THE BAR REVIEW

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION Volume XXIX, Number 2 • Feb. 2022

INSIDE | FEBRUARY

EVENTS AT A GLANCE

2/23	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
3/23	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
4/26	SBA Golf Tournament – 12:30 p.m. – Querbes Park Golf Course

From The President

by Don Armand, darmand@padwbc.com

"A pessimist's brain is fine, as long as it's paired with the boots of an optimist."
~Steve Rinella

I heard that quote recently, while my wife and I were battling Covid 19. Steve Rinella was referring to his "defensive pessimism" - a cognitive strategy that helps people manage anxiety and better pursue their goals. In simplest terms, a defensive pessimist envisions things that might go wrong in a situation, develops plans of action to avoid those potential mishaps, moves forward despite the challenges and adapts along the way. Defensive pessimism has significant benefits – defensive pessimists are less anxious when acting out their plans, more likely to avoid the negative outcomes they imagined and react more positively to disappointment. It's a timely consideration in light of recent events – the wild resurgence of Covid, the terrible accident at the Caddo courthouse on January 22, the tragic effects on the worker involved and the challenges to so many resulting from that accident. I doubt that even a defensive pessimist could have forseen all of those challenges. But what we've seen is this – our friends and colleagues have marched through those challenges with the boots of optimists.

Covid hasn't stopped us. Lawyers, judges and their staffs have faced countless, unexpected illness that required cancellations, reworking and rescheduling. How did we handle it? With characteristic right action. Across the board, we worked out these issues by ready agreement and our judges continued jury trials through March. We showed care for each other's health and the health of our families, without any compromise to the duties we owe to our clients and to the system.

The January accident didn't stop us. The amazing and indefatigable Mike Spence, his crackerjack staff and the intrepid judges of the First JDC, surpassed even their accomplishments in the first Covid shutdown, by keeping essential court functions intact for the first days after the accident and then, against all odds, getting the courthouse reopened weeks before it was thought possible.

I'm privileged and proud to call myself a member of this Bar and to be a colleague and friend of so many optimists, whose boots never stopped marching.

FEB 2022

THE SHREVEPORT BAR ASSOCIATION

Golf TOURNAMENT

SHOTGUN START
1:00 p.m.

ENTRY FEES
$600 per team
4-Man Scramble

LUNCH
11:00 a.m.
included with registration fee

REGISTER
www.shreveportbar.com
or call Dana at 222.3643 Ext. 3

PRIZES
- **Overall Low Gross and Low Net Scores in each flight**
- **Closest to the hole**
- **Long Drive Contest**

April 26, 2022
Querbes Park Golf Course
Shreveport, LA

RICHARD B. KING, JR. MEMORIAL SHOOTOUT!

Enter to have your team represented in this 2-man team alternate shot contest. $150 per team. Play begins at 12:15p.m. Only one team will be named KING! Limited to the first 8 attorney teams registered. Call Dana at 222-3643 to register.

CRAWFISH BOIL FOR NON PLAYERS IS $25

REGISTRATION

SHREVEPORT BAR ASSOCIATION 2022 GOLF TOURNAMENT

Tuesday, April 26, 2022 at Querbes Park Golf Course, Shreveport
Lunch and Crawfish Boil is Included – Awards Given Post Play

Captain Name: _____ HDCP/Best Score: _____ Tel:_____

Address: _____ Email: _____

Player2 Name: _____ HDCP/Best Score: _____ Tel:_____

Address: _____ Email: _____

Player3 Name: _____ HDCP/Best Score: _____ Tel:_____

Address: _____ Email: _____

Player4 Name: _____ HDCP/Best Score: _____ Tel:_____

Address: _____ Email: _____

Make check payable to SHREVEPORT BAR ASSOCIATION and mail:
2022 SBA Golf Tournament Registration, 625 Texas Street, Shreveport, LA 71101

Shreveport Bar Foundation

by Lawrence W. Pettiette Jr., President, lpettiette@padwbc.com

In 1988, the Shreveport Bar Association Pro Bono Project incorporated. Many Shreveport attorneys labored from that day forward to ensure its success. In 2005, the name was changed to the Shreveport Bar Foundation Pro Bono Project.

In 2010, the Shreveport Bar Foundation purchased the building now known as the Shreveport Bar Center. A very functional structure, it is home for the Pro Bono Project, the offices of the Shreveport Bar Association, and the lawyers who staff the domestic violence and protective order services offered by the Shreveport Bar Foundation. The Ask a Lawyer Clinic, Pro Se Divorce Clinics, Wills for Heroes, and many other community outreach and activities are now held at our own venue.

Today the Shreveport Bar Foundation enjoys an excellent reputation in the community for successfully serving our mission statement. This success materialized from the commitment of a small group of lawyers who probably grew tired of calling people to come to the annual fundraising events, such as a speech by an author of an interesting book. Not that long ago, one president told me that she could not sleep at night worrying about how the Foundation would serve the needs of the community because of funding issues. Different fundraisers came and went.

Roy Payne raised the initial money for the purchase of the building by asking individuals for $25,000. With the help of Layne Clark, Julie Lafargue, Bernard Johnson, and others the current building was selected. It has become an excellent venue and a valuable asset; however, debt remains. A plaque honoring the founders has been placed on the building thanks to Ted Cox's relentless efforts to get it done. The Louisiana Bar Foundation has also provided much needed assistance.

The current Board is considering a capital campaign to retire the remaining debt on the building. Any repair, lightning strike, water leak, or other headache of owning your own building that Dana faces monthly has to be paid, but spending money servicing the loan need not be one.

The Krewe of Justinian (I am King) exists to provide social events for the Shreveport Bar Association lawyers and the Ark-La-Tex Mardi Gras community but also to raise money for the Shreveport Bar Foundation. To date, Justinian has contributed $300,000. Consider joining.

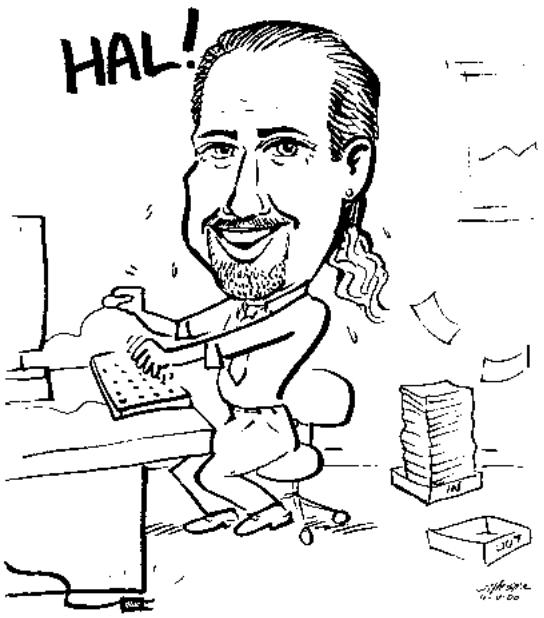
Under Dana Southern's direction, the Shreveport Bar Foundation has become competitive in obtaining grants to further its mission. It is a well run organization with a very engaged Board. It is time for lawyers of the Shreveport Bar to consider retiring the note on the building to ensure the future of our pro bono projects and other service programs.

The Shreveport Bar Foundation Pro Bono Project is able to do all that we do because of the support we receive from our grantors, Louisiana Bar Foundation, Acadiana Legal Services Corporation, The Community Foundation, Carolyn W. and Charles T. Beaird Family Foundation, First United Methodist Church, Grayson Foundation and the SBA Krewe of Justinian

How Write You Are

by Hal Odom Jr., rhodom@la2nd.org

Let's take a new perspective. A court recently wrote, "In the present matter, defendant made a *Batson* challenge to the State's use of peremptory challenges exercised on *perspective jurors* who were African-American." *State v. Daniels*, 18-307 (La. App. 5 Cir. 6/11/19), 275 So. 3d 380. Does anyone have a view on this?



The La. Supreme Court has also had its say: "Defense counsel contends that the trial court erred in denying eight cause challenges against *perspective jurors* * * * who he claims clearly demonstrated their inability to consider a life sentence[.]" *State v. Odenbaugh*, 10-0268 (La. 12/6/11), 82 So. 3d 215. In a different context, a noted formbook suggested: "The parties to this agreement recognize that patronage and goodwill of all customers situated along any route or routes * * *, and prospective patronage and goodwill of *perspective customers* situated along the route or routes, constitute a valuable right[.]" 11 Am. Jur. Legal Forms 2d § 160:19 (Launderer's dyer's, or dry cleaner's route employment contract).

Perhaps trying to avoid a similar error, another court wrote, "Without such notice, the state had no way to prepare expert testimony to explain the blood alcohol levels and put them into *proper prospective*." *State v. Queen*, 17-599 (La. App. 3 Cir. 1/4/18), 237 So. 3d 547. A dissenting judge wrote, "[W]e should look to federal jurisprudence to get the *proper prospective* on Louisiana Law[.]" *State v. Lemoine*, 14-1158 (La. App. 1 Cir. 5/6/15), 174 So. 3d 31. These were not looking to the future.

The motif here is the confusion between two words that sound much alike. **Prospective** is an adjective that means *potential* or *which may occur in the future*. **Perspective** is a noun that means *point of view* or *ability to see the overall situation*. People being questioned on voir dire are always *prospective jurors*, and counsel will want to get their *perspective* on the death penalty. The usage in Am. Jur. is puzzling; after correctly using *prospective patronage*, why would the editors insert *perspective customers*?

As a footnote, the dissenting judge in *Lemoine*, despite the slight lapse, was vindicated, as the Supreme Court agreed with him that money laundering, La. R.S. 13:230, is a general intent crime! *State v. Lemoine*, 15-1120 (La. 5/3/17), 222 So. 3d 688.

How many elements are there? Not in the periodic table, but in the analysis of a general negligence claim? The Supreme Court recently laid out this formulation: "Under the duty/risk analysis, the plaintiff must prove *five* separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of duty element); and (5) proof of actual damages (the damages element)." *Malta v. Herbert S. Hiller Corp.*, 21-00209 (La. 10/10/21), __ So. 3d __, citing *Boykin v. La. Transit Co.*, 96-1932 (La. 3/4/98), 707 So. 2d 1225.

Simultaneously, however, the same court has invoked a simpler, three-element formula: "In Louisiana, there are *three elements* necessary for a negligence cause of action to accrue: fault, causation, and damages." *Eagle Pipe & Supply Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/11), 79 So. 3d 246; *Reggio v. ETI*, 07-1433 (La. 12/12/08), 15 So. 3d 951.

And, on at least one occasion, the court has sought a middle ground: "Jurisprudentially, this civilian concept has been more readily applied within the same context as negligence claims made in common law jurisdictions, where the analysis is subdivided into *four elements:* duty, breach, causation, and damages." *Reynolds v. Bordelon*, 14-2362 (La. 6/30/15), 172 So. 3d 589.

So, back to the original question: how many elements are there?

The five-element formula seems to be the choice in most of the recent Supreme Court opinions, and it has the advantage of pulling apart the concepts of cause-in-fact (an inclusionary factor that casts a wide net over the great chain of causation) and legal cause (an exclusionary factor that pulls it back, saying some things are too remote to create liability). It might be the preferred formula if, as a defendant, you concede that your conduct had something to do with the plaintiff's harm, but it was too attenuated to make you liable. If you are the plaintiff, you may still wish to invoke the three-element (or four-element) formula, on the theory that any proof of causation is enough to include the defendant's conduct.

The courts are likely to continue to recite (and apply) the *Malta* five-element rule; however, until repudiated by the Supreme Court, the simpler, shorter formulas are not wrong. Use your best judgment.

We're not in Kansas anymore. A case synopsis provided by Thomson Reuters caught my attention: "Juvenile was adjudicated delinquent in the Monroe City Court, *Wichita* Parish, No. J-94-0106, John L. Lolley, J." *State in Interest of DS*, 29,554 (La. App. 2 Cir. 5/7/97), 694 So. 2d 565. A slightly earlier case synopsis joined the geographical mélange: "The Fourth Judicial District Court, Parish of *Wichita*, D. Milton Moore, III, J, entered partial summary judgment[.]" *Morehouse Parish Hosp. Serv. Dist. v. Pettit*, 25,396 (La. App. 2 Cir. 1/19/94), 630 So. 2d 1338. No one from Louisiana would make this mistake! Which parish was that, Dear Editor?

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

The custom is not always right. Bobby and Jason Dettenhaim, father and son, operated a farm covering 800 acres in East and West Carroll Parishes. Jason was also the president, sole owner and sole member of a corporation, DFI, which joined the operation in 2018. However, the title to the 800 acres was in the name of Bobby and his wife.

Bobby and Jason did not use an independent crop consultant. For over two decades, they had used Wesley Sanchez, an outside salesman for Greenpoint Ag, an input supplier, who carried farm chemicals from various manufacturers. As part of the process, Bobby and Jason would book their seeds in December; Sanchez would survey the fields early in the year to assess what herbicides and insecticides were needed; these chemicals were then routinely applied to the fields, at Sanchez's suggestion. In 2016, however, owing to a problem with Bobby and Jason's credit line, Sanchez stopped providing his field services, yet nobody at Greenpoint advised Bobby and Jason of this. They planted their 2016 soybean crop, but without Sanchez's oversight it was devastated by worms and stinkbugs. DFI filed suit against Greenpoint, its insurer and Sanchez; later, Bobby and Jason joined as plaintiffs.

After a bench trial, the court awarded Bobby, Jason and DFI damages of $246,334. The court rejected the defendants' claim that Bobby, as the owner of the land, was the only plaintiff with an actual interest in the crop; following common practice in the farming industry, the court decided to "lump the damages among all of the legal entities and individuals and let their tax expert allocate those damages as he saw fit." Greenpoint appealed.

The Second Circuit amended and affirmed, ***Dettenhaim Farms Inc. v. Greenpoint Ag LLC,*** 54,162 (La. App. 2 Cir. 11/17/21), in an opinion by Judge Robinson. The largest part of the opinion addressed Greenpoint's claim that the district court greatly overvalued the plaintiffs' losses by using a comparison with a neighboring farm that did not have the same kind of soil, irrigation, seed types, tillage practices and other factors. The Second Circuit agreed, reducing the award to $148,946, based on historical yields from the plaintiffs' own farm.

The final part of the opinion addressed the role of custom in the law: under La. C.C. art. 3, custom results from practice repeated for a long time and generally accepted as having acquired the force of law, but it can never abrogate legislation. The Second Circuit found specific legislation, La. C.C. art. 491, whereby crops are presumed to belong to the owner of the ground unless an instrument showing separate ownership is filed in the parish conveyance records; no such instrument was introduced at trial. Concluding that the custom cited by the trial court could not override positive legislation, the Second Circuit found that Jason and DFI had no real interest in the unharvested soybeans. It amended the judgment to award the damages only to Bobby, the registered owner.

Given their close interrelationship, it is unlikely that dismissing Jason and the corporation will make much difference to their operation, but the case is a strong lesson in the limitations of custom as a source of law in this state.

The Do-It-Yourself LLC. In 2008, five entrepreneurs joined to form Monroe Credit LLC, a loan company and insurance agency. Without seeking legal advice, they used an older formulary (or perhaps an online source) to draft their articles of organization ("AO"). The AO provided that the LLC would terminate upon the "Death, insanity, bankruptcy, retirement, resignation or expulsion of any Member." In 2011, one of the original members resigned, for unstated reasons, but it didn't really matter; the business was doing well, and the four remaining members bought him out, with each one now owning 25%.

By 2017, however, three of the members began to suspect that the fourth, a man named Lacas, was mismanaging company funds. Lacas admitted that he was "indebted" to the LLC for $48,661 and gave his promissory note for that amount. When he failed to pay the note, the other members voted to revoke his membership, 3-1 (only Lacas dissented). A few months later, Lacas sued the LLC and its three members seeking declaratory judgment, injunctive relief and damages – in essence, he claimed he was still a member, and entitled to be bought out for his 25% share.

The defendants filed exceptions of no right and no cause of action alleging, in essence, that because Lacas was no longer a member of the LLC he had no right to demand injunctive or any other relief. The district court denied these exceptions and commented, *sua sponte*, that under the quoted portion of the AO, the LLC was terminated and could transact no further business other than winding down. Taking this as a cue, Lacas promptly filed a motion for partial summary judgment contending that the 2011 withdrawal of the first member was a "liquidating event," and that he (Lacas) was entitled to judgment dissolving the company. The defendants countered that the AO had been orally, yet validly, amended to provide that withdrawal would not terminate the business; hence, it was still very much an ongoing, healthy enterprise.

The district court cited its prior ruling (to deny the exceptions of no right and no cause) as law of the case, a definitive holding that the LLC was terminated in 2011, and found no genuine issue that immediate liquidation was due under the AO. It also ruled that the expulsion of Lacas was a nullity. After partial final judgment was certified, the defendants appealed.

The Second Circuit reversed, ***Lacas v. Monroe Credit LLC,*** 54,170 (La. App. 2 Cir. 12/15/21), the last civil opinion authored by Judge Garrett, who retired January 6. She began by stating the glaringly obvious: an interlocutory ruling denying a peremptory exception is never law of the case, res judicata or any other binding result. *Babineaux v. Pernie-Baily Drilling Co.*, 261 La. 1080, 262 So. 2d 328 (1972).

On the merits, the court found that the boilerplate used in the AO tracked the language of La. R.S. 12:1334 (3) *before its amendment* in 1997. Since then, the law has not treated withdrawal of a member as a terminating event; the change was made to prevent converting the LLC into a partnership for tax purposes. Further, under La. C.C. art. 1848, extrinsic evidence is admissible to

show that the parties modified a written agreement. The fact that everybody kept granting loans and selling credit insurance after the first guy left, easily created a genuine issue of material fact as to modification.

The court reversed and remanded, but carefully stated that it made no ruling on the merits of the issues raised by the parties. This last proviso might have been inserted to discourage the district court from sniffing out another law of the case.

"Dog bites kid" is not funny. Long ago, Louisiana courts adhered to the common-law rule that a dog gets its "first bite free." *Martinez v. Bernhard*, 106 La. 368, 30 So. 901 (1901); *Tripani v. Meraux*, 184 La. 66, 165 So. 453 (1936). Sometime later, they transitioned to a strict liability rule, *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), but with the gloss that the plaintiff still must prove the animal posed an unreasonable risk of harm, *Boyer v. Seal*, 553 So. 2d 827 (La. 1989) (*Boyer* actually involved a pet cat, but the ruling was inclusive). Perhaps trying to make sense of this menagerie, the legislature in 1996 amended La. C.C. art. 2321 to insert: "Nonetheless, the owner of a dog is strictly liable for damages for injuries to persons or property caused by the dog and which the owner could have prevented and which did not result from the injured person's provocation of the dog." Shortly after this, the Second Circuit held that Art. 2321's precise omission of the term "unreasonable risk" dispensed with any requirement that the plaintiff make that showing. *Allen v. State Farm*, 36,377 (La. App. 2 Cir. 9/18/02), 828 So. 2d 190, *writ denied*. Soon, however, the Supreme Court rejected *Allen*'s strict reading of Art. 2321, ruling instead that the plaintiff must always prove an unreasonable risk of harm. *Pepper v. Triplet*, 03-0619 (La. 1/21/04), 864 So. 2d 181.

This was the state of the law in 2016 when Ashlyn Franks and her boyfriend took her two-year-old daughter to visit a friend, Joshua, on Hwy. 128 in St. Joseph, in Tensas Parish. The property was a farm owned by Joshua's grandfather, Mr. Sikes, but Joshua was staying in a mobile home on the place. About one week earlier, Joshua had adopted a pit bull, which was roving the property when the guests arrived. About two hours into the visit, while Joshua was inside the trailer and Ashlyn and her daughter were sitting on the front porch, the pit bull suddenly attacked the child, badly chewing up her lip. Joshua shot and killed the dog shortly after the incident.

Ashlyn sued Joshua and Farm Bureau, the homeowners' carrier for Joshua's grandfather, who owned the property. After a bench trial, the court found that Joshua was a member of Mr. Sikes's household, and thus covered by the policy. It then found, however, that Ashlyn failed to prove that the dog posed an unreasonable risk of harm; ergo, Joshua had no duty to restrain it. Ashlyn appealed, and Farm Bureau answered the appeal.

The Second Circuit reversed in part, affirmed in part and rendered, ***Franks v. Sikes,*** 54,177 (La. App. 2 Cir. 12/23/21), in an opinion by Judge Hunter. The court acknowledged that for the one week the dog had been with Joshua, it had never growled at him or tried to bite him, and that Joshua had even asked Ashlyn if he should put the dog in its kennel, and Ashlyn said it wasn't necessary. However, the court found that Joshua presented no evidence of the utility of the dog, and that the person who reaps the enjoyment of keeping a dog should bear the cost of injury it causes, not the innocent victim. Even with no prior aggressive behavior, Joshua "was in a superior position to anticipate and guard against precisely the type of harm sustained by the child." The court therefore found strict liability under Art. 2321, but affirmed that Joshua was a member of his grandfather's household and thus an insured under the Farm Bureau policy. Finally, the court awarded past medicals of $2,461, future medicals (revisionary surgery) of $10,500, and general damages for the child of $5,000.

Considering the testimony that the pit bull had never shown any aggression toward Joshua, or to its prior owners and their children, conceivably the defendants could have avoided liability by offering proof of the animal's utility, perhaps as a guard dog. However, in light of the "unreasonable risk" standard, the owner's best option when visitors or small children come calling, is to prevent the potential harm – put the animal in a kennel or other enclosure.

Is that final? In April 2020, the U.S. Supreme Court rendered *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583. This held, for the first time, that the right to jury trial, under the 6th and 14th amendments, requires a unanimous verdict to convict a defendant of a serious offense. Recognizing that it was negating state law and its own jurisprudence, the court carefully held that the new rule applied to cases still pending *on direct appeal*. The La. Supreme Court soon held that *Ramos* applies to cases pending *on direct review* when *Ramos* was decided. *State v. Richardson*, 20-00175 (La. 6/3/20), 296 So. 3d 1050. So, what constitutes "direct review"?

This was the issue in ***State v. Sandifer,*** 54,103 (La. App. 2 Cir. 12/15/21), an en banc opinion by Judge Cox. In May 2016, Tonya Sandifer sold a packet of meth to an undercover officer in Winn Parish; a second planned sale was frustrated when her supplier was arrested before she could get the stuff to Ms. Sandifer. The state charged Ms. Sandifer with one count of distribution of Schedule II CDS and one count of attempted distribution; the jury unanimously found her guilty of the completed offense, but convicted her of the attempt by an 11-1 vote. At sentencing, the judge intoned that illegal drugs were the "source of most of the evil that occurs in the world," he could find no mitigating factors, and any lesser sentence would not adequately reflect the gravity of the offenses; he imposed 25 and 15 years at hard labor, consecutive.

On her first appeal, the Second Circuit affirmed the convictions but vacated the consecutive sentences, remanding so the judge could expressly state why consecutive sentences were needed for this single course of conduct or common scheme. *State v. Sandifer*, 53,276 (La. App. 2 Cir. 1/15/20), 289 So. 3d 212. At resentencing, in October 2020, the judge reiterated his prior remarks and reimposed the same 25 + 15 years.

By this time, of course, *Ramos* was the law, and the 11-1 verdict for the attempt was patently illegal. Ms. Sandifer appealed her "new" sentence, raising for the first time the *Ramos* issue. The state graciously conceded, and the Second Circuit held, that even though she had received an appellate opinion, Ms. Sandifer's "case was not final on direct appeal" when *Ramos* was issued; she was still awaiting final disposition of her sentence claims. The court therefore vacated the attempt conviction and remanded for further proceedings. For good measure, the court added that the original (and reimposed) sentences of 25 + 15 years were excessive.

Sandifer means that cases which have been remanded, and may still be wending through the district courts, are subject to *Ramos* review. The whole problem of defining finality would be moot, however, if the legislature would simply make *Ramos* fully retroactive.

Young Lawyers' Section

by Joy Reger, joykilgo@gmail.com

2022 has taken flight. With January already in the books, Young Lawyers are busy preparing for a year full of networking, philanthropy, and mentoring. I look forward to many opportunities for attorneys both young and experienced to work together to continue to grow, challenge, and reward our community. We are kicking off our first Happy Hour Networking Social on February 17, 2022, at 5:30 p.m., at Orlandeaux's Cafe on the beautiful Cross Lake sponsored by Audrius M. Reed, Attorney at Law.

MARK YOUR CALENDARS! Attorney Volunteers are needed for Judging Northwest Louisiana Regional High School Mock Trial Competition. Competition is scheduled for Saturday, March 5, 2022, at the Tom Stagg United States Court House, the federal courthouse located in downtown Shreveport. There are multiple time slots available starting at 8:30 a.m. with the last round beginning at 1:30 p.m. Please contact the regional coordinator Cody Grosshart by email at: codygrosshart@gmail.com to volunteer to judge a round.

Judging mock trial is a great, low stress, and entertaining way to mentor and challenge our community's youth while influencing future generations of attorneys. The opportunity is open to all lawyers regardless of years of experience or practice area. Please mark your calendars and volunteer for a time slot today.

Federal Update

by Chris Slatten, Chris_Slatten@lawd.uscourts.gov

Motion Drafting Tips: How *Not* to Do It

My approach is that if I want someone to do something for me, I make it as easy as possible for them to do so. But not all attorneys do that when they ask something of judges. I will share with you three examples of those attorneys' motions and explain why they are terrible.

First: Motions for leave to amend a complaint are the worst offenders. In one case there were two motions to dismiss fully briefed when the plaintiff filed a motion for leave to amend his complaint. The motion recited provisions of Rule 15, said granting leave would not unduly delay the case, and affirmed that the defendants consented to leave being granted.

That's nice, but *what does the proposed amendment do?* Does it correct a typo, add or dismiss a party, add or dismiss a claim, or—perhaps—change the allegations that are relevant to the two pending motions to dismiss? Who knows? The attorney knows, but he was too busy or lazy to add a single sentence and give that information to the court. Perhaps he expected the judge to print his original and amended complaints and compare them line-by-line until the judge found what was changed. That is not a realistic expectation.

Second: This motion to amend is a little better than the last one, but it is still sorely lacking. "Through the Amended Complaint, Plaintiff seeks to name an additional defendant and amend the complaint to add new facts and law that Plaintiff has learned is applicable to his case." Who is this new mystery defendant? Will he destroy diversity? In which paragraphs of the proposed amendment might one find the new "facts and law," and can you offer a clue as to their content?

Third: A lawyer filed a bare-bones motion to consolidate two cases. This was the entire argument offered: "Pursuant to Local Rule 7.4.1 no accompanying memorandum is required to be filed with a joint motion to consolidate."

No memo may be required, but that doesn't mean that the lawyer shouldn't explain, even if just in the motion itself, what the motion is based on and why it should be granted. A hint would be nice.

If a lawyer expects a judge to poke around in the two cases and try to see why they might be candidates for consolidation—when the lawyer could not be bothered to offer even a sentence or two on the subject—he should be prepared for disappointment.

Conclusion: If you want a judge to grant your motion, put yourself in his or her shoes and set out the facts the judge will need to be able to do so. If you take that extra minute or two, your motion will have a much greater likelihood of success, and the judge will appreciate it.

District Courts and Bad 5CA Law

District courts are like soldiers who must follow orders from superior officers/courts. Whether a judge likes a precedent or not, he or she should follow and apply it. Article 90 of the UCMJ states that a soldier's duty is to obey "the lawful orders of his/her superior." But the 5CA expects district courts to obey its precedents even when they are probably no longer lawful orders.

This is demonstrated in *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787 (5th Cir. Dec. 2021). The setting: A 2012 5CA panel held that the statutory deadline to file a claim under the Limitation of Liability Act was jurisdictional; a 2015 SCT decision gutted the rationale of the 5CA precedent but did not expressly overrule it.

The 5CA is a strict stare decisis court, so future panels are bound by panel precedent absent a change in the law by Congress, the en banc court, or the SCT. The 2021 *Bonvillain* panel looked at the situation and said it was obligated to depart from the 2012 panel's decision due to the intervening SCT decision.

But what is a district court to do in that situation? The district court in *Bonvillian* followed the bad 5CA precedent rather than the SCT decision. The 5CA said that was an "able decision" because "[t]he district court was not free to overturn the rule we announced in" 2012. District courts, unlike American soldiers, must follow even orders that are likely unlawful. So don't be too rough on your trial court judge if he won't rule in your favor despite your citation of a solid case from the SCT. He's just following orders.

COVID-19 and Business Interruption Insurance

A covid-related state order forbade dine-in service. A restaurant tried to recoup its losses through its commercial property insurance policy that covered business interruption losses caused by "direct physical loss of or damage to property." The 5CA affirmed dismissal of the claim. *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 2022 WL 43170 (5th Cir. 2022). The decision was an *Erie* guess of Texas law, and it joined several other circuits that have issued similar decisions across the country.

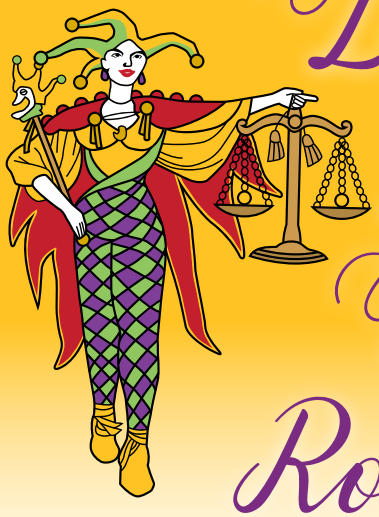
January Luncheon Highlights


COURT OF APPEAL SECOND CIRCUIT
STATE OF LOUISIANA


SHREVE
BAR ASSOC


SHREV
BAR ASSOC

Justinian Bal XXVIII



Laissez Les Bons Temps Rouler











Duchess of Justinian XXVIII

Duchess of Justinian XXVIII

Duchess of Justinian XXVIII

Krewe of J
Royalty Dinner a

Justinian XXVIII
and Royalty Brunch

Pro Bono Project

Do Good Work ~ Hon. Henry A. Politz

We want to recognize and thank the following attorneys who accepted one or more Pro Bono cases and volunteered at our monthly Ask A Lawyer clinic during the last quarter of 2021 and January 2022. Without our volunteer attorneys, we could not provide services to our clients who cannot afford legal assistance.

Elizabeth Carmody
Cook Yancey King & Galloway

Jasmine Cooper
Attorney at Law

Dan Farris
Attorney at Law

Felicia Hamilton
Attorney at Law

David Hemken
Cook Yancey King & Galloway

Taunton Melville
Blanchard Walker O'Quin & Roberts

Larry Pettiette
Pettiette, Armand, Dunkelman, Woodley, Byrd & Cromwell

Audrius Reed
Attorney at Law

Rebecca Vishnefski
Attorney at Law

Angela Waltman
Attorney at Law

David White
Attorney at Law

Stacey Williams
Blanchard Walker O'Quin & Roberts

Mac Zentner
Blanchard Walker O'Quin & Roberts

If would like more information about volunteering or have any questions about our current open cases, please contact Lucy Espree at 318-703-8381 or at lespree@shreveportbar.com.

The Pro Bono Project is able to do all that we do because of the support we receive from our grantors, Louisiana Bar Foundation, Acadiana Legal Services Corporation, The Community Foundation, Carolyn W. and Charles T. Beaird Family Foundation, First United Methodist Church, Grayson Foundation and the SBA Krewe of Justinian.

PRO BONO PROJECT
DO GOOD WORK

GET INVOLVED

Being involved in Pro Bono is a rewarding experience as you give back to the community, gain experience in the court room, and earn CLE credit. Contact the SBF office to get involved.

Lucy Espree, Pro Bono Coordinator,
lucy@shreveportbar.com | 318.703.8381.

Welcome New Members

John C. Dalton Griffin
Hargrove, Smelley & Strickland

Alexandra Harlow
Thomas Soileau Jackson Baker & Cole LLP

Claudia Payne
The Payne Firm, LLC

Wesley Pope
Attorney at Law

Looking for a space to hold a mediation, litigation, deposition, or meeting?

Try the Mediation Center at the Shreveport Bar Center.

For only $150 per day per room, you will receive a soundproof meeting space equipped with video conferencing system, Wi-Fi, and optional beverage service. Reserve Today! Contact the SBA office (318) 222-3643 Ext. 3 or go online to www.shreveportbarfoundation.org

CHAD M. GARLAND
CPA, LLC

Chad M. Garland,

CPA/ABV/CFF/CGMA, ASA, CVA, MAFF, CFE, CTP, MBA

Litigation, Expert Witness & Valuation Services

With 39 years' experience as a licensed CPA in Louisiana and Texas, Chad M. Garland has the knowledge, skills, experience and certifications necessary to handle your forensic accounting, expert witness and business valuation requirements.

In his forensic accountant capacity, Chad M. Garland can help resolve disputes before they reach the courtroom. In cases where disputes do go to court, Mr. Garland can be called upon by the attorney and their client to provide "expert witness" testimony in any given case. He has served as an expert witness on a variety of cases in district and federal court. Mr. Garland is trained to investigate, identify, and prevent financial crime and fraud.

Chad M. Garland operates within a policy of integrity, trust and competence. Know that your forensic accounting, expert witness and business valuation requirements will be handled with the utmost care, concern and attention to detail.

CREDENTIALS:

Certified Public Accountant (CPA)
Accredited in Business Valuation (ABV)
Certified in Financial Forensics (CFF)
Certified Global Management Accountant (CGMA)
Accredited Senior Appraiser (ASA)
Certified Valuation Analyst (CVA)
Master Analyst in Financial Forensics (MAFF)
Certified Fraud Examiner (CFE)
Certified Treasury Professional (CTP)
Master in Business Administration (MBA)

CASE TYPES:

Business Valuation Services · Bankruptcy
Embezzlement · Insurance Claims
Shareholders/Partnership Disputes
Mediation · Personal Injury Claims
Business Economic Losses
Divorce Settlements/Marital Disputes

PHONE 318.220.4416
CGARLAND@CHADGARLANDCPA.COM
900 PIERREMONT RD, STE 120 · SHREVEPORT, LA 71106
WWW.CHADGARLANDCPA.COM

UPCOMING EVENTS

*2022 SBA MEMBERSHIP LUNCHEONS

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

*FEBRUARY 23

SBA Member Luncheon
Speaker: Honorable John S. Hodge, U.S. Bankruptcy Judge

*MARCH 23

SBA Member Luncheon
Speaker: TBD

APRIL 26

SBA Golf Tournament
Querbes Park Golf Course

MAY 3

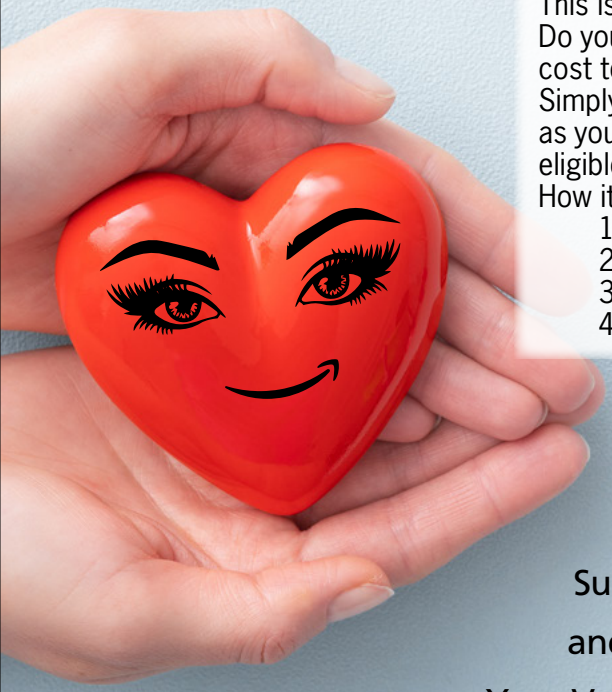
Give for Good Campaign
Rhino Coffee Downtown

*MAY 4

Law Day Luncheon
Speaker: TBD

MAY 6

Red Mass
9:00 a.m. at Holy Trinity Catholic Church



You can now use the Amazon Shopping app on your mobile phone to sign up for AmazonSmile and select "Shreveport Bar Foundation Pro Bono Project" as your favorite charity.
This is a great opportunity for you to support us through AmazonSmile donations.
Do you want to help make a difference while you shop in the Amazon app, at no extra cost to you?
Simply follow the instructions to select "Shreveport Bar Foundation Pro Bono Project" as your charity and activate AmazonSmile in the app. They'll donate a portion of your eligible mobile app purchases to us.
How it works:

1. - Open the Amazon app on your phone.
2. - Select the main menu (=) & tap on "AmazonSmile" within Programs & Features.
3. - Select "Shreveport Bar Foundation Pro Bono Project" as your charity.
4. - Follow the on-screen instructions to activate AmazonSmile in the mobile app.

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Support Us
and Find All
Your Valentine's Gifts!
You Shop. Amazon Gives.

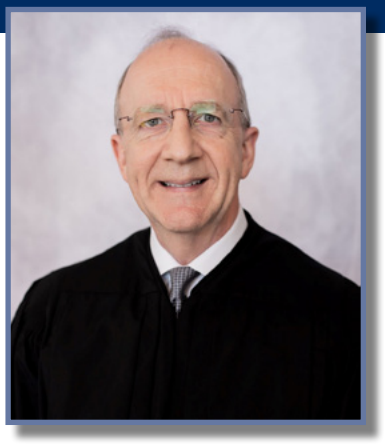
Shreveport Bar Foundation
Pro Bono Project

DEADLINE FOR MARCH ISSUE: FEBRUARY 15, 2022

SBA LUNCHEON MEETING & CLE MEETING – FEBRUARY 23

Petroleum Club (15th Floor) Buffet opens at 11:30 a.m.
Program and Speaker from 12:00 Noon to 1:00 pm.

$40.00 for SBA members; $50.00 for non-SBA members. Advance reservation is required no later than 5 p.m. Monday, February 21.



Bankruptcy Law for Non-Bankruptcy Lawyers

When: 12:00 Noon on Wednesday, February 23
Where: Petroleum Club (15th floor)
Featuring: Hon. John S. Hodge, United States Bankruptcy Judge

Judge Hodge's presentation is eligible for 1 hour CLE credit

Please join us on Wednesday, February 23 as we welcome Judge John S. Hodge, who will give an informative presentation for practical information on bankruptcy law for non-bankruptcy lawyers. Judge Hodge serves as a U.S. Bankruptcy Judge for the Western District of Louisiana. Prior to his appointment, he served as a Chapter 7 bankruptcy trustee and was a member of a Shreveport law firm where his practice focused on bankruptcy, commercial litigation and commercial real estate. He holds a Bachelor of Science in Accounting from Louisiana State University, and a J. D. from Louisiana State University Law Center.

#SHREVEPORTBARASSOCIATION

You may confirm your reservation(s) by email kriggs@shreveportbar.com,
Phone 222-3643 Ext 2 or Fax 222-9272.

I plan to attend the February Luncheon.
Attorney: _____

Please remember to call and cancel if you are unable to attend.
The SBA pays for each reservation made.
No-shows will be invoiced.
Thank You!