, he paid restitution to MMBAT, who had reimbursed the client. The Court ordered that respondent be suspended for a period of six months, to be deferred subject to respondent's successful completion of a six-month period of probation governed by a probation plan. It assessed respondent with all costs and expenses.

Per curiam; Genovese, J., dissenting.

Judge suspended without pay for extensive ex parte communications.

In re: Judge Jerry L. Denton, Jr., 2021-O-01801 (La. 03/25/2022) [37 pp.]

Respondent is a judge of the City Court of Denham Springs. The matter came before the Court from a recommendation of the Judiciary Commission under La. Const. art. V, § 25(C), to discipline respondent. The parties stipulated he violated Louisiana Code of Judicial Conduct Canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved), 2A (failing to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary by engaging in improper ex parte communications and failing to recuse himself), 3A(6) (engaging in private or ex parte interviews, arguments, or communications designed to influence his judicial action), portions of 3A(4) (manifesting bias or prejudice by words or conduct in the performance of judicial duties), and portions of 3C (failing to disqualify himself in a proceeding in which his impartiality might reasonably be questioned). They also agreed he engaged in "persistent and public conduct prejudicial to the administration of justice" that brought the judicial office into disrepute under La. Const. art. V, § 25(C). Respondent stipulated to relevant facts that established the violations. The violations arose from his extensive ex parte conversations over an 18-month period with the grandmother of children involved in a Child in Need of Care proceeding over which he presided. These communications precipitated other misconduct, including a contentious ex parte conversation with counsel for the grandmother regarding retaining jurisdiction in the custody matter and respondent's intentionally misleading another judge in an effort to retain jurisdiction of the custody matter.

The Court agreed with the Commission that, in addition to the stipulated violations, respondent violated the portion of Canon 3A(4) that provides a judge "shall perform judicial duties without bias or prejudice," and that he was "so personally involved and interested" in the custody/visitation fight that he was required by Canon 3C and La. Code Civ. Proc. art. 151 to recuse himself from the proceeding. The Court also determined his actions were "willful misconduct relating to his official duties" under La. Const. art. V, § 25(C). It expressly rejected the contention that the term "willful" required the misconduct be done with the intent to bring about a negative consequence or be done in bad faith.

As for the sanction, the Office of Special Counsel and respondent agreed to a sixty-day suspension without pay. The Commission recommended a six-month suspension without pay, along with payment of costs of the proceedings. The Court found that a four-month suspension without pay would serve the purposes of the disciplinary system. It also accepted the Commission's recommendation that respondent reimburse the Commission $4,676.25 in costs. Justices Crichton, Genovese, and McCallum dissented and would have accepted the recommendation of the Commission.

Per Weimer, C.J.; Crichton, Genovese & McCallum, JJJ., dissenting with reasons.

CONTRACTS

Common law doctrine of voluntary payment has no place in Louisiana law.

Leisure Recreation & Entertainment, Inc. v. First Guaranty Bank, 2021-C-00838 (La. 03/25/2022) [26 pp.]

The underlying dispute centers on a Borrowing Agreement dated December 31, 1991, by which First Guaranty Bank agreed to extend a revolving line of credit in the amount of $1,600,000 to plaintiff. In connection with the Borrowing Agreement, plaintiff executed a Note, promising to pay the indebtedness in monthly installments over a 30-year period, with interest as follows: "Years 1-5, the simple interest rate shall be fixed at 6.5% per annum; years 6-10, the simple interest rate shall be fixed at 7.5% per annum; and years 11-30, the simple interest rate shall be at the Citibank Prime, floating for minimum of one year or fixed for a period of not less than one year, nor more than five years, at option of [plaintiff] with floor and ceiling as shown above." The floor and ceiling rates were 4% and 12%, respectively. Plaintiff made monthly payments under the terms of the Note and Borrowing Agreement for the first 10 years, through December 2001. From year 11 onwards, despite the terms of the note, the Bank continued to charge plaintiff interest at the 7.5% rate, instead of the Prime Rate, which would have been lower on average than 7.5%. In May 2013 plaintiff's officers became aware that the Bank was not calculating interest at the Prime Rate. The Bank at first requested that plaintiff make an election as to the rate terms described in the Note, but weeks later advised that its position had changed and that because plaintiff had failed to exercise its "option" to apply any Prime Rate terms after year 10, the 7.5% rate applied to the last 20 years of the loan.

Plaintiff filed a petition for declaratory judgment, and the Bank responded with exceptions of no cause of action and prescription, an answer, and affirmative defenses. Plaintiff contended that if its chosen Prime Rate structure (a one-year fixed Prime Rate) applied, it had repaid the loan as of June 2015. The parties consented that plaintiff would make continued disputed monthly payments with a reservation of rights. After an initial set of competing motions for summary judgment and an initial appeal to the First Circuit, the parties on remand filed a second set of competing motions for summary judgment. The district court granted summary judgment for plaintiff, denied the Bank's motion for summary judgment, and overruled the Bank's peremptory exception of prescription. The district court determined plaintiff had paid all indebtedness to the Bank as of June 2015 and ordered

the Bank to return all sums received thereafter, together with legal interest from date of judicial demand. On appeal, the First Circuit reversed. It held the Bank was entitled to summary judgment based on the affirmative defense of voluntary payment. At the same time, it ordered the Bank to return all interest payments owed in excess of the Prime Rate following the filing of plaintiff's suit.

The Court granted a supervisory writ and reversed the court of appeal. The primary issue was whether the common law "voluntary payment doctrine," first espoused in *New Orleans & N.E.R. Co. v. La. Const. & Imp. Co.*, 33 So. 51 (La. 1902), was contrary to the Civil Code. Under the doctrine, if a party, with full knowledge of facts, voluntarily pays a demand unjustly made on him and attempted to be enforced by legal proceedings, he cannot recover the money back. The Court rejected the doctrine as in direct conflict with the Civil Code, particularly art. 2299, which provides: "A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it." La. Civ. Code art. 2299. The article applies regardless of whether the person who pays money not owed does so knowingly or by mistake. The court of appeal erred in applying the voluntary payment doctrine to preclude judgment for plaintiff.

The Court then addressed whether plaintiff overpaid under the terms of the Note. Plaintiff's right to choose among interest rate terms was an alternative obligation, as opposed to an option contract. Further, the Note did not contemplate that the 7.5% interest rate would apply in years 11 through 30 or that any rate other than the Prime Rate would apply during that period. The right to choose the rate terms belonged to plaintiff under the terms of the Note and the default provision of Civil Code art. 1809. Further, summary judgment could be rendered declaring that plaintiff's choice, a fixed one-year Prime Rate, applied beginning in year 11 and until the Note was repaid in full. The Court rejected the Bank's argument that any claims for the recovery of overpayments made more than five years before suit was filed were prescribed by art. 3498's five-year limitations period for actions on promissory notes. A prescribed claim related to the Note could be asserted to avoid an equivalent obligation under the Note. Significantly, by consent order, the Bank had renounced any right to assert that the making of a disputed payment prejudiced or altered plaintiff's rights. The Court remanded to the court of appeal for consideration of the Bank's pretermitted arguments. Justices ad hoc Johnson and Jasmine both dissented in part and would have rendered judgment for plaintiff without remand. Reversed and remanded.

Per Crichton, J. (Johnson, J. ad hoc, sitting for Hughes, J., recused; Jasmine, J. ad hoc, sitting for Crain, J., recused); Johnson & Jasmine, JJ., dissenting in part with reasons.

CIVIL PROCEDURE

Writ application had no effect on delays to file suspensive appeal.

Gregory Swafford Family Trust v. Graystar Mortgage, 2022-O C-00059 (La. 03/15/2022) [2 pp.]

After unsuccessfully filing a petition to annul the sale of property at a sheriff's sale, plaintiff filed a petition for injunctive relief against the foreclosing mortgage company, the purchasers of the property, and the Orleans Parish Civil Sheriff. The mortgage company filed an exception of res judicata. On December 18, 2019, the district court maintained the exception and dismissed plaintiff's claims with prejudice. On January 1, 2020, plaintiff moved for a new trial. On September 8, 2020, the district court ruled orally on a number of matters and denied plaintiff's motion for new trial. On September 22 plaintiff moved to set aside the judgment. The district court denied that motion on October 1 and granted plaintiff 30 days to file an application for review. On October 21 plaintiff filed a writ application, which the Fourth Circuit denied the same day. Meanwhile, on October 19 plaintiff also filed a motion for suspensive appeal. The court of appeal dismissed the appeal as untimely, reasoning that plaintiff's notice of appeal was premature because it was filed

during the pendency of its writ application. Judges Belsome and Ledet concurred. Judge Ledet opined that the notice of appeal was timely and would have affirmed on the merits.

The Court granted a supervisory writ, vacated the court of appeal's judgment, and reinstated plaintiff's appeal. Plaintiff's October 19 motion for appeal was filed within the applicable delays following the district court's October 1 ruling denying the motion for new trial. Plaintiff's filing an application for supervisory writs during this time had no effect on the appeal delays. *See Guillory v. Hartford Ins. Co.*, 383 So. 2d 144, 145 (La. App. 3rd Cir. 1980). The Court remanded to the court of appeal to consider the merits of the appeal. Vacated; appeal reinstated; remanded.

Per curiam; Weimer, C.J., dissenting, would deny.

New trial ordered because district court erred in denying motion for AME.

Ronald Hicks v. USAA General Indemnity Company, 2021-C-00840 (La. 03/25/22) [17 pp.]

Plaintiff was a passenger in a heavy-duty flatbed truck when it was rear-ended by a vehicle driven by Robert Harger. Harger was traveling at about 60-65 miles per hour and did not brake on impact. The passenger side of plaintiff's truck was pushed along the railing of a bridge for about 50-60 feet. Plaintiff filed suit against Harger and his insurer, alleging he sustained injuries to his neck, back, and arm. Defendants stipulated to liability so that only injuries and damages were at issue. Plaintiff was treated on 79 occasions by several orthopedic and pain management specialists and surgeons and underwent 13 separate procedures. He initially was examined by orthopedic surgeon Dr. Jason Smith, who determined his back condition was indicative of preexisting degenerative disc disease that was aggravated by the accident. Dr. Smith did not believe plaintiff was a candidate for surgery. Plaintiff was referred by his attorney to orthopedic surgeon Dr. Jorge Isaza. At his 2017 deposition, Dr. Isaza recommended cervical surgery but had difficulty identifying the primary source of the lumbar pain and did not definitively suggest lumbar surgery.

In November 2017 defendants filed a motion to compel an additional medical examination (AME) under La. Code Civ. Proc. art 1464 by their expert, orthopedic surgeon Dr. Chambliss Harrod. Article 1464 states in part: "When the mental or physical condition of a party … is in controversy," the court may order an AME "only on motion for good cause shown." La. Code Civ. Proc. art. 1464. The district court denied the request for lack of good cause. In April 2018, three weeks before trial, Dr. Isaza performed a nerve block procedure and determined most of plaintiff's pain was emanating from the L5-S1 disc. He changed his medical opinion and recommended an anterior discectomy and fusion at L5-S1. Defendants moved to continue the trial and again argued that Dr. Harrod needed an opportunity to examine plaintiff, but the district court denied the continuance. During the four-day trial, Dr. Harrod's failure to personally examine plaintiff was pervasive. Plaintiff's counsel referred to that fact in opening and closing arguments, including a statement that "[t]he context in which [Dr. Harrod] is presented in this case is diabolical." During jury deliberations, the jury asked the district court whether Dr. Harrod was "allowed to see" plaintiff. After a discussion with the parties, the district court declined to answer. The jury rendered a verdict for plaintiff, awarding him almost $1.3 million, with $285,000 for future medical expenses. The First Circuit affirmed.

The Court granted a supervisory writ and reversed. The parties did not dispute that plaintiff's neck and lumbar conditions were "in controversy" under art. 1464. The issue presented was res nova: the meaning of art. 1464's "good cause" requirement. Because the term was not defined in the statute or clear from the plain language, the Court looked to other sources, including the intent of the legislature in enacting the statute and statutory scheme. Article 1464 limited the extensive discovery provided by art. 1422, balancing considerations of sanctity of the body and the right to privacy with considerations of fairness in the judicial quest for truth through discovery. At

the same time, the availability of an exam under art. 1464 was vital because it might be one party's only opportunity to independently ascertain the existence and extent of the other party's claimed injuries. The Court determined that a showing of good cause required the moving party to establish a reasonable nexus between the requested examination and the condition in controversy. The decision rested within the sound discretion of the district court. The plain language of art. 1464 anticipated the district court would take an active role, including "specify[ing] the time, place, manner, conditions, and scope of the examination." La. Code Civ. Proc. art. 1464. In this case, plaintiff put his spinal condition squarely in controversy. Defendants demonstrated good cause for an AME by providing a reasonable nexus between the condition in controversy and the examination sought, particularly in light of the severity of the injuries alleged and the inconsistent medical testimony. The Court expressly declined to adopt a "less intrusive means" factor as a component of "good cause." Requiring a moving party to demonstrate that there were no less intrusive means to obtain the requested information favored plaintiff's privacy interests over fairness in the adversarial process and denied defense experts equal access to evidence. In light of the district court's errors, and given the particular circumstances of the case, remanding for a new trial was proper. Chief Justice Weimer concurred to summarize the analysis. Reversed and remanded.

Per Crichton, J. (Bonin, J. ad hoc, sitting for Hughes, J., recused); Weimer, C.J., concurring with reasons.

TORTS

Storeowner's duty to patrons did not include protecting against vehicle crashing into building.

Rhonda Lacour v. Phillis M. Sino, 2021-CC-00953 (La. 03/15/2022) [6 pp.]

Phillis Sino was attempting to park in front of Aaron's Donuts shop, located in a strip mall in Chalmette. She mistakenly pressed the accelerator instead of the brake, accelerated over a parking stop, drove across the raised sidewalk, and crashed through the exterior wall of the donut shop. Plaintiffs were inside playing video poker, and the video poker machines fell on them. They filed suit against several defendants, including Aaron's Donuts and its insurer. Plaintiffs alleged that Aaron's was negligent in failing to place a protective barrier in the parking lot. Aaron's filed a motion for summary judgment, arguing that it was a lessee of the premises and had no custody or control of the parking lot or the building's exterior, and alternatively, that the accident was not reasonably foreseeable. The district court denied the motion, and the Fourth Circuit denied supervisory relief.

The Court granted a supervisory writ and reversed. A storeowner's duty of reasonable care to its patrons requires the storeowner to protect against the probability of injuries foreseeable in law, which have been defined as "those risks that are probable and foreseeable, not those risks which are merely foreseeable in fact as possible." *Mayeur v. Time Saver, Inc.*, 484 So. 2d 192, 195 (La. App. 4th Cir. 1986), *writ denied*, 486 So. 2d 751, 753 (La. 1986). It was not foreseeable in the law that a vehicle would crash into the exterior wall of the donut shop and cause video poker machines to fall onto customers. Plaintiffs presented no evidence of any prior accidents of this type or magnitude. The risk that plaintiffs would be injured under the unique facts here was simply too remote and attenuated to fall within the scope of Aaron's duty to its customers. Aaron's was entitled to summary judgment. Justice Griffin concurred and would have decided the case based on the fact that Aaron's had no custody or control over the parking lot. Reversed and rendered.

Per curiam; Weimer, C.J., would grant & docket; Griffin, J., concurring with reasons; Hughes, J., concurring.

Apartment owner entitled to summary judgment dismissing claim by plaintiff who delivered baby prematurely after fall at apartment.

Shantell Jenkins v. Arbors on the Lake Apartments, 2021-CC-01662 (La. 03/22/2022) [7 pp.]

While conducting a final inspection of an apartment she had occupied in New Orleans, plaintiff tripped and fell over parts of a door lock that had been left on the floor by maintenance personnel. She was 24-weeks pregnant with her third child. One week later, she was diagnosed with premature preterm rupture of the membranes (PPROM). Eighteen days later, her son was born prematurely. She filed suit against the apartment complex, alleging her fall caused her PPROM and her son's premature birth. Plaintiff's sole expert was Dr. Pullman, who had been plaintiff's treating physician for many years, had delivered her previous children without incident, and had diagnosed her PPROM. During her deposition, Dr. Pullman testified plaintiff's fall could have been a risk factor for her PPROM and premature delivery. She also admitted that other conditions could have been risk factors, including uterine fibroids, bacterial vaginosis, and plaintiff's job as a "pole-dancing instructor." When asked if she was able to say which of these risks caused the PPROM, Dr. Pullman replied, "I can't say which one [may] have been linked to it, no." She also was unable to say it was more probable than not that the trauma from the fall led to plaintiff's PPROM. Defendants moved for summary judgment, arguing plaintiff could not sustain her burden of proof at trial. The district court denied the motion, and the Fourth Circuit denied supervisory relief.

The Court granted a supervisory writ and reversed. Plaintiff alleged her fall caused her PPROM and premature delivery. Expert medical testimony is required when the conclusion regarding medical causation is one that is not within common knowledge. *Jones v. Capital Enterprises, Inc.*, 11-0956 (La. App. 4th Cir. 5/9/12), 89 So. 3d 474, 505, *writ denied,* 12-1634 (La. 10/26/12), 99 So. 3d 651. Here, the complex nature of plaintiff's injuries did not fall within the scope of common knowledge and needed to be established through expert testimony. Plaintiff could satisfy her burden of proving causation by presenting medical evidence that it was more probable than not that the claimed condition was caused by the accident. *Chavers v. Travis*, 04-0992 (La. App. 4th Cir. 4/20/05), 902 So. 2d 389, 400-01. Plaintiff's only medical expert was unable to say it was more probable than not that plaintiff's injuries were caused by the fall. Thus, defendants satisfied their burden of showing an absence of factual support for an essential element of plaintiff's claim. Further, plaintiff could not rely on circumstantial evidence because she failed to exclude other reasonable explanations for her injuries. Summary judgment for defendants was mandated. Reversed; defendants' motion for summary judgment granted; suit dismissed.

Per curiam; Griffin, J., would grant & docket.

Court answers questions certified by federal appeals court in claim by police officer injured in Black Lives Matter protest.

Officer John Doe v. DeRay McKesson, 2021-CQ-00929 (La. 03/25/22) [38 pp.]

Plaintiff alleged he was a police officer responding to a protest in Baton Rouge on July 9, 2016, when one of the protestors threw a block of concrete or other rock-like substance, hitting him in the head and causing serious injuries. Plaintiff filed suit in the United States District Court for the Middle District of Louisiana against the Black Lives Matter (BLM) organization and DeRay McKesson, a leader and co-founder of BLM, alleging that the protest was "staged and organized" by defendants in response to the July 5, 2016, death of Alton Sterling, who was shot by a Baton Rouge police officer. Plaintiff further alleged that the demonstration and riot included a plan to block a public highway and that defendants knew police would be called to clear the highway of protestors.

He alleged McKesson was in charge of the protests, gave orders through the day and night, and incited violence on behalf of BLM. His complaint described similar violent protests and riots organized by defendants in other cities throughout the U.S. He claimed defendants knew or should have known that the demonstration and riot they staged in Baton Rouge would become violent and result in serious personal injuries, citing La. Civ. Code arts. 2315, 2317, and 2324. The federal district court granted defendants' motions to dismiss, but the Fifth Circuit Court of Appeals reversed as to the claims against McKesson. The U.S. Supreme Court then granted a petition for writ of certiorari, vacated the Fifth Circuit decision, and remanded, reasoning that because the constitutional issues raised by McKesson were implicated only in the event Louisiana law permitted recovery, the Fifth Circuit should have sought guidance from the Louisiana Supreme Court.

After remand, the Fifth Circuit certified two questions to the Louisiana Supreme Court: (1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party? and (2) Assuming McKesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine barred recovery under the facts alleged in the complaint? The Louisiana Supreme Court accepted certification and issued this opinion answering both questions.

The Court answered the first question affirmatively, finding the Fifth Circuit's recitation of Louisiana law was accurate. It could be found that McKesson's actions, in provoking a confrontation with Baton Rouge police officers through the commission of a crime (the blocking of a heavily traveled highway) directly in front of police headquarters, with full knowledge that the result of similar actions taken by BLM resulted in violence and injury to citizens and police, would render McKesson liable for damages for resulting injuries to a police officer compelled to attempt to clear the highway of the obstruction. The Court emphasized that Civil Code art. 2315 requires that "***[e]very act whatever*** of man that causes damage to another obliges him by whose fault it happened to repair it." La. Civ. Code art. 2315 (emphasis added).

Turning to the second question, the Court explained that the professional rescuer's doctrine would not bar plaintiff's recovery. The professional rescuer's rule states that a professional rescuer, such as a fireman or policeman, who is injured in the performance of his duties, "assumes the risk" of such injury and is not entitled to damages. *Worley v. Winston*, 550 So. 2d 694, 696 (La. App. 2d Cir.), *writ denied*, 551 So. 2d 1342 (La. 1989). Because La. Civ. Code art. 2323 now mandates a system of pure comparative fault in Louisiana, and *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1132 (La. 1988), abrogated the assumption of risk doctrine, the professional rescuer's doctrine was abrogated in Louisiana both legislatively and jurisprudentially.

Chief Justice Weimer, Justice Genovese, and Justice Crain all concurred with separate reasons. The Chief Justice, who was joined by Justice Crichton, opined that policy considerations supported recognition of a broad duty not to "negligently precipitate the crime of a third party." He disagreed that the professional rescuer's doctrine had been abrogated and opined that it was more appropriately understood in terms of comparative fault and duty-risk, instead of assumption of the risk. Justice Genovese opined that, if the facts alleged in the complaint and the requirements of the duty-risk analysis were met, there could be a duty. He also stated that the professional rescuer's doctrine did not bar recovery. Justice Crain agreed with the result reached by the majority regarding "duty" and wrote separately to clarify why he believed Louisiana law recognized potential liability for the negligent precipitation of a crime of a third party, analyzing duty and scope of the duty. Justice Griffin dissented and would have refrained from imposing a duty.

Per Hughes, J; Weimer, C.J., Genovese & Crain, JJ., concurring with reasons; Crichton, J., concurring for reasons by Weimer, C.J.; Griffin, J., dissenting.

Court orders redaction of medical review panel opinion.

Charles Kelley v. State of Louisiana, 2022-CC-00057 (La. 03/15/2022) [2 pp.]

The Second Circuit excluded in its entirety the opinion of the medical review panel here, on the basis that the panel had exceeded its statutory authority. The court of appeal also excluded the testimony of the medical review panel members. The Court granted a supervisory writ in part. In a brief per curiam with no factual background, it reversed those rulings. The Court remanded to the district court with instructions to redact the portions of the medical review panel opinion in which the panel exceeded its authority and to admit into evidence the remainder of the opinion. It also directed the district court to allow members of the panel to testify to any issues within the scope of their expertise. Reversed in part and remanded.

Per curiam; Weimer, C.J., & Hughes, J., dissenting, would deny.

Prescription not suspended when claimant sent filing fee to PCF instead of DOA.

Brianne Waters v. Dr. Jonathan Lam, 2022-CC-00098 (La. 03/22/2022) [4 pp.]

On September 28, 2020, plaintiff filed a request for review with the Division of Administration (DOA) based on medical malpractice that allegedly occurred on September 29, 2019. The DOA sent a letter to plaintiff on October 9 indicating that the defendants were state health care providers and that plaintiff had 45 days from receipt of the letter to pay a filing fee to DOA in the amount of $100 per defendant. On November 6 plaintiff sent the filing fee to the Patient's Compensation Fund (PCF) – not the DOA. In February 2021 the DOA sent plaintiff a letter advising it had not received the filing fee and would be closing the matter. In the meantime, plaintiff filed suit against defendants on January 5, 2021. Defendants filed a peremptory exception of prescription, arguing that because plaintiff failed to pay the filing fee, her request for review with the DOA was without effect and did not suspend prescription. The district court denied the exception, and the court of appeal denied supervisory relief.

The Court granted a supervisory writ and reversed. Louisiana R.S. § 40:1237.2(A)(1) requires that, within 45 days of receipt of confirmation of receipt of the request for review, a claimant pay the filing fee of $100 per named defendant to the commissioner of the DOA. Failure to comply renders the request for review without effect, including the effect of suspending prescription. La. R.S. § 40:1237.2(A)(1)(e). Plaintiff admitted she did not submit her fee to the DOA within the 45-day limit but argued that submitting her fee to the PCF sufficed. She relied on § 40:1237.2(C)(1), which, in addressing the composition of the medical review panel, referred to the filing fee having "been received by the commissioner or the patients compensation board." Clearly, that language was not intended to govern the requirements for submitting the filing fee but simply listed receipt of the fee as a prerequisite for allowing the attorney for the plaintiff to appoint the attorney member of the panel. Further, any suggestion that a party could file a request for review with either agency was dispelled by § 40:1237.1(A)(2)(a), which explicitly stated that "[f]iling a request for review of a malpractice claim … with any agency or entity other than the division of administration shall not suspend or interrupt the running of prescription." Plaintiff failed to perfect her request for review, and her filing was invalid and did not serve to suspend prescription. Her suit was prescribed on its face. Reversed; exception of prescription sustained; suit dismissed.

Per curiam; Hughes & Genovese, JJ., would deny.

Administrative rule of Louisiana Cemetery Board was unconstitutional.

Westlawn Cemeteries v. The Louisiana Cemetery Board, 2021-CA-01414 (La. 03/25/2022) [23 pp.]

Plaintiff owns and operates a perpetual or endowed care cemetery in Gretna. This type of cemetery has existed since 1908 and is defined as "a cemetery wherein lots and other interment spaces are sold or transferred under the representation that the cemetery will receive perpetual or endowed care." La. R.S. § 8:1(34). They are governed by Title 8, as amended and reenacted in 1974 by Act 417 of the Louisiana Legislature. In conjunction with the reenactment, the legislature created the Louisiana Cemetery Board (LCB) for the purposes of enforcing and administering the provisions of Title 8, including overseeing perpetual or endowed care cemeteries. *See* La. R.S. § 8:66. Title 8 requires that ten percent of gross sales for interment spaces in such cemeteries be deposited into a trust fund. According to § 8:454.1A, "The principal of the trust fund shall remain permanently intact and only the income therefrom shall be expended," and "[t]he income shall be used solely for the care of those portions of the cemetery in which interment spaces have been sold with a provision for perpetual or endowed care." La. R.S. § 8:454.1A. Title 8 also requires that cemetery authorities and trustees comply with various reporting requirements and that the LCB periodically examine the trust funds. The legislature gave LCB the authority to establish "necessary rules and regulations" to administer and enforce Title 8. *See* La. R.S. § 8:67.

In 1982 the LCB promulgated LAC 46:XIII.1503, which was revised in 2013 and provides in pertinent part: "All income received by the trustees of cemetery care funds, which is not remitted to the cemetery authority within 120 days after the end of the latest tax reporting year … shall become … part of and added to the corpus or principal of the trust, and may not be withdrawn or distributed." LAC 46:XIII.1503C (the Rule). LCB later accused plaintiff of violating the Rule and sought almost $400,000 in funds it alleged the trustees improperly disbursed to plaintiff more than 120 days after the close of plaintiff's tax reporting years between 2002 and 2017. Plaintiff filed a petition for declaratory judgment seeking a determination that the Rule was unconstitutional because it exceeded LCB's statutory authority. The district court ultimately agreed and granted summary judgment for plaintiff declaring LAC 46:XIII.1503C unconstitutional on its face.

The LCB filed a direct appeal to the Court under La. Const. art. V, § 5(D)(1), which provides the Court with appellate jurisdiction when "a law or ordinance has been declared unconstitutional." The Court clarified, however, that rules and regulations promulgated by an administrative agency are not laws or ordinances for purposes of the jurisdictional grant, so that a district court's declaration of their unconstitutionality is not directly appealable to the Court. Lacking appellate jurisdiction, the Court, in its discretion, considered the matter under the supervisory jurisdiction granted by La. Const. art. V, § 5(A), to avoid further delay and in the interest of judicial economy.

The Court then clarified that the sole issue before it was the constitutionality of LAC 46:XIII.1503C, because the LCB's brief did not contain other specifications of error. The Court also expressly declined to adopt a rule that would presume administrative rules and regulations to be constitutional. The Rule at issue required all income not remitted to a cemetery authority within 120 days after the end of its tax reporting year to become a permanent part of the principal of the trust. The LCB argued the Rule was administrative rather than legislative, was consistent with its statutory authority, and served the purpose of protecting trust income and "maximizing the long-term viability of perpetual care trusts." The Court disagreed. In promulgating the Rule, the LCB created a restriction as to how trust fund income was to be used, and the Rule did not advance the legislative mandate that trust fund income be used for a cemetery's care and maintenance. It set

forth an altogether new requirement for trust funds not contemplated by § 8:454.1 and beyond the authority of the LCB. The Rule conflicted with the legislative intent behind perpetual care trust funds because it granted trustees the power to determine what happens to trust fund income and resulted in funds that should be used for cemetery care instead becoming part of the principal. It also impermissibly added a 120-day time limitation that was not contained in Title 8. The Court held that LAC 46:XIII.1503C was unconstitutional on its face. Affirmed.

Per McCallum, J.

WORKERS' COMPENSATION

Court affirms employer/law firm's entitlement to damages for LWCC's failure to defend but reduces damage award.

Cox, Cox, Filo, Camel & Wilson, LLC v. Louisiana Workers' Compensation Corporation, 2021-C-00566 (La. 03/25/2022) [22 pp.]

Plaintiff is a law firm based in Lake Charles. In October 2018 its office manager of almost 50 years filed a claim for supplemental earnings benefits and proof of loss with the firm's workers' compensation insurer, Louisiana Workers' Compensation Corporation (LWCC). The claim was based on vision issues that forced the office manager to limit her time working at a computer screen. LWCC denied the claim. On January 15, 2019, the officer manager filed a disputed claim for compensation with the Officer of Workers' Compensation (OWC), naming the firm and LWCC as defendants. On January 16 the firm's managing partner, Thomas Filo, through his assistant , emailed the LWCC adjuster to inform LWCC of the claim and request the name of counsel who would be assigned to defend the firm. The adjuster indicated counsel had not yet been assigned. A few days later, LWCC advised the firm it would assign outside counsel. In house counsel for LWCC was conflicted because LWCC disagreed with the firm's position that the office manager was entitled to benefits. Over the course of several subsequent phone conversations and email exchanges, LWCC explained it was struggling to obtain counsel due to the firm's conflict of interest with other firms. LWCC's counsel obtained an extension for the firm to file responsive pleadings until February 22 and then obtained an indefinite extension of time to answer discovery. It ultimately took LWCC four months to hire counsel for the firm. In the meantime, on March 19, Filo, believing the delay for filing an answer was approaching, filed an answer and cross-claim on behalf of the firm in the workers' compensation matter.

The firm also filed this separate suit in the district court against LWCC, alleging LWCC breached its duty of good faith and fair dealing under La. R.S. § 22:1973 by failing to provide it a timely and proper defense. The petition sought damages in the form of lost revenue that would have been generated by Filo had he not been required to defend the workers' compensation claim himself. The district court denied LWCC's exceptions of no cause of action and lack of subject matter jurisdiction. At the bench trial, witnesses testified for LWCC and for the firm. Among those was Filo, who testified that because his practice is concentrated on personal injury claims, he does not maintain time sheets. He testified that his productivity is gauged by the revenue he generates, and he estimated he spent 68.5 hours defending the firm in the workers' compensation matter. Also testifying was an expert in accounting who examined the amount of revenue generated by Filo in the preceding ten, five, and three years and concluded his hourly rate would be between $2,080 to $2,386.50. The district court rendered judgment for the firm, finding LWCC breached its obligation of good faith and fair dealing in failing to procure counsel for its defense. The district court awarded the firm damages in the amount of $150,083.50, representing 68.5 hours of work by Filo at

$2,386.50 per hour. It also awarded penalties of $300,167, double the amount of damages. The Third Circuit affirmed.

The Court granted a supervisory writ. As for subject matter jurisdiction, the issue was whether the dispute between the firm and LWCC fell under the grant of jurisdiction to the OWC, which is vested with original and exclusive jurisdiction over disputes arising out of the Louisiana Workers' Compensation Act, including "workers' compensation insurance coverage disputes." La. R.S. § 23:1310.3(F). On this issue of first impression, the Court concluded that the firm's claim for penalties under § 22:1973 did not "arise out of" the workers' compensation laws, but instead was an outgrowth of the contractual and fiduciary relationship between the insured and the insurer. The district court correctly denied LWCC's exception of lack of subject matter jurisdiction. Likewise, it correctly denied LWCC's exception of no cause of action. The claim for penalties was not a disguised claim for attorney fees, which would have been unavailable under § 22:1973. The firm's claim was properly described as one for loss of business income.

Turning to the merits of the firm's claim for penalties under § 22:1973, the statute provided at paragraph A: "An insurer … owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach." La. R.S. § 22:1973A. The district court found LWCC breached its duty of good faith and fair dealing and noted LWCC should have known its delay in appointing counsel could cause harm to the firm. These factual findings were not clearly wrong. LWCC did not inform the firm it had obtained a second unlimited extension, leaving the firm justifiably concerned that its lack of representation could expose it to adverse consequences in the OWC proceeding, such as a default judgment or penalties and attorney's fees.

The Court then considered the special damages awarded by the district court and determined the district court abused its discretion. As shown by the expert accountant's testimony, the amount of revenue generated by Filo varied considerably over the ten-year period selected. Thus, the expert's attempt to calculate a theoretical hourly rate for Filo was speculative at best. Further, the firm could have mitigated any harm caused by LWCC's conduct by simply retaining separate counsel to represent the firm in the workers' compensation proceedings, minimizing any impact on the firm's revenue. The costs of substitute counsel were a better and more consistent measure of the damages caused by LWCC's conduct. A reasonable fee for an attorney defending the firm in the workers' compensation matter was $300 per hour. Accepting the 68.5 hours used by the district court, the Court recalculated the special damages at $20,550. It also awarded penalties of $41,100, double the special damages, for a total award to the firm of $61,655. The Court affirmed the judgment of the court of appeal, with an amendment reducing the amount of the award.

Justice Crichton concurred, agreeing with the result but noting that this was a plurality opinion. Chief Justice Weimer dissented, opining that LWCC did not breach its duty of good faith and fair dealing. The Chief Justice noted that LWCC made appropriate and adequate efforts to immediately obtain counsel for the firm but was unable to do so because of the firm's extensive workers' compensation practice. He opined that the firm was never required to represent itself. Justice Crain also dissented as to the finding that LWCC breached its duty of good faith to the firm. He categorized the matter as a disagreement over strategy as opposed to a failure to defend, concluding the record established that LWCC at all times protected the firm from having to file pleadings and being exposed to an adverse judgment. Affirmed as amended.

Per curiam; Crichton, J., concurring with reasons; McCallum, J., concurring for reasons assigned by Crichton, J.; Weimer, C.J., & Crain, J., dissenting with reasons.

Jefferson Parish ordinance regarding overtaking school buses was unconstitutional.

William Mellor v. The Parish of Jefferson, 2021-CA-0858 (La. 03/25/2022) [17 pp.]

In 2008 the Jefferson Parish Council adopted ordinance Section 36-320, et seq., titled "School Bus Safety Enforcement Program for Detecting Violations of Overtaking and Passing School Buses" (SBSEP). The ordinance established civil fines against vehicle owners whose vehicles overtake and pass a school bus with its visual signals activated. It was enforced by the use of automated cameras affixed to the school buses to record violating vehicles. Pertinent here, the SBSEP provided: "The Jefferson Parish School Board, or its agent, is responsible for the administration of the system and for notification of the violation. The Jefferson Parish Sheriff's Office shall be responsible for the collection of the initial fines paid by the vehicle owner." After receiving notices alleging they had violated the ordinance, plaintiffs filed suit alleging the SBSEP violated the Louisiana Constitution. Among plaintiffs' arguments was that, as a home rule charter government under La. Const. art. VI, § 5(G), Jefferson Parish was constitutionally forbidden from enacting ordinances that regulate the School Board. The district court agreed and granted summary judgment for plaintiffs, declaring the ordinance unconstitutional.

The Court considered the matter on direct appeal under La. Const. art. V, § 5(D) and affirmed. The Louisiana Constitution provides that "[n]o home rule charter or plan of government shall contain any provision affecting a school board or the offices of district attorney, sheriff, assessor, clerk of a district court, or coroner, which is inconsistent with the constitution or law." La. Const. art. VI, § 5(G).The constitution ensures school boards are not subject to control by local government subdivisions and envisions a separation of the local parish governments and school board. The language of the Constitution clearly prohibits Jefferson Parish from enacting regulations affecting the School Board. The fact that the School Board did not object to the SBSEP was of no consequence and could not cure what was constitutionally prohibited. The Court also found no merit in the argument that the Sheriff's Office was the only entity charged with enforcement of the SBSEP. It was clear that implementation of the SBSEP required action by and "affecting" the School Board. Chief Justice Weimer dissented, opining that the SBSEP aided and allowed the School Board to fulfill its obligation to protect school children from illegal actions of drivers and that the language of art. VI, § 5(G) was not so broad as to prohibit all actions by a home rule charter government that may affect a school board. Affirmed and remanded.

Per McCallum, J.; Weimer, C.J., dissenting with reasons; Crichton, J., dissenting for reasons assigned by Weimer, C.J.

Court upheld testamentary trust provision that was conditioned on beneficiary not having descendants or a spouse.

Succession of Dean Allen Bradley, 2021-C-01159 (La. 03/25/2022) [11 pp.]

In April 2002 Donald Bradley Sr. executed a will by which he established two separate trusts, with equal shares of his remaining estate left for the principal benefit of his two sons, Donald Jr. and Dean. The will provided that if the principal beneficiary died before termination of the trust, his interest would vest in the beneficiary's "heirs or legatees." If the principal beneficiary died without

descendants, the interest would vest in his spouse. Further, if the principal beneficiary had no spouse, the "the interest shall vest in the remaining trusts created." When Donald Sr. died in 2013, the trust came into existence. In 2015 Dean executed his own will and bequeathed his entire estate, including his trust property, to his fiancée, Vicky Ann Ladner. Dean died in 2017. He had no descendants and was not married. Donald Jr. intervened in Dean's succession proceedings and argued that under the express language of Donald Sr.'s will, Donald Jr.'s trust had a vested interest in Dean's trust because Dean died without a spouse or descendants. Ladner disagreed, arguing that Donald Sr.'s use of the terms "heirs" and "legatees" showed his intent to allow a trust beneficiary to bequeath his beneficiary interest to a testate successor. The parties filed cross-motions for summary judgment, and the district court granted Donald Jr.'s motion and denied Ladner's. On appeal, the Fifth Circuit reversed and granted Ladner's motion.

The Court granted a supervisory writ and reversed the court of appeal. Ascertaining Donald Sr.'s intent, the Court determined that on Dean's death, his trust interest vested in the remaining trust belonging to Donald Jr. It then considered whether the law permitted that disposition and concluded that it did. At the time the trusts came into effect, La. R.S. § 9:1973 provided at paragraph A: "The trust instrument may provide that the interest of … an original … principal beneficiary who dies intestate and without descendants during the term of the trust … vests in some other person or persons, each of whom shall be a substitute beneficiary." La. R.S. § 9:1973A. It provided at paragraph B: "Except as to the legitime in trust, the trust instrument may provide that the interest of … an original … principal beneficiary who dies without descendants during the term of the trust … vests in some other person or persons, each of whom shall be a substitute beneficiary." La. R.S. § 9:1973B. Ladner relied on subpart A for the proposition that a substitution was allowed only when the beneficiary died both intestate and without descendants. Donald Jr. relied on subpart B to argue that the only requirement for substitution was that the beneficiary die without descendants.

The plain language of subpart B supported the conclusion that in cases where the legitime is not in trust, the sole requirement for substitution was that the principal beneficiary die without descendants. This conclusion was supported by comments to the statute as well as a 2016 amendment that "reorganize[d], modifie[d], and clarifie[d] prior law." While the 2016 amendment did not apply, the legislature's clarification of its intent, both in the text and comments, demonstrated that the law in effect at the time the trust came into existence allowed substitution when a beneficiary died without descendants, as long as the legitime was not affected. In this case the trust did not affect the legitime, and Dean died without descendants. Thus, the law permitted Donald Sr. to shift Dean's interest to the remaining trust of Donald Jr. Reversed; judgment of district court reinstated; remanded.

Per curiam.

DOMESTIC RELATIONS

Initial child support claim cannot be brought after father's death.

Dejaun Kendrick v. Estate of Anthony Michael Barre, 2021-C-00993 (La. 03/25/2022) [12 pp.]

Plaintiff alleged Anthony Michael Barre was the father of her son, born one month after Anthony was shot and killed in 2010. She alleged Anthony knew of the pending birth of the child, was excited to welcome a son, was present for the ultrasound, chose the baby's name, and "openly acknowledged" the child. She alleged Anthony's family also acknowledged the child after Anthony's death, named him in the obituary, organized a fund for the child, and visited him in the hospital. Plaintiff further alleged that in 2015, Angel Barre, on behalf of Anthony's estate, filed suit in federal court against Beyoncé for the unauthorized use of Anthony's intellectual property. According to

plaintiff, Angel assured her any damages awarded would be shared with plaintiff and her son but that after the suit was settled, Angel did not uphold her agreement. After amending her petition, plaintiff maintained claims against Anthony's estate and Angel for filiation and child support. Defendants filed exceptions of prescription, no cause of action, and no right of action. The district court granted the exceptions, finding the filiation suit was untimely under La. Civ. Code art. 197, which limits filiation claims brought "for purposes of succession" to one year following the death of the alleged father. The Fourth Circuit reversed, finding art. 197 did not apply.

The Court granted a supervisory writ and reversed the court of appeal. The issue presented was whether a cause of action for child support exists when the petition is first filed after the father's death. The Court concluded that an initial child support claim cannot be brought after the father's death. Generally, child support is an ongoing obligation of a living parent to a minor child. A child support obligation is exigible at the earliest, (1) when the father-child relationship is legally established and (2) from the day suit is filed to collect it. The Court rejected plaintiff's contention that a support obligation could be established after the father's death and enforced against his estate. Because the child support obligation is strictly personal, it abates on the death of the obligor. *See* La. Code Civ. Proc. art. 428. Because plaintiff filed suit for child support after Anthony's death, she failed to state a claim for which there was a legal remedy. The Court noted that plaintiff might have other reasons to establish filiation between Anthony and her son and that its holding was limited to her attempt to establish paternity for child support. The Court reversed denial of the exception of no cause of action and pretermitted discussion of the exceptions of prescription and no right of action. Chief Justice Weimer concurred, explaining that the Court did not decide whether plaintiff had a cause of action against Angel arising out of her promises that the child would share in proceeds from the federal court litigation. Justice Hughes also concurred, noting that plaintiff's other claims remained viable. Reversed.

Per Crain, J.; Weimer, C.J. & Hughes, J., concurring with reasons; Griffin, J., concurring for reasons assigned by Weimer, C.J.

CRIMINAL

District court erred in severing trial to wait for defense counsel's reinstatement to the practice of law.

State v. Corey Major, 2022-KD-00387 (La. 03/09/2022) [4 pp.]

Defendant and two co-defendants were scheduled to be tried together. The week before trial, defendant filed a motion to sever and continue his trial until his preferred counsel of choice, who had been suspended from the practice of law, was reinstated. The district court granted the motion to sever and continued defendant's trial. It ordered the trial of the co-defendants to proceed.

The Court granted a supervisory writ and reversed. Code of Crim. Proc. art. 704, governing severance, provides, "Jointly indicted defendants shall be tried jointly unless: (1) The state elects to try them separately; or (2) The court, on motion of the defendant, and after a contradictory hearing with the district attorney, is satisfied that justice requires a severance." La. Code Crim. Proc. art. 704. A district court should grant a motion to sever only when a joint trial will result in prejudice to the defendant. Here, the district court appeared to find prejudice in the denial of defendant's Sixth Amendment right to counsel, but the district court erred in doing so. The right to counsel is not unlimited. Defendant may not "insist on representation by a person who is not a member of the bar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). There can be no violation of the right if defendant's "counsel" of choice is not licensed to practice law. Further, the right to counsel cannot

be manipulated to obstruct the orderly procedure of courts or to interfere with the fair administration of justice. Here, defendant filed his motion the week before trial and long after counsel was suspended. His present, although not preferred, counsel expressed his readiness for trial. The district court erred and abused its discretion in finding justice required a severance and continuance of defendant's trial. On remand, the Court cautioned the district court to be mindful of a co-defendant's request for a speedy trial when resetting the trial of the three jointly indicted defendants. Reversed and remanded.

Per curiam.

Defendant entitled to subpoena witnesses and materials in support of motion to change venue.

State v. Robert McCoy, 2022-KK-00381 (La. 03/17/2022) [2 pp.]

Defendant moved for change of venue and sought to subpoena witnesses and materials to support his motion. The district court quashed the subpoenas. The Court granted a supervisory writ in part and, in this brief per curiam, reversed the district court. Defendant was entitled to subpoena the witnesses and materials necessary to support his motion. The Court directed the district court to reissue the subpoenas defendant sought. Reversed and remanded with instructions.

Per curiam; Hughes, J., would deny.