

# LOUISIANA GENERAL LIABILITY UPDATE

## SECOND CIRCUIT UNDERSCORES THE SIGNIFICANCE OF MEDICAL HISTORIES IN PROVING CAUSATION

Recently, the Second Circuit discussed the role accurate medical histories play in proving causation. The court stressed that plaintiff must provide an accurate medical history to his medical providers. Otherwise, the court will not rely on the medical provider’s opinion at trial.

In *Lee v. Safeway Ins. et al*, No. 46,716–CA(La. App. 2 Cir. 12/9/11); 2011 WL 6114919 the plaintiff was involved in two motor vehicle accidents over a two month span. For each accident, he treated with a different chiropractor. The plaintiff only filed suit regarding the second accident and alleged that he suffered injuries to his back. At trial, the defendant argued that these injuries were a result of the first accident and not the second accident.

In order to prove causation, the plaintiff offered the medical opinion of his second treating chiropractor. Critically, the evidence showed that the chiropractor was not aware of the other chiropractor nor was he aware of the first accident. In light of these omissions, the court determined that the plaintiff did not provide the chiropractor with an accurate medical history and that the chiropractor’s opinion regarding causation was “fatally flawed.” Accordingly, the Second Circuit reversed the trial court’s judgment as manifestly erroneous because the plaintiff failed to prove causation.

## LOUISIANA SUPREME COURT CLARIFIES THAT A RULE 10.1 LETTER INTERRUPTS ABANDONMENT

All letters are not created equal: A Rule 10.1 letter interrupts abandonment where as other correspondence does not.

In 2006, a truck carrying an oversized load struck an overpass causing property damage. DOTD filed suit against the driver, the truck owner, the company that leased the truck, and the insurer. On March 15, 2007, the owner propounded discovery to DOTD, which DOTD didn’t answer. On April 27, 2007, the owner’s counsel faxed a letter scheduling a conference to discuss the tardy responses in accordance with Rule 10.1 in advance of filing a motion to compel. The conference was held and DOTD eventually responded to the discovery. Time elapsed without any action and eventually the defendants filed motion for dismissal as abandoned, which was granted.

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The critical issue as to whether the case was abandoned was if the owner’s Rule 10.1 letter was a “step in prosecution or defense.” DOTD argued that

the letter was a step because it was a pre-requisite to filing a motion to compel discovery. In response, the defendants argued that the letter was an extra-judicial effort like other correspondence.

Ultimately, the Supreme Court reasoned that the letter was mandatory under Rule 10.1 and, thus, practically the letter was a “step” because it was an essential component of a motion to compel discovery. The court also noted that the letter was served on all counsel, which means there was not a notice issue. Accordingly, the Supreme Court held that the case was not abandoned.

*Louisiana Dept. of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C.*, 2011-0912 (La. 12/6/11); 2011 WL 6091272.

### TRIP AND FALL

## *PLAINTFF'S ACTUAL KNOWLEDGE OF AN OPEN AND OBVIOUS CONDITION IS INSUFFICIENT FOR INSURER TO PREVAIL ON SUMMARY JUDGMENT*

Summary judgment in favor of a bar owner and its insurer was reversed in connection with a patron's fall while exiting the restroom. The plaintiff denied prior visits to the bar and testified that although she safely entered the restroom, located in a dimly lit alcove, she fell upon exiting. The evidence established a several inch drop-down from the threshold of the bathroom door to the floor of the hallway. The defendants argued that the area did not present an unreasonable risk of harm because the step was an “open and obvious condition” and further because the plaintiff had actual knowledge of the step as she safely and without incident negotiated her entrance into the restroom. The appellate court reversed the grant of summary judgment noting that the trial court considered only the knowledge of the hazard and not also the lighting, signage and utility and condition of the step, which are all “material facts remaining to be decided by a trier of fact at a trial on the merits.”

*Boye v. Daiquiris & Creams, No. 3, Inc.*, 2011 WL 5559957 (La. App. 5 Cir.) This decision has not yet been released for publication and is therefore subject to revision or withdrawal.

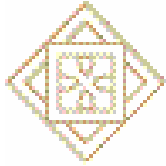
### WAIVER OF POLICY EXCLUSION

## *INSURED'S CONSEQUENTIAL PREJUDICE FROM INSURER'S DELAY IN PLEADING DEFENSE IS ENOUGH*

The insured's summary judgment was granted and the insurer's motion denied regarding a watercraft exclusion in a CGL and umbrella liability policy. The injuries undisputedly arose out of the use of a boat owned by the insured. However, the claims handler misread an exception to the watercraft exclusion and noted that the policy covers *all* boats under 26 feet, as opposed to *non-owned* boats under 26 feet. Initially, only the insured was named as a defendant and although the insurer issued a reservation of rights referencing the watercraft exclusion, the Court held that the

insurer's subsequent behavior constituted a waiver. Almost two years passed between the date that the insurer obtained all information needed to assess the applicability of the exclusion and the assertion of the affirmative defense. Such a gap was determined to be "entirely inconsistent with asserting the watercraft exclusion as a defense to coverage." Regarding prejudice to the insured, the court noted that the insurer's delay allowed the insurer to obtain the insured's cooperation as an aligned party rather than as an adversary. The insured likewise contended that it faced claims of untimeliness in reporting this loss to other insurers which constitutes an additional source of prejudice. The district court ruled that this is the "sort of consequential prejudice from the denial of an insured's 'opportunity to assume and manage its own defense' that Louisiana's stringent waiver policy is intended to prevent."

*Sosebee v. Steadfast Ins. Co.*, 2011 WL 5878055 (E.D. La. 11/23/2011)



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