THE BAR REVIEW

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EVENTS AT A GLANCE

1/27 SBA Membership Luncheon
12:00 p.m. - Petroleum Club

2/24 SBA Membership Luncheon
12:00 p.m. - Petroleum Club

From The President

by Donna Frazier, dfrazier@caddo.org

Wow! I seem to be incapable of forming any other sentiment to express the delight and wonder I feel at being selected to serve as Shreveport Bar Association president. I am extremely honored to have been chosen to serve as president for the 2021 calendar year. It is no easy feat to follow in the footsteps of Tom Arceneaux and Curtis Joseph. Moreover, as Tom knows, it is no easy feat to lead during a pandemic that has totally changed the way we move and function in our daily lives. Please know that I, and the rest of the bar leadership, will be relying upon you, the members, to help the bar to continue to operate smoothly and to thrive during these times.

While most of the bar presidents seem to have been Shreveport natives, I came to Shreveport from Tallulah, Louisiana, in Madison Parish, by way of Texas. After earning my B.A. at LSU and my J.D. at the University of Texas School of Law, I came to Shreveport to serve as a law clerk to now-retired Chief Judge Felicia Toney Williams of the Second Circuit Court of Appeal. From there, I worked as an assistant district attorney under Paul J. Carmouche, serving the community in that capacity for eight years. I would then go on to be Charles Grubb's assistant parish attorney. It was during this time that Charles encouraged me to become more active in the Shreveport Bar Association, as well as the American Bar Association.

I took his encouragement to heart. Prior to the past two years of service on the Executive Council of the Shreveport Bar, I previously served as its secretary/treasurer, and in the American Bar Association, I became very active in the Section of State and Local Government Law, eventually becoming chair of that Section. I am now serving on the council of the Government and Public Sector Lawyers' Division of the ABA. After Charles's retirement as Caddo Parish Attorney, I was appointed to the role, and I currently serve in that capacity.

My path to a legal career was … interesting. It started like a lot of things in life – with teenage rebellion. My parents are educators (both now retired), and they firmly believed that an education degree and teaching certificate were necessities of life. I therefore determined that under no circumstance would I ever become a teacher. In addition to telling me that I needed to look at education as a career, when I was in junior high school, my parents opened a neighborhood corner store. Guess who started a part-time job with which she was not enamored? Yes, that would be ME.

After a few years of working in the store, I gathered enough courage to tell my parents that I did not want to work in the store any longer. Their response was, "You don't have to work for us, but you have to work somewhere." Armed with an "A" average in my typing class (yes, young lawyers, that was actually a thing), I started looking around for a place that needed clerical help after school. Factor into all of this taking the ASVAB. The ASVAB is a military aptitude test, but at that time, our high school guidance counselor had everyone take, whether you planned to join the military or not, so we students could see what careers best fit our interests and abilities. My strongest two career matches were lawyer and, as fate would have it, teacher. Well, because you know the theme here, you know I decided, at that moment, that I would become a lawyer. It was during this time, when I was *still* looking for a new part-time job (that was not under the parental thumb), that I figured I needed to find a law office.
Luckily, my grade-school friend Rhonda Williams's parents were attorneys and had their own firm, Williams & Williams. I asked Rhonda's dad, Moses J. Williams, and his wife (who just happens to be now-retired Second Circuit Chief Judge Felicia T. Williams), if I could work for them in the afternoons after school. They took pity upon me and allowed me to help with filing and typing – and even paid me! The opportunity to have an up-close and personal view of what lawyers do cemented my decision to become one and the rest, as they say, is history.

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HAPPY NEW YEAR SBA!

2021

SBA Membership Renewal Forms have been mailed. Please renew by February 28, 2021

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Ironically, since I've been an attorney, I've taught collegiate courses at both LSUS and the University of Phoenix at various times. Apparently, God has a sense of humor.

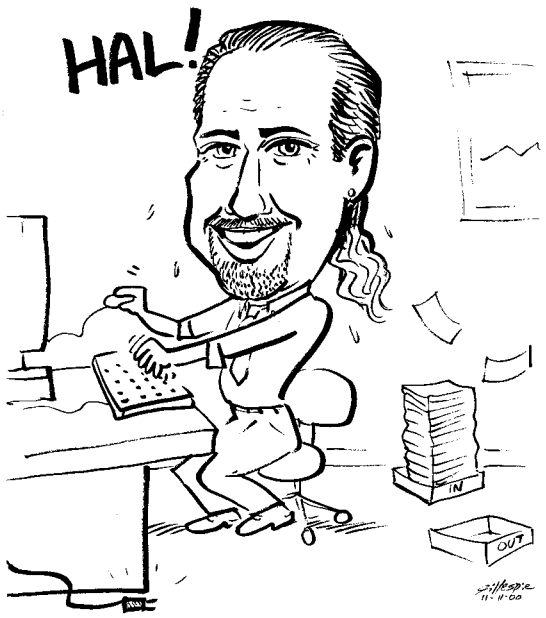
"Although there is uncertainty associated with living in a pandemic, rest assured that the plan for the SHREVEPORT BAR is to continue to give our members GREAT VALUE for their money."

The incomparable Dana Southern, without whom I would not even consider doing this job, will still be our executive director and be handling the bar's day-to-day operations. Additionally, we will continue to have great monthly luncheon programs while following all pandemic executive orders. And while the Judges Pitman have retired as CLE co-chairs, Magistrate Judge Mark Hornsby and Attorney Jim McMichael have agreed to pick up where the Pitmans left off. I would be remiss if I did not thank Judge Michael and Judge Frances Pitman for all the great CLE programs they have brought to the bar over the years. We will also have some joint programs with the Booth-Politz Inn of Court and the Shreveport Bar Foundation and hopefully, by late spring/early summer, we will back to a fully normal programming schedule.

I am really looking forward to the 2021 bar year, and I hope you are as well. Thank you for allowing me to serve as your 2021 Shreveport Bar Association president.

How Write You Are

by Hal Odom Jr., rhodom@la2nd.org



I reject this, with contempt! An appellate opinion recently stated, in its opening paragraph: "A dispute arose regarding alleged mismanagement of the project which *spurned* plaintiffs to file a lawsuit." *ERG Enters. LLC v. Green Coast Enters. LLC*, 2019-1104 (La. App. 4 Cir. 5/13/20), 299 So. 3d 1194. A district court judge chimed in earlier: "Plaintiff is proposing to add claims related to Data Breach, which has *spurned* hundreds of other lawsuits." *Iraheta v. Equifax Info. Servs. LLC*, 2018 WL 3770295 (W.D. La. 1/10/18).

The word used, *spurn*, means to *reject*, especially with contempt or disdain. The Supreme Court has used it correctly: "Congress, moreover, has *spurned* multiple opportunities to reverse *Brulotte*, * * * and has even rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the standard Kimble urges." *Kimble v. Marvel Entm't LLC*, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015). Mere failure to act on a given measure could always be ascribed to Congressional inertia or gridlock, but rejecting a bill is a conscious decision to spurn it.

The word intended was surely *spur*, which means to *activate* or *incite*. It's a figurative sense of using a *spur* on a horse, to make him start running. "[T]he jury could have rationally concluded that defendant's intoxication either *spurred* his aggressive behavior, resulted in his refusal to withdraw from a dangerous situation, or both." *State v. Leger*, 17-2084 (La. 6/26/19), 284 So. 3d 609. "[T]he program is an attempt on the part of the City to build new streets in an effort to *spur* economic growth[.]" *City of New Roads v. Pointe Coupee Parish Police Jury*, 2014-0179 (La. App. 1 Cir. 4/24/15), 167 So. 3d 1068.

Don't spurn the right word choice. Think of it as an occasion to spur some good writing.

Spell Check is egalitarian. The word for *equality of status* or *equivalence in value* is *parity*. "Interim support preserves *parity* in the levels of maintenance and support and avoids unnecessary financial dislocation until a final determination of support can be made." *Rodriguez v. Rodriguez*, 2020-0171 (La. App. 1 Cir. 11/6/20), 2020 WL 6543235.

However, the word is very similar to the much more frequent word for *plaintiff and defendant*. Consider: "There is no ruling on the obligation of the *parities* under the servitude, or the right to construct a circular driveway." *Ventura v. Vogel*, 10-118 (La. App. 5 Cir. 6/14/11), 70 So. 3d 939. "We have reviewed the Report and Recommendation as well as the briefs of the *parities* * * * and we are satisfied beyond cavil that the judgment of the district court should be – and hereby is – affirmed." *Leaf v. Astrue*, 413 Fed. Appx. 724 (5 Cir. 2011).

In both cases, the courts meant *parties*, but if your typo is a real word, Spell Check won't catch it! One court, however, has wielded the editorial pencil: "The LOI states that it is a 'non-binding framework to further the discussions towards a consulting arrangement between the parities [*sic*].'" *Arc Industries LLC v. Nungesser*, 2017-704 (La. App. 3 Cir. 3/17/18), 2018 WL 1181737. Careful readers may also have noticed the superfluous hyphen in *nonbinding* and the Britannic *towards*. No wonder that LOI did not create an enforceable contract.

This "may not" be optional after all. An employment agreement stated, "This employment *may not* be terminated by employer for the first three (3) years, unless employee fails to comply with company drug and alcohol policy." After being found liable (albeit by default judgment) for the balance of the three years' salary, the employer argued, among other issues, "This paragraph contains the permissive 'may' rather than the mandatory 'shall.'" Surely, the argument goes, the choice of *may* means the employer is permitted to call it off, for any reason, before the term is up.

It's an axiom of statutory construction: the word "shall" is mandatory and the word "may" is permissive. La. R.S. 1:3; La. C.C.P. art. 5053. The same applies to contract law. *Bateman v. La. Public Emp. Council No. 17*, 94-1951 (La. App. 4 Cir. 7/26/95), 660 So. 2d 80.

However, the distinction does not hold up when the verb is negated. It's an arcane grammatical concept called "auxiliary negation," but the meaning is simple. When the sign says, "You may not smoke in this building," it does not mean you are granted the permission to refrain from lighting up. It means you are denied the right. In other words, *you shall not* smoke in here.

Several jurisdictions have held that, despite the may-shall dichotomy, *may not* is the equivalent of *shall not*. "When used in conjunction with 'not,' however, 'may' is not deemed to connote discretion; rather, 'may not' is most often construed as if it were 'shall not.'" *Brandt v. Weyant (In re Brandt)*, 437 B.R. 294 (M.D. Tenn. 2010); *Wikle v. Boyd*, 297 So. 3d 1255 (Ala. Civ. App. 2019) (compiling cases). Two states have even written this concept into their statutes: "A right, power or privilege is expressed by 'may' and an abridgement of a right, power or privilege by 'may not,'" 101 Pa. Code § 15.4; "'[S]hall' is mandatory, 'may' is permissive, and 'may not' is prohibitory," Alaska Stat. § 10.06.970(8).

Louisiana has not addressed the question directly, but the Supreme Court has used the terms in a way that leaves no doubt. "The time limits in Article 877 are *mandatory* and *may not* be extended absent a showing of good cause." *State in Interest of JM*, 13-2573 (La. 12/9/14), 156 So. 3d 1161. "[T]hese warranties are *mandatory,* and *may not* be waived by either party." *Carter v. Duhe*, 05-0390 (La. 1/19/06), 921 So. 2d 963.

The offhand use of *may not* could require some interpretation, and thereby thwart a nice summary judgment or exception of no cause. The best advice is, if you mean conduct is prohibited, use *shall not*. The phrase *may not* could well express the idea, but it *may not* suffice.

Read the whole opinion, please. In the vintage case of *Dupont v. Percy*, 28 So. 2d 359 (La. App. 1 Cir. 1946), the case synopsis, supplied by West Publishing Co., concludes, "Judgment affirmed." However, the opinion itself states, on page 363, "For these reasons assigned, the judgment appealed from is annulled and reversed[.]" Oops! Somebody (long ago) goofed, and I hope no one made the mistake of quoting the synopsis instead of the opinion!

Worth Skimming

by Chris Slatten, Chris_Slatten@lawd.uscourts.gov

The First 5th Circuit Case: Still Good Law

The Fifth Circuit's first case arose when a Mr. Robinson was riding his horse near Plano, Texas and was hurt when he contacted a low-hanging telephone wire that was charged with electricity from a thunderstorm. His state court petition against a New York utility company alleged that he was a "resident" of Texas. The utility company removed the case based on diversity, it went to trial, and Robinson got a $2,500 jury verdict. The utility company filed an appeal, which became Case #1 in the brand new Fifth Circuit Court of Appeals.

Here's the best part. The Fifth Circuit threw out the case because the district court did not do what your local court does: harass the lawyers until they properly allege a basis for jurisdiction or admit they can't. The record did not contain suitable allegations of Mr. Robinson's citizenship. "It is well settled that an averment of residence is not the equivalent of an averment of citizenship in the courts of the United States." *Southwestern Telegraph & Telephone Co. v. Robinson*, 48 F. 769 (5th Cir. 1891).

That rule, well settled in 1891, still applies. Alleging a person is a *resident* of a state is not enough to establish that he is a citizen of that state for diversity purposes. A person can have residences in several states, but he has only one *domicile*, and it is his domicile that establishes citizenship. *Midcap Media Finance, LLC v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019). A pleading can avoid doubt by alleging that Mr. X is "a citizen and domiciliary of" a state.

I learned the court history from an article by one of the Fifth Circuit librarians, Andrew Jackson of Houston, in the library newsletter. I literally yelled out loud (can't say what) when I saw that the first 5CA appeal was decided based on an issue that still pops up regularly. It's been 130 years since that first decision, and a lawyer still blows the "well settled" residency/citizenship issue about once a week.

Don't be that guy. But don't feel too bad if you do mess up. Even the 5CA still gets it wrong sometimes. *Anderson v. Wells Fargo Bank, N.A.*, 953 F.3d 311, 314 (5th Cir. 2020) ("We first address Anderson's contention that the district court lacked diversity jurisdiction over the removed matter because Tohill and Anderson are both Mississippi *residents*."); *Fairley v. PM Management*, 724 Fed. Appx. 343 (5th Cir. 2018) ("And because Sophie and Lakeside are both *residents* of Texas, if Sophie were joined as a party, the basis for diversity jurisdiction would fail.). Ouch!

So what happened to Mr. Robinson and his electric rodeo? The case went back to the district court, the allegation of citizenship was fixed, and the appeal returned months later. The utility company argued that it should escape liability because the injuries resulted from the wire being charged with "electric fluid" from a storm that the utility did not create. That defense did not fly because, the 5CA said, "Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and when so suspended and insulated are dangerous to persons who may at such times be brought in contact with them." Back then, they didn't even need experts and a *Daubert* hearing. They just said it. *Southwestern Tel. & Tel. Co. v. Robinson*, 50 F. 810 (5th Cir. 1892).

Pepper Spray and Qualified Immunity

Qualified immunity provides that a state actor is not liable under 42 U.S.C. § 1983 unless he violates the plaintiff's constitutional right and that right was *clearly established* at the time of the violation. Whether the right was clearly established is assessed in light of the specific context of the case, not as a broad general proposition. For example, it is not enough that excessive force is unconstitutional; the plaintiff must point to a case that has held that force used in a similar setting was declared excessive. The specificity requirement has become more demanding over the years. Let's see it in action.

A guard blasted pepper spray in the face of an inmate for no reason at all, and afterward the inmate was allowed water to wash up. Those were the plaintiff's version of the facts that governed for summary judgment. Did the guard violate clearly established law? Would any reasonable public official know that his action was unconstitutional?

The 5CA has previously held that subjecting a prisoner to a punch to the face, baton beating, or tasering for no reason at all violates the constitution. But it held in February 2020 that, before that date, it was not clearly established that it violated the Eighth Amendment for a prison officer to apply a single burst of pepper spray to the face of an inmate in his cell, for no reason at all, followed by availability of water. The guard was free to go, case dismissed. *McCoy v. Alamu*, 950 F.3d 226, 231 (5th Cir. 2020). But because of this holding that clarified the law, the next guard in this circuit who is accused of pepper spraying an inmate in the face, just to watch him dance, will probably not get immunity.

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

No "psychological parent" status. Sharon and Billie, a same-sex couple, had wanted to start a family together, but artificial insemination failed; eventually, Sharon engaged in intimate relations with a male friend, got pregnant, and gave birth to a baby daughter in late 2009. The proud couple listed no father on the birth certificate, and gave the child a hyphenated last name based on Billie's and Sharon's surnames. Notably, the couple never married or entered a domestic partnership, and Billie never adopted the child. The couple separated in early 2013, and managed an amiable custody-sharing plan for a few years; however, in 2016, Sharon (the natural parent) abruptly terminated their arrangement. Billie filed suit to establish parentage and custody, and to fix child support.

The case went to a protracted, four-day trial in which the parties gave interesting and divergent testimony about their relationship. The critical evidence, however, was the opinion of a court-appointed psychologist, Dr. Shelley Visconte, Ph.D., who extensively investigated the parties, interviewed the child, and presented two comprehensive reports to the court. She advised that the child said she wanted to quit having visits with Billie. Nevertheless, Dr. Visconte espoused the theory of "psychological parent," a person whom the child considers to be his or her parent even though that person may not be biologically related to the child. She outlined four factors, apparently drawn from clinical literature, to consider in deciding whether a nonparent is a psychological parent. Applying her own findings to these factors, Dr. Visconte recommended that Billie should be considered a psychological parent, and that having her in the child's life would be in the child's best interest.

The district court accurately observed that Louisiana law makes no provisions for custody disputes between same-sex couples. Stepping into this void, the court essentially adopted Dr. Visconte's thesis of psychological parenthood, crediting it to a Fifth Circuit opinion, *Ferrand v. Ferrand*, 2016-7 (La. App. 5 Cir. 8/31/16), 221 So. 3d 909, and the jurisprudence of other "southern states." The court found that by this metric, Billie proved her status as a psychological, *de facto* or legal parent. The court rendered a considered decree recognizing Billie as the child's legal parent, awarding joint custody to Billie and Sharon, and naming Sharon the domiciliary parent. Sharon appealed.

The Second Circuit reversed, ***Cook v. Sullivan,*** 53,741 (La. App. 2 Cir. 11/18/20), in an opinion by Judge Stephens. The absence of positive law did not entitle the district court to fashion its own law; rather, the closest applicable law should apply. In this situation, that law was La. C.C. art. 133, regulating the award of custody to a person other than a parent: "If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment." The court outlined jurisprudence defining "substantial harm" as parental unfitness, neglect, abuse, and abandonment of rights; the record evidence did not show that the natural parent, Sharon, exhibited these qualities, or that giving her custody would cause substantial harm. The court conceded that Sharon's decision to ban Billie from the child's life may have been "callous and controversial," but it did not rise to the level of substantial harm. Finally, the court noted that after remand, the Fifth Circuit in *Ferrand*, 2018-618 (La. App. 5 Cir. 12/6/19), 287 So. 3d 150, rejected the theory of psychological or *de facto* parenthood and embraced a strict Art. 133 analysis. The court reversed and rendered judgment dismissing Billie's claims with prejudice.

This writer empathizes with the district court's dilemma. In the absence of positive law, Dr. Visconte's approach seems perfectly reasonable, and the overall facts (you can read the opinion, if you're interested) suggest that in other circumstances this plaintiff would have won joint custody. And, in a cruel twist of timing, the Fifth Circuit reversed its *Ferrand* rationale a mere three days before the district court adopted it. The result is that we can disregard the notion of psychological parenthood. Given this state's reticence toward progressive social issues like same-sex marriage and reproductive choice, legislative action to fill the gap exposed in this case seems unlikely.

The problem with defaults. Global Awnings hired Reardon as its director of operations and sales, at a salary of $80,000 a year, car allowance of $400 a month, and specified paid time off; they signed a contract that stated, "This employment may not be terminated by employer for the first three (3) years, unless employee fails to comply with company drug and alcohol policy." Not quite nine months into the contract, Reardon sued alleging that Global Awnings terminated him without claiming he had violated the drug or alcohol policy; that he (Reardon) had made formal demand for unpaid wages and vacation; that Global Awnings never paid him; hence, he was entitled to all wages, benefits and penalties under Title 23.

Curiously (or not), Global Awnings's president and registered agent managed to elude sheriff's deputies for about a month while they tried to serve him. Finally, domiciliary service was effected on somebody at the office, but Global Awnings filed nothing in response. A little over three weeks later, Reardon took a preliminary default, and later moved to confirm this in open court without a hearing, La. C.C.P. arts. 1702 and 1702.1. He filed an affidavit alleging that the total due was $227,952; that this was based on business records and data compilations made by a person with direct personal knowledge thereof; and that all his allegations were true. The district court confirmed the default and rendered judgment for $227,952 plus an attorney fee of 25% ($56,988) and legal interest.

Citation and service may not have grabbed the defendant's attention, but a nearly $300K judgment definitely did. On the last possible day, Global Awnings appealed contending that Reardon did not attach a copy of the employment contract to his motion for default; the court did not show how it reached the precise amount of $227,952; and the court awarded a large attorney fee without any showing of the time and effort expended in taking the default.

The Second Circuit reversed, ***Reardon v. Global Awnings of La. LLC,*** 53,622 (La. App. 2 Cir. 11/10/20), in an opinion by Chief Judge Moore. The opinion quoted the minimum requirements for confirming a default without hearing, found in Art. 1702.1. (If you are in this particular situation, use this article as an indispensable checklist.) Reardon's confirmation failed because he omitted the required (1) copy of the employment contract, (2) copy of the drug and alcohol policy, (3) worksheet showing how the total $227,952 was derived (the court especially cited the opaque application of penalty wages, La. R.S. 23:623 A), and (4) attorney time invoices to

support an apparently large fee. The case was remanded to district court.

The plaintiff's failure to file Art. 1702.1 documents with the motion to confirm default was unfortunate, as it appears the documents exist and the district court looked at them. Still, the plaintiff will get another chance.

There's always a genuine issue. In ***Duran v. Allmerica Financial Ben. Ins. Co.,*** 53,615 (La. App. 2 Cir. 11/18/20), Ms. Duran was badly injured when she drove over a tire that had come off a pickup being driven by Farrar, who had strayed off the highway and struck a guardrail; he was arrested for DWI. Farrar, it turns out, was president of Mer Rouge State Bank, which owned the truck and authorized him to drive it, but at the time of the accident, Farrar was on vacation and using the truck only to make preparations for a hunting trip. Ms. Duran sued the bank and Farrar, their insurer, Allmerica, and her own UM carrier. The defendants moved for partial summary judgment on grounds that the bank cannot be liable for punitive damages, vicarious liability or negligent entrustment. The district court granted all motions, and Ms. Duran appealed.

The Second Circuit reversed in part, as to negligent entrustment, based on the significant summary judgment evidence that Farrar had a drinking problem, other officers at the bank were aware of it, and they had discussed eliminating the use of company vehicles. It is difficult to win a negligent entrustment claim, *Oaks v. Dupuy*, 32,070 (La. App. 2 Cir. 8/18/99), 740 So. 2d 263, but because knowledge is an element, the plaintiff can often survive the MSJ. The Second Circuit affirmed the dismissal of the vicarious liability and punitive damages claims. The opinion is by Judge Cox.

Or is there? In ***Bagwell v. Quality Easel Co.,*** 53,282 (La. App. 2 Cir. 11/18/20), Bagwell was badly injured when his boss, Dugdale, president of Quality Easel Co., accidentally allowed a concrete traffic barrier to roll off the trackhoe he was operating and crush Bagwell's legs. Bagwell sued Quality Easel and Dugdale; the defendants sought summary judgment on grounds of the exclusive remedy of workers' comp, La. R.S. 23:1032. Bagwell admitted he was receiving comp benefits but maintained that because of the business arrangement of Quality Easel, which was a sub-subcontractor on a state project, and the subcontractor, Chad Pody Construction, Dugdale should be deemed an independent contractor and Bagwell not limited to the exclusive remedy. The district court agreed with Bagwell and denied the MSJ.

Quality Easel took a writ, which the Second Circuit granted and made peremptory. Although the determination is fact-intensive, it is not necessarily immune to resolution by MSJ: the court found it indisputable that both men were working for the same entity, Chad Pody Construction, so the exclusive remedy applied. The opinion is by Judge Stephens.

When all else fails, read the contract. The Pearsons hired North American Land Development ("NALDC") to build a house in Ouachita Parish; their contract capped the price at $528,200 and set a closing date of May 8, 2016. Later, however, they agreed to modify, and executed an amended contract extending the closing by six months, to "no later than" November 8, 2016, with the Pearsons to pay interest of 5% "from May 8, 2016 until the date of closing[.]" November 8 came and went, but the Pearsons refused to close, so NALDC sued to enforce the original and amended contracts. Fortunately, in May 2019, NALDC sold the house to a third party for $560,000; after real estate commissions and taxes, NALDC actually made a profit of $3,707.50. NALDC amended its petition to demand only the agreed 5% interest, attorney fees and certain construction add-ons. After trial, the district court awarded NALDC 5% interest from May 8 to November 8, 2016, and an attorney fee of $10,000. NALDC appealed, arguing the interest should have continued to accrue until the house was sold, in 2019.

The Second Circuit affirmed, ***Sunset Realty Inc. v. Pearson,*** 53,555 (La. App. 2 Cir. 11/10/20), in Judge McCallum's final published opinion on the court (he was elected to the Supreme Court on November 3, 2020, and assumed the seat on November 13). The opinion quotes the standard rules of contract interpretation, including the plain-reading rule of La. C.C. art. 2047. The contract provided for 5% interest "from May 8, 2016 until the date of closing," and stated that closing "shall be no later than November 8, 2016." What could be clearer?

The court also quoted the rule of applying ambiguous provisions against the party who supplied the contract, La. C.C. art. 2056. NALDC could have averted this result by wording the amended contract differently, perhaps by adding something like, "or, if the Pearsons do not close on that date, until whatever date the house is actually sold."

A matter of great discretion. The Lairds got married in 1981, and Ms. Laird filed for divorce in 2006. Mr. Laird, an attorney, was at the time litigating a tort case; if he won, his contingency fee would be subject to a community property claim. In fact, the case was successful and he won a fee of $168,117; the district court ultimately found that Ms. Laird was entitled to $56,039. Mr. Laird appealed; the Second Circuit affirmed, and ordered Mr. Laird to pay trial costs, with a minor adjustment to interest. *Laird v. Laird*, 52,560 (La. App. 2 Cir. 4/10/19), 268 So. 3d 1173. Mr. Laird placed the total in the court registry, with legal interest up to the date of deposit. Mr. Laird also claimed that *she* owed him some costs, while Ms. Laird contended that *he* owed her some costs. The district court ruled that costs were offsetting; it denied all costs. Ms. Laird appealed, arguing the judgment effectively required her to pay half the costs, contrary to the appellate judgment charging all costs to Mr. Laird.

The Second Circuit affirmed, ***Laird v. Laird,*** 53,651 (La. App. 2 Cir. 11/18/20), in an opinion by Judge Pitman. Under La. C.C.P. art. 1920, costs are distinctively within the trial court's discretion; in this long and contentious case, the district court simply did not abuse its discretion. In other words, it was time to put this one to bed.

Great discretion, Part 2. Ms. Dotson was in the drive-thru lane of a Popeye's Fried Chicken in Monroe when Balsamo rolled into the rear of her car "at idle speed." Damage to the car was imperceptible, and Ms. Dotson did not mention any back pain at the scene. However, a few hours later, she rushed to the emergency room and, over the next three months, made 28 trips to the chiropractor. Notably, after the first five trips, she never rated her pain higher than 4/10 (and, on that one occasion, "only 25%-50% of the time"), and rated it 0/10 18 times. She sued Balsamo and his insurer. After trial, the City Court awarded her the cost of the ER and the first five chiropractor visits, but no further medical treatment and no general damages. She appealed.

The Second Circuit affirmed, ***Dotson v. Balsamo,*** 53,644 (La. App. 2 Cir. 11/1/20), in an opinion by Judge Stone. Older jurisprudence, apparently cited by Ms. Dotson's counsel, held that the defendant was responsible for all medical treatment, including unneeded treatment, unless the costs were incurred in bad faith, *Starnes v. Caddo Parish Sch. Bd.*, 598 So. 2d 472 (La. App. 2 Cir. 1992), and that a judgment awarding any medical expenses, but no general damages, was legal error, *Chambers v. Graybiel*, 25,840 (La. App. 2 Cir. 6/22/94), 639 So. 2d 361. However, the modern rule, apparently not cited by counsel, is that the defendant is liable only for those expenses reasonably related to the accident, *Guillory v. Lee*, 09-0075 (La. 6/29/09), 16 So. 3d 1104, and that a court may award some special damages while denying general damages, *Wainwright v. Fontenot*, 00-0492 (La. 10/17/00), 774 So. 2d 70. In short, it was all right for Ms. Dotson to go to the ER and make a few trips to the chiropractor, to make sure everything was all right, but not for her to run up the bill. On this record, the court's patience was strained more than the plaintiff's back.

A Public Defender's Journey into Mordor (Caddo Correctional Center)

by Daniel Farris, daniel@danielfarrislaw.com

I have been sitting in my car for well over an hour now. My heart is racing, my hands are trembling, and I can't seem to stop sweating. I was just insulted, yelled at, and cursed at. One person even called me a "kid." I am questioning why I ever became an attorney in the first place and how did I end up here. I put the key in the ignition to finally start my car, but then I stop. I am so shell-shocked at the experience that I just endured that I cannot move. "How did I end up here, how did I end up here, how did I end up here?"

What has sent me into this state of panic and existential crisis? You guessed it – I just had my first jail visit to Mordor, or, as you may call it, Caddo Correctional Center, as a public defender. For those of you who have not read *Lord of The Rings*, Mordor is a very unpleasant place. Let me back up a bit, I am getting ahead of myself.

A few months before I found myself having an existential crisis in my car, I had started my own law practice. I had some money saved up, but I knew that if I did not get some clients as soon as possible, my savings would soon be exhausted. All my fancy dinners at Piccadilly did not come cheap.

I heard through the grapevine that the Caddo Parish Public Defender's Office had some contract attorney positions available and I jumped at the opportunity. I was going to make a difference by representing indigent defendants, a lot of people whom society set up to fail, and my burgeoning law practice had now secured a stable cash flow. I could not have been more excited. I even texted some of my exes, "You missed out, I'm a rich lawyer now. Soon you'll be seeing my billboards on the freeway." (Just kidding).

My excitement was ill-placed and I was in for a rude awakening – I had no idea what was waiting for me at Mordor. Fast-forward post my first attorney-client visitations and I am sitting in my car shell-shocked.

This article is divided into three parts – First, why going to Mordor as a public defender is a terrible experience, Second, ways to prepare, and Third, some suggestions to make it not so terrible. Let us start with the first.

Why going to Mordor as a public defender is a terrible experience

It is a well-known fact that public defenders get a bad rap. Despite being some of the most hard-working, brilliant, compassionate, well-intentioned and experienced criminal defense attorneys, let's face it, the public and the clients think public defenders suck. They assume that you suck because if you did not suck, you would be a private attorney with billboards on the freeway. To use a sports analogy, they see a private attorney as Michael Jordan and you as playing on the JV team, if that. Ironically, they do not know that I was an all-star basketball player in high school. (Nobody fact check that.) So, before you step one foot into Mordor, you already have the assumption that you are not the cream of crop going against you. And when you come to face to face with your clients, you have to overcome this assumption.

Now, when you arrive at Mordor, the first thing you notice is the invisible dark cloud hanging over the building. You cannot see it, but you can darn sure feel it. All the pain, anger, sadness, frustration that has built up inside that place over the years, all of that negative energy is palpable. If you do not feel it once you park your car, when you get inside those doors, you definitely feel it then. It sends a shiver down your spine. They don't call it Mordor for nothing.

Next, once you get inside, the deputies at the front desk tell you where your clients are and use a crude map to direct you to them. They open the doors and you are on your way; you will get lost the first time. As you navigate the halls, you quickly notice that there are no windows; no outside light or happiness ever enters these corridors. Only anger and sadness. The first time I walked down those halls, I got the thought, "Lord, have I died and gone to purgatory?"

Eventually, you find the unit where your clients are held and you are surprised to see that the attorney-client visitation area is a clear window space located right in the unit. So, all of the inmates housed in the particular unit see you as you talk to your client, but first you have to get your client. You have a seat and try to remain calm.

The deputy swings open the door, "Who are you here to see?!"

"Huh…huh…Smith."

"Who?! Speak up!"

"I said Smith!"

The deputy closes the door and yells for your client, and you hear some of the inmates trying to get your attention, "Are you my lawyer?! I need to speak with you! Hey, I'm talking to

you! When are you going to see me?! My girlfriend needs to talk to you?!" Get used to this every time you go into Mordor.

Finally, your client comes in, and here is where the fun really begins. Before you even introduce yourself, they unload on you. All of their anger, frustration, sadness, rage – you get it all. Then, they question your age, experience, and knowledge of the case. Remember, you are just a public defender, so they assume you suck. After it ends, you ask for your next client, and the process starts all over again. In the backdrop, the other inmates never stop trying to get your attention, and as you finally leave, some are still demanding to speak with you, every single time. Going into Mordor as a public defender is mentally, emotionally and spiritually draining, especially the first time with no idea of what to expect. Luckily for you, after making countless journeys into Mordor, I am going to tell you some ways to prepare for it.

How to prepare for your journey into Mordor as a public defender

The first thing you want to do is plan your journeys into Mordor on days you do not have anything else going on. No court, no consults, no research – nothing. You need all of your strength as you go into Mordor and you're going to be so exhausted afterward that you're not going to want to do anything law related, trust me.

After you leave, plan on spending time with your significant other. Go on a fun date or a relaxing evening alone together – you have earned it. "But Dan, the thought of spending time with my significant other sounds just as bad as going into Mordor!" Huh, then you may have some bigger problems that I cannot help you with…

"But Dan, I'm single, what do I do?!" OK, I can help you with that. First, remember you will not be single forever, your true love is out there … somewhere … likely Japan or The North Pole. You think people are jealous of you now: wait until you bring your Elf wife or husband to the cocktail party. Regardless, if you are single, like yours truly, then after you leave Mordor, go home, get comfortable, grab a bucket of ice cream and watch a movie that always picks you up. For me, it is "Toy Story 3," "Dumb and Dumber" or "Dead Men Don't Wear Plaid." ("Dead Men Don't Wear Plaid" is an underrated movie starring Steve Martin from the '80s that I suggest you watch. It is hilarious).

Those are my tips for preparing for your journey into Mordor. Feel free to throw in meditation, yoga, church or prayer. Finally, let's talk about two simple ways to make Mordor less terrible for public defenders.

Ways to make Mordor less terrible for public defenders

If you're like most people, you hate when someone tries to cut the line and get in front of you. Well, you have to get used to it as a public defender. You have to sit and wait as private attorneys' cases are called up before yours. It may seem like a small thing, but to your clients, their relatives, and to lay people in the courtroom, this gives the impression that the private attorneys' time is more valuable than yours. It gives the impression that the private attorney is able to cut the line because of their clout. This may be a fiction, but it feeds the prevailing notion of public defenders as being on the JV team compared to the Michael Jordan private attorneys. In our profession, and many others, impressions are everything, so here is a suggestion – stop letting private attorneys cut the line of public defenders. By doing this amazingly simple thing, three things are had.

First, the public will have more respect for public defenders, which, in turn, increases trust and faith in our criminal justice system. This should be enough to warrant the change by itself, but there is more. Second, indigent clients will have more respect for their public defenders, which will lead to better attorney-client relationships. So, when you go into Mordor as a public defender, the experience will not be as terrible because you are not constantly having to show your client that you are actually good at your job. Lastly, once the first two points are done, it will increase the likelihood of cases getting resolved in a timely matter, decreasing the resources that the Court has to expend, that the District Attorney's Office has to expend, and that the Public Defender's Office has to expend.

"But Dan, they do a bad job at getting clients over from Mordor, we can't have private attorneys sitting there all day?" So, a private attorney's time is more valuable than an underpaid and overworked public defender's? Even if you believe that, the aforementioned benefits are at least worth a consideration. "But Dan, if people have more trust in the Public Defender System, they will be less prone to hire private attorneys?" I am mindful of that, as I am a private attorney myself, but I think the benefit outweighs the negative in this regard. The second thing that can be done to make a public defender's journey into Mordor less terrible can be accomplished by the person in charge of Mordor.

The dumbest idea I have ever seen was putting the attorney-client visitation area at Mordor in an open space in the jail units – change this. This will dramatically improve the experience that public defenders endure at Mordor. Actually, this is not the dumbest idea I have ever seen. The dumbest idea I have ever seen was how Luke Skywalker was treated in new Star Wars trilogy. (Let it go Dan, let it go).

Conclusion

I am no longer a contract public defender with Caddo, and despite my repeated journeys into Mordor, I still look back on my time in that position with fondness. I like to think that I made a difference and helped some people that society set up to fail. I gained a ton of experience, tried jury trials including serious matters, and I made some lifelong friends. I hope this article illuminates what Caddo public defenders have to experience when they go into Mordor.

If you enjoyed this article, feel free to send me positive feedback. The only thing I love more than a client on retainer is, "Atta boy Dan, atta boy." Oh, and cookies … and donuts … lots and lots of donuts. So, if you want another article from me, send me donuts … I mean positive feedback, or you will find yourself disappointed like I was when I saw the new Star Wars trilogy. (Let it go Dan, let it go).

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Shreveport Bar Association *Christmas Party*

In keeping with tradition, and to bring some cheer to this otherwise not so cheerful holiday season, the Shreveport Bar Association hosted its annual Christmas party for its members, Shreveport Bossier Bar Auxiliary members, and local law students. With safety precautions in mind, our president, Tom Arceneaux, and wife Elizabeth graciously opened their beautiful home to host the party. If you were unable to attend, you also missed the opportunity to see the beautiful renovations (10 years in the making) of this historic Highland home.

Attendees gathered (at a social distance) to visit with one another, some of whom have not been able to meet in person for some time. Everyone enjoyed a spread of delicious food catered by Fat Calf Brasserie and listened to Christmas songs sung by Haley Brooke Powell, who also played the piano.

Thank you, Tom and Elizabeth, for hosting us. It was great to see those who could come, and we understand for the ones who could not and look forward to seeing you at next year's party.

Heidi Trant and LSU Law student Meredith Smith

Codi Setters, Judge Brady O'Callaghan, Jesse Gilmore, Valerie DeLatte, Luke Whetstone, Stacey Williams and Nancy Cooper

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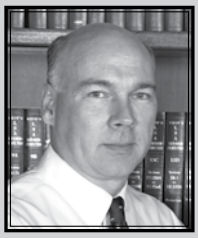

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UPCOMING EVENTS

2021 SBA MEMBERSHIP LUNCHEONS

12:00 Noon at the Petroleum Club (15th Floor)

JANUARY 27
Speaker: Benjamin E. Griffith

FEBRUARY 24
Speaker: TBD

MARCH 24
Speaker: TBD

MAY 5
Law Day Luncheon
Speaker: TBD

JUNE 23
Speaker: TBD

SEPTEMBER 22
Speaker: TBD

OCTOBER 27
Speaker: H. Alston Johnson

NOVEMBER 10
Veterans Program
Speaker: TBD

IMPORTANT NOTICE

Due to Covid–19, all scheduled SBA activities are subject to change, rescheduling or cancellation.

DEADLINE FOR FEBRUARY ISSUE: JANUARY 15, 2021

SBA LUNCHEON MEETING – JANUARY 27

Petroleum Club (15th Floor) – Buffet opens at 11:30 a.m. Program and Speaker from 12:00 Noon to 1:15 p.m. Cost for lunch & CLE is $35.00 for SBA members with advance reservation and $40.00 for lnon-SBA members and late reservation (after 5:00 pm the Monday prior to the luncheon)

Election-Related Litigation Leading Up To The 2020 Presidential Election

When: **12:00 Noon on Wednesday, January 27**
Where: **Petroleum Club (15th floor)**
Featuring: **Benjamin E. Griffith, PLLC**

Mr. Griffith's presentation is eligible for 1-hour CLE credit

Join us on Wednesday, January 27 for a presentation by Ben Griffith who will talk about election-related litigation leading up to the 2020 Presidential election. This presentation is approved for one hour of CLE. Ben is principal of Griffith Law Firm in Oxford, Mississippi, and for the past 45 years has enjoyed a civil litigation practice focused on defense of governmental entities in election law and voting rights in several southern states as well as insurance defense and coverage actions on behalf of public sector insurers. He earned his J.D. from the University of Mississippi School of Law in 1975, where he is an Adjunct Professor of Election Law. He served on the ABA Board of Governors (2016 - 19), and chaired the ABA Standing Committee on Election Law (2010 - 13) and ABA Section of State & Local Government Law (2007 - 08). He has authored a number of works in his area of expertise, most recently as co-editor and chapter author of *America Votes! Challenges to Modern Election Law and Voting Rights* (B. Griffith & J. Young, Editors, 4th ed. ABA 2020). He is a member of the ABA Cybersecurity Task Force and the ABA Central Europe and Eurasia Law Initiative.

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I plan to attend the January Luncheon.
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No-shows will be invoiced.
Thank You!