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INSURANCE

Restaurant's commercial insurance policy did not provide coverage for business income losses during COVID-19 pandemic.

Cajun Conti, LLC v. Certain Underwriters at Lloyd's London, 2022-C-01349 (La. 03/17/2023) [12 pp.]

Plaintiffs were the owners of the French Quarter restaurant Oceana Grill, which could accommodate 500 guests at any one time prior to the COVID-19 pandemic. On March 16, 2020, responding to the emerging COVID-19 virus, the mayor of New Orleans issued an emergency proclamation prohibiting most public and private social gatherings. Oceana Grill's operations were limited to take-out and delivery services, with no dine-in services. Complying with government-imposed capacity restrictions, the restaurant opened at 25% capacity two months later. Due to social distancing guidelines, Oceana Grill remained at 60% capacity or less throughout the pandemic. Plaintiffs also incurred expenses to sanitize the space. Due to capacity limits and the additional expenses, Oceana Grill could not generate pre-COVID-19 income. Plaintiffs maintained an all-risks commercial insurance policy with loss of business income coverage through Certain Underwriters at Lloyd's, London (Lloyd's). Plaintiffs filed suit against Lloyd's, seeking a declaratory

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judgment that the "policy provides business income coverage from the contamination of the insured premises by COVID-19." Lloyd's moved for summary judgment, arguing there was no coverage under the policy because COVID-19 did not cause "direct physical loss of or damage to property." The district court denied summary judgment. After a three-day bench trial, the district court denied the relief sought by plaintiffs. On appeal, the Fourth Circuit reversed. The court of appeal found the policy was ambiguous and reasoned that "direct physical loss" could mean loss of use of the property. Judge Belsome dissented, concluding the policy language was not ambiguous and did not provide coverage. Judge Pro Tempore Luker agreed.

The Court granted a supervisory writ, reversed the court of appeal, and reinstated the district court's decision. To recover lost business income under the terms of the policy, the insured must experience a suspension of operations "caused by direct physical loss of or damage to property." The suspension may be a "slowdown" or a "cessation" of business activities, and the claimant may recover lost business income during the "period of restoration," but all conditioned upon "direct physical loss of or damage to property." Plaintiffs claimed they were entitled to coverage because either COVID-19 contamination caused direct physical loss or damage to property or the policy was ambiguous. Their expert opined at trial that "when the virus lands on property it transforms that property from noninfectious, safe, to infectious. Nobody wants to touch or wants to be near property that is infectious. So that is damage." A defense expert testified COVID-19 could be eliminated through proper cleaning, thus allowing the restaurant to operate safely during the pandemic. Another defense expert testified the virus could be cleaned with a disinfectant and did not cause physical damage to inanimate surfaces. Using the general rules of contract interpretation, and giving the phrase its plain, ordinary, and generally prevailing meaning, the Court construed "direct physical loss of or damage to property" to require that the insured's property sustain a physical – meaning tangible or corporeal – loss or damage. The loss or damage must also be direct, not indirect. Applying those meanings to the facts and arguments here, COVID-19 did not cause direct physical loss of or damage to Oceana's property. Its property remained physically intact and functioning.

The Court rejected plaintiffs' argument that "direct physical loss" encompassed the inability to use covered property. The property was not physically lost in any tangible or corporeal sense. The court of appeal erred by focusing on the loss of use rather than on a direct physical loss. The Court found support for its interpretation in the policy's definition of "period of restoration," which provided that the restoration period ends when the property should be "repaired, rebuilt or replaced" or "business is resumed at a new permanent location." A layperson would not say that cleaning tables, plates, or silverware was a "repair." The fact that Oceana was not required to repair, rebuild, or replace anything supported the Court's conclusion that no "direct physical loss of or damage to property" occurred. The Court also disagreed with the court of appeal's conclusion that the policy was ambiguous. In context, the terms "repair" and "suspension" were not ambiguous. The Court noted that numerous other state supreme courts had reached a similar result when analyzing comparable policy language. It also rejected plaintiffs' argument for coverage based on the availability of a virus exclusion that was not included in the policy. Because the contract was clear, it was not necessary to consider parol evidence regarding a virus exclusion not included in the policy. Justice Hughes dissented and would have found coverage based on plaintiffs' physical loss of its property due to its contamination by the virus. Reversed; district court judgment reinstated.

Per Crain, J.; Hughes, J., dissenting with reasons; Griffin, J., dissenting for reasons assigned by Hughes, J.

CONTRACTS

Defendant who breached contract not entitled to fee award even though plaintiff didn't prove damages.

Stuart Services, LLC v. Nash Heating & Air Conditioning, Inc., 2023-C-00015 [3 pp.]

In February 2008 Ronnie Camet sold the "good will," client list, and name of his business, "R.C. Camet Air Conditioning," to plaintiff for $60,000. Camet also entered into an employment agreement with plaintiff whereby Camet would serve as plaintiff's liaison to his former clients through December 2009. The employment agreement contained non-compete and non-solicitation clauses that covered a two-year period after Camet's termination. Camet worked for plaintiff until November 1, 2009. He unsuccessfully attempted to negotiate a change in the terms of the non-compete provision and, in February 2010, nonetheless began working for a competitor, Nash Heating & Air Conditioning. In October 2011 plaintiff filed this suit against Nash and Camet alleging Camet had violated the non-compete provision by working for Nash and had successfully pursued former accounts in violation of the Louisiana Unfair Trade Practices Act.

In 2014 plaintiff filed a motion for partial summary judgment on the issue of whether Camet breached the employment agreement. The district court granted the motion, finding Camet breached the employment agreement but reserving the issue of damages. A bench trial on damages was held in 2021, and the district court ruled for Camet, finding plaintiff failed to prove any damages and dismissing its claims with prejudice. Further, the district court awarded Camet $90,000 in costs and attorney's fees as the "prevailing party" entitled to recover expenses and attorney's fees under the sales and employment agreements. Plaintiff appealed. Camet answered the appeal and requested additional costs and fees. The Fifth Circuit affirmed the award of costs and fees to Camet, amended the judgment to add an additional cost, and remanded for the calculation of costs and attorney's fees expended by Camet on appeal.

The Court granted a supervisory writ and reversed the award of costs and attorney's fees to Camet. The Court's jurisprudence consistently holds that where one party substantially breaches a contract, the other party has a defense and an excuse for nonperformance. Under La. Civil Code art. 2013, "When the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, to regard the contract as dissolved." In granting plaintiff's motion for partial summary judgment, the district court found Camet breached the provisions of the employment agreement when he became employed by Nash. Camet did not appeal that finding. Plaintiff was entitled to raise non-performance as an affirmative defense to Camet's request for attorney's fees and costs under the contract. Camet, the breaching party, was not entitled to recover fees and costs. Reversed and vacated.

Per curiam; Weimer, C.J., would grant & docket.

TORTS

Court reassigns fault in case where inmate escaped and attempted to kidnap plaintiff.

Sharon Tisdale v. David Hedrick, 2022-C-01072 (La. 03/17/2023) [22 pp.]

Matthew Morgan was a Louisiana Department of Safety & Corrections inmate assigned to the Concordia Parish Correctional Facility in Vidalia. After arriving he was approved for a trustee position and transferred to Concordia Parish jail, located inside the parish courthouse. On February

20, 2019, Morgan was assigned to work with other trustees on the courthouse grounds. He was wearing civilian clothes and under the supervision of Deputy Sheriff Morris Wilson. While the inmates were working, Deputy Wilson left the courthouse grounds without informing other deputies present at the courthouse. Left unsupervised, Morgan simply walked away from the courthouse grounds to a nearby Wal-Mart parking lot. Once there, he approached plaintiff, who had just shopped for groceries and was walking to her vehicle. Although she initially declined his offer to help load her groceries, he was insistent, so she relented. After the groceries were loaded, she went to sit in the driver's seat of her vehicle, and Morgan jerked the driver's-side door open and squatted beside her, displaying some sort of blade. He told her, "I need a ride, and I need it right now." Plaintiff was frightened and thought Morgan would kill her. She offered him money to leave, but he insisted that he needed a ride. When plaintiff refused Morgan's demand to move over to the passenger seat, Morgan pulled her out of the vehicle and around to the other side and placed her in the passenger seat. As Morgan was walking back around to the driver's side, plaintiff jumped out and ran away screaming for help. Morgan ran and was apprehended inside a nearby bank. He was charged with simple escape, attempted second-degree kidnapping, and attempted carjacking.

Plaintiff filed suit against Morgan and Concordia Parish Sheriff David Hedrick, individually and in his official capacity. She asserted that as a result of Morgan's attack, she sustained physical pain and suffering, mental anguish, emotional distress, loss of enjoyment of life, medical expenses, and post-traumatic stress disorder (PTSD). Plaintiff alleged Morgan was responsible for his intentional tort and that the sheriff was grossly negligent in failing to properly supervise Morgan, failing to provide adequate security to prevent Morgan from leaving the work detail, failing to investigate his background before appointing him to be a trustee, allowing him to be a trustee, and allowing him to be in street clothes. After a bench trial, the district court found for plaintiff, furnishing extensive reasons for judgment. It found the sheriff was negligent in allowing Morgan to acquire trustee status, which negligence was made more egregious by the sheriff's failure to follow the clear policies and procedures for selecting trustees. Specifically, Morgan had a prior conviction for forcible rape, which prohibited him from being selected as a trustee. The district court also found the gross negligence of Deputy Wilson allowed Morgan to escape and that Morgan's wearing street clothes and not a prison uniform or stenciled clothing also violated clear policy. Further, although the State did not show how Morgan obtained the blade, the evidence established he had access to a tool shop where he could check out a blade. The district court also recounted in detail the medical testimony presented by plaintiff. The district court found that plaintiff suffered from PTSD and that the healthcare providers' testimony showed she would never completely recover. Despite plaintiff's efforts to cope with her PTSD, there would always be triggers and recurring effects that medication could not prevent. The district court assigned 90 percent fault to the sheriff and 10 percent to Morgan. In addition to special damages, it awarded plaintiff $250,000 in general damages. On the sheriff's appeal, the Third Circuit affirmed.

The Court granted a supervisory writ to address (1) whether the district court erred in assigning 90 percent fault to the sheriff and (2) whether the general damages award of $250,000 was excessive. As to the first issue, the Court detailed Louisiana law and jurisprudence regarding the allocation of fault, including the factors outlined in *Watson v. State Farm Fire & Casualty Insurance Co.*, 469 So. 2d 967, 974 (La. 1985). The sheriff argued the percentage of fault assigned to him was excessive considering Morgan committed an intentional act. The Court agreed that the district court abused its discretion in apportioning 90 percent fault to the sheriff. Applying the *Watson* factors, a review of the record supported the conclusion that Morgan bore at least as much fault as the sheriff with respect to the nature of the conduct and the relationship to the damage. The record supported the district court's finding that the sheriff and his employees committed

numerous negligent acts comprising gross negligence that caused plaintiff's damages. At the same time, the district court failed to give sufficient consideration to the wanton and criminal nature of Morgan's intentional acts. While the Court could not say the sheriff was more culpable than Morgan on the spectrum of fault, the record supported a finding the sheriff was equally at fault. The Court amended the judgment to assign 50 percent fault to Morgan and 50 percent to the sheriff.

As for the amount of general damages, the Court discussed the medical testimony and plaintiff's PTSD diagnosis in detail and found no abuse of discretion in the district court's award of $250,000 in general damages. Justices Hughes and Griffin both dissented in part because they would have affirmed the allocation of damages. Affirmed as amended.

Per Weimer, C.J.; Hughes & Griffin, JJ., dissenting in part with reasons.

Court reinstates district court award for plaintiff injured by watermelon display at grocery store.

Lashondra Jones v Market Basket Stores, Inc., 2022-C-00841 (La. 03/17/2023) [20 pp.]

Plaintiff filed suit to recover for injuries she sustained in July 2017 while shopping at defendant's supermarket. Trial testimony established that plaintiff and her son were attempting to purchase a watermelon. The watermelons were displayed in large cardboard bins on top of wooden pallets. The pallets were surrounded by a black barrier or "pallet guard." The only watermelons remaining were at the bottom of the bins, and plaintiff stepped on the pallet guard to reach a watermelon. When she did, the pallet guard gave way, and plaintiff fell against the bin and injured her right side, back, and leg. She testified that there was no sign indicating she should not step on the pallet guard and that since the pallet guard surrounded the pallet and she had never seen one before, she assumed it was a step. She presented evidence of her injuries and treatment, including medical records and testimony from her son and husband. She also presented testimony from an expert in the field of safety engineering, who opined that the pallet guard actually created more hazards than it solved. The district court found that the display created an unreasonable risk of harm and that defendant, at the very least, had constructive notice of the potentially dangerous condition on its premises and failed to exercise reasonable care to protect its customers. The Court specifically found plaintiff, her son, and her safety expert to be credible witnesses, noting that the expert's opinions and conclusions were thoughtful and well-explained and that he did not overreach. The Court rendered judgment for plaintiff and awarded her $35,000 for pain and suffering, $10,000 for loss of enjoyment of life, and $738.95 for medical expenses. On appeal, the Third Circuit reversed, finding manifest error in the district court's factual findings. Reviewing de novo, the court of appeal concluded the bin set-up did not present an unreasonable risk of harm.

The Court granted a supervisory writ, vacated the court of appeal's decision, and reinstated the district court's. The Court reviewed the parameters of merchant liability in Louisiana. Under La. R.S. § 9:2088.6, to prove her fall was caused by a breach of defendant's duty, plaintiff had the burden to prove some part of the watermelon display (either the fruit bin, wooden pallet, and/or pallet guard) presented an unreasonable risk of harm, which defendant created or the defect of which defendant had actual or constructive notice, and that defendant failed to exercise reasonable care. *Thompson v. Winn-Dixie Montgomery, Inc.*, 15-0477, P. 7 (La. 10/14/15), 181 So. 3d 656, 662 (*see LSCR* Vol. 23 No. 10). In ruling that plaintiff met that burden, the district court expressly credited the testimony and evidence presented by plaintiff, including the expert testimony, over the evidence presented by defendant. Because plaintiff's testimony and evidence was not contradictory, internally inconsistent, or implausible on its face, the district court's finding of fault could not be manifestly erroneous. In its oral reasons for judgment, the district court indicated at one point that

the box itself had collapsed, causing plaintiff to fall. This was clearly a misstatement by the district court, given the entire record and the rest of the district court's reasoning. There was ample evidence in the record for the district court's determination that the display presented a foreseeable and unreasonable risk of harm to plaintiff, of which defendant had notice but failed to warn its customers. In light of the district court's credibility findings, and under the unique facts and circumstances of the case, the appellate court erred in finding manifest error in the district court's decision. Instead of remanding to the court of appeal to review the damages award, in the interest of judicial efficiency, the Court reviewed the award and affirmed. It concluded the district court did not abuse its vast discretion in making the general damages award. Chief Justice Weimer concurred to note that guidelines for future cases involving the "open and obvious" defense could be found at *Farrell v. Circle K Stores, Inc.*, 22-00849 (La. 03/17/2023) (below) decided the same day. Vacated; district court judgment reinstated; general damage award affirmed.

Per Hughes, J.; Weimer, C.J., concurring with reasons.

Court clarifies consideration of open and obvious conditions in duty/risk analysis.

Suzanne Farrell v. Circle K Stores, Inc., 2022-CC-00849 (La. 03/17/2023) [27 pp.]

On July 10, 2019, Suzanne and Joseph Farrell were traveling to Galveston, Texas, when they stopped to refuel at a Circle K Store in Pineville. While Mr. Farrell pumped gas, Mrs. Farrell decided to take their dog for a walk. She chose a grassy area located at the edge of the parking lot. To reach the area, she had to traverse a long pool of water that was draining to the low spot of the parking lot. She attempted to step over the water at its narrowest part, approximately one foot across, but as she made that attempt, she fell and sustained personal injury. The Farrells filed this suit against Circle K and the City of Pineville. Defendants moved for summary judgment, arguing they were not liable because the alleged hazardous condition was open and obvious. They pointed to Mrs. Farrell's testimony that she fell when she misjudged her ability to step over a "murky," "brownish gray" pool of water at the edge of the parking lot. In opposing the motion, plaintiffs argued the hazard was not the pool of water, but the slippery substance hidden in the water, which was not open and obvious. The district court denied defendants' motion, finding genuine issues of material fact as to "whether a reasonable person should have seen the mold/mildew/algae/slime present in the water puddle at issue." The Third Circuit denied defendants' writ application, finding no error in the district court's ruling. Judge Perry dissented.

The Court granted a supervisory writ and reversed. It discussed the familiar rules regarding the burden of proof on summary judgment and the standard of review. Whether a claim arises in negligence under La. Civ. Code art. 2315 or in premises liability under art. 2317.1, the duty/risk analysis applies, and the result should be the same. Under the duty/risk analysis, a plaintiff must prove five separate elements: (1) defendant had a duty to conform his conduct to a specific standard (the duty element), (2) defendant's conduct failed to conform to the standard (the breach element), (3) defendant's substandard conduct was a cause-in-fact of plaintiff's injuries (the cause-in-fact element), (4) defendant's substandard conduct was a legal cause of plaintiff's injuries (the scope of duty element), and (5) proof of actual damages (the damages element). *Malta v. Herbert S. Hiller Corp.*, 21-209, p. 11 (La. 10/10/21), 333 So. 3d 384, 395 (*see LSCR* Vol. 29, No. 10). At trial, plaintiffs would bear the burden of proving those elements of their claim. Thus, to prevail on summary judgment, defendants were required to show an absence of factual support for any of the elements.

Applying the duty/risk analysis here, the Court found the first element existed: defendants, as custodians of the property, had a duty to keep the premises in a reasonably safe condition. As for

the second element, breach of duty, the Court applied the risk/utility balancing test. The risk/utility balancing test is a consideration of four factors: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of social utility or whether the activities were dangerous by nature. *Bufkin v. Felipe's Louisiana, LLC*, 14-288 (La. 10/15/14), 171 So. 3d 851, 856; (*see LSCR* Vol. 22, No. 10). Considering the first factor, the pool of water was not intended, and the Court found no utility to its presence.

The next factor in the risk/utility balancing test was the central focus of the Court's opinion. The likelihood of the magnitude of harm factor asks the degree to which the condition will likely cause harm. This includes consideration of whether the condition was open and obvious. The Court recognized that the issue of whether a condition was open and obvious had been addressed inconsistently in the jurisprudence. It used this case as an opportunity to rectify and clarify the analysis. The phrase "open and obvious" was "a figment of judicial imagination" that was "notably absent from any of the premises liability statutes." In some decisions, the question of whether a condition was open and obvious was part of the duty element of the duty/risk analysis. In others, it was part of the breach of duty element. Courts often erroneously conflated the duty and breach elements. The Court expressly clarified that whether a condition is open and obvious is embraced within the breach of duty element of the duty/risk analysis. Further, it is not a jurisprudential doctrine barring recovery – only a part of the second factor of the risk/utility balancing test, which considers the likelihood and magnitude of the harm. Notably, the Court stated that "it is inaccurate to profess that a defendant generally does not have a duty to protect against an open and obvious condition."

While the analysis was clarified, the basic premise of a condition being open and obvious was unchanged. For a hazard to be open and obvious, it must be one that is open and obvious to all who encounter it. The concept asks whether the condition would be apparent to any reasonable person who might encounter it. If so, that reasonable person would avoid it, and the factor would weigh in favor of finding the condition not unreasonably dangerous. Further, while a plaintiff's knowledge is appropriately considered in assessing comparative fault at trial, it should not be considered on summary judgment in determining whether a condition was open and obvious. Considering the facts of this case, including that the pool of water was located at the edge of the parking lot and was very large, and the fact that the condition was apparent to all who might encounter it, the likelihood and magnitude of harm – the second factor in the risk/utility balancing test – was minimal.

The Court was unable to consider the third factor of the risk/utility balancing test because there was no evidence of the cost of prevention. The fourth factor, the social utility of Mrs. Farrell's activity, did not weigh heavily in the analysis. After considering all four factors in the risk/utility balancing test, the Court found the allegedly hazardous condition was not an unreasonably dangerous condition and that defendants met their initial burden of pointing out the absence of factual support for the breach element of the duty/risk analysis. Plaintiff, in turn, failed to establish the existence of a genuine issue of material fact or that defendants were not entitled to judgment as a matter of law. No reasonable juror could find defendants breached the duty owed to plaintiffs, and summary judgment for defendants was mandated. It was unnecessary for the Court to consider the remaining three elements of the duty/risk analysis.

Chief Justice Weimer concurred, noting that the statement "no legal duty is owed because the condition encountered is obvious and apparent to all and not unreasonably dangerous" should disappear from the jurisprudence. He wrote separately to elaborate more fully on what considerations will be relevant in determining whether summary judgment is warranted in cases presenting issues typically reserved for trial, such as breach of duty. Justice Hughes dissented and

opined that because the pool of water had been standing for 12 days and contained debris and slime, the facts should be presented to a trier of fact for comparison of fault. Justice Griffin also dissented, finding genuine issues of material fact existed to preclude summary judgment. She questioned the continued application of the open and obvious condition doctrine. Reversed and rendered.

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

CIVIL PROCEDURE

Lower courts erred in applying res judicata to bar multiple actions.

Rick Sutton v. Jack Adams, 2022-C-01672 (La. 03/07/2023) [13 pp.]

This case involves multiple lawsuits between Rick Sutton and Jack Adams and related entities. In 2014 Sutton filed suit against Adams for breach of a 2011 oral contract to open a jewelry and fine arts gallery together (the breach of contract suit). Sutton alleged two entities were to be formed as part of their plan: Rjano Holdings, Inc. and Maison Royale, LLC. Sutton was awarded preliminary injunctive relief. In 2016 Sutton filed a second suit against Adams (the RICO suit) alleging the two entered into an agreement to settle the breach of contract suit in December 2015, but that Adams failed to honor the settlement agreement, fraudulently induced Sutton to enter into the settlement agreement, and violated Louisiana's Racketeering Act and Unfair Trade Practices Act. Adams filed exceptions of no cause and no right of action in the RICO suit. The district court sustained the exceptions after a hearing and dismissed the RICO suit with prejudice in a December 2017 judgment. That judgment was affirmed by the Fourth Circuit, and the Louisiana Supreme Court denied Sutton's writ application. In the still-pending 2014 breach of contract suit, Adams then filed exceptions of no right of action and res judicata, based on the final December 2017 RICO suit judgment. The district court sustained the exceptions and, in April 2019, dismissed the breach of contract suit based on the res judicata effect of the RICO suit judgment.

In yet a third action, Adams sued Sutton for abuse of process. In that action, Adams alleged he was the sole shareholder of Rjano Holdings. That prompted Sutton to seek mandamus relief based on Sutton's belief that he owned shares in Rjano Holdings. Sutton also filed a third-party demand against Maison Royale. After a four-day trial, the district court ruled in favor of Sutton on the mandamus claim and issued a December 2018 judgment finding Sutton was a 50 percent owner of Rjano Holdings. The district court also issued a judgment in September 2019 overruling an exception of res judicata by Maison Royale to Sutton's third-party demand. On his appeal of the December 2018 mandamus judgment, Adams urged an exception of res judicata to the mandamus action based on the RICO judgment. The Fourth Circuit agreed that res judicata applied and reversed the December 2018 mandamus judgment. It also found res judicata applied to bar Sutton's third-party demand against Maison Royale and reversed the district court's September 2019 judgment to the contrary.

The Court granted supervisory writs to review multiple judgments: (1) the April 2019 district court judgment finding res judicata applied to the breach of contract suit, (2) the court of appeal's ruling applying res judicata to reverse the district court's December 2018 judgment on Sutton's mandamus action, and (3) the court of appeal's ruling applying res judicata to Sutton's third-party demand against Maison Royale, LLC and reversing the district court's September 2019 judgment. The Court vacated all of those rulings, concluding that res judicata did not apply. The requirements for applying the res judicata doctrine in Louisiana are set forth in La. R.S. § 13:4231. The statute speaks of res judicata applying to bar "subsequent actions" arising out of "the transaction or occurrence that is the subject matter of the litigation" in which a judgment has been

rendered. Here, the district court's April 2019 judgment applied res judicata in reverse, using a judgment in a subsequent action (the RICO action) to bar an earlier-filed lawsuit (the breach of contract action). The district court erred in doing so. Further, even assuming a subsequent action could bar a prior action, the district court also erred because the two suits did not involve the same transaction or occurrence. The breach of contract action was based on breach of the 2011 oral agreement to open a gallery, and the RICO action was based on breach of the December 2015 settlement agreement and events that occurred after the breach of contract suit was filed.

Further, the court of appeal erred in applying res judicata to the mandamus action and the third-party demand. Again, the actions did not arise from the same transaction or occurrence as the RICO action. Finally, the Court noted that an earlier judgment does not bar another action by a plaintiff when exceptional circumstances justify relief from the res judicata effect of the judgment. La. R.S. § 13:4232(A)(1). The evidence at the trial of the mandamus action indicated a risk of miscarriage of justice because Adams admitted under oath to falsifying alleged corporate documents and attempting to admit them into evidence. After vacating all of the judgments at issue, the Court remanded for a contradictory hearing to determine whether consolidation of the remaining actions in the district court would be appropriate. Vacated and remanded.

Per curiam.

Law of the case doctrine did not apply to interlocutory ruling.

Jason Durel, MD v. Acadian Ear, Nose, Throat & Facial Plastic Surgery, 2023-C-00024 (La. 03/07/2023) [4 pp.]

Plaintiff is a former employee and co-owner of Acadian Ear, Nose, Throat & Facial Plastic Surgery in Lafayette. In 2017 he executed a physician employment agreement with Acadian, along with a shareholders' agreement through which he received 75 shares of the company. The employment agreement contained non-compete and non-solicitation provisions but provided that those provisions would not apply if plaintiff terminated his employment for cause. Prior to renewal of the agreement in 2020, plaintiff consulted an attorney and attempted to negotiate changes to the contract, including the elimination of the non-compete and non-solicitation provisions. Acadian would not agree to any changes. In April 2020 counsel for plaintiff notified Acadian of its alleged default under the terms of the agreement and that plaintiff was terminating his employment for cause. Plaintiff alleged office personnel had selectively and systematically favored another doctor by filling his schedule in preference to plaintiff's. Counsel also informed Acadian of plaintiff's intent to withdraw his interest in the corporation under La. R.S. § 12:1-1435. Under that statute, entitled "Oppressed shareholder's right to withdraw," "[if] a corporation engages in oppression of a shareholder, the shareholder may withdraw from the corporation and require the corporation to buy all of the shareholder's shares at their fair value." La. R.S. § 12:1-1435(A).

Plaintiff began working for and holding an ownership interest in another practice. Acadian then informed plaintiff that his termination was a disqualifying event under the agreement and that Acadian was required to repurchase plaintiff's shares at book value. Plaintiff filed the petition in this action seeking withdrawal based on oppression and the payment of fair value for the shares under § 12:1-1435(A). Acadian filed a reconventional demand seeking injunctive relief and damages. The district court granted Acadian a temporary restraining order and subsequently held an extensive hearing on the preliminary injunction. It found plaintiff terminated his employment without cause and violated the terms of the non-solicitation provision, but that Acadian had waived its rights under the non-compete provision. The district court dissolved the TRO and denied the preliminary injunction. The parties filed cross-appeals. While those appeals were pending on rehearing before

the Third Circuit, Acadian filed in the district court an exception of no right of action as to plaintiff's claims under § 12:1-1435(A). Citing the law of the case doctrine, Acadian argued plaintiff's claims for shareholder oppression should be dismissed based on the district court's finding at the preliminary injunction hearing that there was no wrongdoing by Acadian. The district court agreed and dismissed plaintiff's claims. On appeal, the Third Circuit affirmed, explaining that the conduct at issue at the preliminary injunction hearing was the same conduct that formed the basis of the oppression claim.

The Court granted supervisory writs and reversed. A peremptory exception of no right of action determines if the plaintiff belongs to the class of persons to whom the law grants a cause of action asserted in the suit. Plaintiff, as a shareholder seeking to withdraw from Acadian, clearly had a right of action under § 12:1-1435. Further, a determination made in connection with a preliminary injunction is not "law of the case" because that doctrine does not apply to interlocutory rulings. The lower courts thus erred in applying the law of the case doctrine to find plaintiff had no right of action. Reversed and remanded.

Per curiam.

Court enforces mandatory deadlines for filing opposition to motion for summary judgment.

Linda Jill Mahe v. LCMC Health Holdings LLC, 2023-CC-00025 (La. 03/14/2023) [3 pp.]

The opposition to a motion for summary judgment "shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion." La. Code Civ. Proc. art. 966(B)(2). In this case defendants filed a motion for summary judgment, which the district court set for hearing. Plaintiff did not file an opposition and, instead, filed a motion to continue the day before the hearing. Plaintiff's excuse for not filing a timely opposition was that her expert was out of town. The district court granted the motion to continue, stating he wanted to "have the substance" of the opposition. The Fifth Circuit denied defendants' writ application.

The Court granted a supervisory writ and reversed. As the Court stated in *Auricchio v. Harriston*, 2020-01167, p. 5 (La. 10/10/21), 332 So. 3d 660, 663 (*see LSCR* Vol. 29, No. 10), the time limits in art. 966 are mandatory. Although art. 966(C)(2) provides that "[f]or good cause shown, the court may order a continuance of the hearing" on the motion for summary judgment, such a continuance cannot serve as a pretext to circumvent the deadlines of art. 966(B)(2). Plaintiff failed to move for the continuance prior to the expiration of the 15-day deadline. Under the circumstances, her excuse did not constitute good cause. The district court erred in granting the continuance to consider an untimely filed opposition. The Court reversed the lower courts, denied the continuance, and remanded for the district court to hold a hearing on defendants' motion for summary judgment without considering plaintiff's untimely filed opposition. Reversed, rendered, and remanded.

Per curiam; Weimer, C.J., would grant & docket; Griffin, J., would deny.

Court remands for hearing as to whether opposition to motion for summary judgment was timely served.

Andrea Downing v. State of Louisiana, 2023-CC-00039 (La. 03/14/2023) [3 pp.]

This case also involved the deadlines of La. Civ. Code art. 966(B)(2), which provides that the opposition to a motion for summary judgment and supporting documents "shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion." La. Code Civ. Proc. art. 966(B)(2). Defendants filed a motion for summary judgment. At the hearing,

they objected to plaintiffs' opposition documents as untimely. Defendants argued that although plaintiffs' opposition was timely filed on the fifteenth day before the hearing, defendants were not served with the opposition until two days before the hearing. Plaintiffs' counsel stated she attempted to serve defendants by email but "the state server blocked that opposition from coming in." Counsel for defendants claimed the server could not block the sending of an email. The district court overruled defendants' objection and then denied their motion for summary judgment. The Fourth Circuit denied defendants' writ application.

The Court granted a supervisory writ and remanded. Article 1313(A)(4) states in part that "[s]ervice by electronic means is complete upon transmission but is not effective and shall not be certified if the serving party learns the transmission did not reach the party to be served." La. Code Civ. Proc. art. 1313(A)(4). The record here was not clear, and the Court was not able to determine whether the alleged transmission by plaintiffs' counsel met the requirements of art. 1313(A)(4). As a result, the Court remanded for the district court to conduct a hearing and to specifically decide whether plaintiffs proved the email transmission of their opposition was effective and certified under art. 1313(A)(4). If plaintiffs prevailed, defendants had the right to have the ruling reviewed. If defendants prevailed, the district court should consider their motion for summary judgment without plaintiffs' opposition. Remanded.

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

PROPERTY

In dispute over ownership of French Quarter lot, defendant acquired ownership through 10-year acquisitive prescription.

1026 Conti Holding, LLC v. 1025 Bienville, LLC, 2022-C-01288 (La. 03/17/2023) [30 pp.]

At issue here was the ownership of "lot AA," a small parcel of land located in the center of a block in the French Quarter. It was bounded on two sides by an alley accessing Conti Street and was contiguous on its other sides with three parcels identified as lots 8, A, and B, owned by defendant. Another nearby parcel, bordered by the alley and fronting on Conti Street, was owned by an entity related to plaintiff. The lot at issue, lot AA, was first mentioned in an 1880 sale to Gustav Pitard. The act conveyed ownership of Lot B to Pitard "together with the use of the yard and of the alley in common to said property and others." Lot AA was the referenced "yard in common." Mr. and Mrs. Pitard also acquired ownership of lots 8 and A. After Mr. Pitard's death, Mrs. Pitard conveyed lots 8, A, and B to Pitard, Inc., and the language regarding use of the yard and alley was repeated. Mrs. Pitard also purported to convey title to lot AA, declaring she owned the parcel by virtue of acquisitive prescription. In 1921 Pitard, Inc. conveyed lots 8, A, B, and AA to John Saxton. Although the sale purported to include lot AA, the language about use of the common yard and alley was included in the descriptions of lots A and B. Saxton ultimately defaulted on a mortgage on lots 8, A, and B, and the parcels were sold by sheriff's sale in 1938. Significantly, record title to lot AA remained in Saxton's name. In 1944 the party who acquired lots 8, A, and B via sheriff's sale sold them to brothers Rudolph and John Holzer. Again, the descriptions of lots A and B included the right to use the common yard and alley, with lot AA depicted as the yard. From 1944 to 2001, the Holzers exclusively used lot AA for access, parking, deliveries, storage, and other uses incidental to the operation of their businesses in the block. Lot AA was assessed to them on the property tax rolls, and they paid the taxes on it. There was no evidence that Saxton, after his 1938 default on the mortgage, ever again used lot AA or made any claim to its ownership. When he died, lot AA was not mentioned as an asset of his estate. In January 2000, almost 60 years after they first began to use lot AA, the Holzers conveyed several parcels, including lot AA, to Bruno Properties, LLC, for $1.6

million. About six years later, Bruno Properties conveyed most of those parcels, including lot AA, to defendant for $5.5 million. One parcel was sold by Bruno to plaintiff.

A dispute arose between the new neighbors when defendant refused to allow plaintiff to park on lot AA. In an earlier suit between the parties, the courts found that a servitude acquired by plaintiff did not extend to parking on lot AA. During the course of those proceeding, plaintiff learned that the public records did not contain a sale of lot AA from Saxton to anyone. In 2015, plaintiff found two of Saxton's grandchildren and paid $100 for their interest in lot AA. Relying on that sale, plaintiff filed this suit in February 2016 seeking a judgment declaring it the owner of lot AA. Defendant reconvened, asserting it had acquired ownership of lot AA by acquisitive prescription. After a two-day bench trial, the district court found plaintiff proved record title to lot AA. However, the district court concluded defendant's ancestor-in-title, the Holzers, acquired ownership of lot AA by 30-year acquisitive prescription, so that defendant was the owner of lot AA. The Fourth Circuit affirmed on appeal, with Judge Love dissenting in part.

The Court granted a supervisory writ and affirmed, although on different grounds. The Court explained that resolution of defendant's 30-year acquisitive prescription claim required consideration of whether possession by the Holzers was precarious and, if so, whether the possession changed to adverse. The district court erred in failing to make that determination, and that error interdicted its fact-finding process. Because the record was complete, the Court conducted a de novo review. It first found that defendant was in possession of lot AA when suit was filed in 2016, so that plaintiff had the burden of proving plaintiff acquired ownership from a previous owner or by acquisitive prescription. Plaintiff relied on acquisitive prescription by an ancestor-in-title. Plaintiff's chain of title originated with the 1918 act of sale from Mrs. Pitard to Pitard, Inc., which declared Mrs. Pitard and her husband acquired lot AA through acquisitive prescription by possessing it as owners for 30 years. Defendant acknowledged Mrs. Pitard's ownership, and the Court found plaintiff proved a record chain of title to one who acquired the property by acquisitive prescription.

Defendant countered that while plaintiff's chain of title was facially valid, it did not convey ownership of lot AA because the Holzers, defendant's ancestor-in-title, acquired the lot by 30-year acquisitive prescription. The Holzers' extensive possession of lot AA was not disputed, but because the Holzers had a right to use the lot via a servitude, their possession of lot AA was precarious. Acquisitive prescription does not run in favor of a precarious possessor or his universal successor. La. Civ. Code art. 3477. The Court considered whether the Holzers had changed their type of possession for purposes of prescription. Under current art. 3439, added in 1982, the Holzers would have been required to give "actual notice" of their intent to possess for themselves to Saxton. There was scholarly disagreement about whether art. 3439 changed the law, but the Court found it unnecessary to decide that issue. The evidence at trial did not establish that the Holzers' use of lot AA gave either actual or constructive notice of a change in their intent to possess as owners. The Court denied defendant's claim of 30-year acquisitive prescription.

Instead, the Court determined defendant had acquired ownership of lot AA through 10-year acquisitive prescription. The requisites for acquisitive prescription of 10 years are possession for 10 years, good faith, just title, and a thing susceptible of acquisitive prescription. La. Civ. Code art. 3475. While the Holzers' possession was precarious, Bruno and defendant possessed lot AA for themselves as owners because they took possession of the lot under acts translative of ownership. *See* La. Civ. Code art 3479. Although defendant's possession was about four months short of 10 years at the time this suit was filed, defendant could tack Bruno's possession to achieve the necessary 10 years. *See* La. Civ. Code art. 3442. The recorded act of sale of lot AA from Bruno to defendant satisfied the just title requirement. The Court then examined the good-faith element, which was the primary

dispute. Good faith is presumed and is rebutted on proof the possessor knew or should have known he was not the owner. La. Civ. Code art 3481. The presumption of good faith shifted the burden of proof to plaintiff, and the inquiry was an objective one focused on whether the possessor's mistake was reasonable. Plaintiff failed to meet its burden to prove Bruno knew or should have known the Holzers did not acquire lot AA by acquisitive prescription. The Court expressly held that a seller's lack of record or "paper" title was not determinative of the buyer's good faith where, as here, the seller's purported ownership was based on acquisitive prescription. The lack of record title was a factor to be considered but was not dispositive of the buyer's good faith. It was undisputed Rudolph Holzer told Bruno that the Holzers owned the lot because for 60 years they alone possessed it, were assessed taxes on it, and paid taxes on it. The record also showed that when Bruno acquired the lot in 2000, the actual owners, the Saxtons, had no knowledge of their ownership or any interaction with the lot. They had not asserted any dominion and control over it for at least 70 years. Because of the complex nature of the legal issues involved, evidenced by the conclusions reached by the lower courts, Bruno's legal mistake was a reasonable one. Plaintiff did not rebut the presumption of Bruno's good faith. Nor did plaintiff rebut defendant's good faith. When defendant acquired title to lot AA in 2006, an attorney prepared the closing documents and provided a title opinion certifying Bruno had valid title to lot AA. The title insurance included lot AA. Plaintiff failed to prove defendant knew or should have known Bruno was not the owner of lot AA. Defendant proved the necessary elements for 10-year acquisitive prescription. The Court affirmed the lower courts' judgments declaring defendant the owner of lot AA.

Chief Justice Weimer concurred, agreeing as to the issue of 10-year acquisitive prescription but opining that the analysis regarding 30-year acquisitive prescription was dicta. Justice Hughes also concurred, expressing concern about the public records doctrine. Affirmed.

Per Crain, J.; Weimer, C.J., & Hughes, J., concurring with reasons.

DOMESTIC RELATIONS

Community property partition agreement did not grant wife use of home for her lifetime.

William Dering v. Kay Dering, 2022-C-01857 (La. 03/07/2023) [8 pp.]

In 1981 William and Kay Dering executed a community property partition agreement and were divorced. Decades later William filed this action seeking a partition of co-owned immoveable property that was their former family home. Kay moved for summary judgment, arguing the community property partition agreement granted her a lifetime usufruct over the home. William filed a cross-motion for summary judgment arguing the agreement merely granted Kay a right of habitation that terminated when their children reached the age of majority. The agreement specifically provided that both parties would remain owners of the property in indivision and that the property "may remain in the care of [Kay] as residence for the two minor children" of whom Kay had permanent care, custody, and control. It also provided: "This agreement remains valid for as long as [Kay] chooses to reside there, with the stipulation that [Kay] maintains the present condition of said property and continues payment of the monthly notes due … [of] $137.00 per month; and for as long as [Kay] does not remarry or set up household with another male while the minor children remain in her custody." The agreement further provided that on the sale of the property, Kay would be credited for the principal amount she paid on the mortgage, and any remaining balance would be equally divided between the parties. The district court ruled in Kay's favor that she had a right to remain in the home. The Third Circuit affirmed.

The Court granted a supervisory writ, reversed, and rendered judgment for William. The agreement was clearly tied to the needs of the couple's minor children and contemplated the eventual sale of the property. It did not contain the words "lifetime" or "usufruct." Chief Justice Weimer dissented, opining that the agreement did not provide that Kay's right to use the property terminated when the children reached majority status. Instead, it created a right in her favor to remain on the property for as long as she chose to reside there, subject to certain conditions, which she performed. Justice Griffin agreed with the Chief Justice and opined that, in furtherance of an equitable solution, the majority read between the lines of the contract instead of enforcing it as written. Reversed, rendered, and remanded.

Per curiam; Weimer C.J., & Griffin, J., dissenting with reasons.

CRIMINAL

Court remands for application of correct version of habitual offender law.

State v. Kelly Cockerham, 2022-KP-1661 (La. 03/07/2023) [2 pp.]

In a brief per curiam, the Court granted a supervisory writ in part, vacated defendant's habitual offender adjudication and sentence, and remanded for further proceedings in accordance with *State v. Lyles*, 19-0203 (La. 10/22/19), 286 So. 3d 407 (*see LSCR* Vol. 27, No. 10). In *Lyles*, the Court vacated a habitual offender sentence and remanded because defendant was adjudicated and sentenced under the wrong habitual offender law. It held that for defendants whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed before that date, the full provisions of the 2017 amendments to La. R.S. § 15:529.1 apply. Those amendments included a reduction from ten to five years of the "cleansing period" or time allowed between the end of a sentence for an offense and the commission of the next offense on the habitual offender ladder and significant reductions in the sentencing ranges at each rung of the ladder. Vacated and remanded.

Per curiam; Crichton, Genovese & McCallum, JJJ., dissenting.

Editor's note: The Court issued the same ruling in *State v. Brandon Martin*, 2022-KH-1224 (La. 03/14/2023).

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