



# LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2012:5

May 1, 2012

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## UPCOMING MEETINGS

<b>June 22, 2012</b>	<b>Associate Skills Set Seminar #4, Lucy's Retired Surfers' Club, New Orleans</b>	<b>2.0</b>
<b>Aug. 2-4, 2012</b>	<b>LADC Trial Academy, Loyola Law School, New Orleans</b>	<b>21.0*#</b>
<b>Aug. 16, 2012</b>	<b>Associate Skills Set Seminar #5, Lucy's Retired Surfers' Club, New Orleans (save the date)</b>	<b>2.0</b>
<b>Aug. 17, 2012</b>	<b>LADC Sizzlin' Summer Seminar, Windsor Court, New Orleans (save the date)</b>	<b>8.0*#</b>
<b>Dec. 7, 2012</b>	<b>LADC Defense Lawyers' Seminar, Windsor Court, New Orleans (save the date)</b>	<b>8.0*#</b>

(A registration form may be downloaded or you may register online at [www.ladc.org](http://www.ladc.org) if registration is open at this time. For seminars designated "save the date," registration is not open at this time.)

\* - includes one credit for professional responsibility (ethics)  
# - includes one credit for professionalism

## BULLETIN BOARD

**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>.

**ASSOCIATE SKILLS SET SEMINAR #4:** The LADC's new mini-CLE series for associates has been a resounding success, drawing 20 or more registrants to Lucy's for each of the first three sessions. Continuing to offer one every other month, we will have two this summer. The next one is Friday, June 22 at Lucy's. The two-hour CLE will feature Crystal Domries, Michael Mims, and Kathleen Simon on the topic "Transition from Law School to Law Practice: The Skills and Pointers We Wish We Had Known." We are very pleased that many associates are attending these seminars and joining the LADC. We appreciate the leadership and

planning of Sarah Kirkpatrick (Bradley Murchison, Shreveport), Carla Dillon (Jones Walker, Baton Rouge) and Sarah Stogner (Carver Darden, New Orleans). Please note the time change for the June meeting: 3-5 on Friday afternoon with a social hour to follow.

**OTHER SUMMER SEMINARS:** Registration is now open for the LADC Trial Academy on Aug. 2-4. This is great trial training for our members who have not had much trial experience. The always popular Sizzlin' Summer Seminar will be held at the Windsor Court on Friday, Aug. 17. Speakers will be announced and registration will open in late May. Please mark your calendar.

**LADC ELECTIONS 2012:** Ballots for electing members to the LADC's board of directors were sent out via the listserve in early April. Members have until May 5 to submit their votes to Secretary-Treasurer Bobby Gilliam. The board will elect the new secretary-treasurer.

**PAST PRESIDENTS ADVISORY COMMITTEE:** President Ben Mayeaux announced the formation of a new advisory committee composed of past presidents of the LADC. The committee will provide a means of better capturing organizational history and wisdom from those who have spent years in leadership of the LADC. The mission of this committee is to advise the officers and board of directors from time to time regarding the business and activities of the association in order to maintain continuity and uphold the standing of the Association in the legal community. President Mayeaux's initial appointments to the committee were Cliffe Laborde (president in 1999-2000), Shelby McKenzie (2001-02), and John Perry (2007-08).

**“CALLING ALL LAWYERS!!!”** Your LADC has recently instituted a Pro Bono Committee. We are happy to announce our first initiative – “Calling All Lawyers!!!” – a pilot program in conjunction with the Louisiana Civil Justice Center (“LCJC”). We need your help to make it a success. The LCJC receives numerous calls from people from around the state simply looking for guidance on a number of legal issues. That's where we come in! For those individuals wishing to speak with a lawyer, the LCJC staff will obtain their contact information and the nature of their inquiry. That information will be provided to a volunteer lawyer who will call the “clients” to discuss their issue. We, as volunteer lawyers, will accept a 2 hour shift during which time we will attempt to assist between 5–8 “clients.” Don't worry – we will be providing our volunteers with information regarding frequently asked questions and contact numbers for various agencies to provide to the clients. Initially, the 2 hour slots will be from 7 a.m. to 9 a.m. on Tuesdays and 4 p.m. to 6 p.m. on Thursdays. We will not be taking on the clients' cases, so the volunteer's involvement will be limited to the 2 hour session. Once we have assisted the client, we will provide a brief report to the LCJC advising of the advice given. For more information or to volunteer, please contact Will Montz: [wmontz@ln-law.com](mailto:wmontz@ln-law.com); 337.237.7000.

**50<sup>th</sup> ANNIVERSARY:** The planning meeting to establish the LADC was held on Nov. 22, 1963. The LADC will be 50 years old in 2013. Details for the 50<sup>th</sup> Anniversary celebration will be unveiled as it is planned.

**LADC MEMBERS** may want to consider attending the 2012 DRI Diversity for Success Seminar and Corporate Expo, June 7-8, 2012 in Chicago, Illinois: [http://dri.org/event\\_brochures/20120440.pdf](http://dri.org/event_brochures/20120440.pdf). To register online visit

<http://www.dri.org/Event/20120440>.

**CONDOLENCES:** In recent months, two strong supporters of and contributors to the LADC passed away. The organization expresses its members' sincere sympathy to the families and friends of Jerry Weigel and Bill Christovich. Both Jerry and Bill contributed time and talent to the LADC's Trial Academy. Jerry served as President of the LADC 2002-03. Jerry passed on Jan. 29, 2012, and Bill on April 10, 2012.

### **NEW MEMBERS**

Denia S. Aiyegbusi, New Orleans  
Christy Barber, Houston  
Jason Camelford, New Orleans  
Katie Chabert, Baton Rouge  
Lauren Courville, Metairie  
Adam deMahy, New Orleans  
Mason C. Johnson, Lafayette  
Bryan Lege, Lafayette  
Deanne McCauley, Mandeville  
Anne Marie Muller, Baton Rouge  
Wesley Romero, Lake Charles  
Karen Sher, New Orleans  
Diane Sweezer, Houston  
Todd Wallace, New Orleans

### Abandonment

A letter that clearly establishes an agreement that the plaintiff would take no action adverse to the interests of any party without first allowing them the opportunity to protect their interests is sufficient to interrupt abandonment under CCP Article 561. Miles v Suzanne's Cafe & Catering, Inc., Fifth (La.) Circuit, No. 11-CA-907 (3/27/12)

### Court Rules

The Louisiana Supreme Court has adopted a rule (Part G, Sec.13 of the General Administrative Rules for all Louisiana Courts) that requires certain lawyers and the clerk of court to notify the Judicial Administrator about commencement and completion of lawsuits filed in the district court for damages arising from an offense or a quasi-offense. The new rule, adopted in December, includes the requirement of filing a Civil Case Sheet Form. The rule requires petitioner's attorney to complete the Civil Case Sheet Form. The rule further requires the clerk of court to submit the civil case sheet form and the final judgment to the Judicial Administrator within specified time limits. An approved Louisiana Civil Case Reporting Form is included in the rule. The rule took effect 12/20/11. The link to the rule on the Court's website is [http://www.lasc.org/rules/orders/2011/Part\\_G\\_Section\\_13\\_order.pdf](http://www.lasc.org/rules/orders/2011/Part_G_Section_13_order.pdf).

The failure to file the memorandum required by Rule 9.9(a) of the Uniform Rules of District Courts does not mean that the issue is not properly before the court; the only sanction for failure to comply with the rule is that the offending party may forfeit oral argument. Pierrotti v Johnson, First Circuit, No. 2011-CA-1317 (3/19/12)

#### Damages; Dogs

A divided five-judge panel of the Fourth Circuit has made an award to a dog owner for mental anguish arising from the death of the family dog. The dog was struck and killed by a motorist while the dog was being walked by the owners' son. An award for mental anguish resulting from property damage is permissible only when at least one of four conditions is satisfied: 1) damage by an intentional or illegal act; 2) damage by an act for which the tortfeasor will be strictly or absolutely liable; 3) damage by acts constituting a continuing nuisance; or 4) when the owner is present or nearby and suffers psychic trauma as a result. The majority observed that there is an emotional bond that sets in between some pets and their owners, and in this case there was a close family-like relationship between the husband and wife and their dog, which had been part of their lives for approximately 12 years, and the dog's loss caused the couple psychic trauma. The awards were \$5,000 each to the husband and wife. Barrios v Safeway Insurance Co., No. 2011-CA-1028 (3/21/12) (Bagneris and Ledet, JJ, dissenting in part)

#### Negligence; Gambling

Does a casino owe a duty to a third person to identify a compulsive or problem gambler when the third person suffers economic loss caused in part by a patron's embezzling funds for his gambling activities? No, says the Fifth (La) Circuit, in NOLA 180 v Treasure Chest Casino, LLC. There the third person sought recovery from the casino after the third person's financial officer embezzled funds (approximately \$667,000) from the person and lost a substantial amount of that money in slot machines at the casino. The court began with the principle that generally there is no duty to protect others from the criminal activities of third persons. While a duty may arise under certain circumstances, the court denied recovery in this case, pointing out that the third person was not the casino patron, was never victimized on the casino premises, and didn't have any special relationship with the casino. No. 11-CA-853 (3/27/12)

#### Worker Compensation; Penalties

In Johnson v Conagra Poultry Company, the Third Circuit imposes the maximum amount of penalties (\$8,000) based upon R.S. 23:1201(F) upon an employer who failed to timely pay for 13 separate medical prescriptions. The attorney fee award also was increased from \$2,000 to \$5,000. See earlier opinion, No. WCA 11-986 (3/21/12) (Decuir and Gremillion, JJ, dissenting)

### **OTHER SIGNIFICANT DEVELOPMENTS**

#### Arbitration

A district court errs in giving preclusive effect to an unconfirmed arbitration award, although the parties do not dispute the existence or finality of the unconfirmed award. Greer v Town

Construction Co., Inc., First Circuit, No. 2011 CA 1360 (3/23/12). The First Circuit relied on the Supreme Court's recent decision in Interdiction of Wright, 75 So 3d 893, 897 (La. 2011).

### Contributory Negligence

75% (lowered from 100%) to defendant executing a sudden right turn into a driveway in front of plaintiff, and 25% to plaintiff, a following motorist, in Dotie v Safeway Insurance Co., Second Circuit, No. 46,840-CA (3/14/12)

### Damages

The Privacy Act of 1974, codified in part at 5 USC Sec. 552A, authorizes suit for violation of the confidentiality of certain records and authorizes "actual damages" for violations. Congress did not "unequivocally authorize an award of damages for mental or emotional distress." Thus, the Privacy Act did not waive the federal government's sovereign immunity from such damages. Federal Aviation Administration v Cooper, \_\_\_ US \_\_\_ (2012) (Sotomayor, Ginsburg and Breyer, JJ, dissent; Kagan, J, did not participate)

Consortium: \$25,000 to wife of 40 years where husband's injuries caused a significant change in their lifestyle, including a sex life that became "basically nonexistent," and husband became unable to assist in the home, mow the yard, take care of the garden, change the oil in their cars, or help with shopping. Husband could not sleep well and often slept in a separate room. Caskey v Merrick Construction Co., Inc., Second Circuit, No. 46,886-CA (3/14/12) (Caraway, J, dissenting)

### Detrimental Reliance

A petition may sufficiently assert a claim for detrimental reliance without specifically naming it as the theory, where the allegations show defendant's promise and plaintiff's justifiable reliance on it. State Farm Mutual Auto. Ins. Co. v Coard, Fourth Circuit, No. 2011-CA-0799 (3/28/12) (McKay, J, dissenting)

### Directed Verdicts

When a defendant, rather than rest upon its motion for directed verdict, introduces evidence after the denial of that motion, the defendant is deemed to have abandoned the motion and the evidence in the case is judged on the entirety of the record. Duncan v Bartholomew, Fourth Circuit, No. 2011-CA-0855 (3/14/12)

### Evidence

The trial judge does not err in admitting claimant information forms, signed by claimants and notarized, as evidence on a motion to certify a class action. The court of appeal also held that the trial court erred in establishing two subclasses based upon the lack of numerosity and causation, but upheld the certification of a subclass claiming mental anguish damages even without

accompanying physical injury. Stewart v Rhodia, Inc., First Circuit, No. 2011 CA 0434 (3/14/12) (five-judge court; Whipple and McDonald, JJ, dissenting)

### Insurance; Appraisals

Appraisal clauses are enforceable under Louisiana law, but they do not deprive a court of jurisdiction over the matter. Thus, where an insurance policy contains an appraisal provision that does not set forth specific guidelines as to how the appraisal process should be conducted, but does provide for some involvement of the trial court in the process, the trial court may provide reasonable guidelines to ensure that the process is fair and impartial. Further, a party challenging the use of a particular appraiser must present evidence showing the appraiser's honesty or integrity is suspect, which the plaintiffs failed to do in this case. Dufrene v Certain Interested Underwriters at Lloyd's of London, Fifth (La.) Circuit, No. 11-CA-1002 (3/27/12)

### Insurance; Direct Action Statute

Where the duties are set forth in a contract between the parties, but the duties allegedly breached by the defendant arise solely out of contractual obligations, the Direct Action statute does not provide the plaintiff with a cause of action to pursue the claim directly against the insurer. Mentz Construction Services, Inc. v Poche, Fourth Circuit, No. 2011-CA-1474 (3/14/13) (Bonin, J, dissents in part)

### Judgments

A judgment which simply stated that the "Motion for Summary Judgment is GRANTED" is not a proper appealable final judgment if it does not contain decretal language and does not name the parties for whom and against whom it is granted, and the relief that is granted or denied; those determinations should be evident from the language of the judgment without reference to other documents in the record. Gaten v Tangipahoa Parish School System, First Circuit, No. 2011-CA-1133 (3/21/12)

### Medical Malpractice

The Louisiana Medical Malpractice Act applies to a claim against a psychiatric medical facility for negligently placing a patient in a room with another patient with special medical needs, failing to provide appropriate supervision and monitoring the minor child patient, and failing to assist the patient after learning that he has been assaulted by another patient. W.P. v Universal Health Services Foundation, Fifth (La.) Circuit, No.11-CA-801 (3/27/12)

The decision to not evacuate a nursing home and to shelter in place during a hurricane is not medical malpractice, but is an administrative decision not covered under the Louisiana Medical Malpractice Act. In so ruling, the Fourth Circuit relied on the Supreme Court's decision in LaCoste v. Pendleton Methodist Hosp., L.L.C., 07-0008, 07-0016 (La. 2007), 948 So. 2d 184, which held that Methodist Hospital's decision to shelter patients in place during Hurricane Katrina, without an adequate evacuation plan and without sufficient emergency power, did not relate to medical treatment or the dereliction of professional medical skill. As in LaCoste, the

court of appeal applied the six factors established in Coleman v. Deno, 01-1517 (La. 2002), 813 So. 2d 303, to determine whether the claim sounded in medical malpractice. Montalbano v Buffman, Inc., Fourth Circuit, No. 2011-CA-0753 (3/21/12)

Where the alleged acts of negligence raise issues peculiar to the particular specialty involved, then only those qualified in the specialty may offer evidence of the applicable standard of care. However, it is a specialist's knowledge of the requisite subject matter, rather than the specialty within which the specialist practices which determines whether a specialist may testify as to the degree of care which should be exercised. A particular specialist's knowledge of the subject matter on which he is to offer testimony is determined on a case by case basis. Howard v Vincent, Fourth Circuit, No. 2011-CA-0912 (3/28/12)

### Strict Liability

In Marie v American Alternative Ins. Co., the Fifth (La) Circuit absolves a hospice from liability for damages to a patient for a bite by a dog brought onto the premises by a visitor to another patient; the hospice did not have custody and control over the dog, and allowing the dog at the facility did not present an unreasonable risk of harm when considering the likelihood and magnitude of the harm versus the utility of having the dog on the premises. No. 11-CA-832 (3/27/12)

### Worker Compensation; Penalties; Prescription

As follow-ups to St. Tammany Parish Hospital v Marine Products, Inc., (1<sup>st</sup> Circuit 2012) on the issue of prescription on claims for penalties and attorney's fees, see two subsequent First Circuit opinions, Baton Rouge General Medical Center v Louisiana Restaurant Association, No. 2011-CA-0610 (3/19/12) (Higginbotham, J, concurring), and No. 2011-CA-0625 (3/23/12).

### Worker Compensation; Subrogation

The division of funds received following the compromise of the third party claim is controlled by R.S. 23:1102, and not by Section 1103, which applies to apportionment of damages awarded in a judgment in a tort suit between the employer and employee in suits against third parties. Parish of Ascension v Reider, First Circuit, No. 2011-CA-0896 (3/23/12) (Welch, J, concurring in result)

## **WRIT APPLICATIONS OF NOTE**

The state Supreme Court has granted writs in Marange v Custom Metal Fabricators, Inc., No. 2011-C-2678, involving the issue of whether the employee is entitled to a separate penalty for each instance in which the employer improperly denies medical benefits. Opinion below: 75 So. 3d 990 (3d Cir 2011)