

SELECTED LEGISLATION
OF THE
2002 FIRST EXTRAORDINARY SESSION

LIMITATION OF LIABILITY

Fontenot (SB 46)

Act No. 34

Extends the existing limitation of liability provisions for food banks to food service establishments or restaurants that donate food to food banks.

Effective June 16, 2002. (Amends R.S. 9:2799(A)(1))

Schedler (SB 107)

Act No. 48

Provides for the limitation of liability for the Audubon Commission, the city of New Orleans, and any other entity which operates any facilities of the Audubon Commission for any loss or damage resulting from injury by a golf ball or golf cart while using the Hurst Walk area of Audubon Park. Provides for warning signs to be posted and for exceptions for intentional or grossly negligent acts by an employee.

Effective June 16, 2002. (Adds R.S. 9:2795.2)

CHILDREN

Johns (HB 27)

Act No. 62

Existing law defines "shared custody" as a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time.

New law clarifies the calculation of child support in a shared custodial arrangement and applicable worksheet. Provides that the theoretical support obligation shall be cross multiplied by the actual percentage of time the child spends with the other parent. Clarifies that each parent's proportionate share of any direct payments made on behalf of the child to a third party shall be deducted from the basic support obligation.

Effective June 16, 2002. (Amends R.S. 9:315.9(A) and 315.20)

Ansardi (HB 38)

Act No. 65

Includes stepparents and stepgrandparents as eligible petitioners in intrafamily adoptions and provides for retroactive and prospective application to pending and future intrafamily adoptions.

Effective April 18, 2002. (Amends Ch.C. Art. 1243(A)(intro. para.))

OF LOCAL (NEW ORLEANS) INTEREST

Richmond (HB 115)

Act No. 135

Authorizes a constable of the First or Second City Court of the city of New Orleans to charge and collect the fees for services specified and enumerated for the constables in the same amount that the civil sheriff of the parish of Orleans is authorized to charge and collect for the identical service. Specifies that a constable is not authorized to provide additional services other than specified under existing law.

Effective June 16, 2002. (Adds R.S. 13:2158(D))

Bajoie (SB 60)

Act No. 121

Authorizes the judges of the Civil District Court for the Parish of Orleans and the First and Second City Courts of the city of New Orleans, sitting en banc, to utilize the monies in the judicial expense fund to pay all or any part of the cost of planning, designing, and constructing a new courthouse for the parish of Orleans. Specifies that the new courthouse shall house the following courts and all related support offices:

- (1) Civil District Court.
- (2) First and Second City Courts.
- (3) Juvenile Courts.

Prohibits the use of additional fees and costs to fund the planning, design, or construction of a new courthouse and requires any additional funds used for such planning, design, or construction to come from commercial leasing revenues, contributions from agencies to be located in such courthouse, or any other non-court cost related source.

Requires approval of plans and costs by the Joint Legislative Committee on the Budget prior to construction of a new courthouse. Further requires contracts for planning, design, or construction of a new courthouse to be subject to the public bid laws.

Effective June 16, 2002. (Adds R.S. 13:1312(D))

Bajoie (SB 61)

Act No. 122

Creates the office of first appearance hearing officer of the Municipal Court of New Orleans to be appointed by a majority of the judges of the court and subject to removal by a majority of the judges of the court.

Requires the judges of the court to adopt rules as are necessary to define the functions, duties, and operational procedures of the office.

Sets forth the following qualifications for office: an attorney licensed to practice law in the state, at least 30 years of age, to have practiced law in the state for at least five years, and to be a duly qualified elector of Orleans Parish.

Sets forth the annual salary pay range and requires the Municipal Court of New Orleans and the city of New Orleans to provide necessary support services and personnel to the office which cost shall be borne by the city.

Specifies the following powers and duties: the administering of oaths and affirmations, the taking of acknowledgments and affidavits, the signing of orders including peace bonds, the fixing of bail or exercising certain powers of parole, and the fining and punishing for certain contempt of court.

Terminates the office on August 15, 2003 unless reenacted by the legislature, and authorizes the judicial Council of the Supreme Court of Louisiana to evaluate and make recommendations as to the necessity of continuing this office after one year.

Effective June 16, 2002. (Adds R.S. 13:2496.3)

MISCELLANEOUS

Martiny (HB 85)

Act No. 89

Provides procedures for the initiation of administrative remedies involving prisoner litigation. Revises procedures to address *Pope v. State*, 99-2559 (La. 6/29/01), 792 So.2d 713, which held that the Corrections Administrative Remedy Procedure Act as applied to tort actions was unconstitutional. Requires prisoner to initiate his administrative remedy for a delictual action for injury or damages within 90 days from the date of the injury or damage. Provides that subsequent to and in the event the inmate disagrees with the final determination, the delictual action for injury or damages shall be filed separately as an original civil action in the parish where the prison is situated to which the prisoner was assigned when the cause of action arose. Specifically excludes from judicial review any administrative decisions relative to delictual actions for injury or damages as mandated by *Pope*.

Effective April 18, 2002. (Amends R.S. 13:5101(B), R.S. 15:1172(B) and (C), 1177(A)(intro.para.) and (1) and (C), 1179, 1184(A)(2) and (D), and 1186(A) and (B); Adds R.S. 15:1172(D) and (E), 1177(A)(10), and 1184(F) and (G); Repeals R.S. 49:964(G)(7))

Bruneau (HB58)**Act No. 79**

Increases the filing fee from \$10 to \$25 for the required annual report for domestic and foreign limited liability companies to be filed with the secretary of state.

Effective April 18, 2002. (Amends R.S. 12:1364(A)(4) and (B)(4))

Campbell (SB 51)**Act No. 155**

Requires all railroad companies operating in this state to maintain their rights-of-way at any public road or highway railroad grade crossing not protected by an active warning device so that vegetation, structures, and other obstructions do not obstruct the view of approaching motorists. Requires railroad companies to cut vegetation and remove structures and other obstructions obstructing the view of approaching motorists from either direction within the maintenance width and length of the crossing.

Effective April 25, 2002. (Adds R.S. 48:386.1)

Heitmeier (SB 44)**Act No. 33**

Authorizes the chief of police of the Crescent City Connection Police Department to appoint police officers under his command as ex officio notaries public so that they may function as a notary public to administer oaths, receive sworn statements, and execute affidavits, acknowledgments, and other documents, all limited to matters within the official operations of the Crescent City Connection Police Department. Requires all acts performed by such notary public to be performed within the jurisdictional limits of the Crescent City Connection Police Department only.

Effective April 18, 2002. (Adds R.S. 35:408)

SELECTED JURISPRUDENCE

Constitutionality of La. Statutes

Wal-Mart Stores, Inc. v. Keel, 817 So.2d 1 (La. 2002)

Employer sought to reduce its compensation benefits paid to workers' compensation claimant by amount of old age Social Security benefits she received. The Office of Workers' Compensation (OWC) rendered judgment reducing claimant's weekly benefits, and claimant appealed. The court of appeal reversed. After granting employer's application for supervisory writs, the Supreme Court remanded the case to the OWC for further proceedings. On remand, the OWC transferred the case to the 6th Judicial District Court, which held that the statute, R.S. 23:1225, which allows the reduction in workers' compensation for claimants receiving remuneration from Social Security was unconstitutional. The employer appealed. The Supreme Court held that R.S. 23:1225(C)(1)(b) unconstitutionally denied employees over age 65 equal protection of the laws under La. Const. Art. I, §3.

New Orleans Campaign for a Living Wage v. City of New Orleans, 2002 WL 31005227 (La. 2002)

Separate actions were brought seeking declarations regarding the constitutionality of R.S. 23:642, which prohibits local governmental subdivisions from establishing a minimum wage which the private employer would be required to pay employees, and the constitutionality of city Ordinance No. 20376, which established a minimum wage for individuals employed and performing work in the city. The Civil District Court rendered judgment declaring the statute unconstitutional, upholding the validity of the city's minimum wage ordinance, and denying request for injunctive relief. On consolidated appeals, the Supreme Court held that the statute prohibiting local governmental subdivisions from establishing a minimum wage rate was a legitimate exercise of the state's police power, and that the city's minimum wage law abridged the police power of the state under La. Const. Art. VI, §9, and was therefore unconstitutional.

Women's Health Clinic v. State, 804 So.2d 625 (La. 2002)

Abortion clinics and physician brought an action against the state for a declaratory judgment on the constitutionality of R.S. 9:2800.12, which imposes tort liability upon abortion providers in favor of the mother of the unborn child for any damage occasioned or precipitated by the abortion. Plaintiffs argued that the statute is unconstitutionally vague, violates the right to privacy, and denies them equal protection of the law. The clinics and physician requested a permanent and preliminary injunction against enforcement of the statute. The district court declared the statute unconstitutional. The state suspensively

appealed. The supreme court held that the issue of the constitutionality of the statute was not ripe for determination at the hearing on the motion for preliminary injunction and vacated and reversed the lower court's decision declaring R.S. 9:2800.12 unconstitutional.

Louisiana Public Facilities Authority v. Foster, 795 So.2d 288 (La. 2001)

The Public Facilities Authority (PFA) brought an action against the governor for a declaratory judgment on the constitutionality of statutes regulating the PFA and appropriating money. The district court declared unconstitutional, Acts 915, 1238, and 1323 of the 1999 Regular Session, as well as certain portions of Act 11 of the 2000 Second Extraordinary Session. The state appealed. The supreme court, reversing the lower court, held that the PFA is a public entity, not a "private citizen," and, therefore, is not protected by the state constitution and the prohibition against laws impairing the obligations of contracts, that the one-object provision of La. Const. Art. III, § 15(A), was not violated by a bill for an act to regulate public trusts, and that the germaneness requirement of La. Const. Art. III, § 15(C), was not violated by an amendment to the bill regulating public trusts, and that Act 11 (House Bill 1) of the Second Extraordinary Session, did not withdraw funds from the state treasury since the funds were in the possession of the PFA, a state entity.

Malone v. Tubbs, 2002 WL 31001976 (La.App. 2 Cir. 2002)

Voters brought actions against three ex-felons, challenging their qualifications to run for public office. The provisions of La. Const. Art. I, § 10, as amended by Act 1492 of the 1997 Regular Session, disqualify all candidates for elective office who have been convicted of a felony, who have exhausted all legal remedies, and who have neither received a gubernatorial pardon nor had 15 years elapse from the completion of their original sentence. La. Const. Art. I, §10(B), which applies to all convicted felons attempting to qualify for public office after the effective date of the 1998 amendment, is not an ex post facto law in violation of the United States or Louisiana Constitutions. The gubernatorial pardon required by La. Const. Art. I, §10(C), does not include the automatic first offender pardon provided by La. Const. Art. IV, §5 or R.S. 15:572.

Constitution; Sovereign Immunity; Execution of Judgments

Vogt v. Board of Commissioners, 814 So.2d 648 (La.App. 4 Cir. 2002)

**The La. Supreme Court granted writs on September 20, 2002.

Property owners obtained a judgment against the levee district board of commissioners for the board's failure to return property that had previously been taken for a spillway, and then was required to be returned (public purpose has ceased). Pursuant to La. Const. Art. XII, §10(C), the court held that no coercive means existed to force the state, state agencies, or political subdivisions to comply with judgments rendered against them, and therefore, the owners could not obtain a writ of mandamus or seizure to satisfy the judgment against the levee board.

U.S. Constitution; Sovereign Immunity

Lapides v. Board of Regents, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002)

University of Georgia professor brought §1983 and state tort law claims against the board of regents in state court. The state removed the suit to federal court and moved to dismiss on the ground of Eleventh Amendment immunity. The U.S. Supreme Court held that the state waives its Eleventh Amendment immunity when it removes a case from state court to federal court.

U.S. Constitution; First Amendment

Byers v. Edmondson, 2002 WL 1200768 (La.App 1 Cir. 2002)

Th shooting victim and her family brought an action against her shooter, the shooter's boyfriend, and the producers, director, and distributors of a movie the shooter and her boyfriend repeatedly watched which allegedly inspired the shooter and her boyfriend to go on a crime spree. The district court dismissed the claim. The shooting victim appealed. The court of appeal reversed and remanded. On remand, the district court granted the producers, director, and distributors summary judgment. The shooting victim appealed. The court of appeal held that the movie did not incite the shooter and her boyfriend to go on a crime spree, and that the movie did not constitute obscenity. The First Amendment insulates the director and producer of a film from liability to a victim damaged when a third person "copycats" the actions of characters portrayed in the film, where the film was not obscene and was not likely to produce imminent lawless action (incitement). The "incitement" that removes speech from First Amendment protection is that which exhorts, urges, entreats, solicits or overly advocates or encourages unlawful or violent activity on the part of viewers.

Abandonment

James v. Formosa Plastics Corp., 813 So.2d 335 (La. 2002)

The abandonment period in C.C.P. Art. 561 was not interrupted as to plaintiff's action against a defendant while plaintiff was pursuing the dismissal of a co-defendant on appeal. Article 561 requires that a party take a step in an "action" in the trial court within three years of the last action of either party. Several "actions" may be present in the same lawsuit. In this case, plaintiff's suit against the two defendants were separate "actions", and plaintiff abandoned the action not on appeal. (The dismissal of the co-defendant was also upheld on the separate appeal.)

Madison v. Touro Infirmary, 2002 WL 1933341 (La.App. 4 Cir. 2002)

Plaintiff sent a letter to defendant requesting the defendant's agreement to set the matter for trial. Defendant responded by letter that discovery was still outstanding. The court found that the correspondence did not amount to a step in the prosecution of the suit, and that the last step taken was the deposition of one of the defendants over three years prior to defendant's filing of the motion to dismiss.

Forum Non Conveniens

Cantuba v. The American Bureau of Shipping, 811 So.2d 50 (La.App. 4 Cir. 2002)

The surviving families of seamen lost at sea after the sinking of a bulk carrier in international waters in the North Atlantic brought suit against the bulk carrier in 1994. C.C.P. Art. 123 was amended by Act 536 of the 1999 Regular Session to allow the dismissal of maritime suits for *forum non conveniens*. During the sixteen months following the amendment to Article 123, the defendant filed several motions invoking the authority of the court before finally filing a motion to dismiss for *forum non conveniens*. The Fourth Circuit concluded that the parties in a civil action are charged with knowledge of the law, and that under the circumstances, the defendant had lost its claim for dismissal for *forum non conveniens*, "whether by laches, waiver or estoppel."

Service of Process; Prescription; Interruption

Futrell v. Cook, Fourth Circuit, 805 So.2d 325 (La.App. 4 Cir. 2001)

Relatives of patient filed a medical malpractice action against treating physicians, hospital, and insurers on December 20, 1999. The petition noted that service instructions would be provided at a later date. Plaintiff simultaneously mailed an unfiled copy of the petition to defendants requesting waiver of service of the petition. Counsel for defendants responded by letter that he was authorized to receive service on behalf of the defendants, but that plaintiff needed to mail him a filed copy of the lawsuit. Plaintiff never mailed the filed copy of the lawsuit but had the defendants served on July 5 and 6, 2000. Defendants filed exceptions of prescription and lack of service of process. The court of appeal held that the trial judge properly dismissed the action without prejudice in accordance with C.C.P. Art. 1672(C), but that the trial court erred in sustaining the exception of prescription, since the record contained no evidence to support a finding of "bad faith" under R.S. 9:5801, which is necessary to determine that an interruption of the prescriptive period never occurred. C.C.P. Art. 1672(C) does not equate "good cause" with the "bad faith" needed in R.S. 9:5801.

Renfroe v. State, 809 So.2d 947 (La. 2002)

Plaintiff brought a timely suit against DOTD for injuries resulting from an accident caused by an alleged defect in the Causeway Boulevard, which at certain points has signs designating it as "LA 3046". Causeway Boulevard is in fact a state highway both north and south of the point of the accident, and state police investigated the accident. When plaintiff learned that the highway was not a state highway at the point of the accident, he filed, outside of the one-year prescriptive period, a supplemental and amending petition, which added the Parish of Jefferson and the Greater New Orleans Expressway Commission (GNOEC) as defendants. Plaintiff then filed a second supplemental and amending petition substituting Road District No. 1 of Jefferson Parish (RD No. 1) for the Parish of Jefferson. DOTD was dismissed on summary judgment. The court held that plaintiff's claim against the GNOEC and RD No. 1 had prescribed. Prescription was not interrupted by timely suit against DOTD,

because it was not a solidary obligor or joint tortfeasor with the GNOEC or RD No.1. The amended petition did not "relate back" under C.C.P. Art. 1153 because there was not timely notice to the local entities. *Findley v. Baton Rouge*, 570 So.2d 1168 (La. 1990) is inapplicable since there was no "identity of interests" (none of the components of a parent corporation and wholly owned subsidiary relationship between the state and the local entities). The amended petition did not merely correct a misnamed defendant, but added entirely new and unrelated defendants. *Contra non valentum*, which applies only in exceptional circumstances, did not apply in this case because, although it was unusual that different unrelated parties would own and maintain different portions of one roadway, the fact that the portion of the roadway was owned by some party other than DOTD was "reasonably knowable" by the plaintiff within the prescriptive period.

Prescription; Contra Non Valentum

Terrebonne Parish School Board v. Columbia Gulf Transmission Co., 290 F.3rd 303 (5th Cir. 2002)

The application of the doctrine of *contra non valentum* and of constructive notice is "defendant-specific" in that prescription does not necessarily begin to run at the first indication that the plaintiff may have suffered harm, but rather, the court should look to when the plaintiff has a reasonable basis to pursue a claim against a specific defendant and the reasonableness of the plaintiff's inaction prior to pursuing the claim.

Prescription; Contra Non Valentum; "Repressed Memory"

Doe v. The Archdiocese of New Orleans, 823 So.2d 360, (La.App. 4 Cir. 2002)

Plaintiff brought an action against the church for alleged sexual abuse by a former priest. The Fourth Circuit held that the trial court properly allowed the testimony of an expert on whether the alleged child sexual abuse victim had valid a "repressed memory" of 1973 and 1978 sexual encounters, that C.C. Art. 3496.1 and R.S. 9:2800.9, providing special prescriptive periods for actions for abuse and sexual abuse of a minor, do not apply retroactively, and that if the trier of fact determines that the plaintiff had a repressed memory, the doctrine of *contra non valentum* would apply to suspend the prescription.

Peremption; Legal Malpractice; Continuous Representation

Dauterive Contractors, Inc. v. Landry and Watkins, 811 So.2d 1242 (La.App. 3 Cir. 2002)

The one and three year limitation periods for legal malpractice claims provided by R.S. 9:5605 are peremptive periods, not prescriptive periods. Therefore, the "continuous representation" rule can not operate to suspend or interrupt the time limitations within which a malpractice action must be brought.

Perez v. Trahan, 806 So.2d 110 (La.App. 1 Cir. 2001)

During mediation, defendant offered to settle the underlying case for \$120,000. The offer was not accepted, the case went to jury trial, and the jury failed to award any damages. The decision was appealed with plaintiff's trial counsel handling the appeal for the next two years. Plaintiff filed a malpractice claim approximately two and a half years after the jury's decision based on his attorney's alleged failure to recommend acceptance of the prior settlement offer. The court held, in part, that the alleged malpractice was known when the jury returned its verdict and that the continuous representation rule did not apply to the one-year preemptive period for legal malpractice claims under R.S. 9:5605.

But see, *Gettys v. Session and Fishman, L.L.P.* 772 So.2d 874, (La.App. 5 Cir. 2000) which treated the one year preemptive period as a prescriptive period and applied the continuous representation rule in its conclusion that claimant's legal malpractice suit was timely filed.

Legal Malpractice; "Claims Made" Policies

LeBlanc v. Succession of Raggio, 818 So.2d 140 (La.App. 1 Cir. 2002)

The court concludes that the terms of Westport's legal malpractice insurance policy regarding when a claim can be made are void because they are in contravention of R.S. 22:629. The policy provided that coverage would be provided only if the claim is made during the policy period. R.S. 22:629 provides, in part, that no insurance contract shall contain any condition limiting the right of action against the insurer to a period of less than one year from the time when the cause of action accrues.

Attorneys; Contempt

Meek v. Meek, 2002 WL 31065133 (La.App. 2 Cir. 2002)

During a hearing, counsel for the defendant repeatedly interrupted the court and, in a raised voice and argumentative tone, responded to the judge's questions by stating, "you're the one that wears the black robe, Judge. That's your call." The trial court found defendant's attorney to be in direct contempt of court and sentenced her to 24 hours in jail and a fine of \$100 (both of which were suspended), and placed her on unsupervised probation for a period of six months. Attorney appealed, and the Second Circuit reversed, holding that attorney's "somewhat flippant response" was not intended to insult the court's authority, and that counsel's behavior, "while aggressive and at times somewhat less than professional, . . . did not rise to the level of a direct contempt of court."

Medical Malpractice

Richard v. La. Extended Care Centers, Inc., 809 So.2d 1248 (La.App. 3 Cir. 2002)

**The La. Supreme Court granted writs on June 14, 2002.

Nursing home resident filed a suit against the nursing home for injuries allegedly sustained, "when she was viciously attacked by an employee. . . or alternatively, allowed to fall from her wheelchair." The Third Circuit upheld the dismissal of the negligence action against the nursing home, as premature, since that claim must first be submitted to a Medical Review Panel, but reversed the dismissal of the claim for intentional tort which need not be submitted to an MRP.

Williams v. Jackson Parish Hospital, 798 So.2d 921 (La. 2001)

Patient sued the hospital and blood centers, alleging damages sustained when she was infected by tainted blood during a transfusion. Patient argued that it was impossible for her to comply with the preemptive period of R.S. 9:5628 (one-year prescriptive and three-year preemptive period for medical malpractice claims) since she did not discover her injuries until after the time had lapsed. The district court sustained the hospital's preemptory exception of prescription. The court of appeal affirmed and remanded the case for an evidentiary hearing on the constitutionality of R.S. 9:5628. The district court denied the challenge to the statute, and the patient appealed. The court of appeal affirmed. The patient petitioned for certiorari review. The supreme court reversed and remanded, holding that the action in strict products liability arising out of a defective blood transfusion, which was filed before enactment of the blood shield statutes, "was not governed by the three-year prescriptive period for medical malpractice claims", overruling *Boutte v. Jefferson Parish Hospital Service District No. 1*, 759 So.2d 45, and *Walker v. Bossier Medical Center*, 714 So.2d 895, and holding that the patient's claim had not prescribed.

Compromise and Settlement

Tran v. Allstate Ins. Co., 806 So.2d 103 (La.App. 4 Cir. 2001)

Counsel for underinsured motorist carrier made an oral agreement to settle with insured for \$775 while at the courthouse, however, the agreement did not occur in open court or on the record. Insured reserved her rights against the other defendants. Plaintiff's counsel had a Vietnamese interpreter orally transmit the offer to plaintiff who was willing to accept the offer. Subsequent to the courthouse agreement, insurer forwarded to plaintiff's counsel a letter confirming the settlement along with a W-9 form for signing. Counsel for plaintiff signed and returned the W-9 form along with a cover letter acknowledging the enclosed documents were completed and executed and, "[h]oping this letter finds you in good spirits". Insurer then sent a receipt, joint motion to dismiss, and the settlement check for \$775. When the documents were not returned, insurer filed a Motion to Enforce Settlement. C.C. Art. 3071 provides in part that the compromise to a lawsuit must, ". . . be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding." The Fourth Circuit held that since "(t)here is nothing in the record to indicate that the plaintiff ever gave her attorney the express consent necessary to accept the terms of

this settlement," and that because "the terms of the settlement were not reduced to writing and signed by the parties, there is not an enforceable settlement agreement." (It was footnoted in this decision that the settlement check was cashed and deposited in the plaintiff attorney's trust account.)

Contracts; Illicit or Immoral Purposes

Dugas v. Dugas, 804 So.2d 878 (La.App. 3 Cir. 2001)

Father, plaintiff, transferred various movable and immovable property to his daughter and then sued his daughter for the return of the transferred property. His admitted purpose of the transfers was to place these properties beyond the reach of his potential judgment creditors, who were suing him at the time of the transfers. After the threat had passed, plaintiff asked his daughter to return the property. When she refused, he filed suit, claiming that the transfers were simulated sales which lacked adequate consideration and were actually disguised donations, which were null and void. The court granted summary judgment in daughter's favor pursuant to C.C. Arts. 2030 (contract is absolutely null when object of contract is illicit or immoral) and 2033 (performance rendered under contract whose cause is illicit or immoral may not be recovered by a party who knew or should have known of the defect that made the contract null). The court went on to explain that, "to return his former properties to him, would not only be tantamount to sanctioning but, also, participating in this type of 'game' and manipulation of the system."

Custody and Visitation

Weaver v. Weaver, 824 So.2d 438 (La.App. 3 Cir. 2002)

The "reformation rule", first adopted by the Louisiana Supreme Court in *Fulco v. Fulco*, 254 So.2d 602 (1971), allows a parent to retain custody of the children if the parent reforms or abstains from any previous course of open indiscretion and probable immorality. The reformation removes that parent's previous indiscretion and is no longer a factor in determining that parent's fitness for custody. "However, an eight year history of seven boyfriends who either lived or slept over on numerous occasions at (mother's) residence, in the presence of her young daughter, is not the type of activity that will be obliterated under the reformation rule."

Wood v. Wood, 2002 WL 31235524 (La.App. 1 Cir. 2002)

"When granting or modifying visitation to a nonparent, a court must exercise care not to apply either Civil Code art. 136 or La. R.S. 9:344 in a vacuum." The court must balance those provisions against a fit parent's constitutionally protected (*Troxel v. Granville*, 530 U.S. 57 (2000)) fundamental right of privacy in child rearing, and must be aware that any rights of nonparents are ancillary to those of a fit parent. "The trial court must consider the presumption that the mother acted in the best interest of the child." "[S]imple disagreements over the amount of visitation would not generally be sufficient to outweigh the rights of the mother to decide what is the best interest of her child."

Evidence; Comparative Negligence; Seat Belts

Rougeau v. Hyundai Motor America, 805 So.2d 147 (La. 2002)

Looking to the legislative history of R.S. 32:295.1(E), which prohibits the admission of evidence of the non-use of a seat belt to prove contributory negligence or to mitigate damages, the court found the prohibition also applies to product liability actions involving allegations of design defect in an automobile. Following a Mississippi Supreme Court decision, the court determined that evidence of non-use of a seat belt is only admissible in a product liability action if: "(1) it has probative value for some purpose other than as evidence of negligence, such as to show that the overall design, or a particular component of the vehicle, was not defective; (2) its probative value is not outweighed by its prejudicial effect or barred by some other rule of evidence; and (3) appropriate limiting instructions are given to the jury, barring the consideration of seat belt non-usage as evidence of comparative negligence or to mitigate damages." The court concluded that since the plaintiff alleged that defects in the braking and front-end vibration system caused her to run off the road and strike a steel utility pole, evidence that she was not wearing her seat belt was irrelevant for any purpose other than to show causation of her damages and was therefore inadmissible.

Torts; Immunity

Gregor v. Argenot Great Central Ins. Co., 817 So.2d 152 (La.App. 4 Cir. 2002)

**The La. Supreme Court granted writs on June 21, 2002.

Survivors brought an action for wrongful death against Pascal's Manale, oyster fishermen and sellers, and DHH when a restaurant patron died after eating raw oysters. In 1991, DHH amended the Louisiana Sanitary Code to require all establishments that sell or serve raw oysters to display a warning sign "at point of sale" with the following wording:

"THERE MAY BE A RISK ASSOCIATED WITH CONSUMING RAW SHELLFISH AS IS THE CASE WITH OTHER RAW PROTEIN PRODUCTS. IF YOU SUFFER FROM CHRONIC ILLNESS OF THE LIVER, STOMACH OR BLOOD OR HAVE OTHER IMMUNE DISORDERS, YOU SHOULD EAT THESE PRODUCTS FULLY COOKED."

The restaurant posted the sign behind the oyster bar but had no other warnings. The victim, who was diagnosed with Hepatitis C several weeks earlier, ate raw oysters in the restaurant's dining room and after being admitted into the hospital, lapsed into a coma and died. The court held DHH negligently enforced the Sanitary Code and such enforcement did not involve a discretionary function providing immunity under R.S. 9:2798.1, and that the trial court properly apportioned fault at 25% to Pascal's Manale and 75% to DHH.

Torts; Comparative Fault

Petre v. State, 817 So.2d 1107 (La. 2002)

At 9:20 p.m. a mother was traveling with her ten-year-old daughter on La. Hwy. 107. The two had left one friend's house and were traveling to another friend's house. The mother inadvertently passed her friend's driveway, turned around in the parking lot of an abandoned store and then proceeded back towards her friend's house and encountered a vehicle that she thought might be driven by the friend. While glancing to the left at the other vehicle and traveling at a speed of forty to forty-five miles per hour, the right side wheels of her car left the paved surface. She traveled along the ditch a short distance until she hit a culvert causing her vehicle to become airborne and travel an additional 122 feet. The vehicle bounced off of two trees, overturned, and ultimately came to rest on a stump. The mother suffered physical injuries and was rendered unconscious for two days. The daughter suffered numerous serious injuries, which resulted in her untimely death. The investigating state trooper found no marks on the surface of the highway and concluded that the vehicle was under control when it left the highway. Nearly two hours after the accident, the hospital obtained a blood sample from the mother that yielded a blood-alcohol reading of 0.247 percent based on grams of alcohol per 100 cubic centimeters of blood. The mother pled guilty to vehicular homicide of her daughter. In the prior twenty-four months, she had been arrested for and presumably convicted of two DWI's. La. Hwy. 107 is a two-lane, asphalt-surfaced highway that became a part of Louisiana's highway system in the 1920's. It was a gravel roadway until it received an asphalt surface in 1952. In 1987, the travel lanes of the highway were widened at the expense of the shoulder. At the time of the accident, the area in which the accident occurred was made up of two curves in the roadway and was marked in both directions by yellow diamond-shaped signs illustrating the configuration of the curve and advising motorists not to exceed forty miles per hour while traveling through the curves. The mother brought suit against DOTD, and the father (ex-husband) brought suit against both the mother and DOTD. In upholding the award to the mother and father, the court found that the unreasonably dangerous shoulder and slope of the adjacent ditch prevented the mother from reentering the road and upheld an allocation of 50% fault to each. The Supreme Court found that the law does not allow it to prohibit the mother from recovering in part from DOTD because she was intoxicated (.25 BAL) at the time of the accident.

Default Judgments

Conerly v. Jefferson, 820 So.2d 1173 (La.App. 4 Cir. 2002)

The court granted the defendant an extension of time within which to respond. Two days after the extension expired, plaintiff took a default judgment and confirmed it. Defendant filed an answer the day after confirmation. The court held that under these circumstances, the plaintiff committed an "ill practice" when he did not notify defense counsel of his intent to confirm default. "The fact that the Code of Civil Procedure does not mandate that counsel attempt to notify opposing counsel of his intent to confirm default . . . does not mean that failure to do so in an on-going petitory action is not an ill practice under ... (CCP) art. 2004."

District Court Rules

The Supreme Court has adopted uniform Rules for Louisiana Civil Courts, effective April 1, 2002. Some of the rules (1) require mandatory conference between the lawyers before the filing of discovery motions, (2) permit 35 interrogatories without leave of court, (3) require a memorandum in support of a motion for summary judgment with specific content, and a memorandum in opposition to the motion at least 8 days prior to the hearing, with specific content, (4) require that exceptions and motions be accompanied by an order requesting the fixing for hearing, (5) require that a supporting memorandum accompany an exception or motion, (6) require requests for issuance of subpoenas at least 10 days before the desired appearance date, (7) require all stipulations to be written and filed in the record or made in open court and entered on the minutes, and (8) require a party filing suit for executory process to highlight or emphasize the language in the attached exhibits necessary for executory process. A judge may deviate from the rules in a particular proceeding, and such deviation must be made on the record in open court in the presence of all parties or by written order. The rules are available at www.lasc.org and www.lsba.org.

Summary Judgment

Pierre-Ancar v. Browne- McHardy Clinic, 807 So.2d 344 (La.App. 4 Cir. 2002)

Trial court, in a medical malpractice suit alleging failure to diagnose patient with endometriosis, granted defendant's third motion for summary judgment on the morning of the trial. Despite a full year passing since the defendants originally brought their summary judgment motion, and despite the fact the court clearly informed the plaintiff in what respect her evidence was lacking, the plaintiff failed to put forth expert testimony to support her position. The Fourth Circuit concluded that C.C.P. Art. 966(D), which requires that a motion for summary judgment be heard and rendered ten days before trial, applies only to motions that do not dispose of the case in its entirety, and is not violated where the judge heard the motion, for a third time, two weeks before trial on the merits but deferred judgment until the trial date. (It should be noted that the granting of the summary judgment appeared to have disposed of the entire case.)

Stare Decisis

In Re Orso, 283 F.3d 686 (5th Cir. 2002)

In interpreting R.S. 22:647 (exempts proceeds of annuity contracts from seizure), the U.S. Fifth Circuit observes that: "Because Louisiana stands alone among the 50 states as a hybrid Civil Law/common law jurisdiction, its situation is unique: The State's constitution, its codes and its statutes, are the primary sources of law; court decisions are treated as secondary sources of law, without *stare decisis* precedential effect."

Wills

Succession of Helms, 810 So.2d 1265 (La.App. 3 Cir. 2002)

Daughter and her husband, as coexecutors of the estate of testator, opened a succession for the estate of testator and sought a determination that daughter was the sole beneficiary and universal legatee under testator's will. The second daughter contested the recognition of daughter as sole legatee. In affirming the district court's decision of awarding the entire estate to the first daughter and giving nothing to the second daughter, the Third Circuit held that: (1) the bequest to testator's second daughter of "the minimum portion allowed by Louisiana law, in existence at the time of my death" resulted in that daughter taking nothing under testator's will; (2) the creation of a spendthrift trust did not evidence testamentary intent that the second daughter would receive something under testator's will; and (3) that the trial court judgment which interpreted testator's bequest of "the minimum portion allowed by Louisiana law, in existence at the time of my death" as providing nothing for second daughter did not disinherit the daughter.

Succession of Aycock, 809 So.2d 1185 (La.App. 3 Cir. 2002)

Testatrix, in her own handwriting, wrote her olographic will, and then the notary public signed the testament, dated the testament, and notarized it in testatrix's presence. The testament clearly expressed testatrix's intent to leave all of her financial accounts to a friend, and her home to her niece and nephew. Testatrix's sole heir, her brother, challenged the will, claiming it was invalid since the notary, not the testatrix dated the will, and was therefore not in full compliance with C.C. Art. 1588. In reaching its decision, the Third Circuit looked to the supreme court case of *Succession of Boyd*, 306 So.2d at 692, which held that the "object of the law is surely not to frustrate the will of the testator." The court noted that the testator took "painstaking steps to assure the will reflected her wishes," and that nothing in the record "hints she may not have desired what is clearly expressed in the document." Upholding the will, the Third Circuit observed that "(t)he exceptional circumstances presented, the interest of justice, and the purpose underlying the enactment of La. Civ. Code art. 1588 favors a finding that the will is valid."

Succession of Smith, 806 So.2d 909 (La.App. 5 Cir. 2002)

Testator executed a statutory will in her hospital room with two nurses acting as witnesses. The testator's son, the notary and the first witness were in the room with the testator, but the second witness was in the doorway of the testator's room. All four people witnessed the testator signing the will. Upon seeing the testator sign at least one of the pages, the second witness returned to his duties at the nurses station. The notary then took the will to the nurses' station, where both witnesses signed the will. Although the witnesses were not together the entire time it took for each to sign, the second witness testified that he could see into the testator's room from the nurses station. It was not clear whether the testator could actually see, from her bed, the witnesses signing. The Fifth Circuit concluded that the will would have been valid even though the second witness was not actually in the room when the testator signed, but that the will was invalid because the witnesses and the notary did not sign the document "in the presence of the testator and each other."