



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2011:12

December 1, 2011

OFFICERS

President
BEN L. MAYEAUX
Laborde & Neuner
1001 W. Pinhook Rd.
Lafayette, LA 70505
337-272-0346 Fax: 337-233-9450
E-Mail: bmayeaux@ln-law.com

President-Elect
THOMAS G. BUCK
Metairie, LA

First Vice President
HARRY J. "SKIP" PHILIPS, JR.
Baton Rouge, LA

Second Vice President
MARTA-ANN SCHNABEL
New Orleans, LA

Secretary-Treasurer
BOBBY GILLIAM
Wilkinson, Carmody & Gilliam
P. O. Box 1707
Shreveport, LA 71166
318-221-4196 Fax: 318-221-3705
Email: bgilliam@woglwfir.com

Immediate Past President
RONALD J. SHOLES
New Orleans, LA

DIRECTORS

District 1 - New Orleans
JOHN E.W. BAA, II
DAN RICHARD DORSEY
TIM HASSINGER
JAMES A. HOLMES
TARA L. MASON
VALERIE THENG MATHERNE

District 2 - Baton Rouge
DAVID BIENVENU
GLENN FARNET
L. VICTOR GREGOIRE, JR.
GRACELLA G. SIMMONS

District 3 - Lafayette
MICHAEL J. JUNEAU
KENNY L. OLIVER

District 4 - Lake Charles
CHRISTOPHER P. IEYOUB
JOHN J. SIMPSON

District 5 - Alexandria
GREG ENGELSMAN
MARK A. WATSON

District 6 - Shreveport
REGINALD ABRAMS
WM. TIMOTHY ALLEN, III
SARAH A. KIRKPATRICK
MICHAEL D. LOWE

District 7 - Monroe
JAY P. ADAMS
JOHN B. HOYCHICK

Executive Director
WILLIAM R. CORBETT

Associate Executive Director
DANE S. CIOLINO

Executive Director Emeritus
FRANK L. MARAIST

8982 Darby Avenue
Baton Rouge, LA 70806
225-928-7599 Fax: 225-928-7339
E-mail: ladefensecounsel@aol.com
Website: www.ladc.org

UPCOMING MEETINGS

December 8, 2011	Associate CLE Skill Set Kick Off– Ethics and Professionalism, Lucy’s Retired Surfers Bar & Restaurant (registration open)	2.0*#
December 9, 2011	Defense Lawyers’ Seminar, Windsor Court Hotel, New Orleans (registration open)	7.0*#
Jan. 25-29, 2012	LADC Winter Meeting, Beaver Creek, CO (registration open)	10.0*#
Feb. 10-11, 2012	LADC 2012 North Louisiana Seminar, Shreveport (registration open in early December)	10.0*#
April 24-29, 2012	LADC Annual Meeting, Costa Rica (registration open)	8.0*#

(A registration form may be downloaded at www.ladc.org if registration is open at this time.)

* - includes one credit for professional responsibility (ethics)

- includes one credit for professionalism

BULLETIN BOARD

HAPPY HOLIDAYS TO ALL!

ONLINE REGISTRATION: You now can register online for LADC seminars. To register online, visit the LADC website and click the link for the seminar. You will have the option of paying by credit card or having an invoice sent to you by email. For a while, we will preserve the method of downloading a registration form from the LADC website and mailing it in. The LADC website address is <http://www.ladc.org>.

WINDSOR WONDERLAND: You cannot possibly prepare for the holidays without attending the LADC’s annual Defense Lawyers’ Seminar. Now is the time to register for the LADC’s most popular seminar of the year, which will be held at the Windsor Court Hotel on Friday, December 9. Our special guest speaker will be the Honorable William K. Suter, Clerk of the Supreme Court of the United States. Other featured speakers will be Matt Cairns, the Immediate Past President of the DRI, Tom Galligan, Alston Johnson, John Church, and Greg Smith. Need Ethics and Professionalism credits to end the year? Be joyful because we have them for you.

The Louisiana Judicial College has a seminar in the hotel that same day, and we will have a cocktail reception at the end of the seminar, to which we will invite the judges. Register for the seminar on the LADC website, either by using the new online registration or by downloading a registration form.

CLE FOR ASSOCIATES: Acting on the recommendation of the CLE Strategic Planning Committee, the LADC Board approved and funded a series of short CLE programs targeted at attorneys at the associate level. The first of these mini-seminars will be held at Lucy's in New Orleans from 4-6 p.m. on Thursday, Dec. 8. The two-hour CLE will include a one-hour ethics presentation by Larry Shea focused on ethical billing practices, and a one-hour professionalism presentation, which will be presented by a panel of judges (including Judge Guy Holdridge and Michael Bagneris) will focus on avoiding unprofessional ("annoying") defense tactics. The CLE will be followed by a social hour at Lucy's main bar. Subsequent short programs will follow every other month starting in February 2012. Registration for the Dec. 8 seminar is open.

BEAVER CREEK WINTER MEETING 2012: Join us for the Winter Meeting at Beaver Creek in 2012. The meeting will be during the last week of January 2012 rather than during Mardi Gras week. Due to high room rates and expected large crowds (Presidents' Day weekend is the weekend before Mardi Gras) during the early Mardi Gras week, we have decided to take advantage of favorable room rates and smaller crowds on the slopes at the end of January. Please plan to join us. This meeting is a great opportunity to earn almost all your CLE hours for the year, and ski. We have to guarantee our room block by mid-November, so sign up soon to be sure you have the accommodations you want. You can register now on the LADC website.

2012 NORTH LOUISIANA SEMINAR: The annual seminar will be Feb. 10-11, 2012 at a new venue: the Petroleum Club. Registration will open in early December.

COSTA RICA ANNUAL MEETING: Our Costa Rica program is the most innovative in years. For the first time at an annual meeting, the LADC is offering individual condos of one, two or three bedrooms with full kitchens and patios. Your refrigerator will be stocked on arrival. Restaurants and a few shops are nearby, the ocean and the jungle are in your back yard, the hospitality suite is open daily, and each delegate will have a golf cart to get around. Have a look at the brochure at 2012 LADC Costa Rica CLE or contact Peter McLean at ptmclean@hotmail.com. It is important to sign up now to get what you want. Register now on the LADC website.

MEMBERSHIP DRIVE: At the August 18 meeting of the LADC Board, the Board launched a membership drive. It is the goal of the LADC to add at least 100 members by the end of April 2012. When dues notices are sent out later this year, the LADC will make available a free one-year membership for those who have never been LADC members. Please help us recruit some new members for your organization.

DIVERSITY CONCLAVE: The LADC is co-sponsoring the LSBA Fifth Annual Conclave on Diversity in the Legal Profession: "The Professional Workplace: Conquering the Myths and Creating a Competitive Advantage." It will be held at the New Orleans Marriott at the

Convention Center on March 2, 2012. For more details, contact Kelly McNeil Legier at 504-619-0129.

NEW MEMBERS

Joseph Guichet, New Orleans
Alan W. Stewart, Lafayette
S. Ault Hootsell, III

KEY DEVELOPMENTS

Arbitration; Res Judicata

In Interdiction of Wright, the Supreme Court concludes that res judicata does not apply to an unconfirmed arbitration award. No. 2010-CC-1826 (10/25/11) (Weimer, J, dissenting in part; Johnson and Guidry, JJ, dissenting)

Attorneys; Malpractice

In MB Industries, LLC v CNA Insurance Company, the Supreme Court rules that Louisiana law does not impose a per se rule requiring an appeal before a legal malpractice action may be filed, and does not require that expert testimony be provided in a legal malpractice claim if the undisputed facts establish malpractice which was so obvious that a lay person would recognize it as falling beneath the necessary standard of care. The Court opines that a party does not waive the right to file a legal malpractice suit by not filing an appeal of the underlying judgment unless a reasonably prudent party would have filed an appeal, given the facts at the time. The Court also concludes that a reasonable jury could find that a lawyer's handing over a box of a client's documents as part of document production without making copies is negligence under any standard and thus expert testimony is not needed. However, plaintiff did not establish that the breach of not copying the documents caused the unfavorable outcome of the litigation. No. 2011-C-0303 (10/25/11) (Johnson, J, dissents in part)

Insurance

The pre-amendment version of R.S. 22:1892 (formerly numbered R.S.22:658) is applicable where (1) insurer failed to pay the claim within 30 days after receiving satisfactory proof of loss, the insured submitted sufficient proof of loss and filed her petition for damages, and no new damages were discovered subsequent to 8/15/2006, the effective day of the amendment. The lower courts erred in applying the amended version of R. S. 22:658, thereby allowing attorney fees to be awarded. Durio v Horace Mann Insurance Co., Supreme Court, No 2011-C-0084 (10/25/11) (Victory and Knoll, JJ, concur in part)

Damages sustained as a result of an insurer's breach of duties under R.S. 22:1973 (renumbered from R.S. 22:1220) are damages that are sustained as a result of the insurer's breach of duties, and not the amount due under the contract. “[T]he lower court erred in calculating La. R.S. 22:1220 penalties based on contractual amounts due under the insurance contract. Such penalties

are properly calculated by doubling the amount of damages sustained as a result of the insurer's breach of its duty under the statute." Durio v Horace Mann Insurance Co., supra.

Interest

The judicial interest for the year 2012 has been fixed at 4%.

OTHER RECENT DEVELOPMENTS

Attorneys

The Anti-Injunction Act denies a federal court authority to enjoin a state court from imposing sanctions on one of the attorneys handling the federal case for his failure withdraw from the representation. Estate of Brennan v Church of Scientology Flag Service Organization, Inc., 645 F 3d 1267 (11th Cir. 2011)

In Belue v Leventhal, 640 F 3d 567 (4th Cir. 2011), the appellate court concludes that the trial court erred in revoking pro hac vice status to an attorney without giving the attorney due process (notice and a meaningful opportunity to respond). The attorney had moved to recuse the judge.

Comparative Negligence

100% to motorist whose vehicle ran off of the road, and 0% to highway department for claimed defective highway, in Davis v State, Third Circuit, No. CA 11-625 (11/2/11). Trial judge erred in granting JNOV, holding that parties were equally at fault, after the jury found motorist solely at fault. Thus verdict in favor of state was reinstated.

Damages

The provision of Article 1997 that an obligations debtor is liable for all damages for a direct consequence of failure to perform does not extend to attorney's fees. Ocmand v Lubrano, Fifth (La.) Circuit No. 11-CA-1114 (10/25/11)

Damages; Property

A subsequent purchaser of property may have the right to seek rescission of the sale, reduction of the purchase price or other legal remedies for non-apparent property damages inflicted before the sale. However, he does not have the right to sue a third party for the damages. Eagle Pipe & Supply, Inc. v Amerada Hess Corporation, Supreme Court, No. 2010-C-2272 (10/25/1) (Victory, Guidry and Clark, JJ, concurring; Weimer and Johnson, JJ, and Lobrano, J, ad hoc, dissenting)

Discovery

For a federal court's punishment of a litigant's "callous and careless" attitude toward its e-discovery obligations, see PIC Group Inc. v LandCoast Insulation, Inc., ___ F Supp 2d ___ (SD Miss 2011)

Dismissal

The trial court does not have authority to dismiss on its own motion actions pending before it. Sanders v Alexandria Civil Service Commission, Third Circuit, No. CA 11-539 (11/2/11)

Negligence

In Benjamin v Lambing, the Third Circuit reverses the trial court's finding of fault on the part of a motorist where the trial court disregarded the physical evidence and ignored contradicted expert testimony that demonstrated that that motorist's version of the accident was the only credible and creditable version. No. CA 11-649 (11/2/11)

Summary Judgment

A decision concerning the existence of an unreasonable risk of harm for an alleged defective thing may be reached by motion for summary judgment when no factual dispute is asserted. Dowdy v City of Monroe, Second Circuit, 46,693-CA (11/2/11)

Torts; Trespass

Any instruction that a defendant may be held liable for inadvertent trespass resulting from an intentional act is not a correct statement of Louisiana law when the trespass at issue is the severing of an underground cable located on property owned by one of the alleged trespassers and the property is not subject to a servitude to the owners of the underground cable but only to the contractual right to keep it as an existing cable under the property. The Supreme Court makes this conclusion in answering a question certified by the U.S. Fifth Circuit in MCI Communications Services Inc. v Hagan, No. 2011-CQ-1039 (10/25/11)

Trials

In Chef Menteur Land Co. v Sandrock, the trial court had actual knowledge that the attorney was under the impression that he had withdrawn from the case. There was no notification in writing to the client, and the only evidence that the client was aware of the trial date was voice mail probably left by the attorney to the opposing counsel. Held, the trial judge erred in proceeding to trial and casting the litigant in judgment. When an attorney moves to withdraw, the trial judge is responsible for either notifying the litigant of a pending trial date or confirming with the withdrawing attorney that the litigant has been notified in writing of the trial date. Fourth Circuit, No. 2011-CA-0497 (10/19/11)

Worker Compensation; Penalties

The WCJ does not abuse his “great discretion” in choosing to refuse to award penalties and attorney's fees where there was evidence that employer terminated benefits based upon medical evidence that claimant could return to work with no restrictions. Robinson v Calcasieu Parish School Board, Third Circuit, No. WCA 11-615 (11/2/11)

Where the employer failed to authorize surgery, it was not a discontinuance of benefits but a failure to provide a required benefit. Thus penalties are awardable under R.S. 23:1201(F) and the penalty should be limited to \$2,000. Easton Pharmacy, Inc. v Buller, Third Circuit, No. WCA 11-585 (11/2/11)

Claimant reported the accident early in the next morning the day after the accident occurred, and asked for medical treatment that day. Employer denied treatment because claimant did not report the accident on the day that it occurred. After the requests for medical treatments were ignored, claimant sought benefits and damages. The Third Circuit awards claimant penalties in the amount of \$8,000 for failure to pay hospitals, denial of physical therapy and denial of an MRI when the employer did not “reasonably controvert” the claim in Marange v Coastal Metal Fabricators, Inc., No. WCA 11-743 (11/2/11)