THE BAR REVIEW

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EVENTS AT A GLANCE

5/5	Red Mass *Holy Trinity Catholic Church*
6/15	Trial Advocacy Lunch & Learn Series 12: Noon – *Shreveport Bar Center*
6/28	SBA Membership Luncheon – 12:00 p.m. - *Petroleum Club*
7/27-28	SBA Trial Academy

From The President

by Nancy Cooper, ngcoop23@gmail.com

Judge Matlock Reflects on Innovation and Challenges in Caddo Juvenile Court

On the edge of downtown Shreveport, tucked away between Spring, Stoner and Market Streets, sits a small cluster of buildings bursting at the seams, day and night, with numerous champions working tirelessly to support children and families in crisis. The Caddo Parish Juvenile Justice Complex houses our Caddo Juvenile Court ("CJC"), one of only four specially designated juvenile courts in Louisiana, where Judge David Matlock has been serving for almost three decades. First elected in 1994 and serving as Chief Judge since 1999, Judge Matlock will be retiring at the end of May. He will leave behind a legacy of firsts that will hopefully continue to evolve as we learn more and more about the science behind complex childhood trauma and the significant impact it has on our mental health, our crime rate, our workforce, our economy and our overall stability and well-being as a nation.

Judge David Matlock

I first met Judge Matlock in 2012 after returning to Shreveport from Texas. I decided to take a completely different career path working for the State representing children in child in need of care ("CINC") cases. Walking into my office on my first day, I was greeted with a big fat Children's Code and two lengthy and alarming affidavits describing in detail the circumstances surrounding heart-wrenching removals of children from their families. Needless to say, I was unprepared for the harsh realities of our powerful child welfare system and the astonishingly complicated and turbulent issues facing everyone involved in CINC cases.

Stepping behind the curtain of a CINC case is a privilege. Invading the private lives of parents and children, having access to their homes, their schools, their medical histories, their childhood traumas, their secrets and their struggles is both humbling and awe-inspiring. The people who work with these families – the investigators, social workers, foster parents, counselors, court appointed special advocates – are all part of a team when these cases come to court. And then there're the lawyers – for the State, the parents, the children. It's a crowded, chaotic courtroom, to say the least, and it takes a very special, very patient, empathetic and experienced judge to achieve good outcomes in these cases.

Fortunately, when I embarked on my new legal journey back in 2012, I found myself in the courtrooms of the three most amazing judges I'd ever encountered: Judge Paul Young, Judge Shonda Stone and Chief Judge David Matlock. Over the course of my decade spent representing children at CJC, I was witness to an extraordinary evolution in the way we approach CINC cases in Caddo Parish, thanks in large part to Judge Matlock's willingness to listen, to embrace and to implement new ideas and, in his words, "to see families through a trauma lens and seek to understand the *why* behind the behavior."

Judge Matlock was born and raised in Shreveport. He graduated from Byrd High School as a National Merit Scholar and earned a degree in English at LSUS before moving to Texas where he spent a semester at UT-Austin studying petroleum engineering. He earned his J.D. in 1981 from Baylor University and, remarkably, was

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Continued from pg 1 "From the President"

the top scorer on the Texas Bar exam that year. After law school, he moved back to Austin where he accepted a position at the city's oldest law firm at the time, Clark, Thomas Winters & Shapiro, which had notably served as counsel to former President Lyndon B. Johnson. After marrying and starting a family, he and his wife, Mary, decided to return to Shreveport in 1983 to be closer to their parents. He accepted a position at Hargrove, Guyton, Ramey & Barlow and achieved partner status before accepting a position at Blanchard, Walker, O'Quin & Roberts in 1989. In 1990, he successfully ran for a seat on the Caddo Parish School Board and, in 1994, he was elected to fill Judge Gorman Taylor's vacated seat at CJC where he joined Judge Andrew Gallagher. Five years later, upon Judge Gallagher's retirement, Judge Matlock became Chief Judge.

I sat down with Judge Matlock on the eve of his retirement to hear his thoughts about the accomplishments he's made over the years and the court he leaves behind. When I asked him about programs at CJC that may surprise people, he responded that they have a number of specialty courts that work to help parents of children overcome all kinds of challenges, such as substance abuse, employment, mental health, domestic violence and educational obstacles.

Honestly, the best thing you can do for a child is to help heal their parent. Whether they're going to be reunified or not, that's still their parent, forever. They'll be sitting across Thanksgiving meals from them in 20 years… I remember a particular 14-year-old who was living with his grandmother. His mother had very serious issues. I asked him, "Is there anything else I can do for you?" and he said "yes, please help my mother." He was never going to live with his mother, but he loved her and cared about her. He wanted healing for her. And so we try to do that with every child and adult.

What are the most meaningful parts of serving as a juvenile judge? **One of the things I've enjoyed most in my practice is my relationship with my judicial colleagues. With Andy. With Vernon. Paul. Shonda. Ree. Natalie. Bobby … every one of my judges. That's been the most fun, and probably the most challenging part of it all. Those relationships. Understanding that our relationship as judges affect the culture and the temperament of every person who comes into that building and who is impacted by the programming and the processes that are involved … us getting that right is fundamentally important.**

What are the most misunderstood issues that impact the health, safety and welfare of children? **You start by asking what's happened rather than what's wrong. It helps to understand how we got here and why we're doing this because ultimately, a large part of what we're doing is trying to prevent. If we don't constantly look for the whys, then we're just gonna be waking up the next morning and doing the same thing over and over again forever. If we can try to understand how we got here, what's going on in an individual case, then we're able to extrapolate that into what we can do as a culture, as a profession, as a community, to heal and prevent.**

In what ways can juvenile justice be linked to our overall crime rate? **If we think we can understand or address the environment of criminality in our communities without understanding and addressing mental health, then we are tilting at the wind. Yes, it's necessary to punish crime, but to understand it – the overall criminality in our modern culture – without understanding mental health is impossible. And you cannot understand mental health without understanding the impact of relational trauma and adverse childhood experiences… I'm a spiritual person, a faith-based person. That is who I am… Family is important. Employment, school, medicine, all of those institutions are important. But each of those professions, of those disciplines, in today's environment,**

needs to recognize the impact of trauma because we have new ways of understanding it. New ways of addressing it.

What advice might you give new juvenile judges? **The advice I would give to judges is to listen… You can never be too child-focused. Give people voice. If you want to know what we need to do for someone, ask them, don't tell them. Listen. Ask. Be kind to lawyers and their families … don't embarrass lawyers … these are people who have devoted their lives to justice and fairness… and their families make sacrifices as well, it's important … the things we cherish as a country, they're just words on paper until you have a profession that implements them, carries forward those fundamental societal values … the work that lawyers are doing in the courtroom is important, their cases are important, that individual lawyer is important, and they need to know that when they go back and weren't able to attend field day with their child because they were in court. Life's hard enough… there's no reason to make people's jobs harder than they need to be. People need to enjoy their work. If you're a court that claims to be about families, then you need to be about the families who work in that building.**

The most powerful person in the courtroom is not the judge. It's not the caseworkers. It's not the lawyers. It is that young parent whose decisions, their choices, will make the difference for them and for their child for decades to come. They determine the outcome… It's a different mindset than trying a case in a civil suit, a personal injury case. That's about what has already happened. And a lot of what we're dealing with is about what will happen and what we can do to achieve optimal results for children and for families. It's a different way of thinking.

How can lawyers and citizens in our community help protect the health, safety and welfare of our children? **Everything starts at home and expands out. Find organizations that genuinely help people and are child-focused, family-focused, and support those. Volunteers for Youth Justice is a good example … Be a foster parent … Lawyers can help parents and foster parents. Lawyers can represent children. Lawyers can offer to serve in those cases where people need help and that provide therapeutic responses to fundamental problems … Children need mentors.**

Is there anything in particular you'd like to say to our community? **I'd like to speak to the importance of foster parents. We have children who are spending the night in DCFS offices or put up in hotels and other adverse circumstances because we don't have placements for children. The best way we can support and recruit foster parents is by giving them a voice, listening to them, letting them understand that they are important and likely have information about the child or the family that others don't have and that we need … and providing a systematic way that they can inform the process is critical. Support foster parents.**

How do you feel about leaving the juvenile justice system after pouring so much of your time and energy into it? **I have real confidence that our system is strong and robust … I have a high degree of confidence in the folks who are working in our building and the agencies and groups that are working with us. It's a great feeling knowing that, frankly, things are going to get even better.**

Speaking with Judge Matlock again, after spending an enormous amount of time in his courtroom during my decade with the Child Advocacy Program, I can't help but reflect on other significant changes he made there, in addition to all the programs and services he helped pioneer. For example, the addition of a state-of-the art therapeutic calming studio that now gives frightened, abused and neglected children a place to wait for their hearings and visit with their lawyers and CASA volunteers. His decision to stagger the CINC docket by setting hearings at intervals throughout the day, as opposed to bundling hearings together in the mornings and afternoons, which prevents children from waiting long hours in a crowded lobby, sometimes sprawled out on the floor, missing school. Providing goody bags for children filled with water, snacks and toys to keep them comfortable and occupied before and during hearings. The addition of a therapy dog, named Sasha, who is frequently brought into the courtroom to help defuse secondary trauma for children that is often triggered by hearing or speaking about past trauma.

For these and so many other contributions to our juvenile justice system, for creating a trauma-competent CINC court program, and for renewing my faith in what it means to be a lawyer, I want to thank Judge Matlock. I know he is looking forward to spending his retirement years with Mary and his grandchildren, fishing and beekeeping, riding tractors and tinkering with diesel motors, and enjoying all of his many hobbies. I also know that the culture of courtesy and kindness he created at CJC will forever impact the way we, as lawyers in his courtroom, will approach our work and treat our colleagues. I hope that, as lawyers, we will carry forward Judge Matlock's kind spirit and humble attitude. And be grateful for the privilege of being a lawyer.

Judge David Matlock and Sasha

SBA TRIAL ACADEMY

July 27-28, 2023

U.S. District Court Western District of Louisiana

and

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It's hard to improve on this program – First rate program, do it again next year – Excellent subject matter, instructors and location – I hope this is the beginning of a new opportunity to obtain CLE credit in Shreveport – Very professional, (refreshing change). Hats off to visionary planners and SBA President.

These are just a few of the comments received from last year's participants.

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SCHEDULE:

Thursday, July 27

8:30 a.m.	Check in
9:00 a.m.-Noon	Trial Practice
Noon	Lunch (provided in Jury Rm)
1:00 p.m.-4:15 p.m.	Trial Practice

Friday, July 28

8:30 a.m.	Check in
9:00 a.m.-Noon	Trial Practice
Noon	Lunch (on your own)
1:00 p.m.-4:15 p.m.	Trial Practice

DRESS:
Courtroom attire, please.

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ACCOMMODATIONS:

The Hilton Shreveport Convention Center Hotel

104 Market Street, Shreveport - The SBA has secured a discounted rate block of rooms for Wednesday, Thursday and Friday evenings. Call 1-800-445-8667 to make your reservation. All reservations must be made by July 12, 2023, to receive the discounted group rate. The discount code is "**SBA Trial Academy**" or you can book online at https://book.passkey.com/go/SBATrialAcademy23

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BE IT BIG OR SMALL, YOUR ACTIONS MATTER!

Your gift to the Shreveport Bar Association or the Shreveport Bar Foundation can ensure the long-term sustainability of these organizations and allow them to serve the local bar and community for years to come. The SBA is heavily dependent on CLE revenue, and competition from free classes puts that at risk. Your generous donation or bequest will help the SBA and SBF maintain an executive director, publish The Bar Review, and provide pro bono legal services to domestic violence victims and other deserving clients.

Please remember the SBA and SBF in your planned giving to show your support for our organizations and the services they provide. Your generosity is appreciated.

Contact any of us if you would like to discuss ways to best help our organizations.

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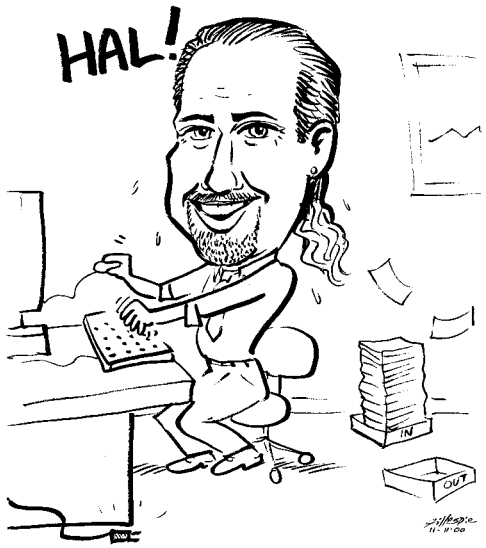
How Write You Are

by Hal Odom Jr., rhodom@la2nd.org



Not so fast! This came in a recent opinion: "Dr. Dowd is an *imminently* qualified, board-certified neurosurgeon with many years of experience." *Lenox v. Central La. Spokes LLC*, 22-134 (La. App. 3 Cir. 9/21/22), 2022 WL 4362139. A Federal district court joined in: "[T]his Court would duplicate [the magistrate judge's] thorough, well-reasoned, and *imminently* sound analysis and opinion in *McClain*[.]" *Tarleton v. DG La. LLC*, 2022 WL 2347346 (W.D. La. 6/29/22). More apprehensively, the Fifth Circuit set off the word choice in quote marks: "The trial court found Villanueva was '*imminently* qualified on the issue of mitigation.'" *Lucio v. Lumpkin*, 987 F. 3d 451 (5 Cir. 2021).

The word chosen, *imminent*, means *on the verge of happening* or *impending*. Custodial arrest for a misdemeanor is allowed if the person "makes a statement indicating that he or she intends to *imminently* inflict injury to self or another[.]" *State v. Johnson*, 21-0239 (La. App. 4 Cir. 12/29/21), 334 So. 3d 805 (quoting an ordinance). Exigent circumstances exist for a warrantless search if officers reasonably believe "evidence or contraband will *imminently* be destroyed." *State v. Lamons*, 22-604 (La. App. 3 Cir. 2/8/23), 2023 WL 1808469. In other words, the infliction of injury or destruction of evidence could happen *any time now*. The mnemonic is anything *imminent* is going to happen *immediately*.

The word intended, *eminent*, is a near homophone and means *prominent*, *obvious* or *outstanding in one's field*. "In sum, the court's jury selection process was both *eminently* reasonable and wholly consistent with this Court's precedents." *United States v. Tsarnaev*, 142 S. Ct. 1024, 212 L. Ed. 2d 140 (2022). "Dr. Kozin is *eminently* qualified to render an opinion on the diagnosis and treatment of brachial plexus injuries[.]" *LaBauve v. LAMMICO*, 19-848 (La. App. 3 Cir. 4/28/21), 318 So. 3d 983. There's no mnemonic for this, but try substituting *immediate* anyway. Would you say somebody is *immediately qualified*, or an analysis is *immediately* reasonable?

"Taking" it to another level. Here's a rare misuse: "the exercise of *imminent domain* which would necessarily involve just compensation." *Buckskin Hunting Club v. Bayard*, 30-1428 (La. App. 3 Cir. 3/3/04), 868 So. 2d 266 (quoting the district court). Expropriation may be inevitable, but it is seldom imminent.

The questionable "who." The "Roving Grammarian," Ellen Jovin, recounted one of her Grammar Table visits, to Venice Beach, California. A visitor asked her, "Is it by *whom* or by *who*?" Ms. Jovin replied, "I say *by whom*. But sometimes I don't say *whom* when it's technically called for. Like, would you say *Who did you call?* or *Whom did you call?*" She added, "It can sound pompous, I think, to say, *Whom did you call?*" Somebody then blurted out, "Unless you're talking about *Ghostbusters* – *Whom ya gonna call?*" Ellen Jovin, *Rebel with a Clause*, Boston: Mariner Books © 2022, 290-291.

Purists will quickly say *who* is nominative and *whom* is objective; since the sentence parses out to *you are going to call* + object, the pronoun should be objective, *whom*. But have you ever heard such a usage? Would you write it?

The eminent U.S. anthropologist and linguist Edward Sapir discussed this a century ago:

> Probably the majority of those who read these words feel that it is quite "incorrect" to say "Who did you see?" We readers of many books are still very careful to say "Whom did you see?" but we feel a little uncomfortable (uncomfortably proud, it may be) in the process. We are likely to avoid the locution altogether and to say "Who was it you saw?" * * * The folk makes no apology. "Whom did you see?" might do for an epitaph, but "Who did you see?" is the natural form for an eager inquiry. It is of course the uncontrolled speech of the folk to which we must look for advance information as to the general linguistic movement.

He concluded, "It is safe to prophesy that within a couple of hundred years from to-day not even the most learned jurist will be saying 'Whom did you see?'" Edward Sapir, *Language: An Introduction to the Study of Speech*, New York: Harper, Brace & Co. © 1921, 166-167. Well, we have gone half of his projected two centuries; was he right? (He could have prophesied the early demise of the hyphenated *to-day*!)

I have suggested that when it starts a question, *who* should be considered the "interrogative case," regardless of sentence structure that would require an awkward objective *whom*. *Who* did you see, *who* did you tell, *who* are you looking for – all seem perfectly appropriate in almost any context. *Who* should be the powerful first word of a question, analogous to *what*, *where*, *when* or *how*. Prof. Sapir reasoned, "The interrogative pronoun or adverb, typically an emphatic element in the sentence, should be invariable." *Id.* at 170. So there, we have some sound authority!

Of course, the opposite view has its defenders. The eminent journalist William Safire famously coined "Safire's Law": Whenever *whom* is correct, recast the sentence! William Safire, "On Language: The Political Who," New York Times Magazine, 6/30/1996. Okay Bill, if you're comfortable with *what person or persons are you going to call*, go right ahead!

Who are you going to trust, food? A memo filed in the Second Circuit recited, "The petition stated that [the defendant] breached its contractual obligation detailed in the CRA to act in *food faith*[.]" Oh, this delicious slip appears now and then. A section heading: "B. Partial Motion for Summary Judgment on Duty of *Food Faith* and Fair Dealing." *Somerset Pacific LLC v. Tudor Ins. Co.*, 2019 WL 446587 (E.D. La. 2019). Purporting to quote La. C.C. 3158 (as it then provided): "Such pledge so made, without further formalities, shall be valid as well against third persons as against the pledger thereof, if made in *food faith*." *Western Sur. Co. v. Avoyelles Farmer Co-Operative*, 277 So. 2d 627 (La. 1973).

These letters are adjacent on the keyboard, and most of us would rather think about *food* than about *fair dealing*, but Spell Check won't catch it. Proofread, but not on an empty stomach!

Federal Update

by Chris Slatten, Chris_Slatten@lawd.uscourts.gov

Guidelines and Altered Serial Number: Defendant's felon-in-possession guidelines calculation was given a four-level increase based on a provision that applies when a defendant's firearm "had an altered or obliterated serial number." Defendant objected that there was no evidence his firearm (.223 short-barreled rifle; maker unknown) ever had a serial number. With 3-D printing and the ability to make your own gun, it is not a given that a firearm ever had a serial number. The 5CA agreed, noting that "something cannot be 'altered or obliterated' if it never existed in the first place." The case was remanded for resentencing, where I suppose the U.S. will get a shot at presenting evidence the rifle once had a serial number. *U.S. v. Sharp*, 62 F.4th 951 (5th Cir. 2023).

State-Created Danger Doctrine: A disabled public-school student was sexually assaulted by another student with known violent tendencies. Despite knowing of the attack, the victim's teachers let both her and her attacker wander the school unsupervised, and the attacker struck again. The child's mother sued school officials under § 1983, invoking the "state-created danger" doctrine, which is an exception to the general rule that the state actors (police, teachers, etc.) have no duty under the Due Process Clause to protect people from privately inflicted harms.

The defendants invoked qualified immunity, and the 5CA granted it on the grounds that the state-created danger doctrine is not clearly established law in this circuit. It is clearly established in nine other circuits, and no circuit has rejected it. The 5CA has had multiple cases going back to the 1990s that presented the issue. The court has never rejected the doctrine outright, but it has effectively done so by repeatedly granting QI on the grounds that the doctrine is not clearly established. Judge Wiener concurred to suggest en banc rehearing because it was "well past time for this circuit to be dragged screaming into the 21st century by joining all of the other circuits that have now recognized the state-created danger cause of action." *Fisher v. Moore*, 62 F.4th 912 (5th Cir. 2023).

Navigable Waters; Recreational Use Immunity: A fisherman died from injuries suffered after his boat hit a submerged warning sign in the D'Arbonne Wildlife Refuge. His estate sued pipeline companies said to be responsible for the sign. All agreed that the defendants won if Louisiana's Recreational Use Statute applied, but the statute did not apply if the accident happened on a navigable waterway.

The accident happened over "land that is dry 67 percent of the time, where vegetation is not destroyed and the land is not bare, as evidenced by the need to mow it with some regularity. More significantly, the Bayou D'Arbonne does have an 'unvegetated channel' which is some 597 feet wide at the location where the boat split off to fish near the sign. The sign was located 58 feet away from the unvegetated channel. The unvegetated channel is a neat, natural line by which the ordinary high-water mark may be established. Within the channel, there is no vegetation; outside of it, there is." The water at the site of the accident was held to be not navigable, so the immunity statute applied. *Newbold v. Kinder Morgan SNG Operator, LLC*, __ F. 4th __, 2023 WL 2487267 (5th Cir. 2023). The court applied three tests to assess navigability, so hire experts and dig into them if faced with a similar case.

Appellate Judge in a Trial Court: An article in *The National Law Journal* discussed the pros and cons of appellate judges sitting by designation in a trial court to get some perspective. It cited Judge Posner's observation: "How can an appellate judge review a trial when he has never seen one, except perhaps in a movie?"

I've heard that Judge Politz presided over a jury trial here in the late '80s, but I'm not aware of other appellate judges presiding over a Shreveport trial. (Judge Stewart did once hold an initial appearance when all district court judges were out of town.) Associate Justice Rehnquist once sat as a district court judge in a civil trial in Virginia. The case went to trial, and the jury returned a verdict for the plaintiffs. The Fourth Circuit held that the future chief justice blew it; he should have dismissed the case for lack of a valid constitutional claim. Not surprisingly, this was done by a gutless per curiam opinion. *Heislup v. Town of Colonial Beach*, 813 F.2d 401 (4th Cir. 1986).

I've long advocated a rule that if a district judge dismisses a case on summary judgment or Rule 12(b)(6), and the appellate court reverses and remands, the district judge has the option (exercisable once every 5 years) to demand that a member of the appellate panel take over the case and try it.

Off-Campus Speech: Coushatta High kids in the '80s often debated whether the principal could punish us for off-campus activity. We thought we knew the answer (No!), but the federal courts still can't figure it out.

Some Texas high schoolers were at a Whataburger smack talking about a football rivalry when a QB recorded and sent a three-second Snapchat video to another student and said, "[We'll] put your mother[ ]cking ass in the hospital, n[ ]gga'. What the f[ ]ck." He got in trouble at school, and he sued to assert a First Amendment violation. The 5CA reviewed caselaw from *Tinker* (1969) (black armband protest) to *Mahanoy* (2021) (the cussing cheerleader Snapchat case) about on and off campus speech. In the end, the contours of the law were still too fuzzy to make the principal's action a violation of "clearly established law." Qualified immunity for the principal. *McClelland v. Katy Indep*. __ F.4th __, 2023 WL 2728225 (5th Cir. 2023).

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

Is it really healthcare? Ever since the enactment of the La. Medical Malpractice Act ("LMMA"), in 1975, courts have grappled with the issue of exactly what acts in a medical setting are, or are not, healthcare. The seminal case of *Coleman v. Deno*, 01-1517 (La. 1/25/02), 813 So. 2d 303, set out six factors to consider in resolving this. If it's not healthcare, the claim can go straight to court, but if it is, it must go to a Medical Review Panel ("MRP"), through the LMMA system. Then, if the patient is in an assisted living facility, the issue is somewhat complicated by the overlay of the Nursing Home Residents' Bill of Rights ("NHRBR"), enacted in 1985 and amended in 2003 to abolish money damages for deprivation of a patient's rights.

Mr. Wendling was checked into Riverview Care Center, in Bossier City, in January 2020. He left Riverview on November 23, 2020, and died the next day from sepsis allegedly caused by decubitus wounds. His widow filed a request for MRP against Riverview and two of its directors. Before the MRP could act, and before prescription had run, she filed a tort suit in the First JDC alleging breaches of many standards of care, especially chronic neglect of Mr. Wendling's requests to change his diaper, allowing him to sit in his waste for prolonged periods of time and then failing to take proper measures once his infected bedsores were discovered. Ms. Wendling argued that her husband suffered humiliation, embarrassment and indignity from the lack of appropriate care. Riverview asserted an exception of prematurity, urging the claims were all healthcare, governed by LMMA and subject to review by an MRP. The district court sustained the exception and dismissed the claims without prejudice; Ms. Wendling appealed.

The Second Circuit reversed in part, ***Wendling v. Riverview Care Ctr. LLC,*** 54,958 (La. App. 2 Cir. 4/5/23), in an opinion by Judge Robinson. The opinion lays out the contours of LMMA, the burden of proof on an exception of prematurity and the applicable portions of NHRBR. Notably, the court had previously held that changing a patient's diaper is not healthcare and that an NHRBR claim is separate and distinct from an LMMA claim, *Henry v. West Monroe Guest House Inc.*, 39,442 (La. App. 2 Cir. 3/2/05), 895 So. 2d 680; *Furlow v. Woodlawn Manor Inc.*, 39,485 (La. App. 2 Cir. 4/20/05), 900 So. 2d 336. The opinion recognized that since the 2003 amendment to NHRBR, courts have "moved away from" pre-amendment rulings on diapering, *Evans v. Heritage Manor Stratmore*, 51,651 (La. App. 2 Cir. 9/27/17), 244 So. 3d 737, and treated incontinent care as part of medical or professional care in a nursing home; however, *Evans* was distinguished as involving battery of a patient during a diaper change. The court stood by its earlier view that under the *Coleman v. Deno* factors, changing a diaper is not healthcare, and that the allegations supported a "claim for dignity-type damages" from negligent diapering. The court reversed as to dignity-type claims, but affirmed as to all others.

Some of the evidence adduced at the hearing on the exception seems incriminating, such as testimony that Riverview put diapers under lock and key in an effort to avoid excess use, but potentially prevented employees from accessing them when needed; this may have influenced the court to elevate the dignity claims. However, the case exposes a small opening in the LMMA and NHRBR system which may exist until the legislature tightens up these statutes even more.

The quandary of the fee. Another recurring issue in medical malpractice has been the effect of a late filing fee. Typically the claimant files a timely MRP request, complete with fee, against one qualified healthcare provider, and then moves to join another defendant but, this time, is late with the fee. La. R.S. 40:1231.8 A(1)(e) permits the Division of Administration to treat a claim as "invalid and without effect" if the fee is not timely paid; the DOA, through the Patient Compensation Fund, took the position of rejecting *the entire claim* if the second filing fee, for the additional defendant, was late. The Supreme Court finally rejected this interpretation, in *Kirt v. Metzinger*, 19-1162 (La. 4/3/20), 341 So. 3d 1211, holding that a late fee negates only the additional claim, not the original one; however, this did not resolve all issues.

Before *Kirt* came down, Cooper was admitted to Northern La. Medical Center, in Ruston, for chest pain and shortness of breath; a Dr. Smith took him off his Brilinta, feeling gallbladder surgery might be necessary. A week later, Cooper went into cardiogenic shock; a cardiologist quickly put him back on Brilinta, but it was too late; Cooper died the next day. His children filed a timely request for MRP against the hospital, with the required fee, in September 2018. In the course of discovery, they got the hospital's records and contended that, only then, did they learn that Dr. Smith played a part in their father's death. In January 2020 they filed an amended and supplemental claim to add Dr. Smith; the Fund advised them they had 45 days to remit the extra fee. Well past the 45 days, and with no supplemental fee received, the Fund returned the original fee and advised them their whole claim was invalid and without effect. Days later, *Kirt* came down, and the parties entered a stipulated judgment reinstating the claim against the hospital only.

Days later, the plaintiffs filed a second amended and supplemental request, again trying to add Dr. Smith, who filed an exception of prescription. The district court sustained it, dismissing the claim against Dr. Smith; the plaintiffs appealed. They advanced the innovative argument that their timely request against the hospital interrupted prescription as to all "joint and solidary obligors," including Dr. Smith, ostensibly under § 1231.8 A(2)(a).

The Second Circuit affirmed, ***In re: Med. Review Panel of Cooper,*** 55,014 (La. App. 2 Cir. 4/5/23), in an opinion by Judge Thompson. The opinion outlined the sad history of the Fund's "interpretation" of § 1231.8 A(1)(e), the Supreme Court's holding in *Kirt* and the Second Circuit's initial case treating *Kirt* literally, *Ferguson v. Howell*, 53,139 (La. App. 2 Cir. 9/1/21), 327 So. 3d 600. In essence, the general rule of interruption of prescription could not supersede the specific rule of § 1231.8 A(1)(e): if you don't pay for a new defendant, he's out. The court also cited one case from the Fourth Circuit, and one from the Fifth, that reached the same result.

The Supremes may have clipped the DOA/Patient Compensation Fund, but the Fund is still serious about getting its filing fees.

You can use the Guide, but use it right. When a parent who owes child support is voluntarily unemployed or underemployed, the court can determine his or her earning potential (with certain narrow exceptions); as an aid in this determination, the court is authorized, by La. R.S. 9:315.11 A, to use a resource called the La. Occupational Employment Wage Survey (often called the "Wage Guide" and, presumably, posted on the La. Workforce Commission website). The Wage Guide came into play in a recent Ouachita Parish case.

Cedriquze Johnson and his girlfriend, Matila Adams, had a baby in 2016; the couple was never married. In early 2021, the state sued Johnson on Adams's behalf for child support. At an initial hearing, Adams testified that she had moved to Shreveport and was in a job making about $3,300 a month.

Johnson's income, by contrast, was pretty elusive. At the initial hearing, he claimed that COVID-19 lockdowns had shuttered his various businesses; he was unemployed and already paying $176 a month in support to another child. The court ordered him to pay a modest $190 a month. At a later hearing, Johnson testified he earned money "here and there" and by "hustling," including working for an agency that scouts recruits for the NBA; he had about $7,000 in a bank account for an investment business, but he could not access it. The court imputed his income to be $100,000 a year, ordering a monthly support payment of $937. In a final hearing, Johnson said he had recruited Zion Williamson, the Pelicans' power forward; he was an NBA scout; he brokered "sports marketing bills" for advertisers like Nike, Puma, Gatorade and Powerade; he'd flown to California, attended an event at Kanye West's private school, and later gone to Saints, LSU Tigers and Southern Jaguars games, looking for talent. The district court, consulting the Wage Guide, counted Johnson as a "producer and director" (average income of $45,720) and as a "coach and scout" ($58,890). Support remained at $937, and Johnson appealed.

The Second Circuit reversed in part and affirmed in part, ***State v. Johnson,*** 54,945 (La. App. 2 Cir. 3/1/23), in an opinion by Judge Cox. As with most support cases, the discussion is fact-intensive; ultimately, the court found the evidence simply wouldn't support classifying Johnson as a "producer and director," but the other, "coach and scout," was not plainly wrong. Unfortunately for Johnson, this adjustment did not change the big picture enough to reduce the support of $937, which was affirmed.

In addition to the Wage Guide (which the trial court deemed "grossly low"), the opinion makes fascinating reading, a paradox of jet-setting and relative squalor. There were allusions to signing Zion Williamson to an $80 million deal with Michael Jordan (details could not be disclosed because of a "gag order"); testimony about working in a bingo hall for $10 an hour, yet flying to southern California just days before trial; and yes, some of Johnson's social media posts seemed to belie his claims of being virtually broke. The court decided there was some real money there.

An insurance saga, Part 1. Godfrey, an attorney in New Orleans, owned a 2004 Chevy Suburban. In circumstances not disclosed in the pleadings, somebody named Jones got hold of the Suburban and, in August 2019, drove it up to Tensas Parish and wrapped it around a utility pole. Godfrey discovered that Jones owned a separate vehicle, a Ford truck, which he had insured with GoAuto for property damage up to $25,000, but no collision coverage. Godfrey had no collision coverage on the (rather old) Suburban, so he sued Jones and GoAuto for the damage. GoAuto moved for summary judgment citing a policy provision that excluded coverage for "damage to any property * * * in the care, custody or control of, a covered person." GoAuto contended that Jones had care, custody or control of the Suburban when he wrecked it; hence, no coverage. Godfrey filed his own MSJ on grounds that the exclusion was unenforceable as it violated the coverage mandated by La. R.S. 32:900 C. The district court agreed with GoAuto, dismissing all claims against it.

Godfrey appealed, and the Second Circuit reversed, ***Godfrey v. Go Auto Ins. Co.,*** 54,060 (La. App. 2 Cir. 9/22/21), 328 So. 3d 537, in an opinion by Judge Stone. To comply with § 900 C, the exclusion must be limited to use of a vehicle *with the permission of the owner*, and there was a genuine issue whether Jones was using the Suburban with the owner's permission when he wrecked it.

Part 2. Back in the 6th JDC, Godfrey filed a new MSJ, supported by his own affidavit that he had never given Jones permission to use the Suburban. GoAuto filed an opposition, but did so less than 15 days before the scheduled hearing, the time limit of La. C.C.P. art. 966 B(2). Godfrey argued vehemently that the opposition should be stricken as untimely, but the district court denied his motions to strike and his MSJ. (In all fairness, what is less suitable for MSJ than a question of somebody's intent?) Godfrey sought supervisory review.

A writ panel of the Second Circuit granted in part, ***Godfrey v. Go Auto Ins. Co.,*** 54,998 (La. App. 2 Cir. 1/6/23) (unpub.), citing recent jurisprudence that, unless all parties agree, the 15-day limit of Art. 966 B(2) is absolute; the court cannot extend it, *Auricchio v. Harriston*, 20-01167 (La. 10/10/21), 332 So. 3d 660. The court then found that the only valid MSJ evidence was Godfrey's affidavit, which negated any permission to use the Suburban; with nothing to contradict this, the court *must find* that Jones lacked permission and, hence, the exclusion did not apply. The panel granted Godfrey's MSJ and declared coverage, but denied all other claims.

Part 3. Apparently unhappy with that last portion of the ruling, Godfrey applied for rehearing, claiming he was entitled to judgment fixing damages, attorney fees and penalties. This time, however, *he* was the one who overlooked a nuance of the practice: URCA 2-18.7 allows rehearing of a writ application only when the court (1) granted a writ, (2) dismissed an appeal or (3) ruled on the merits of an appeal. Since Godfrey was not complaining about any portion of the ruling that did these things, the rehearing was not considered. ***Godfrey v. Go Auto Ins. Co.,*** 54,998 (La. App. 2 Cir. 3/22/23) (unpub.). I assume that Godfrey can still assert his subsidiary issues in the district court, but the futile rehearing application cost him time and filing fees. The Second Circuit will apply the 15-day rule of Art. 966 B(2) *and* the rehearing rule of URCA 2-18.7.

I mention Part 3 because it is a fitting postscript to a long-running case. And I mention Part 2 to remind readers that many writ rulings address serious procedural and substantive issues, even though they might not appear on the court's news releases or website, and not get counted in the statistics as published opinions.

BAR BRIEFS

by Ryan Goodwin, Sarah E. Smith and Valerie A. DeLatte

SBA CONTINUING LEGAL EDUCATION

Magistrate Judge Mark Hornsby, Continuing Legal Education Chairman, does an excellent job putting together outstanding CLE programs for the Shreveport Bar Association. If you have not signed up to attend one or more of our continuing legal education opportunities, we have several coming up, including the Trial Academy on July 27-28, Recent Developments on September 13-14, the North Louisiana Criminal Law seminar on October 13 and our annual December CLE by the Hour on December 13-14.

In addition to our one- and two-day seminars, we are holding a three-part Lunch & Learn series on trial advocacy this year. The first in our series was held on April 6. Chief Judge Frances Pitman and Judge Craig Marcotte gave a presentation entitled "Winning at Oral Argument-Tips from the Bench." June 15 is our next Lunch & Learn series on trial advocacy which will be presented by Judge Elizabeth Foote and Jim McMichael and entitled "Perfecting the Art of Cross-Examination." Finally, our last Lunch & Learn will be presented by Patrick Jackson and Larry Pettiette and is entitled "Refresher on Trying a Civil Jury Trial" and will be held on August 24.

We thank all of our presenters who have presented and will present at our continuing legal education seminars.

Judge Craig Marcotte and Chief Judge Frances Pitman

Monroe Inn of Court

by Hal Odom Jr., rhodom@la2nd.org

CURRENT ISSUES IN LEGAL ETHICS

"Ethics Update" was the topic at the April 2023 meeting of the Judge Fred Fudickar Jr. (Monroe, La.) IOC. Jon K. Guice, of Hammonds, Sills, Adkins & Guice, in Monroe, focused on two major areas of legal ethics, setting client expectations and the challenges of communications with clients (and nonclients).

After running down the basics of RPC 1.15 ("Confirm your fee arrangement"), Jon offered his tips for avoiding the common sticking points, especially explaining the inherent delays in the justice system, with which the client is probably unfamiliar. He strongly urged attendees to advise new clients how they practice – with professionalism and courtesy extended to the court and to opponents. "Rambo tactics are rarely successful," he said, "and this extends to the client!" Another point that is obvious to practitioners, but perhaps unfamiliar to new clients, is that no result is guaranteed: you want to highlights the positive aspects of the case, but not omit the negative ones. Last but not least, follow Rule 1.5(b) every time, laying out the basis or rate of the fee and expenses.

Jon then turned to multiple issues of communicating with clients in the digital age, starting with encryption of emails. This seems like an extraordinary burden when most emails are a mere "Okay" or "3:00 is fine," but some clients want the assurance of security. He advised against using "reply all," and the potential conflict of communicating with a client on his employer's email – the employer normally owns this, and the employee has no expectation of privacy. He also discussed special problems of posting large documents to Dropbox or Google Docs. Several attendees joined the discussion, saying that these convenient online services may allow readers to access embedded metadata, a result that can cause embarrassment or worse.

As a resource (and general good reading), Jon highly recommended "La. Legal Ethics," the blog of Loyola Law professor Dane Ciolino. On the lighter side, Jon began the program with an informal list of "worst case" clients, such as those who "have terminated two or more lawyers before hiring you," are "critical of other attorneys or the profession," "know more than you do," or "just want 'help' in their representation." Most attendees nodded in knowing agreement, and at the end, one spoke up, "Who's left?"

The meeting was held at noon on April 10 in the Premier Room of the Lotus Club, on the ninth floor of the historic Vantage/ONB Building in downtown Monroe. Because of the early setting, no cocktail hour was held, but members got lunch from the Lotus Club's buffet. Most importantly, the 14 members in attendance received their coveted one hour of ethics credit. The Inn's secretary-treasurer, Mike Street, announced that the final meeting of the season would be the annual crawfish boil, on May 8.

Jon Guice, of Hammonds, Sills, Adkins & Guice, in Monroe, gave an ethics update that sprinkled practical angles and personal experiences into the mandates of the RPC.

Judge Stephens Winter, of the Fourth JDC, Hal Odom and Mike Street, of Watson, McMillin & Harrison, exchanged some jovial recollections while waiting for the buffet to be set.

Lauren Jarrett and Linda Ewbank, of Hammonds Sills, and Shereba Diaz, a sole practitioner in West Monroe, are pictured after the program.

Pro Bono Project

Do Good Work ~ Hon. Henry A. Politz

April's Outreach Event

On April 18, we partnered with The Highland Center to provide citizens with information on estate planning. Our guest speaker was Deryl Medlin, of Medlin & Lafargue LLP. Lunch was provided by realtor Carlos Hartwell. Deryl was absolutely incredible and spent 1.5 hours with the 15+ participants going through the basics of succession and wills. The information he provided is crucial for our community to have access to, and it was evident that everyone was very grateful for his time and really learned a lot. We cannot thank Deryl enough for his time on this event and The Highland Center for partnering to reach our community!

Pro Bono Project Ask A Lawyer Clinic and Open Cases, Volunteers

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

Coburn Burroughs
Gordon McKernan Injury Attorneys

Valerie DeLatte
Jack Bailey Law Corporation

Katherine Evans
Attorney at Law

Allison Foster
Querbes & Nelson

Gernine Mailhes
Attorney at Law

Heidi Martin
Nickelson Law

Evan McMichael
Caddo Parish Public Defender's Office

Taunton Melville
Attorney at Law

Holland J. Miciotto
Law Office of Holland J. Miciotto LLC

Larry Pettiette
Pettiette Armand Dunkelman Woodley & Cromwell

David White
Attorney at Law

Our April 17 Ask A Lawyer clinic had 9 volunteer attorneys who saw 44 attendees! We are so grateful to everyone who showed up to make this clinic possible!

Allison Foster, Coburn Borroughs and Evan McMichael

Coburn Burroughs and Evan McMichael

Deryl Medlin

Taunton Melville

Valerie DeLatte, David White and Heidi Martin

Larry Pettiette

Valerie DeLatte, Coburn Burroughs, Taunton Melville, Heidi Martin, Katherine Evans, David White, Allison Foster, Evan McMichael and Larry Pettiette

SBA Pickleball

TOURNAMENT *Highlights*

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LUNCH & LEARN SERIES

Join Us for one or more of our Lunch & Learn sessions in 2023!

Approved for 3 Louisiana CLE Credit Hours

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April 6

June 15

Aug 24

April 6

Winning at Oral Argument—Tips from the Bench:

Presented by Chief Judge Frances Pitman and Judge Craig Marcotte — Second Circuit Court of Appeal

June 15

Perfecting the Art of Cross—Examination:

Presented by Judge Beth Foote –U.S. District Court, Western District of Louisiana and James McMichael—McMichael & Carter LLC

August 24

Refresher on Trying a Civil Jury Trial—Tips From the Pros:

Presented by Patrick Jackson—Attorney at Law and Larry Pettiette—Pettiette, Armand, Dunkelman, Woodley & Cromwell

To Register visit:

https://shreveportbar.com/lunch-learn-2023/

Save the Dates 2023

Shreveport Bar Association's
Continuing Legal Education

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

*2023 SBA MEMBERSHIP LUNCHEONS

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

MAY 5

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

*JUNE 28

Law Day Luncheon
Speakers: Professor Deleso Alford and Chancellor John K. Pierre
Southern University Law Center

AUGUST 11

Krewe of Justinian Coronation Bal
Sam's Town Casino

JUNE 15

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

JULY 27-28

SBA Trial Academy

AUGUST 24

Trial Advocacy Lunch & Learn Series II
12:00 Noon at Shreveport Bar Center
Presenters: Patrick Jackson
and Larry Pettiette

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

SBA LUNCHEON MEETING – JUNE 28

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

$40.00 for SBA members; $50.00 for non-SBA members. Advance reservation is required no later than 5 p.m. Monday, June 26.

Professor Deleso A. Alford

Chancellor John K. Pierre

When: **12:00 Noon on Wednesday, June 28**

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

Featuring: **Professor Deleso A. Alford and Chancellor John K. Pierre**
Southern University Law Center

This presentation is approved for one hour of CLE credit

Professor Deleso A. Alford is a Shreveport native and is doing groundbreaking work bridging legal and medical education by telling stories—what she refers to as "HER stories"—the unique and particularized lived experiences of black women intersecting with healthcare and research. She has moved her scholarship into classrooms and the courtroom, benefiting law and medical students and society at large with her racially inflected lessons. Professor Alford earned a B.S., magna cum laude, at Southern University A&M College, a J.D. at Southern University Law Center, and an LL.M. at Georgetown University Law Center. She has a Certification in Clinical Bioethics from the Medical College of Wisconsin. Deleso A. Alford, the Rachel Emanuel Endowed Professor, is also serving as the director of the off-campus instructional site (OCIS) team facilitating the establishment of a pathway to legal education opportunities to the north Louisiana region. She was recently appointed as the Managing Fellow for the Southern University Law Center (SULC) Health Equity Law & Policy Institute. On March 14, 2023, SULC Health Equity Law & Policy Institute held its inaugural Henrietta Lacks Symposium: "Seeing Women Through the Lens of Genetic Justice, Reproductive Justice, and Criminal Justice." Professor Alford's panel, entitled, "Genetic Justice & Medical Racism Panel," featured civil rights attorney Ben Crump and fellow panelists Kim Parker, Doug Rendleman, Yusuf Henriques, Caprice Roberts and Robert Klonoff.

John K. Pierre was named Chancellor of the Southern University Law Center in mid-May 2016, becoming the seventh individual to head the institution. The Southern University Board of Supervisors approved the appointment at its March 18, 2016, board meeting. Prior to that, Pierre served as interim chancellor of the Law Center since July 1, 2015, following Chancellor Freddie Pitcher, Jr., who served as SULC head for more than 12 years. Pierre has been on the law faculty of the Southern University Law Center since 1990. He was promoted to Associate Vice Chancellor for Special Projects in 2003 and to Vice Chancellor of Institutional Accountability and Evening Division on October 1, 2006. Additionally, he teaches commercial law, tax law, contracts, and property. For seven years, Professor Pierre was involved in the Baton Rouge school desegregation case as co-counsel for the Baton Rouge Branch of the NAACP in *Davis v. East Baton Rouge Parish School Board*. He was also co-counsel in the landmark case of *McWaters v. FEMA*. Pierre is a member of the Louisiana State Bar Association, Texas Bar Association and the Society of Louisiana Certified Public Accountants. He earned a bachelor's degree in accounting from Southern University A&M College in 1980, a master's degree in tax accounting from Texas Tech University in 1982, and a Juris Doctor Degree from the Southern Methodist University, Dedman School of Law, in 1985. Pierre has published numerous articles on tax law, sales and contracts, real estate and commercial law, ranging from magazine features and legal journals to law review articles.

Please join us on Wednesday, June 28, as we welcome Professor Deleso A. Alford and Chancellor John K. Pierre.

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 June 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!