

LOUISIANA GENERAL LIABILITY UPDATE

Recent Jury Decisions

The plaintiff filed suit against his home owner's insurer, Shelter General Insurance, after his home was damaged by Hurricane Gustav. Their claim included property damages, contents, and additional living expenses. Although Shelter made a payment to the plaintiff, plaintiffs claimed that they were not paid an adequate amount and that the insurer had acted arbitrarily, capriciously and without probable cause. The jury found that the plaintiffs were not paid the full amount they were owed and the insurer acted in bad faith. They awarded plaintiffs compensatory damages of \$32,000 and \$64,000 in penalties totaling a verdict of \$111,000.

Calahan v. Shelter General Insurance; 19th JDC East Baton Rouge Parish Case No. 581786

The plaintiff ordered a salad to go from Applebee's restaurant. When she started to eat the salad on her way home, she found that it was contaminated with a tip of a human finger in it. (She did not ingest the finger "tip") Plaintiff filed a lawsuit against Applebee's recalling that she felt revolted and complained of severe post-traumatic stress as a result of the experience. The plaintiff provided evidence that an Applebee's cook actually cut his finger when preparing the chicken for the salad. The cook knowingly served the contaminated food. The jury found the restaurant not liable providing that they did not violate the standard of care. They focused on the fact that the plaintiff's first call was to the restaurant and then to her lawyer. The defense was able to successfully attack the credibility of the plaintiff arguing that she was clearly exaggerating for monetary gain.

Chambers v. Applebee's Restaurant, 24th JDC Jefferson Parish Case No. 621954

Plaintiff was a thirty-two year old female who was involved in a rear end accident. The driver of the vehicle who rear ended the plaintiff was driving a commercial vehicle for COX Enterprises. The collision caused only minor damage to the vehicles. The plaintiff treated for radiating lower back pain with Dr. Walter Ellis in Baton Rouge, LA. The defense focused on the minor nature of the wreck in an attempt to diminish the alleged injuries. They even retained a biomechanics expert, C.E. "Ted" Bain from San Antonio, TX. The jury found that the plaintiff sustained an injury. They awarded her all \$37,659 of the medical specials alleged but only \$7,431 in general damages.

Inside this issue:	
RECENT JURY DECISIONS	1
GENERAL DAMAGES	2
NECESSARY PROOF FOR LOST WAGE CLAIM	2
VICARIOUS LIABILITY	3

Does a jury have to award general damages if it finds the defendant liable and awards medical specials?

In *Stewart v. Haley*, the plaintiffs were involved in a rear-end accident on April 24, 2008. Plaintiffs claim to have been injured as a result of defendant's negligence. Both plaintiffs treated with Dr. Bryan Ross, a chiropractor, following the accident. Defendants stipulated to liability prior to trial and the jury was asked to determine damages only. The jury found that both plaintiffs suffered injuries as a result of the accident, but only awarded a total of \$8,389.44 in damages which were designated for past medical expenses.

The plaintiffs appealed the jury's award claiming that general damages, such as pain and suffering, should have been awarded since the jury found that both plaintiffs were injured in the accident. The First Circuit analyzed whether the jury must award general damages to a plaintiff if medical specials are awarded. In its analysis, the First Circuit relied on the Supreme Court's rulings in *Green v. K-Mart Corp.*, 2003-2495 (La.5/25/04), 874 So.2d 838 and *Wainwright v. Fontenot*, 2000-0492 (La.10/17/00), 774 So.2d 70.

The Supreme Court differentiated between cases where the plaintiff's medical treatment was for a recognized injury that resulted from the accident and those cases where the plaintiff received medical treatment to determine if he/she suffered an injury. Here, the jury was unequivocal in their jury interrogatories when they affirmatively found that plaintiffs were both injured. In *Green*, the Supreme Court held that if a plaintiff's medical treatment was due to an injury that was found to be a result of the accident in question, then general damages must be awarded. Therefore, the First Circuit in *Stewart*, awarded a total of \$17,500 in general damages to the plaintiffs since the jury found that they sustained injuries as a result of the accident. *Stewart v. Haley*, 2011-0584 (La.App. 1 Cir. 11/9/11) 2011WL5415175.

DAMAGES/PROOF REQUIRED FOR LOST WAGES

PLAINTIFF'S "GUESSTIMATION" AS TO EARNINGS FROM PART-TIME WORK WAS INSUFFICIENT TO SUPPORT A LOST WAGE CLAIM

The plaintiff was involved in an automobile accident, filed suit, which proceeded to trial in Avoyelles Parish. The defendant's contended that the plaintiff's made a "guess estimate" as to the amount of money that she earned as a farrier and that the trial court's award of damages for her part-time work was an abuse of discretion. The Third Circuit Court of Appeal stated that in cases where there is no basis for a precise mathematical calculation of the amount of lost earnings, the trial court has the discretion to award a reasonable amount of damages. This may consist of a plaintiff's own testimony. However, to allow a plaintiff to recover damages for lost wages in the absence of

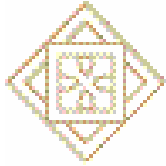
independent support is highly speculative. In this case the plaintiff estimated that she typically earned between \$400 and \$700 per month working as a farrier. She testified that she was unsure of the exact amount because it was a cash business and she did not keep records. She also testified that she did not report her income from the farrier business as taxable income. The trial court awarded \$400 per month, for 18 months, regarding the lack of ability of the plaintiff to perform the horse farrier business. The Court of Appeal noted that the plaintiff was unsure of the amount earned from the farrier business and could only provide a self described “guesstimate” as to her earnings. The Court of Appeal stated that although the uncorroborated testimony of the plaintiff can support a lost wage award, based on the facts of this case, they found that the plaintiff’s testimony regarding the lost wage claim was insufficient. Thus, the trial court erred in awarding damages for lost wages.

Johnson v. St. Romain, 2011-266 (La.App. 3 Cir. 10/5/11)

***HOSTILE WORK ENVIRONMENT AND VICARIOUS LIABILITY ACTION
AGAINST EMPLOYER RELATED TO A SEXUAL ASSAULT ON AN
EMPLOYEE***

The plaintiff, an employee of Pathfinder Energy Services, brought a lawsuit against his employer for a hostile work environment and vicarious liability action, related to a sexual assault by his supervisor and three co-workers. The plaintiff alleged that his supervisor directed him into the workshop where he was attacked by his supervisor and three workers on his crew. The plaintiff testified that he was extremely embarrassed and frightened by the event and initially did not want to tell anyone about the attack. However, the news of the attack spread and the plaintiff was approached by another worker who encouraged him to contact human resources. A few days later, he contacted human resources and reported the attack to the local police department. Eventually, after an internal investigation and interviews with the participants, Pathfinder terminated the four individuals involved in the attack. Mr. Edmond filed suit against Pathfinder and the four individuals who perpetrated the attack asserting he was forced to work in a hostile work environment, and that Pathfinder was vicariously liable for the intentional actions of its employees. Pathfinder filed a Motion for Summary Judgment asking that the plaintiff’s claim be dismissed because he could not prove a sexual harassment claim against Pathfinder. It was also alleged by Pathfinder that it was not vicariously liable for any of the individual actions and/or intentional tort. The trial court granted Pathfinder’s MSJ and the plaintiff appealed the judgment. The Third Circuit Court of Appeal held there was a genuine issue of material fact as to whether the sexual assault by the supervisor and three co-workers was within the scope of their employment, and as such precluded summary judgment on the vicarious liability claim. However, the Court of Appeal upheld the MSJ on the employee’s hostile work environment claim based on the plaintiff’s deposition testimony that he did not feel that Pathfinder had knowledge of any improper behavior by its other employees.

Edmond v. Pathfinder Energy Services, 201-151 (La. App. 3 Cir. 9/21/11)



TAYLOR, WELLONS, POLITZ & DUHE, APLC

NEW ORLEANS | BATON ROUGE

<p>1515 POYDRAS STREET SUITE 1900 NEW ORLEANS, LA 70112 P: (504) 525-9888 F: (504)525-9899</p>	<p>7924 WRENWOOD BOULEVARD SUITE C BATON ROUGE, LA 70809 P: (225) 387-9888 F: (225) 387-9886</p>
--	--

OUR SERVICE IS THE PRACTICE OF LAW... ...FOR TODAY, AND THE FUTURE.

Paula Wellons	pwellons@twpdlaw.com	Sammie Henry	shenry@twpdlaw.com
Paul Politz	ppolitz@twpdlaw.com	Marvin Olinde	molinde@twpdlaw.com
Charles Duhe	cduhe@twpdlaw.com	Tanner Magee	tmagee@twpdlaw.com
B. Scott Cowart	scowart@twpdlaw.com	Michelle Maraist	mmaraist@twpdlaw.com
Desiree Adams	dadams@twpdlaw.com	Jill Miller	jmiller@twpdlaw.com
Dominic Amato	damato@twpdlaw.com	D. Scott Rainwater	srainwater@twpdlaw.com
Gerald Arceneaux	garceneaux@twpdlaw.com	Leah R. Rhodes	lrhodes@twpdlaw.com
Jason Bone	jbone@twpdlaw.com	Heidel Schneider	hschneider@twpdlaw.com
Gina Talluto Cursain	gcursain@twpdlaw.com	Brent Steier	bsteier@twpdlaw.com
Daryl Daigle	ddaigle@twpdlaw.com	Ashbrooke Tullis	atullis@twpdlaw.com
Vicki Elmer	velmer@twpdlaw.com	Lance Vinson	lvinson@twpdlaw.com
David Harpole	dharpole@twpdlaw.com	Ryan Zumo	rzumo@twpdlaw.com



All rights reserved. These materials may not be reproduced in any way without the written permission of Taylor, Wellons, Politz & Duhe. This newsletter is designed to provide general information on general liability. Although this newsletter is prepared by professionals, it should not be used as a substitute for professional services. If legal or other professional advice is required, please contact us.

Before citing any case, statute or regulation cited in the newsletter, we suggest you verify the accuracy of the information relied on by confirming that the decision has not been overruled or modified, or the statute or regulation amended, subsequent to the time the newsletter was published.