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Insurance Company Hit with Penalties for Failure to Defend Manufacturer

Shaffer v. Stewart Const. Co., Inc.,
2003-971 (La. App. 5 Cir. 1/13/04), ___ So. 2d ___

In this case, Louisiana's Fifth Circuit Court of Appeal affirmed the trial court's assessment of damages against an insurer for its failure to defend a product manufacturer as well as an award of penalties against the insurer for its alleged arbitrary and capricious conduct.

Plaintiff was injured while working with a Vibro-Hammer rented from ICE, its owner and manufacturer. Plaintiff filed suit against his employer, its insurer, Pacific Insurance, and ICE. Pacific Insurance refused to defend ICE in the litigation although the rental agreement provided that it was required to do so. The insurer argued that because ICE was the manufacturer of the Vibro-Hammer, the plaintiff's exclusive remedy was under the LPLA. The plaintiff, however, did not assert this cause of action in his original petition. Instead plaintiff's petition alleged simply that ICE supplied, maintained and had custody of the Vibro-Hammer.

The trial court found that the petition stated a cause of action in negligence under Civil Code articles 2515 and 2316. Judge Pitre, writing for the Fifth Circuit, affirmed that ruling and affirmed the trial court's conclusion that the insurance company was required to defend the claim. Additionally, because Pacific disregarded the plaintiff's assertion of a negligence claim, the appeal court found that the insurance company lacked good faith and was, therefore, arbitrary and capricious in its actions. The Fifth Circuit affirmed the trial court's award of penalties and attorney's fees against the insurance company.

- [Michelle D. Craig](#)

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Restaurant Liable under *Res Ipsa Loquitur* for Patron's Broken Teeth

Poplar v. Dillard's Dept. Stores, Inc.,
2003-1023 (La. App. 5 Cir. 12/30/03), ___ So. 2d ___

Restaurant patron, Angel Poplar, broke several teeth when she bit into a foreign object in a shrimp po-boy at Dillard's restaurant. Poplar sued Dillard's for negligence urging that Dillard's was liable under the doctrine of *res ipsa loquitur*. Dillard's countered that, because Poplar could not show a specific action where Dillard breached its duty of care, Poplar was not entitled to prevail on her negligence claim. The trial court agreed with Poplar and awarded damages.

The Louisiana Fifth Circuit Court of Appeals affirmed, finding that the requisite elements of *res ipsa loquitur* were met in this case. Under the doctrine of *res ipsa loquitur* negligence may be inferred where: (1) the circumstances surrounding the event are such that they would not normally occur in the absence of negligence on someone's part; (2) the instrumentality is under the defendant's exclusive control; and (3) the negligence falls within the duty of care owed to the injured party.

The court noted that all the elements of *res ipsa* were met in this case. The presence of a foreign object in prepared food leads to the inference that someone was negligent in preparing the food. Moreover, because Dillard's had exclusive control over the ingredients of the food and because Dillard's owed a duty of care to Poplar, the inference that Dillard's was negligent was supported.

- [Diana A. Cross](#)

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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