# THE BAR REVIEW

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION Volume XXX, Number 3 • Mar. 2023

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## EVENTS AT A GLANCE

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| 3/22 | SBA Membership Luncheon – 12:00 p.m. - Petroleum Club |
| 4/6 | Trial Advocacy Lunch & Learn Series I – 12: Noon – SBC |
| 4/25 | SBA Golf and Pickleball Tournament – Querbes Park Golf Course |

# From The President

*by Nancy Cooper, ngcoop23@gmail.com*

## The Color Purple

It's March! Finally! A month to regroup and reflect after a glorious holiday season of celebrations. From Halloween through Thanksgiving, Christmas and New Year's, and ending with Mardi Gras. To some, March is the season of Lent – the period between Ash Wednesday and Easter. The word Lent derives from the Middle English word "*lente*" meaning springtime and the lengthening of days – an appropriate time for prayer and fasting, reflection and confession, discipline and spiritual renewal. Whether you practice the Christian ritual of Lent or not, it's a marvelous opportunity to slow down and count your blessings. It's a journey we can all take together.

At the February Shreveport Bar luncheon, U.S. District Judge Maury Hicks (King XXIX of our SBA's Krewe of Justinian) spoke about the color purple – the color worn during Advent and Lent. It's known to many as Louisiana's signature color, from LSU to Mardi Gras to K&B. Widely recognized as the color of royalty and nobility, it also symbolizes pain and suffering. In the book of Mark 15:16-20, we're told that Jesus wore a purple robe during His trial and beatings. In Alice Walker's book *The Color Purple*, it symbolizes the facial bruises on the female characters at the hands of violent men.

But as Judge Hicks recounted last month, purple is also known – perhaps predominantly – as the color of justice. He referenced Roman Emperor Justinian, for whom our SBA's Mardi Gras krewe is aptly named. Justinian served as emperor of the Byzantine Empire from 527 to 565 and is known for codifying the old Roman law, reducing corruption and leaving impressive achievements in art, architecture and legal reform. Judge Hicks also referenced the statue of Lady Justice outside of the Tom Stagg United States Court House on Fannin Street. He made note of the fact that she is blindfolded – because by definition, justice must be blind to outward appearances, namely race.

As we bid farewell to February – the month we celebrated both Mardi Gras and Black History this year – the color purple as a symbol of justice seems particularly compelling. When I moved to New Orleans in 1991 for law school, the gubernatorial race between Edwin Edwards and David Duke was making national headlines. At the same time, Dorothy Mae Taylor – the first African American woman to serve on the New Orleans City Council – was introducing an ordinance that would ultimately prohibit the issuance of parade permits to Mardi Gras krewes who discriminated on the basis of race, religion, gender, disability or sexual orientation.

Growing up in Shreveport in the '70s and '80s, I had zero appreciation for Mardi Gras in 1991. I had never been to a Mardi Gras parade or tasted king cake. I'd never heard of Rex, Comus or Zulu. Little did I know that 30 years later, I would captain a krewe of my own – a Mardi Gras krewe of northwest Louisiana lawyers for the Shreveport Bar Association – and that I'd grow to have a profound appreciation for Councilwoman Taylor's fearless efforts and the impact she and others have made on the evolution of Mardi Gras and our popular Louisiana traditions.

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***Continued from pg 1 "From the President"***

Mardi Gras and the color purple were on full display up in Washington DC last month when the Mystick Krewe of Louisianians hosted their 74th Annual Washington Mardi Gras Ball at the Washington Hilton. Congresswoman Julia Letlow from Louisiana's 5th Congressional District chaired the event this year, which was themed "Louisiana: The Steel Magnolia" – a particularly appropriate theme given Rep. Letlow's courageous 2021 campaign after the tragic death of her husband who'd previously won the seat but died only days before taking office. Congresswoman Julia Letlow is Louisiana's first (*ever!)* Republican woman elected to Congress.

If you're not familiar with the history of Washington Mardi Gras, head down to Capitol Park Museum in Baton Rouge where a temporary exhibition titled "Carnival in the Nation's Capital: The Washington Mardi Gras Ball" is on display through September 16, 2023. According to the museum's brochure for this exhibition, Washington Mardi Gras Ball began in 1944 "by homesick Louisianians eager to introduce fellow Washingtonians to their favorite holiday." In the foreword to this brochure, Lt. Gov. Billy Nungesser writes that "the desire to replicate some of the carnival experience in our nation's capital goes beyond wanting to give more people the opportunity to catch some beads, eat Cajun and Creole delicacies, and dance to carnival tunes. What we also want to celebrate is the healthy balance of work and play, of business and friendship, and of professionalism and informality that is uniquely Louisiana … here in Louisiana we've learned that life is both a party and a challenge, celebrations are better than confrontations, and our revelry contributes to our resiliency."

Our SBA can and should celebrate the color purple all year long by working together to seek justice for our northwest Louisiana community. Our members can better serve our community and each other when we work *and* play together, when we balance our business relationships with our friendships, and when we collaborate to host parties or confront challenges.

The last Northwest Louisiana Mardi Gras Association Grand Bal of the 2023 season was hosted by the Krewe of Harambee and themed "Fantastic Voyage." Captain XXII (and SBA member) Shanté Wells and the members of his Royalty took us around the world from places like Barbados to Dubai in immaculate costumes with gorgeous backdrops. At the end of the procession, however, King XXII LaTari Fleming brought us home to northwest Louisiana – to Lincoln Parish, Grambling, Louisiana. It was the perfect ending to a glorious Mardi Gras season for all of our area krewes as we came full circle and celebrated our northwest Louisiana heritage together.

If you haven't done so already, please join the SBA. Join the Krewe of Justinian. Get involved. Take a seat at the table next to someone you don't know or someone with whom you disagree. Or as they do at Washington Mardi Gras, belly up to the "65th Parish" with someone from across the aisle or across the courtroom. Red + Blue = Purple. After all, membership in SBA is primarily about forming relationships. It's an investment that will make you a better lawyer and a better person.

# GIVE for GOOD

powered by Community Foundation

**May 2, 2023**


LRVDV Program
Legal Reresentation for
Victims of Domestic Violence

**May 2 is Give *for* Good!** The Shreveport Bar Foundation needs your help! Helping domestic violence victims through our Legal Representation for Victims of Domestic Violence program and supporting the Pro Bono Project are great reasons to **Give *for* Good!** Mark your calendar for Northwest Louisiana's BIGGEST giving day of the year, Tuesday, May 2, 2023! **Give *for* Good** is an online fundraising event powered by the Community Foundation.


The Shreveport Bar Foundation operates several programs, The Pro Bono Project, Legal Representation for Victims of Domestic Violence Program, Monthly Legal Clinics and Self Represented Litigant. Your donation will help continue to fund these programs that provide legal resources to our community. We ask that you choose the Shreveport Bar Foundation when you **Give *for* Good** this year! Get Ready To Give!


Advance giving is open visit https://www.giveforgoodnla.org/sbfprobono and make a donation. You have until May 2 at 11:59 PM, to make your donation, when all giving will end.

# THE SHREVEPORT BAR ASSOCIATION

# ANNUAL GOLF TOURNAMENT

**SHOTGUN START**

**1:00 p.m.**

**ENTRY FEE**

**$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 in each Flight**

**Closest to the Hole Contest**

**Long Drive Contest**

**April 25, 2023**
**Querbes Park**
**Golf Course**
**Shreveport, LA**

**RICHARD B. KING JR. MEMORIAL SHOOTOUT!**

**Enter to have your team represented in this 2-man team golf alternate shot contest. $150 per team. Play begins at 12:15 p.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 $35**

## REGISTRATION

**SHREVEPORT BAR ASSOCIATION - 2023 GOLF TOURNAMENT**

**Tuesday, April 25, 2023 at Querbes Park Golf Course, Shreveport**

**Player gift, 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:_____

# PICKLEBALL TOURNAMENT

## Sponsored by Shreveport Bar Association


## ENJOY A DAY OF FUN AND COMPETITION

## Tuesday, April 25

## 12:30 pm

### Registration Deadline: Monday, April 24, 2023

**The number of participants will be limited so register early to guarantee a spot!**

**Tournament is open to anyone 21 or older.**

**SBA members and nonmembers are welcome.**

**You will be placed on a team, and teams will be chosen on Tuesday morning, April 25**

***Please complete the registration form below and mail along with entrance fees before the April 24 deadline.***

**Crawfish Boil for Non players is $35**

**SHREVEPORT BAR ASSOCIATION PICKLEBALL TOURNAMENT**

***Registration fee includes the following:***

***Player Gift ($50 gift certificate to Superior Steakhouse)***

***Lunch (begins serving at 11:00 a.m.)***

**Crawfish Boil (begins serving at 5:00 p.m.)**

***Prizes will be awarded immediately following the tournament***

**New to pickleball and would like a tutorial session? Please contact the SBA office before April 4**

**REGISTRATION FORM**

**Name:** _____ **Skill Level: (please circle):** 3.0 3.5 4.0 4.5+

**Email Address:** _____ **Phone:** _____

**Registration Fee: $75**

**Make check payable to SHREVEPORT BAR ASSOCIATION and mail to:**

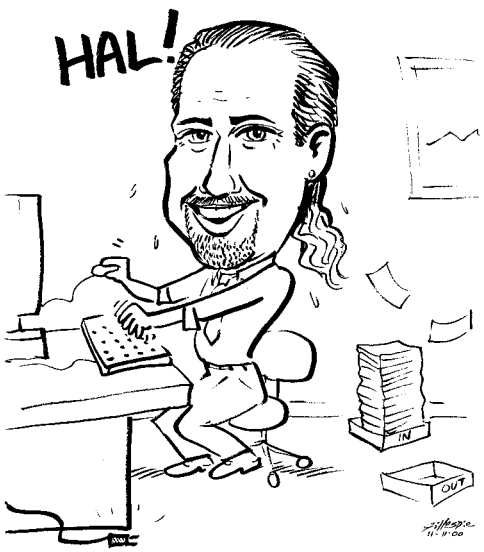
**2023 SBA Pickleball Tournament, 625 Texas Street, Shreveport, LA 71101**

**Email questions to Dana at dsouthern@shreveportbar.com or call 318 703-8373**

# How Write You Are

*by Hal Odom Jr., rhodom@la2nd.org*

**This is the most important thing ...** In an influential case of judicial discipline, the La. Supreme Court intoned, "The *tantamount* duty of a judge is to conduct fair and impartial proceedings." *In re Cooks*, 96-1447 (La. 5/20/97), 694 So. 2d 892. Subsequent cases have echoed this maxim reflexively. *Covington v. McNeese State Univ.*, 10-0250 (La. 4/5/10), 32 So. 3d 223 (recusal of a judge); *Capers v. NorthPro Props. Mgmt. LLC*, 53,919 (La. App. 2 Cir. 5/5/21), 321 So. 3d 502 (a landlord-tenant dispute). The plain meaning is that fairness is the *highest* or *most important* duty.




Only problem is that the word doesn't mean that. *Tantamount* means *equivalent* or *of like value*. "Plaintiff's right to 'file a complaint' is not *tantamount* to a due process hearing." *Gotte v. Air Conduit LLC*, 22-00971 (La. 10/4/22), 347 So. 3d 860 (Genovese, J, concurring). "Such notice is *tantamount* to knowledge or notice of everything to which a reasonable inquiry may lead." *Bryant v. Dean Morris LLC*, 54,657 (La. App. 2 Cir. 8/10/22), 345 So. 3d 483. Most often, this word is sandwiched between *is* and *to*.

So, what did the Supremes mean? Obviously, another mountainous word, *paramount*, which means *most important* or *above all others*. "Requiring counsel to present * * * evidence over the defendant's objection 'would be inconsistent with an attorney's *paramount duty* of loyalty to the client[.]'" *State v. Brown*, 18-01999 (La. 9/30/21), 330 So. 3d 199 (quoting a California case). "Drivers moving through the parking lot have the *paramount duty* of attentiveness and maintaining a low vehicle speed[.]" *Collins v. Creighton*, 53,522 (La. App. 2 Cir. 9/23/20), 303 So. 3d 1114.

Legal writers occasionally face the dilemma of needing to quote an authority containing a word that was obviously misused. (Recall R.S. 9:2800's solemn reference to "the existence of facts which *infer* actual knowledge," when we know that facts can't infer – only people can!) One option is to quote the case or statute one time as written, but then use the correct term in your own argument – discuss the judge's *paramount duty* or *preeminent duty*, or facts which *imply* actual knowledge. Another is to cite but not directly quote, although a paraphrase doesn't quite pack the authority of a quote. Perhaps you can find a case that tries to untangle the confusion; with R.S. 9:2800, consider *Perdomo v. City of Kenner*, 18-156 (La. App. 5 Cir. 10/17/18), 258 So. 3d 983, fn. 5.

At any rate, avoid demoting those paramount duties.

**Intensive writing.** The online newspaper *The Hill* recently quoted a congressman about his bill addressing the January 6 insurrection: "Ours [an amendment to the Electoral Count Act], for all *intensive purposes*, just hit this week[.]" Mychael Schnell & Rebecca Beitsch, "House tees up first vote on Jan. 6 reform legislation," *The Hill* (9/20/22). A newsletter chimed in: "Many cases have held a lender responsible as an 'owner or operator' under CERCLA if it participated * * * to such an extent that it has become, for all *intensive purposes*, the 'owner' of the property." "Lender Liability under Superfund," Exec. Legal Summary (Dec. 2022 update).

Fortunately, I'm aware of only one La. case to plumb this depth of intensity: probable cause existed because of "information given by their fellow officer who was for all *intensive purposes* an eye witness to the commission of this offense." *State v. Bland*, 260 La. 153, 255 So. 2d 723 (1971).

By now, we all know the phrase is *intents and purposes*. Regardless what it sounds like in casual speech, try to write it correctly, for any purpose.

**Another easy elision.** Consider this quote, reproduced in an opinion: "I was at his *beckon call* for everything. I chauffeured, did his haircuts, I did everything." *Tassin v. Tassin*, 14-488 (La. App. 3 Cir. 12/3/14), 161 So. 3d 818. Or this, from a law review: "Counsel for the hiring party would * * * cast the web site designer as an uncreative lackey who is at the *beckon call* of the hiring party." Rinaldo Del Gallo III, "Who Owns the Web Site? The Ultimate Question," 16 J. Marshall J. Comput. & Info. L. 857 (Summer 1998).

The expression is *beck and call*, meaning *at the slightest wish*. Try to keep this straight, for all intents and purposes.

**Danglers.** Be sure your prepositional and other phrases are placed in such a way that the reader can tell what they modify.

"After proceeding through the lower courts, this court granted writs of certiorari in the case to address the res nova issue[.]" *Hartman v. St. Bernard Parish Fire Dept.*, 20-00693 (La. 3/24/21), 315 So. 3d 823. Are they saying that the La. Supreme Court wended through the lower courts? I doubt it.

"Defendant shot Washington in the knee, who immediately ran from the building." (From a brief filed in the Second Circuit.) Tell me now, which one fled? Was it the defendant, while holding the gun, or Washington, with a bullet wound in his knee?

"Giving meaning to all of its terms, the attestation clause substantially complies with Article 1579(2)." *Succession of Liner*, 19-02011 (La. 1/27/21), 2021 WL 266394 (Crain, J, dissenting). Is the clause giving meaning to its own terms, or is the court doing this? Notably, the Supreme Court granted a rehearing and vacated this early version of *Liner*.

**The nuclear option.** From the "opinion" prefacing an order: "Stay denied; Writ granted in part; See per *curium*." *State ex rel. Cosey v. Hooper*, 21-01603 (11/4/21), 326 So. 3d 1231. And, the plaintiffs filed a motion to strike passages that "revisit the merits of the * * * Fifth Circuit per *curium* opinion." *Wightman v. Ameritas Life Ins. Co.*, 22-00364 (La. 10/21/22), 351 So. 3d 690.

The right word, *curiam,* is a form of *curia*, a Roman judicial body, and means *court.* (They are not cognate, however.) You'll just have to remember this one: *curium*, named after Marie Curie, is a highly radioactive element, used in the spectrometers mounted on spaceships. The legal expression, meaning *by the court, without a specified author*, is misspelled *ad nauseam*. My fervent cry is this: No Nukes!

# Federal Update

*by Chris Slatten, Chris_Slatten@lawd.uscourts.gov*

**Bankruptcy Appeal; Statement of Issues**: Bankruptcy Rule 8009 requires that in an appeal to a district court the appellant must file a designation of the items to be included in the record on appeal and "a statement of the issues to be presented." On appeal to the appellate court, a similar rule requires that a bankruptcy appellant file a statement of the issues to be presented on appeal. FRAP 6(b)(2)(B)(i).

The appellants in *Matter of Highland Cap. Mgmt., L.P.*, 57 F.4th 494 (5th Cir. 2023) filed a statement of four issues, but those issues did not fairly encompass a standing argument that was argued in their appellate brief. The standing issue was waived.

**Title VII and Prompt Remedial Action:** When an employee is harassed by a coworker, a negligence standard governs employer liability under Title VII. The employer is negligent if it knew or should have known about the conduct and failed to stop it. An employer is not negligent when it takes prompt remedial action that is reasonably calculated to end the harassment. The plaintiff in *Hudson v. Lincare, Inc.*, 58 F.4th 222 (5th Cir. 2023) alleged that coworkers called her the N-word and used racially charged language in the office. The employer nonetheless obtained summary judgment because, as soon as plaintiff complained, the employer investigated and wrote the offenders that they would be fired if they used similar language again.

**Retaliation and Coworkers:** Ms. Hudson also alleged retaliation in response to her complaint. That required she show an adverse employment action, which is one that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. An employment decision tends to be materially adverse when it changes hours, salary, benefits, or the like.

Hudson alleged that coworkers failed to fill her orders and refused to work with her after her complaint. The 5CA said that would not be retaliation from her employer, Lincare. "The actions of ordinary employees are not imputable to their employer unless they are conducted in furtherance of the employer's business." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) "The [coworkers'] alleged misconduct was not in furtherance of Lincare's business." *Hudson*. Summary judgment for the employer affirmed.

***Terry* Stop; When *Exactly* Did It Happen?:** Dispatch notified an officer of a telephone tip of a suspicious gold Corolla near a park known for drug deals. The tipster asked that police "get these drug dealers out of his park." The officer spotted a gold Corolla, pulled in behind it, and turned on her emergency lights. The driver's door opened on the Corolla, and the officer commanded the driver three times to stay in his car. He did not comply. The officer told him to put his hands on his vehicle; instead he placed his keys on top of the car and turned towards it. The officer conducted a pat-down and attempted to move the driver next to her patrol vehicle, but he refused. He turned towards the officer, keys in hand, and said he wanted to talk to her. The driver banged on his car's hood, while yelling to a passenger to lock the car. He also motioned to the passenger to put something in his mouth. Driver was arrested. A pistol and drugs were found in the car.

The driver, charged as a felon-in-possession, filed a motion to suppress that challenged the lawfulness of the seizure that led to the discovery of his gun. A *Terry* stop is a Fourth Amendment seizure that allows an officer to briefly detain an individual for further investigation if the officer has reasonable suspicion (RS) the individual is engaged in criminal activity. Whether there is RS depends on what the officer knew *at the time the seizure was made*. This makes it important to nail down exactly when the seizure happened, so the officer's knowledge at that point can be assessed.

A seizure occurs when an officer objectively manifests an intent to restrain the liberty of an individual through either use of physical force or a show of authority. But there is no seizure without actual submission. This suspect was seized when the officer pulled behind him, activated her emergency lights, and ordered the man to stay in his car. The man did not fully comply with the orders, but there was adequate submission to be a seizure. *U.S. v. Wright*, 57 F.4th 524 (5th Cir. 2023).

Did RS exist to justify the seizure at that point (before the bargaining, banging and signaling to the passenger)? All the officer had at that moment was the tip. The 5CA reviewed the law on reliance on anonymous tips and remanded for a finding by the district judge on whether this tip sufficed. The Court added that the government had an opportunity and obligation to present its evidence establishing RS at the prior hearing, and it did not get a second opportunity on remand.

**Title VII; Failure to Train:** The 5CA clarified some fuzzy precedent in *Rahman v. Exxon*, 56 F.4th 1041 (5th Cir. 2023). "[W]e plainly hold now that an inadequate training theory can satisfy the adverse action prong of *McDonnell Douglas* if the training is directly tied to the worker's job duties, compensation, or benefits." "[A]n inadequate training claim must be based on, in essence, a failure to provide comparable training. So, offering a plaintiff an *equal opportunity* to *access* the necessary components of the training program is enough to defeat an inadequate training allegation." The black plaintiff was given training comparable to what a white coworker received, but he failed his required tests. Summary judgment for the employer affirmed.

# Justinian XXIX HIGHLIGHTS

KREWE OF JUSTINIAN
ESTABLISHED 1994


Captain Nancy Cooper

Queen Susie Stinson and Captain Nancy Cooper

Queen Susie Stinson, Duke Chris Merckle, Emily Merckle and Ford Stinson

Duke Matt Buckle, Consort Nikki Buckle, Sarah Giglio and Trey Giglio

Float Lieutenant Jimmy Franklin and Family

Hon. King Maury Hicks

Queen Susie Stinson and Consort Ford Stinson


Queen Susie Stinson, Hon. King Maury Hicks and Captain Nancy Cooper

Justinian XXIX Centaur Parade

Duchess Heidi Martin and Duchess Michelle Perkins

Duchess Heidi Martin, Captain Cooper, Hon. King Hicks, Queen Stinson, Duke Matt Buckle, Duchess Michelle Perkins, Duchess Carolyn Thompson and Duke Merckle

Duchess Michelle Perkins and Consort Keith Perkins

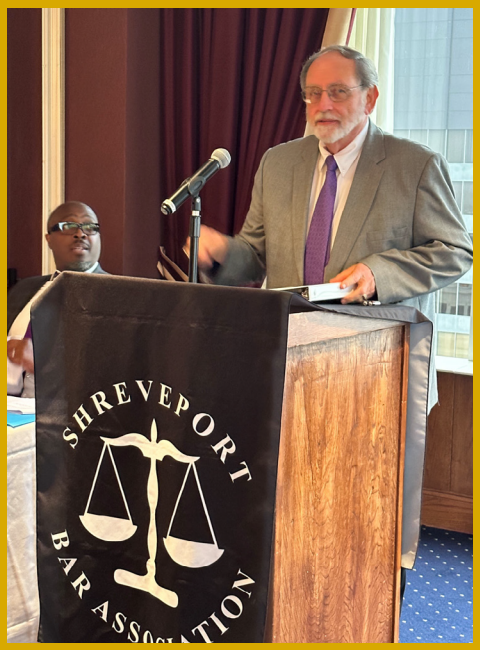
Justinian Float in the Highland Parade

Duchess Heidi Martin and Consort Drew Martin

# St. Paul's Day School Visit

# FEBRUARY LUNCHEON HIGHLIGHTS






# Second Circuit Highlights

*by Hal Odom Jr., rhodom@la2nd.org*

**Chalk one up for free speech.** In January 2021, somebody saw the plaintiff, Garsee, removing a sign that had been left on or near his commercial property on Louisville Ave., in Monroe. That person called MPD to report a theft and identified Garsee as the suspect; as a result, they arrested Garsee. Soon afterward, however, charges were dropped for lack of evidence and Garsee filed suit for defamation. He named three defendants: Ms. Sims, an employee of a nearby business, Auto Trim Design; Cobb, the owner of that business (who "positively identified" Garsee as the thief); and the business itself. Garsee alleged that the accusation of theft was defamatory per se and damaged him by jeopardizing his video poker and hemp licenses. Oddly enough, about two weeks after filing suit, he dismissed Cobb as a defendant.

The remaining defendants filed exceptions of no cause of action arguing that the petition did not allege that Ms. Sims or anybody acting on behalf of Auto Trim ever accused Garsee of theft. The district court sustained the exceptions and gave Garsee leave to amend his petition, which he did; however, the defendants filed new exceptions of no cause, basically reiterating their earlier arguments. The district court once again sustained the exceptions and dismissed all claims. Garsee appealed.

The Second Circuit affirmed, ***Garsee v. Sims,*** 54,832 (La. App. 2 Cir. 1/11/23), in an opinion by Judge Cox. The court noted that the purpose of the exception of no cause is not to determine whether the plaintiff will prevail at trial but to test whether the law affords a remedy on the facts alleged in the petition. La. C.C.P. art. 927 A(5); *Pesnell v. Sessions*, 51,871 (La. App. 2 Cir. 2/28/18), 246 So. 3d 686. Granting this exception should be rare, and happen only when the plaintiff can prove no set of facts in support of any claim. *Badeaux v. Sw. Computer Bur. Inc.*, 05-0612 (La. 3/17/06), 929 So. 2d 1211. The court next outlined the elements of defamation, *Kennedy v. Sheriff of E. Baton Rouge Parish*, 05-1418 (La. 7/10/06), 935 So. 2d 669, including the privilege extended to the communication of alleged wrongful acts to law enforcement personnel, *Bradford v. Judson*, 44,092 (La. App. 2 Cir. 5/6/09), 12 So. 3d 974.

The court then parsed Garsee's petition: it alleged that all Ms. Sims did was "accusing plaintiff of stealing a sign," not that this communication was unprivileged. Further, once Garsee dismissed Cobb, who actually reported the theft, there was no conduct by anybody who could make Auto Trim liable. In short, it was that truly rare case in which the petition did not assert a cause of action.

Some statements in the trial court briefs (not discussed in the opinion) suggested a troubled relation between Garsee and the defendants, who had been his tenants for a while. Still, the message is that reporting criminal activity to law enforcement is generally privileged; if the report is simply incorrect, it's probably not defamation.

**A shopping frenzy.** On January 1, 2018, Ms. Pistorius and her friend Ms. Richardson trooped to the Dillard's in Mall St. Vincent for the annual New Year's Day sale, which can draw a fevered crowd. They arrived midmorning, entered through the men's department, and started down the main aisle intending to turn right into the ladies' shoe department. However, a flatbed stocking cart was nudged against a display case and looming low on the right side of the 10-ft. aisle. Ms. Pistorius started to make her turn toward the shoe department, glanced back to see where Ms. Richardson was in the crowd, but strode directly into the corner of the cart, falling and hurting herself. The incident was captured on store video – lots of it. She sued Dillard's for her personal injuries.

Dillard's moved for summary judgment, urging that the size and location of the cart made it open and obvious, and thus not an unreasonable risk of harm. The district court agreed, citing some state and federal cases that had found no genuine issue when store customers tripped on things in their way. The court granted summary judgment and dismissed Ms. Pistorius's claims. She appealed.

The Second Circuit reversed, ***Pistorius v. Higbee La. LLC,*** 54,780 (La. App. 2 Cir. 2/8/23), in one of the final published opinions of Chief Judge Moore (rendered after his retirement, hence the designation "ad hoc" on the cover). The court quoted the Merchant Liability statute, R.S. 9:2800.6 (especially subsection B(1), requiring proof that the condition "presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable") and the "open and obvious" defense, *Cox v. Baker Distrib. Co.*, 51,587 (La. App. 2 Cir. 9/27/17), 244 So. 3d 681. However, the court recognized that in a situation where the customer is likely to be distracted by the merchandise, and the obstruction is ankle-high, the question of open-and-obvious is not open-and-shut, *Grisby v. Jaasim II LLC,* 54,646 (La. App. 2 Cir. 9/21/22), 349 So. 3d 103. With the video evidence that Ms. Pistorius did not actually see the cart, the court found that a genuine issue remained. The court also noted that in a home improvement store (like Home Depot), flatbed carts are provided for customers and are commonly encountered in the aisles, but not so in a department store (like Dillard's). Judge Marcotte dissented without reasons.

The Merchant Liability statute makes it very difficult for a plaintiff to win a slip-and-fall or trip-and-fall on store premises, but *Pistorius* and *Grisby* show that such a claim will not necessarily go straight down on MSJ.

**Storage wars.** In late 2018, Marlin Jones was driving down North 11th St., in West Monroe, and spotted a large self-storage facility with a "for sale" sign in front. Jones was looking for a good investment to fund his retirement, so he called the real estate agency, DB Realty, and scheduled a tour of the property. The owner, Big Stuff Storage LLC, attended the tour, through its member-manager, Jere Spence. (Spence had previously been a real estate agent at DB Realty.) Spence gave Jones some printed info (occupancy analysis report, master list of all tenants, email stating the regular expenses) and told him that of the 266 units, 132 were vacant; if all were occupied, the rent revenue would be $12,205 a month.

Jones was very interested. He asked Spence to verify the income, but Spence was a little evasive, saying there were no "traditional books," but a software program for self-storage businesses, and the North 11th property was melded in with the rest of Big Stuff's properties; moreover, his rent figures might not be accurate because he had allowed discounts on some of the units. However, Jones was still interested, and they started to bargain: Spence originally wanted over $1 million (it had appraised for $1.16 million in June 2017), but after new appraisals and an updated rent report (up to $12,705 a month), they settled on a price of $910,000. Prior to closing, another issue arose: Spence was buying insurance only on the office, but Jones's mortgage lender required insurance on the whole property, greatly raising the buyer's costs. Spence agreed to lower the price to $870,000, and Jones accepted. They closed in January 2019, in an "as is, where is" sale.

Almost immediately, Jones found the operation was nothing like what had been represented in Spence's documents. In the first month, rents totaled only $2,863, and after Jones aggressively recruited more tenants, by midyear it still was only $5,066. And, in addition to some tenants getting discounts, many were not paying at all, or had abandoned their units; 49% of the units marked on the roll as occupied were, in fact, empty. To top it off, a large number of "cash entries" were logged, but not actually received. Jones sued Big Stuff and Spence seeking rescission for error or mistake of fact or, alternatively, nullity for intentional, fraudulent misrepresentation of fact.

Big Stuff and Spence countered that the sale was "as is, where is," and that they never guaranteed $12,000 a month in rent. The matter went to a two-day bench trial, after which the court agreed with the seller: there was sufficient information to make Jones suspicious, but no evidence of fraud. It issued no specific findings as to rescission for error, but dismissed all of Jones's claims. Jones appealed.

The Second Circuit affirmed, ***I-20 Self Storage LLC v. Big Stuff Storage LLC,*** 54,814 (La. App. 2 Cir. 1/11/23), in an opinion by Judge Pitman. The court detailed the law of fraud, La. C.C. art. 1953, and the fact that there is no vice of consent when the defrauded claimant "could have ascertained the truth without difficulty, inconvenience, or special skill," La. C.C. art. 1954. The court considered that the "as is, where is" sale conveyed only the land and improvements, not the ongoing business, so the alleged shortfall in rent revenues could not have substantially influenced the buyer's consent. As for the claim of rescission for error, the court noted the similar principle of La. C.C. art. 1949: the vice must affect a substantial quality of the thing sold, and both parties must regard it as a cause of the obligation. Again, the sale was only for the land and physical plant, the parties negotiated a "very long time," and the seller made serious concessions in the asking price. The evidence supported, at most, unilateral error.

Jones did not exactly "buy in haste, repent at leisure," but his enthusiasm to get a piece of the self-storage action may have overshot the circumstances. It's not reality TV, and you get more than five minutes to make your decision!

**A case of osteomyelitis and manifest error.** The 73-year-old plaintiff, Frye, fell off a forklift and badly fractured his right wrist. He was carried to Northern La. Medical Center, in Ruston, where the on-call orthopedic surgeon, Dr. Ballard, ran X-rays and repaired the fracture by inserting an external fixation device through the skin and into the bone. Frye's initial progress looked good, but about a month later Dr. Ballard found swelling, pain and drainage from the site so he prescribed a broad-spectrum antibiotic and ordered occupational therapy, which Frye took. A week later, seeing no progress, Dr. Ballard switched antibiotics and continued the OT; there was still little progress, and Dr. Ballard suspected "lack of care for his fixator." In the following weeks, the pain persisted but the evidence of infection diminished. After about 3½ months, Frye sought a second opinion, from Dr. Milstead in Shreveport. Dr. Milstead found "significant collapse of the entire proximal row" and "erosive changes" of the carpal and proximal metacarpal bones, and could not rule of "septic arthritis." Referred to an infectious disease specialist, Dr. Abou-Faycal, Frye finally got relief after receiving broad-spectrum antibiotics in a hospital setting for about six weeks.

Frye applied for a medical review panel, which found that Dr. Ballard's conduct – specifically, the "unaddressed infectious process" – did not meet the applicable standard of care and was a factor in the alleged resultant damages. With this favorable MRP opinion, Frye filed a medical malpractice suit against Dr. Ballard. Presumably in accord with COVID-19 protocols, the trial consisted entirely of depositions on video or read into the record: Frye and his wife, and Drs. Milstead and Abou-Faycal, and several other doctors, one of whom had served on the MRP. The plaintiff's experts established that use of an external fixator increases the risk of infection, though one of them admitted that the X-rays, MRI and blood tests were "not very obvious for infection." Dr. Ballard presented two experts, one of whom could not tell if the changes in Frye's bone scan were from the treatment or from osteoarthritis, inflammatory arthritis or tumors. The other said that after the first two broad-spectrum antibiotics, Frye's wrist seemed to get better, and the X-rays did not clearly indicate osteomyelitis.

The district court found that Frye's recovery "waxed and waned" over the months, the fixator pin was necessary to set the complex fracture, and Frye had other risk factors for infection. The court found no breach of the standard of care, and dismissed all claims. Frye appealed.

The Second Circuit affirmed, ***Frye v. Ballard,*** 54,813 (La. App. 2 Cir. 1/25/23), in an opinion by Judge Hunter. The court laid out the statutory burden of proof, La. R.S. 9:2794 A, and the rule that the "highest degree of care possible" and "absolute precision" are not required, *Gordon v. LSU*, 27,966 (La. App. 2 Cir. 3/1/96), 669 So. 2d 736. Applying the manifest error standard of review, the majority found that the district court was faced with competing expert opinions and was not unreasonable in accepting the view of the defense experts. Judge Thompson dissented, calling it "concerning" that the MRP found a breach and causation but that the district court could find otherwise.

As often happens on appeal, manifest error was as much, or more, decisive than a mound of expert medical testimony.

**Which came first?** Denny and Lesa got married in Caddo Parish in 2003, with a prenup agreement. On May 26, 2020, Denny filed a petition for Art. 102 divorce in Caddo; referring to the prenup, he reserved his right to pursue any other claims. Three days later, May 29, Lesa filed her own petition for Art. 102 divorce, but this was in Orleans Parish; she also demanded interim and final spousal support, partition of co-owned property and various other relief. On June 18, Denny filed a supplemental and amending petition, seeking an Art. 103 divorce alleging Lesa's adultery and abandonment; he also demanded revocation of donations and partition of co-owned property. However, Lesa filed exceptions of lis pendens and prematurity, on grounds that her Orleans Parish petition was first with respect to spousal support and partition. The district court denied these, and the Supreme Court denied writs, *Gamble v. Gamble*, 21-00475 (La. 6/1/21), 316 So. 3d 835. More amended petitions and exceptions followed. Ultimately, the First JDC denied Lesa's latest exception of lis pendens, as the first suit, in Caddo, involved the same parties in the same capacities and arose out of the same transaction or occurrence as the second one, in Orleans. Lesa sought supervisory review.

The Second Circuit denied the writ and sustained the lis pendens, ***Gamble v. Gamble,*** 54,595 (La. App. 2 Cir. 1/18/23), in an opinion by Judge Robinson. The court quoted the law of lis pendens, La. C.C.P. art. 531, and of relating back, La. C.C.P. art. 1153, noting that Art. 1153 applies to defeat declinatory exceptions, *Fortenberry v. Glock Inc. (USA)*, 32,020 (La. App. 2 Cir. 6/16/99), 741 So. 2d 863. The court found that all claims arising out of Lesa's amended petition arose out of the same conduct, transaction or occurrence as in Denny's original petition: the termination of the marriage. Lesa's claims must yield to Denny's petition, which was filed first.

Incidentally, the Orleans Civil District Court sustained Denny's exception of lis pendens; the Fourth Circuit reversed, but in short order the Supreme Court granted a writ, reinstated the ruling and dismissed Lesa's Orleans action, *Gamble v. Gamble*, 22-00102 (La. 4/20/22), 336 So. 3d 452. If the action is divorce and its ancillary claims, filing first really does matter.

# BAR BRIEFS

## JUDGES IN THE CLASSROOM AND ON THE FOOTBALL FIELD

Judges meeting with students as part of Judges in the Classroom outreach programs might not always be able to measure the impact of their discussion with the students immediately. For Shreveport City Court Judge Brian Barber, however, his interaction with a smaller group of students outside of the Judges in the Classroom program does often show more immediate returns. In this capacity, however, Judge Barber is better known as "Coach" Barber, because in addition to his role as city court judge, he serves as offensive line coach for varsity football at Calvary Baptist School in Shreveport, a position he's held for the last three years among his 20 years in different roles at different levels and schools. Although this interaction with students may be somewhat nontraditional for a judge, Judge Barber believes it provides him an even greater opportunity to serve as a mentor and teacher to those under his watch. The success the team has had on the field (winning their district every year since 2013 and three state championships) underscores lessons learned off the football field, which can serve as building blocks for each young person's future success in life. "As a coach, your success is not measured on the wins you take but rather the winners you make," said Judge Barber. "And the same line applies to being late for practice or court…if you come late, then you better come runnin'!"



**Shreveport City Court Judge Brian Barber speaking with students at Calvary Baptist Academy.**


**Shreveport City Court Judge Brian Barber with members of the Calvary Baptist Academy Cavaliers offensive line.**

# Monroe Inn of Court

*by Hal Odom Jr., rhodom@la2nd.org*

## STRATEGIES FOR STRESS

"Turning Stress into Success" was the topic at the February 2023 meeting of the Judge Fred Fudickar Jr. (Monroe, La.) AIC. The presenter was Dr. Angela White-Bazile, executive director of the La. Judges & Lawyers Assistance Program ("JLAP"). Dr. White-Bazile is noted for her regular column, "Lawyers Assistance," that appears in each bimonthly issue of *La. Bar Journal*.

Dr. White-Bazile gave a highly spirited presentation on how to spot stress or burnout in yourself or in fellow lawyers, strategies for coping with it, and resources available through JLAP. She pointed out that suicide is the 11th-highest cause of death in the general population, but the third-highest among lawyers, and everyone can play a part in bringing the numbers down. She admitted it can be difficult to broach the subject of stress or depression with another lawyer, given our tendency to be organized, structured and somewhat defensive. She asked, emphatically, "Can you talk to the strong?"

She also led the group in a breathing-and-stretching exercise designed to lower one's anxiety level. The communal activity was a refreshing change to the normal sedentary mode of IOC meetings!

The meeting was held at the Lotus Club, in the historic Vantage/ONB Tower on DeSiard Street in downtown Monroe, on February 13. Heavy hors d'oeuvres and an open bar preceded the actual meeting, and the 14 members in attendance received one hour of professionalism CLE. Charlen Campbell, this year's president, announced that future meetings were slated for March 13, April 10 and May 8, 2023. She also renewed her call for members to invite any new practitioners in the northeast La. area to contact her about joining the Inn.

**Dr. Angela White-Bazile, executive director of La. JLAP, conferred with Hap Martin, of Shotwell, Brown & Sperry (and current editor of La. Bar Journal), before the meeting began.**

**Charlen Campbell, president of the Inn, and Ashley Herring, of the Chapter 13 Trustees Office, paused to visit with Hal shortly before the meeting.**


SBA Membership
Renewal Forms
have been mailed.
Please renew by
February 28, 2023



# Save the Dates 2023

Shreveport Bar Association's
**Continuing Legal Education**

**MAR 2-3**
Federal 5th Circuit Appellate Advocacy & 5th Annual Northwest Louisiana Appellate Conference

**APR 6**
Lunch & Learn Series I
Winning at Oral Argument
Tips from the Bench

**JUNE 15**
Lunch & Learn Series II
Perfecting the Art of Cross-Examination

**JULY 27-28**
SBA Trial Academy

**AUG 24**
Lunch & Learn Series III
Refresher on Trying a Civil Jury Trial
Tips from the Pros

**SEPT 13-14**
Recent Developments by the Judiciary Seminar

**OCT 13**
North Louisiana Criminal Law Seminar

**DEC 13-14**
December CLE by the hour


# DISPLAY YOUR FLAG THIS MARDI GRAS SEASON

Purchase a Justinian flag today. 100% of the proceeds will be donated to the Shreveport Bar Foundation, which provides charitable legal assistance and education to the public through two primary programs: The Pro Bono Project and the Legal Representation for Victims of Domestic Violence Program ("LRVDV").

3' X 5' Double Sided
Krewe of Justinian Flag

**Price: $150**

Payable to the Krewe of Justinian or Shreveport Bar Foundation. Mail or hand deliver and pick up your flag at 625 Texas Street, Shreveport, LA 71101

# Welcome New Members

**Michael T. Anderson**
*Caddo Parish District Attorney's Office*

**Heather Courtney**
*Second Circuit Court of Appeal*

**Justin Courtney**
*Attorney at Law*

**Honorable Daniel J. Ellender**
*Second Circuit Court of Appeal*

**Christopher C. Traylor**
*Acadiana Legal Service Corp.*

**B. Slattery Johnson**
*Second Circuit Court of Appeal*

**Reid Jones**
*Wiener, Weiss & Madison*

**Megan Poljak**
*Second Circuit Court of Appeal*

# SBA
## TRIAL ACADEMY
## SAVE THE DATE
## JULY 27-28, 2023


# *2023 SBA MEMBERSHIP LUNCHEONS

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

***MARCH 22**
SBA Member Luncheon
*Speaker: Mayor Tom Arceneaux*

**APRIL 6**
Trial Advocacy Lunch & Learn Series I
12:00 Noon at Shreveport Bar Center
*Presenters: Hon. Elizabeth Foote and Jim McMichael Jr.*

**APRIL 25**
SBA Golf and Pickleball Tournament
Querbes Park Golf Course

**MAY 2**
Give for Good Campaign
Event Location TBD

***MAY 3**
Law Day Luncheon
*Speaker: TBD*

**MAY 5**
Red Mass
9:00 a.m. at
Holy Trinity Catholic Church

# AMAZON WISH LIST

The Shreveport Bar Foundation is excited to announce the launch of its Wish List program for the Pro Bono Project, Legal Representation for Victims of Domestic Violence programs, and the Shreveport Bar Center through Amazon. This new wish list program allows our supporters to purchase supplies and other items needed to run our programs. This can range from pens (for the AAL clinics) to soap and paper products for the building)! **Check out the full list of options!**

https://www.amazon.com/hz/wishlist/ls/3EW9JTZSJNVEZ?ref_=wl_share

Or scan the QR code.

amazon wishlist

DEADLINE FOR APRIL ISSUE: MARCH 15, 2023

# SBA LUNCHEON MEETING – MARCH 22

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

***$30.00 for SBA members; $35.00 for non-SBA members. Advance reservation is required no later than 5 p.m. Monday, March 20.***

## *"The Upcoming Millage Reauthorization"*

**When:** **12:00 Noon on Wednesday, March 22**

**Where:** **Petroleum Club (15th floor)**

**Featuring:** **Mayor M. Thomas Arceneaux**

Please join us on Wednesday, March 22, as we welcome Mayor Tom Arceneaux. Mayor Arceneaux was sworn in as Shreveport's 57th Mayor on December 31, 2022. Mayor Arceneaux is a graduate of Captain Shreve High School, LSU and LSU Law School and has spent much of his adult life in Shreveport. He is an attorney and has been active in civic affairs, especially as an advocate for the Highland neighborhood, where he lives in a home he restored with his wife, Elizabeth, and they have three children and six grandchildren.

# #SHREVEPORTBARASSOCIATION

**You may confirm your reservation(s) by email dsouthern@shreveportbar.com,**
**Phone 222-3643 Ext 3 or Fax 222-9272.**

I plan to attend the March 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!**