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Judicial Confessions: Anything You Say . . .

C. T. Traina, Inc. v. Sunshine Plaza, Inc.,
No. 03-C-1003 (La. 12/3/03), ___ So. 2d ___

Although the *Traina* decision involves a contractual dispute, the Louisiana Supreme Court's holding will impact all manner of Louisiana litigation. The Court appears to have significantly expanded the types of declarations that constitute judicial confessions thus limiting a litigant's ability to abandon prior unsuccessful assertions.

Louisiana Civil Code article 1853 provides that a judicial confession arises from any *declaration* made by a party in a judicial proceeding. The consequence of a judicial confession is considerable. It obviates the need to produce evidence regarding the matter confessed and can only be revoked for error of fact. Perhaps, because of the perceived severity of these consequences, Louisiana courts have been reluctant to find that litigants' allegations and assertions constitute judicial confessions. In prior decisions such as *Smith v. Board of Trustees*, 398 So.2d 1045 (La. 1981) and *Cheatham v. City of New Orleans*, 378 So.2d 369 (La. 1979), the Supreme Court had imprecisely referred to the necessary declaration as an "admission." The lower courts seized this opportunity to significantly restrict the scope of judicial confessions. Instead of using the evidentiary definition of "admission" as a declaration by a litigant consistent with article 1853, the courts employed a far more restrictive interpretation of "admission" as being only an intentional, formal admission such as an allegation admitted by a defendant in its answer.

The *Traina* decision indicates that the more expansive evidentiary definition of "admission" is appropriate. Sunshine Plaza, Inc. hired Commercial Asset Management Company (CAMCO) as a general contractor to build a shopping center. CAMCO hired Traina as the plumbing subcontractor. CAMCO failed to pay Traina approximately \$43,000 and filed for bankruptcy. Traina filed a suit on open account against Sunshine seeking the amount owed and attorneys' fees. Sunshine filed exceptions of no cause of action and no right of action in which it contested recovery of attorneys' fees contending that the labor and materials were furnished pursuant to an oral contract and not on open account. The district court found that an oral contract existed between Traina and Sunshine and rendered judgment in favor of Traina. The Court of Appeal reversed the judgment finding that Traina had not proved the existence of an oral contract between it and Sunshine.

The parties' arguments to the Supreme Court focused on whether the evidence adduced at trial was sufficient to establish the existence of an oral contract. However, the Court ignored these arguments and reinstated the original judgment finding that Sunshine's statements in its exceptions concerning the existence of an oral contract constituted a judicial confession that had not been properly revoked. The Court's rationale is a deceptively simple example of statutory construction. However, considered in the context of prior jurisprudence and Judge Weimer's concurring opinion, the decision has several significant implications.

First, judicial confessions can no longer be limited to formal admissions. The Court specifically found that the allegations of a party contained in other pleadings constituted a judicial confession. Although the Court continues to refer to an "admission," the result clearly establishes that this is

broadly defined consistent with the language of article 1853 as any declaration of a litigant in a judicial proceeding.

Second, withdrawing a judicial confession requires an affirmative act and a showing that it was made under error of fact. A litigant does not effectively revoke a judicial confession simply by subsequently making contrary assertions. As pointed out by Judge Weimer, prior jurisprudence such as *J. H. Jenkins Contractors, Inc. v. Farriel*, 259 So.2d 882 (La. 1972), held that a litigant could revoke a judicial confession by simply adopting a contrary position unless his opponent had been misled or deceived. In *Traina*, the Court of Appeal had found that Sunshine judicially confessed the existence of an oral contract but concluded that the confession had been revoked when it filed subsequent pleadings denying any contractual relationship. Returning to the language of article 1853, the Court rejected this reasoning and found that there had been no revocation of the confession because Sunshine had not asserted that its confession had been made under error of fact. Although the Court did not describe the nature and proceedings by which an assertion of error should be made, the safest assumption is that it requires a motion to revoke the judicial confession and a hearing to determine whether the confession was made under error of fact.

Third, Judge Weimer correctly noted that there was sufficient evidence to support the trial court's ruling that an oral contract existed and to reverse the Court of Appeal's conclusion that this decision was manifestly erroneous. Thus, the concurring opinion illustrates that the Court intended to use this opportunity to clarify the law regarding judicial confessions.

Although this holding will impact all litigation, it may resolve one of defendants' most persistent problems in asbestos litigation; the requirement that a defendant prove the liability of codefendants who settled to obtain credit for the settlement. Commonly, asbestos plaintiffs sue numerous defendants alleging that each committed various species of misconduct contributing to their injuries. However, plaintiffs generally settle with and dismiss most defendants and proceed to trial against an unlucky few. Under applicable law, the few remaining defendants must prove the liability of the dismissed defendants to claim a reduction of plaintiffs' recovery. Unfortunately, few defendants are prepared to produce evidence to establish the liability of a codefendant. Attempting to use the plaintiff's own testimony to accomplish this is generally futile because an unusually selective form of amnesia affects most plaintiffs eliminating any memory of the misdeeds of the settled defendants. Defendants' past attempts to use plaintiffs' allegations of exposure, misconduct and causation as judicial confessions were frustrated by the argument that only formal admissions could constitute a judicial confession. However, the Supreme Court's action resurrects this argument and suggests that asbestos plaintiffs' own allegations contained in their petition would be *full proof* against them and obviate the need for the trial defendants to produce any evidence of the liability of dismissed codefendants.

In *Traina*, the Louisiana Supreme Court stripped away the judicial gloss restricting the scope and effect of judicial confessions under Louisiana Civil Code article 1853. Although, the Court did not indicate the reason it chose to act at this time, the consequences should be significant. Litigants and their counsel must give careful consideration to their assertions, allegations and contentions as they will generally be bound by them.

- [William L. Schuette](#)

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Hip Replacement Manufacturer Found Not Liable for Patient's Death

Oiler v. Biomet Orthopedics, Inc.,
2004 WL 325389 (E.D. La. 2/17/04)

Patient Debra Oiler died following numerous complications resulting from hip replacement

surgery. The hip replacement implant components used for Oiler's surgery were manufactured and sold by Biomet. Oiler's surviving spouse alleged that Biomet's negligence in failing to properly screen, procure, process and distribute the hip replacement materials was the proximate cause of Oiler's death. Originally filed in Orleans Parish, the suit was ultimately removed to federal court by Biomet. Biomet moved for summary judgment, arguing that Oiler failed to plead a proper claim pursuant to the Louisiana Products Liability Act ("LPLA") and, regardless, failed to provide sufficient evidence to support a LPLA claim. Oiler also separately alleged negligence; however, that theory of recovery is not available separate from LPLA.

LPLA allows a claimant to recover against a manufacturer if he establishes four separate elements: (1) that the defendant manufactured the product; (2) that the claimant's damage was proximately caused by a characteristic of the product; (3) that this characteristic made the product unreasonably dangerous; and (4) that the claimant's damage arose from a reasonably anticipated use of the product. A product is "unreasonably dangerous" only if it is unreasonably dangerous in (1) construction or composition; (2) design; (3) lack of adequate warning; or (4) failure to conform to an express warranty of the manufacturer about the product.

Here, Oiler alleged that the hip components were unreasonably dangerous in their construction or composition, arguing that there were questions regarding whether the parts were properly sterilized. Biomet shipped the parts to independent companies for sterilization, after which they were packaged, warehoused in an unsterile environment, handled by employees who did not wear protective suits, and shipped through either UPS or Federal Express. Biomet contended that the parts were sterile, submitting the affidavit of Rex White, Biomet's Director of Regulatory Compliance. Although White could attest that the parts were sterile upon leaving the company's control, there were certain questions he was unable to answer in deposition regarding sterilization of particular parts in Wales, former FDA warnings, and prior test reports. Oiler, however, failed to submit additional evidence of any kind, relying instead on showing certain shortcomings in White's deposition.

The district court ultimately granted summary judgment in favor of Biomet, focusing on the burden of proof at the summary judgment level of litigation. Biomet, as a defendant, need only show that evidence in the record is inadequate to prove the plaintiff's case. Biomet did not have to conclusively prove the sterility of the component parts. After Biomet demonstrated a lack of evidence in the record supporting Oiler's claims under LPLA, Oiler bore the burden of presenting evidence that would allow a reasonable factfinder (a judge or a jury) to conclude that the parts were not sterile. The proper type of evidence to establish a claim under LPLA in this case would have been expert testimony, based on specialized medical knowledge. Oiler, however, failed to submit any evidence establishing contamination, let alone the testimony of an expert. Consequently, Biomet was found not liable at the summary judgment level.

- [Sarah B. Belter](#)

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Second Circuit Holds Hospital Is Not Strictly Liable for Contaminated Blood

Day v. Morehouse General Hosp.,
37,803 (La.App. 2 Cir. 1/28/04), ___ So.2d ___

A woman infected with Hepatitis C during a 1967 blood transfusion filed suit against the treating hospital. In 1999, at the age of 63, the victim died from complications associated with Hepatitis C. After her death, her husband and children amended the petition and sued for damages for wrongful death based on product liability for the sale and administration of defective blood.

The trial court found in favor of the hospital concluding that the administration of the blood did not constitute a sale. Judge Sharp, writing for the Second Circuit, affirmed the trial court's ruling finding

that the plaintiffs had no cause of action in strict liability in 1967 when the transfusion occurred or in 1999 when the wrongful death action came into existence.

Strict liability in product liability claims did not arise until 1971 with the Louisiana Supreme Court's holding in the seminal product liability case, *Weber v. Fidelity & Cas. Co. of N.Y.* Accordingly, the Second Circuit concluded that a strict liability cause of action for an allegedly defective blood transfusion did not exist at the time of the 1967 transfusion.

Furthermore, considering that there was no test to detect Hepatitis C in the 1960s because the disease was unknown, and that the blood dispensed to the decedent was administered in compliance with applicable standards in effect at that time, the court acknowledged that even if it had found that the plaintiffs had properly proceeded under strict liability, the defendant would still have a viable defense because the blood was unavoidably dangerous. (*See 4TH CIR. RECOGNIZES "UNAVOIDABLY UNSAFE" DEFENSE TO STRICT BLOOD PRODUCTS LIABILITY CASE*, July 2002, Vol. 18.)

The court also considered whether to apply the law in existence at the time of decedent's death or at the time of the transfusion. The law in effect at decedent's death defined the transfusion of blood as the "rendition of a service" and not a sale, and further provided that strict liability would not be applicable to these types of services. Because blood shield laws are not laws governing conduct, but instead are laws based on status, the court found it permissible to apply the law in effect at the time that the decedent died instead of that in effect at the time of the transfusion. Accordingly, the plaintiffs' claims were dismissed with prejudice.

- *Michelle D. Craig*

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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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