

# Around

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# the Bar

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**2017 BRBA President**  
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On the cover:

Karli Glascock Johnson will be sworn in as the 88th president of the Baton Rouge Bar Association Wednesday, Jan. 11, 2017, at the U.S. District Court for the Middle District of Louisiana.

Photographed outside of their home are (L to R, standing) Murphy Johnson, Scott Johnson, Karli Glascock Johnson, Tanner Wilson; (L to R, seated) Ally (dog), Rose Johnson and Cecile Johnson.

Cover photography by Pamela Labbe.

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VOLUNTEERS ARE NEEDED TO HELP WITH THE REGION III HIGH SCHOOL

# MOCK TRIAL COMPETITION

*We need judges, timekeepers and competition judges  
for Friday, Feb. 17, and Saturday, Feb. 18.*

*To volunteer or for more information, please contact  
Lynn S. Haynes at [lynn@brba.org](mailto:lynn@brba.org) or 225-214-5564.*

5) There will be no excess liability for the PCF.

Having an unenrolled health-care provider as a defendant will inevitably create important procedural issues after the lawsuit is filed. Practitioners need to be aware of these potential pitfalls.

Prior to the lawsuit being filed, the plaintiff and his attorney have no ability to conduct any discovery, which is available to the parties while the case is pending before the medical-review panel. After the lawsuit is filed, the defendant hospital will file an answer and will likely send written discovery to the plaintiff asking whether an expert has been retained to address liability and/or causation issues. If the answers to those questions are “no,” the hospital will consider filing a motion for summary judgment seeking to have the lawsuit dismissed with prejudice.

To combat an aggressive defense of an un-enrolled health-care provider, practitioners should consider one or more of these suggested actions:

- 1) Propound written discovery and have it served with the petition;
- 2) As soon as counsel for the defendant sends a letter of representation or files an answer, request depositions of key fact witnesses;
- 3) Relying on La. C.C.P. art 966A(3), which provides that “after an opportunity for adequate discovery,” ask the trial judge to set a specific period for discovery and a date after that period of discovery for dispositive motions;
- 4) Have the case reviewed by a medical expert before it is filed, so that you can disclose your experts in the responses to the initial discovery propounded by the defendants; and
- 5) Schedule face-to-face meetings with subsequent treating physicians to determine whether they are willing to provide causation testimony.

The decision to leave the medical-review panel system, with the many benefits provided to health-care providers, is a bold one. Being self-insured and having uncapped liability may seem ludicrous, but it may make complete financial sense to a health-care provider such as a hospital. Is it a trend or an aberration? Only time will tell, but we need to be prepared and ready to adapt with a different approach to a more traditional litigation track for medical malpractice cases. ■

<sup>1</sup> La. R.S. 40:1231.1, *et seq.* (formerly La. R.S. 40:1299.41, *et seq.*)

<sup>2</sup> La. R.S. 40:1237.1, *et seq.* (formerly La. R.S. 40:1299.39, *et seq.*)

<sup>3</sup> La. Patient’s Compensation Fund.

## NEGLIGENT CREDENTIALING:

# The negligent credentialing claim that evaded the LMMA

BY JUDY GIORLANDO, CARROLL DEVILLIER & DANIELLE L. BOREL

On Oct. 19, 2016, the Louisiana Supreme Court rendered a decision that alters the landscape of medical malpractice litigation for health-care providers. In *Billeaudeau v. Opelousas General Hospital Authority*,<sup>1</sup> the court held that the plaintiffs’ claim for negligent credentialing against a hospital did not fall within the purview of the Louisiana Medical Malpractice Act (LMMA). Therefore, the claim for negligent credentialing was not subject to review by a medical review panel nor the limitations of liability under the LMMA.

The *Billeaudeau* matter initially arose out of treatment rendered by Dr. Kondilo Skirlis Zavala, an independent contractor of Opelousas General Hospital (OGH), to Brandi Billeaudeau. Dr. Zavala was a physician working in OGH’s emergency department. Plaintiffs (Brandi and her parents) collectively filed suit against OGH asserting that OGH was negligent for the following reasons:

- a. Failure to develop and/or implement adequate policies and procedures to competently address stroke and/or administration of tPA, a treatment for stroke victims;
- b. Failure to distribute its written stroke and/or tPA protocol to Dr. Zavala, the treating physician in the hospital’s emergency department;
- c. Failure to ensure that Dr. Zavala had reviewed and accepted the hospital’s written stroke and/or tPA protocol;
- d. Failure to supervise Dr. Zavala; and
- e. Negligent credentialing of Dr. Zavala.

Thus, in addition to the complaints about the care Brandi received, plaintiffs alleged “negligent credentialing.” Specifically, plaintiffs asserted that Dr. Zavala was not qualified to be credentialed by OGH under OGH’s credentials policies.

Plaintiffs filed a motion for partial summary judgment “asking the District Court to declare [that] their claim against OGH for negligent credentialing was not subject to the terms of the LMMA, including the cap on damages found in La. Rev. Stat. § 40:1231.2(B)(1).”<sup>2</sup> The dispute

centered around the LMMA’s definition of “malpractice,” found at La. R.S. 40:1299.41(A)(8), and whether negligent credentialing was included. Plaintiffs argued that their negligent credentialing claim arose from a breach of La. R.S. 40:2114, which obligates hospitals to establish and regulate staff membership and clinical privileges. Plaintiffs further argued that La. R.S. 40:2114 was housed by a statutory regime separate from the LMMA, and thus was not susceptible to the limitations of the LMMA. OGH opposed the plaintiffs’ motion and argument, asserting that the suit at hand should not be construed more broadly than a medical malpractice claim. The trial court granted the plaintiffs’ motion for summary judgment, a decision that was affirmed by the Louisiana Third Circuit Court of Appeal.

The Louisiana Supreme Court’s holding — agreeing with the plaintiffs’ position — was ultimately rooted in the application of the *Coleman v. Deno* factors, six factors that assist courts with determining whether certain conduct by a qualified health-care provider constitutes “malpractice” under the LMMA.<sup>3</sup> Importantly, in assessing the six factors, the court found that the decision to hire this physician was *administrative* and not directly related to patient treatment or dereliction of professional skill. Also, expert medical evidence would not be necessary to establish the alleged wrong. Based on these findings, the plaintiffs’ negligent credentialing claim was deemed not subjected to the limitation on liability under the LMMA

and was allowed to remain before the trial court while the corresponding claims of medical malpractice were pending before the medical-review panel.

Interestingly, the court did not discuss the legislative history of the LMMA in its analysis, as was discussed in detail by the trial court. Also, the court did not analyze prior negligent credentialing decisions, such as *Plaisance v. Our Lady of Lourdes Regional Medical Center, Inc.*, where the court held that the plaintiffs’ “negligent credentialing” claim fell within the purview of the LMMA after it conducted an analysis of the *Coleman* factors.<sup>4</sup> Rather, the court dismissed those decisions as distinguishable based on their “mixed allegations of negligent credentialing and supervision or strictly negligent supervision claims,” the latter of which falls under the LMMA.

Health-care providers now face an increased and uncapped liability. Practically, this decision will allow plaintiffs who assert medical malpractice claims to simultaneously litigate against a health-care provider in a trial court if negligent credentialing is also asserted. No doubt, the uncapped liability for the independent claim of negligent credentialing will impact medical malpractice suits and health-care liability policies. ■

<sup>1</sup> 16-0846 (La. 10/19/16), 2016 WL 6123862.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> 01-1517 (La. 1/25/02), 813 So. 2d 303, 307.

<sup>4</sup> 10-348 (La. App. 3 Cir. 10/6/10), 47 So. 3d 17, 22.

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