LOUISIANA ASSOCIATION OF DEFENSE COUNSEL

LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2018:9 **September 1, 2018**

P.O. Box 9430
Metairie, LA 70055

UPCOMING MEETINGS

September 21, 2018	Young Lawyers' Seminar, "Real" Practice Tips for Young Lawyers *International House*, New Orleans
October 17, 2018	Northshore Mini-Seminar, *Nuvolari's Restaurant*, Mandeville
December 7, 2018	Defense Lawyers' Seminar, *Roosevelt Hotel*, New Orleans

BULLETIN BOARD

2018 YOUNG LAWYERS' AWARDS AND BOARD DINNER: The LADC is fortunate to have a large group of young lawyers who are both outstanding lawyers and wonderful people. Each year the Young Lawyers' Awards and Board Dinner gives our organization an opportunity to recognize some of our estimable young members. Michele Brooks (Porteous Hainkel Johnson) was the recipient of the fourth annual Frank L. Marist Award.

Congratulations to Michele and Maraist Award finalists Grant Tolbird (Davenport Files & Kelly), Phillip Smith (NeunerPate), Beaux Jones (Baldwin, Haspel, Burke & Mayer), Graham Ryan (Jones Walker), and Jasmine Brown (Blue Williams). Congratulations to nominees Ne'Shira Millender (Taylor Porter), Kelly Brian (Blue Williams), Jerry Edwards, Jr. (Blanchard, Walker, O'Quin & Roberts), Craig Hebert (Louisiana Department of Justice), Meghan Senter (Manning, Gross & Massenburg), and Ray Lewis (Deutsch Kerrigan).

The recipient of the fourth annual Young Lawyers Committee Member of the Year Award was Thomas McCall (Jones Walker).

YOUNG LAWYERS' SEMINAR, "REAL" PRACTICE TIPS FOR YOUNG LAWYERS: At the International House Hotel on Friday, Sept. 21 from 11:30 until 4:45 p.m., this seminar will feature five hours of CLE by-the-hour from judges, lawyers, and firm administrators who will provide insight into a variety of topics intended to provide "real" practice tips to young lawyers, but which will be relevant to all attorneys regardless of experience.

Bob Barton, Michelle Arseneaux, Beth Liner, and Thomas McCall will provide insight into understanding firm administration and the business of law, including the benefits of thinking like a business owner as a young attorney and

suggestions to enhance your marketing and business development efforts. Their presentation will be followed by a "speed dating" style session where participants will have a chance to ask questions in a small group setting. Sarah Stogner will present an hour of ethics sharing how she has successfully garnered personal branding to develop a niche practice and national recognition for her subject matter knowledge. Judges Piper Griffin will present on "How to Keep Your Civil Practice Civil," and Marilyn Castle will discuss "Finessing Litigation."

2019 ANNUAL MEETING: LADC President Mickey deLaup has selected the site and dates for the 2019 meeting. The meeting will be May 1-5, 2019, in the beautiful city of Santa Fe, New Mexico.

2019 WINTER MEETING AND SKI TRIP: We again will hold a joint conference with the Texas Association of Defense Counsel at the *Steamboat Grand in Steamboat Springs*, CO, on January 30, 2019 through February 2, 2019.

2018 DEFENSE LAWYERS' SEMINAR: It is never too early to save the date for the LADC's biggest seminar of the year. We will return to the beautifully decorated *Roosevelt Hotel* for our joint seminar with the Louisiana Judicial College on Friday, December 7, 2018. If this seminar is not part of your end-of-the-year holiday traditions, it should be. The CLE agenda is being finalized and will be released after Labor Day.

LADC ON-DEMAND CLE: The LADC has recorded several on-line CLE seminars is making them available for online CLE credit on the DRI website. Each segment has been approved by Louisiana MCLE. MCLE rules "allow up to 4 hours per compliance period of credit hours delivered through technologically assisted means. Ethics, professionalism, and law office management credits may be obtained in this manner." Two new segments went live in May, including Ethics. The LADC on-demand CLE is available at *https://digitell.dri.org/dri/store/7*.

MAILING CHECKS TO THE LADC: The LADC is discontinuing the lockbox with Chase Bank. Accordingly, please send any checks to the LADC to the following address: Post Office Box 9430, Metairie, LA 70055-9430. Thank you for helping us in our efforts to manage the budget and save money

QUESTIONS REGARDING SEMINARS OR TRIPS: Call Kimberly Zibilich at Event Resources NOLA: Telephone (504) 208-5510, and email at *Kimberly@eventresourcesnola.com*.

NEW MEMBERS

Lori Barker
Wilson Elser

Thomas Cook
Cook Yancey King & Galloway
Shreveport

Brittany Cooper
Gaudry, Ranson, Higgins & Gremillion
Gretna

Angelica Dubinsky
Hailey, McNamara, Hall, Larmann & Papale
Metairie

Jordan Henagan
Ottinger Hebert, L.L.C.
Lafayette

Amy Miller
Law Office of Michael S. Coyle
Ruston

Kristi Obafunwa
Kean Miller, LLP
Baton Rouge

Meghan Senter
Manning Gross + Massenburg, LLP
New Orleans

James Sticker
Mickey S. deLaup, APLC
Metairie

RECENT DEVELOPMENTS

ATTORNEYS' FEES

Rehearing granted to clarify that the $578,384.98 fee a law firm received as an hourly rate before the contract was changed to a contingency fee contract was to be credited against the $2,177,500 contingency fee awarded by the trial court. *Board of Supervisors of Louisiana State University Agricultural and Mechanical College v. Southern Electronics, Inc. (f/k/a Southern Radio Supply Co., Inc.) and the City of New Orleans*, 2017-CA-0722 (La. App. 4 Cir. 8/3/18), found at: *http://www.la4th.org/opinion/2017/450755.pdf*.

CIVIL PROCEDURE

The time period provided in La. Rev. Stat. 51:1409(E) for the filing of LUTPA claims is prescriptive, rather than peremptive. *The Congregation of The Immaculate Conception Roman*

Catholic Church of the Parish of Calcasieu d/b/a Immaculate Conception Cathedral School v. Sam Istre Construction, Inc., et al., 17-1186 (La. App. 3 Cir. 8/8/18), found at: *http://la3circuit.org/Opinions/2018/08/080818/17-1186opi.pdf*.

DAMAGES

Damaged property was valued at $5,000 and landowner made restoration claims for the property that exceeded $3,000,000. There was no written agreement between Entergy and the landowner requiring Entergy to restore the property to its original condition, and no underlying agreement that fell within the writing requirement of La. C.C. art. 1839. Summary judgment in favor of Entergy affirmed because there was an absence of factual support sufficient to establish that there was a contract between Entergy and the landowner to repair damage to the property that occurred during post-Hurricane Katrina repair work to Entergy's transmission line. *Lafourche Realty Company, Inc. and The Allen Company v. Entergy Louisiana, Inc., Entergy Louisiana Holdings, Inc., Entergy Services, Inc., Irby Construction Company, Irby Construction Company of Mississippi, Highlines Construction Company, Inc., and Frogco, Inc.*, 2017 CA 0850 (La. App. 1 Cir. 7/18/18), found at:
http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%200850%20Decision%20Appeal.pdf.

General damage award of $150,000 to 28 year old man affirmed. He suffered daily from a significant level of pain as a result of his multiple lumbar disc herniations rendered symptomatic by the accident and would continue to suffer pain for the duration of his life. General damage award of $200,000 to 24 year old man affirmed where his multiple thoracic, cervical, and lumbar disc herniations were made symptomatic by the accident. He would have chronic pain for the rest of his life and possibly surgery in the future. Their wives' awards of $40,000 for loss of consortium were affirmed. Awards of 18 months of physical therapy were affirmed. The trial court's denial of awards for diminished future earnings capacity was affirmed. *Latulippe v. Braun and Jefferson Parish Hospital Service District No. 1 d/b/a West Jefferson Medical Center*, 18-CA-83 (La. App. 5 Cir. 8/10/18), found at:
http://www.fifthcircuit.org/dmzdocs/OI/PO/2018/BB28AE38-6E95-491E-AA40-9AE9E779BA2A.pdf.

IMMUNITY

A child was injured when a rotten tree fell on him while he was playing soccer in a common area of the Natchez Trace subdivision, a gated residential area not open to the public. Owners and operators of property that is used for recreational purposes are entitled to immunity from tortious liability pursuant to the Recreational Use Immunity Statutes. Immunity does not apply when the premises are used principally for a commercial, recreational enterprise for profit. Immunity is not restricted to situations where there is evidence of an intent to permit the entire public to use the land. It is the owner, lessee, or occupant's use of the premises, not the underlying classification of the premises as a commercial recreational enterprise for profit, that determines the availability of immunity. The area where this accident occurred was used by the Natchez Trace homeowners for many recreational purposes. Although the homeowners paid dues to the homeowners association, Natchez Trace, for the maintenance of the common areas, there was nothing in the record to establish that Natchez Trace derived a profit from these dues. Natchez Trace's use of the common areas was not principally for a commercial recreational purpose so as to exclude it

from immunity. Further, showing that a defendant addresses work orders and complaints in a timely fashion, does not equate to knowledge of a dangerous condition on the day of an accident or that a defendant failed to warn of such a condition. The plaintiffs still had a breach on contract claim against the homeowner's association. *Doyle v. Lonesome Development, Limited Liability Company, Nautilus Insurance Company, Natchez Trace Property Owners Association, Inc., Western World Insurance Company and Renaissance Property Management, a Division of Renaissance Realty Services, LLC*, 2017 CA 0787 (La. App. 1 Cir. 7/18/18), found at: *http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%200787%20Decision%20Appeal.pdf*.

INSURANCE

The UM carrier providing UM coverage for the plaintiff-vehicle is not a solidary obligor with the liability insurance carrier for the defendant-driver. Therefore, the timely filing of suit against the UM carrier did not serve to interrupt prescription as to the tortfeasor's motor vehicle liability carrier. *Johnson, et al. v. Foremost Insurance Company, et al.*, 18-C-406 (La. App. 5 Cir. 8/15/18), found at: *http://www.fifthcircuit.org/dmzdocs/WI/Writ%20Disposition/2018/077DA392-3FE1-4B54-82DF-13EDE86BFDB9.pdf*.

MEDICAL MALPRACTICE

Summary judgment in favor of hospital reversed. Plaintiff suffered a miscarriage after being admitted to the emergency room without seeing a physician and thereafter was diagnosed as having an ectopic pregnancy which required immediate surgery. The trial court abused its discretion in striking the affidavits of plaintiffs' experts which were filed along with plaintiffs' timely filed supplemental opposition to the motion for summary judgment. These affidavits created a genuine issue of material fact as to whether the hospital breached its standard of care. *Dufour v. The Schumacher Group of Louisiana, et al.*, 18-20 (La. App. 3 Cir. 8/1/18), found at: *http://la3circuit.org/Opinions/2018/08/080118/18-0020opi.pdf*.

A health care provider becomes enrolled in the PCF, and thus qualified, upon completion of the following: approval of an application, demonstration of financial responsibility to the satisfaction of the PCF, and payment of the applicable surcharge to the PCF. The health care provider must be qualified prior to the commission of the tortious act, not on the date a petition is filed. *Brimmer v. Eagle Family Dental Inc.*, 2017-CA-0951 (La. App. 4 Cir. 8/8/18), found at: *http://www.la4th.org/opinion/2017/450988.pdf*.

NEGLIGENCE

Summary judgment in favor of grocery store reversed. Plaintiff slipped on a clear liquid on the floor. Plaintiff presented evidence establishing that a clear, liquid substance was present on the aisle prior to her fall, that she was on that aisle for approximately 10 minutes before she slipped and fell, and that during that time no one else was on the aisle with her. Further, the liquid was not found on a section of the aisle where similar products were located, leading to the inference that it did not spill while plaintiff was shopping on that aisle. This presented a genuine issue of material fact as to the period of time the liquid was on the floor and whether such period was sufficient to constitute constructive notice of the hazardous condition. *Foto v. Rouse's Enterprises, LLC*, 2017 CA 1601 (La. App. 1 Cir. 8/6/18), found at:

http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%201601%20Decision%20Appeal.pdf.

After a tractor-trailer driver heard a loud bang, he continued driving for two miles and then performed a "wiggle" maneuver to wiggle the trailer so he could see the tires out his rear-view mirrors to determine whether he had suffered a blowout. The following driver died when debris from the tire struck his vehicle and caused him to run off the road. Jury found tractor-trailer driver 10% at fault and the driver's employer 90% at fault for using a defective tire. Trial court granted plaintiff's motion for JNOV and increased the general damage award in the survival action from $50,000 to $150,000. The decedent survived the accident impact for approximately 25-35 minutes. Lower court judgment affirmed. *Mouton, et al. v. AAA Cooper Transportation, et al.*, 17-666 c/w *Mouton v. AAA Cooper Transportation, et al.*, 17-667 (La. App. 3 Cir. 7/18/18), found at:
http://la3circuit.org/Opinions/2018/07/071818/17-0666opi.pdf.

TORTS

The state has a right of action under LUPTA to bring claims against a pharmaceutical company. However, the State did not have a right of action under LUPTA in this case because all of the alleged various acts of misconduct occurred between 2000 and 2005, prior to the 2006 amendment that added civil penalties and restitution as potential relief in LUPTA cases. In deciding that issue, the court of appeal did not address whether the State could seek civil penalties or restitution without having sought injunctive relief pursuant to La. Rev. Stat. 51:1407(A). Further, the State did not have a cause of action under the Louisiana Monopolies Act, even though the State alleged that defendants' actions affected commerce within Louisiana and defendant sold the product in Louisiana, because the wrongful acts (patent infringement) occurred outside the geographic boundaries of Louisiana. In addition, the State failed to state a cause of action for unjust enrichment because unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided. Finally, the court pretermitted any discussion as to whether the State had a right of action as an indirect purchaser of the prescription drug at issue. Trial court judgment overruling defendants' peremptory exceptions of no cause of action as to the State's Louisiana Unfair Trade Practices claim, its Louisiana Monopolies Act claim, and its unjust enrichment claim was reversed. *State of Louisiana, by and through its Attorney General James Caldwell v. Fournier Industrie et Sante and Laboratories Fournier, S.A., Abbott Laboratories, AbbVie, Inc.*, 2017 CA 1552, 2017 CW 1218 (La. App. 1 Cir. 8/3/18), found at:
http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%201552%20Decision%20Appeal.pdf.

Trial court granted defendants' motion for summary judgment, dismissing plaintiffs' claims that decedent's cancer and death were caused by exposure to radioactive dust, due to a lack of proof of medical causation because decedent was a lifelong smoker. The trial court excluded the testimony of plaintiffs' expert toxicologist because she was not a medical doctor. The court of appeal reversed because the trial court did not conduct a *Daubert* analysis of any kind, and the exclusion of the expert's evidence without an evaluation of the relevant reliability factors was legal error; therefore, the court of appeal must accept the opinion of that witness. The expert testified that decedent's radiation exposure increased his risk of lung cancer and this opinion was

not contradicted by any medical doctor. This testimony created a genuine issue of material fact as to whether decedent's exposure to radioactive dust was a factor in causing his lung cancer. Summary judgment in favor of defendants reversed. *Hickman v. Exxon Mobil Corporation, Exxon Mobil Oil Corporation, Humble Oil & Refining Company, Humble Oil & Refining Corporation, Chevron USA, Inc., BP Corporation North America, Inc., The Texas Company, Devon Energy Production Company, LP., Dynamic Exploration, Inc., ConocoPhillips Company, Shell Oil Company, Marathon Oil Company, Sunset Petroleum, Stone Oil Company of Baton Rouge and Al Cunningham*, 2017 CA 0235 (La. App. 1 Cir. 7/18/18), found at: *http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%200235%20Decision%20Appeal.pdf*.

In a class action involving alleged violations of the Health Care Consumer Billing and Disclosure Protection Act, the insurer's liability was based on a breach of contract theory for which La. C.C. art. 3499 provides a ten year prescriptive period. Plaintiff alleged that he had a relationship with the insurer based on its administration of an insurance policy under which he was insured, that the the insurer made promises that contracted health care providers would file claims with the health insurance issuer and/or would accept the contracted reimbursement rate from the health insurance issuer, and/or would collect from the enrollee or insured only any deductive, co-payment, co-insurance or other amounts as set forth in the policy of insurance as the insured's liability, all of which was an object of the contract between the insured and insurer. Trial court judgment granting insurer's exception of prescription was reversed. *DePhillips, Individually and on behalf of others similarly situated v. Hospital Service District No. 1 of Tangipahoa Parish, doing business as North Oaks Medical Center/North Oaks Health System*, 2017 CA 1425 c/w *Williams, Individually and on behalf of all others similarly situated v. Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Health System and North Oaks Medical Center, and Louisiana Health Service & Indemnity Company d/b/a Blue Cross Blue Shield of Louisiana*, 2017 CA 1426 (La. App. 1 Cir. 7/18/18), found at: *http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%201425%20Decision%20Appeal.pdf*.

The subsequent purchaser rule is a jurisprudential rule which provides that a property owner "has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted." This rule applies to mineral leases. Further, a mineral lease does not create a real right which runs with the land and does not enable a landowner to sue for property damage. In the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively. Further, the mineral lease does not burden the lessee with a real obligation to restore property in favor of the landowner. Although a mineral lease is a real right under La. Rev. Stat. 31:16, it is not purely a real right that automatically attaches to the property. Finally, plaintiff sought and obtained a number of assignments from previous owners in an attempt to comply with the subsequent purchaser rule. One of the assignors was from a dissolved corporation incapable of assigning claims. The other assignment was obtained after plaintiff filed its original petition and plaintiff did not file its "First Amended Petition for Damages" asserting these assigned claims until 6 years after the original petition was filed. This was a supplemental

rather than amending petition and did not relate back to the original filing. Lastly, it is impossible to transfer rights to an assignee under an expired mineral lease. Summary judgment in favor of defendants affirmed. *Grace Ranch, LLC v. BP America Production Company, et al.*, 17-1144 (La. App. 3 Cir. 7/18/18), found at:
http://la3circuit.org/Opinions/2018/07/071818/17-1144opi.pdf.

WORKERS' COMPENSATION

School board argued that the enactment of the medical treatment guidelines in 2006 gave the WCJ authority to modify a prior judgment and that a 1997 judgment should be modified to state that any orders by claimant's health care providers must be submitted to the carrier for pre-authorization in accordance with the utilization review procedures. The WCJ denied the request of the school board to review each item adjudicated in the 1997 judgment again for medical necessity and reasonableness, but ordered that any requests for items not adjudicated in the 1997 judgment would be subject to the medical treatment guidelines. The court of appeal found that the WCJ properly refused to modify the judgment to apply the medical treatment guidelines to the 20 items identified in the 1997 judgment because they had already been determined to be medically reasonable and necessary and the application of the medical treatment guidelines to modify those items would constitute an impermissible retroactive application of La. Rev. Stat. 23:1203.1. Further, the claimant had not made a "new claim" for treatment falling outside the scope of the 1997 judgment. As such, the school board's remedy would be to file an application for a modification of the medical benefits award based on a change of condition. Claimant attacked language in the recent WCJ judgment requiring that for the 20 items adjudicated in the 1997 judgment, she or her healthcare provider must submit bills and expenses to the school board so that it may make adjustments according to the Reimbursement Schedule and make payments directly to the healthcare provider. The court of appeal found that, as the Reimbursement Schedule was enacted prior to the 1997 judgment, it could not be considered a substantive change in the 1997 judgment and could apply. However, the court of appeal found that the portion of the judgment decreeing in effect that the Reimbursement Schedule did not apply to any of the adjudicated items where no healthcare provider was involved was overbroad, and that the school board was entitled to adjust the cost of these items pursuant to the Reimbursement Schedule. *LaFourche Parish School Board v. Rodrigue*, 2017 CA 0296 (La. App. 1 Cir. 7/18/18), found at:
http://www.la-fcca.org/opiniongrid/opinionpdf/2017%20CA%200296%20Decision%20Appeal.pdf.

YOUNG LAWYERS' REPORT

HEY, YOUNG LAWYERS, BE MORE THAN A NAME ON A MEMBERSHIP LIST: AN OPEN LETTER TO FELLOW YOUNG LAWYERS

By Amber B. Barlow of Kuchler Polk Weiner, LLC

Dear Young Lawyers,

As it typically happens, we as young lawyers pass the bar, get hired on at a firm, and join several professional organizations, usually ones pushed by their law firm or their senior partner's favorite. But there is much more benefit and opportunity to joining these organizations than most

realize that I would like to share. Being a member of LADC has specifically benefited not only me personally, but professionally. For example, LADC provides its members opportunities to attend CLEs, networking, getting your name out in the legal community, publication opportunities, building leadership and collaboration skills, exploring new practice areas, and learning new, current, relevant topics in your own practice areas. So if you are going to join a professional organization, LADC has much to offer, and many young lawyers should take full advantage of the membership. I encourage you to be more than just a name on a membership list.

ATTEND CLES

Attending CLEs targeted to your area of practice provides many opportunities and is a treasure trove in and of itself. For example, not only are you able to learn new, innovative concepts specific to your practice area, attending the CLEs gives a chance to network and meet with other practitioners around the country practicing in the same areas. As you advance in your practice area and take on more leadership roles within your firm, the benefit from talking with other attorneys outside your firm and immersing yourself in the subject area outside of the day-to-day grind of practice is invaluable. Sometimes stepping away from your desk and engaging in conversation with other attorneys practicing in similar areas provides a time to learn new, creative methods and concepts to handle issues you have faced in your practice or may face in the future.

Not only are you able to attend CLEs targeted to your practice area, but you have the ability to attend so many CLEs that are targeted to a new practice area that you may be interested in learning and developing. DRI CLEs have a vast array of speakers and experts on specific topics in the law and the happy hours and dine arounds allow the perfect opportunity to discuss these matters with the best of the best. Attending CLEs, whether specific to your practice area or a new practice area, allows you to explore other practice areas and find your niche in your legal career. After all, there are always new things to learn and new areas to explore.

NETWORKING

A second major benefit to being active in LADC is all the networking opportunities. Of course, attending CLEs provides a great opportunity for networking, but this is not the only way networking takes place within LADC. For example, there are many committees and forums available within the organization which puts its members in touch with one another and promotes professional connections. Who would not want access at their fingertips to collaboration efforts with other smart, talented attorneys around the country?

As many young lawyers quickly learn, it is important to get your name out in the legal community. To grow a book of business, others in the community need to know your name and know your talent. The best way to work on your name recognition is to immerse yourself in organizations where others are able to see your work ethic, talents, and character. In several years, you will be the lawyers they are calling on when they have a referral, are in-house counsel, or need a good lawyer in your state.

BUILDING AND DEVELOPING SKILLS

Being an active member of LADC means you are able to serve on committees, work with focus groups, and be given publication opportunities. Each of these presents opportunity to build, develop, and polish your own skills set. For example, serving on one of the many committees

LADC has to offer allows you to work with others towards a common goal. Working with others, solving problems, building creativity, and communication are tools that you, as a young lawyer, will need in your own practice and certainly within your own firm. As you advance in your practice and in your firm, new leadership roles may present themselves. You will be able to use the skills and tools you have sharpened through LADC activities to bring into your own professional realm to benefit yourself, your firm, and your clients.
Publication opportunities also give young lawyers an opportunity to further use their research and writing skills. As we all know, research and writing are key components to being a good, well sought after practitioner and any time you are able to work on these skills will benefit you and your practice.

Last, sometimes, as a young lawyer, it can be difficult to find yourself, your confidence, and your voice. Most times, you are thrust into a busy trial docket with seasoned attorneys and speaking up and asserting your own ideas about the work may seem overwhelming and timid. However, working and collaborating with other attorneys through LADC helps many young lawyers develop their own voice and confidence in their ideas, creativity, and talents. Speaking up on projects and assignments through LADC will help to mold those abilities to speak up and have a confident, respectable voice in your own firm, with your own partners, in your own practice. These skills are long-lasting and crucial to your development and professional reputation.

Sincerely,
A Fellow Young Lawyer Benefiting from Membership in LADC

Amber B. Barlow is an Associate Attorney with the New Orleans office of Kuchler Polk Weiner, LLC, where she practices in the areas of toxic tort litigation focusing on products and premises liability and environmental litigation. She received her law degree from the Mississippi College School of Law in 2012, and is admitted to practice in all state and federal courts in Louisiana. Ms. Barlow can be reached at abarlow@kuchlerpolk.com.

COMPQUANTUM QUANTUM REPORT

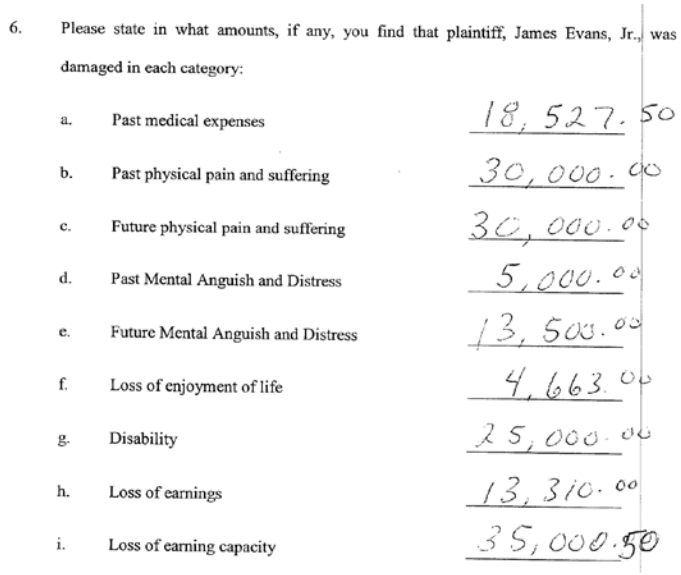
By Eric Johnson of *CompQuantum*

Kristin Loup "was falsely accused of a crime, arrested without probable cause, and subjected to such extreme temperatures at the Ascension Parish Jail that she developed the beginning stages of frost bite" in violation of her constitutional rights and "entitling her to damages under 42 USCA §1983." *Loupe v. O'Bannon*, 14-00573 (USDC-MDLA 08/07/18). Or so she alleged. A USDC-MDLA jury did not concur. Ascension Parish officials, Sheriff Jeff Wiley, his deputy, District Attorney Ricky Babin and his assistant, had not denied her "basic human needs" while detaining Ms. Loup on January 24, 2014.

Apparently Ms. Babin testified at a bond reduction hearing on behalf of her boyfriend who was facing prosecution on an attempted murder charge. The DA explained in the federal court Status Report that Ms. Loup's testimony contradicted complaints lodged with the police about domestic abuse, thus providing probable cause for an arrest.

Perhaps only Louisiana Farm Bureau was completely satisfied with the jury verdict in *Zatarain v. Burt*, 115,450 c/w 116,420 (23rd JDC 08/17/18). That's not to say Michael Zatarain and Angela Oncale went uncompensated or that John Burt was vindicated for physical and mental damages he was found to have intentionally caused. Ms. Oncale's general damage award of $235,000 falls within the range for cervical injury, future four level fusion and PTSD and Mr. Zatarain's $75,000 for PTSD was not inconsequential. And Mr. Burt's entire liability, with interest, exceeding $500,000 will negatively impact the balance sheet. But neither side achieved a complete victory in litigation over the defendant's domestic dispute fueled road rage incident with his estranged wife and her friend. Meanwhile, Farm Bureau owes nothing, having prevailed on their intentional act exclusion coverage defense.

One could make a parlor game out of speculating on the logic of jury answers to some verdict form interrogatories. For example, consider this from *Evans v. Lobdell Wrecking Service*, 657,648 (19th JDC 08/17/18):



6. Please state in what amounts, if any, you find that plaintiff, James Evans, Jr., was damaged in each category:

a.	Past medical expenses	18,527.50
b.	Past physical pain and suffering	30,000.00
c.	Future physical pain and suffering	30,000.00
d.	Past Mental Anguish and Distress	5,000.00
e.	Future Mental Anguish and Distress	13,500.00
f.	Loss of enjoyment of life	4,663.00
g.	Disability	25,000.00
h.	Loss of earnings	13,310.00
i.	Loss of earning capacity	35,000.50

There may be a reasonable explanation for why 73% of Mr. Evans' mental anguish and distress still lies ahead of him even though the physical pain is evenly distributed, but the hedonistic measure of loss has a peculiar, logic defying precision. Some actions have the primary effect of making observers ask questions.

Reporting on *Spann v. Gerry Lane Enterprises, Inc.*, 2016-0793 (La.App. 1 Cir. 08/24/18), at the CompQuantum Law Blog in *An Issue Laden Opinion*, I tried to avoid editorial comment on the propriety of plaintiff's "clear violation" of a consent order. While the characterization comes in Judge McDonald's dissent, the trial judge admitted plaintiff's expert discovery "troubles the court" and the majority didn't distance its view of the matter from Judge McDonald's description. I can sympathize with a plaintiff needing to salvage her claim from dismissal on summary judgment, but the precedent of disregarding an agreed discovery protocol with impunity at the trial and appellate levels is, indeed, troubling.

The net result, following a series of indulgences favoring the plaintiff and a major reversal on quantum, yielded a marginal defeat for the defense at the First Circuit. The reduction of Judge Johnson's $700,000 increase of general damages, from the jury award of $25,000, to a "highest reasonable amount" of $125,000 is somewhat enigmatic. Had it been a *de novo* assessment, the explanation based on plaintiff's generally favorable recovery would be sufficient. But to say that $125,000 is the maximum permissible for multiple facial fractures, three vertebral fractures, a wrist fracture and an elbow avulsion fracture treated with reconstructive surgeries on the face

and wrist surgery, seems to be a stretch. There is, at least, a low probability of any court having to address a similar constellation of injuries in the near future.

One might infer from Judge Giarrusso's written reasons in *Williams v. Liberty Mut. Ins. Co.*, 2015-4019 (Civil District Court 07/18/18), that a narrative accounting for his defeat was more explanation than the plaintiff deserved. In clipped fashion - I imagine a terse reading for performance purposes - she enumerates five reasons why the defendant was more credible. She begins with: "1. A picture is worth a thousand words. There is no damage to Ms. Lewis' car." Items 2-5 continue in similar fashion and brevity.

If there is a category for results that place plaintiffs within reach of retirement or a high performance Italian motorcar, but not both, a St. Bernard Parish bench trial judgment does just that (subject to appeal). In *McClosky v. Higman Barge Line, Inc.*, 14-1303 (34th JDC 08/02/18), Judge Buckley's quantum assessments in favor of four plaintiffs included the following for general damages:

- $1,900,000 - Cervical discectomy and three level fusion; lumbar fusion and future surgery; shoulder injuries with pre-trial surgery on the left and recommended surgery on the right
- $1,600,000 - Aggravation of pre-existing herniations at L3-4 and L4-5 and new herniation at L2-3 treated with three level fusion; and two level ACDF at C5-6 and C6-7
- $500,000 - Lumbar disc injury and single level fusion followed by successful emergency surgery to address complications with permanent restriction; and scalp and ear lacerations from broken glass
- $350,000 - Shoulder and knee re-injuries requiring post-accident surgeries on joints that had been surgically repaired prior to the accident.

Of course, the least of these will have to make do with domestic options unless they intend to skip oil changes.

We stay in St. Bernard Parish with a property damage appeal of quantum for the loss of oyster beds. *Cibilic v. Cox Operating, L.L.C.*, 2017-0813 (La.App. 4 Cir. 06/06/18). Having barged bleary eyed out of Hopedale to sobering stints logging wells in Eloi Bay, this case reminded me of grease and grime and ashtrays overflowing with cigarette butts, desperately chain smoking as the trick to staying awake long enough to avoid disaster. But, perhaps I'm just projecting. Anyway, that was a long time ago and I'm sure today's operators are consummate professionals whose activities were an unavoidable contributor to the destruction of Pero and Mary Ann Cibilic's Eloi Bay oyster lease. Regardless, the Fourth Circuit affirmed a finding that defendant's workover operations caused the damage, but reduced plaintiff's award from $5,140,759.70 to $3,001,650.00.

For a case study on merchant liability, *see* *Constructive notice - 10 minutes to a triable fact under La. R.S. § 9:2800.6* analyzing reversal of a defense summary judgment in *Foto v. Rouse's Enterprises, LLC*, 2017-1601 (La.App. 1 Cir. 08/06/18).

OTHER RECENT TRIAL AND APPELLATE POSTINGS AT COMPQUANTUM

Broussard v. State Farm Mut. Auto. Ins. Co., 2016-1422 (15th JDC 07/17/18) - Defense judgment after trial court previously denied motion for summary judgment in MVA case.

Brown v. Remble, 658,432 (19th JDC 07/12/18) - General damages of $40,000 for four month cervical soft-tissue injury and "permanently disfiguring" lump in breast caused by accident.

Bourg v. Contreary, 715,013 (24th JDC 08/03/18) - med-mal defense bench trial judgment

Dean v. Sea Supply, Inc., 2016-14254 (USDC-EDLA 07/13/18) - Jones Act clip and fall defense judgment.

Dufour v. The Schumacher Group of Louisiana, Inc., 2018-0020 (*La.App. 3 Cir.* 08/01/18) - reversing a med-mal defense summary judgment

Doty v. GoAuto Ins. Co., 2018-0055 (La.App. 3 Cir. 07/05/18) - $65,000 *LeJeune* damages awarded to wife for witnessing injuries to husband hit by vehicle Im mall parking lot. Damages recoverable under separate policy limit from husband's claim.

Floyd v. Chung, 2014-1851 (14th JDC 07/10/18) - Bench trial med-mal defense judgment.

Hickman v. Exxon Mobil Corp., 2017-0235 (La.App. 1 Cir. 07/18/18) - Toxic tort defense summary judgment reversed.

Hoddinott v. Hoiddinott, 2017-0841 (La.App. 4 Cir. 08/01/18) - reversing a defense dismissal on exception of *res judicata* in a domestic violence civil suit.

Huval v. The Louisiana State University Police Dept., 2016-00553 (USDC-MDLA 07/20/18) - $25,000 general damages for TMJ injury, cervical strain, severe emotional distress, electrical shock from Taser. Plaintiff was injured outside the Chimes on Highland Road in Baton Rouge. He, his wife and his brother - a Louisiana State Trooper, were waiting for ride when confronted by BRPD officers.

Latulippe v. Braun, 2018-0083 (*La.App. 5 Cir.* 08/10/18) - General damage awards of $200,000 for thoracic herniation that could not reasonably be treated with surgery due to potential complications and cervical herniations with only the possibility of future two level fusion and $150,000 for cervical and lumbar bulging/protrusion treated conservatively.

Sims v. Vides, 767,734 (24th JDC 07/23/18) - Jury trial defense judgment on fault in motor vehicle accident.

Shields v. The Parish of Jefferson, 701,815 (24th JDC 08/07/18) - The trial judge granted plaintiff's motion for new trial after earlier involuntary dismissal for failure to appear at trial.

Stenzel v. GEICO Gen. Ins. Co., 762,318 (24th JDC 07/11/18) - $32,000 general damages for wrist injury with remaining embedded "shrapnel" and knee and ankle soft-tissue injuries with significant bruising and residual pain.

Turk v. Broome, 2015-12945 (22nd JDC 07/03/18) - Involuntary dismissal at close of plaintiff's case in chief.

Vallejos v. USAA General Indemnity Co., 2016-9368 (Civil District Court 08/03/18) - Defense judgment on finding that plaintiff failed to prove fault on contradictory accounts of details surrounding MVA.

UPSTATE
MEDIATION GROUP

Resolving Disputes in Central and Northern Louisiana

616 Front Street
Natchitoches, LA 71457

Natchitoches (318) 352-2302

1818 Avenue of America
Monroe, LA 71201

Monroe (318)325-3200