The Bar Review

PUBLICATION OF THE SHREVEPORT BAR ASSOCIATION Volume XXXII, Number 1 • Jan. 2025

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EVENTS AT A GLANCE

1/22	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club
2/1	Krewe of Justinian Bal at Horseshoe Casino Riverdome
2/22	Krewe of Centaur Parade
3/2	Krewe of Highland Parade
2/26	SBA Membership Luncheon – 12:00 p.m. - Petroleum Club

From The President

by Elizabeth M. Carmody, elizabeth.carmody@cookyancey.com

Happy New Year, all!

MAY 2025 BE A BLESSED ONE FOR YOU AND YOUR FAMILY!

I thought long and hard about my first message to the Shreveport Bar Association as its new president and the thought I had for all of you for this year going forward is to embrace resilience. Resilience is defined by Oxford English Dictionary as "the capacity to withstand or recover quickly; toughness." As children, resilience is our greatest gift. As adults, it can be our greatest struggle. We, as lawyers, face a lot of twists and turns in our practices but we always have to navigate how to deal with them (quickly sometimes) to the benefit of our clients and ourselves. That is what we do.

My mother, Helen Onebane Mendell, the only woman in her Tulane law school class of 1968, was a full-time attorney in Lafayette when I was a child (and only retired last year after 50+ years) so, fortunately, I had my grandmother, Mamie Onebane, a retired high school teacher and one of my greatest influences, to take care of me while my mother worked. Because of that, I grew up with the opportunity to spend quite a bit of time with my grandfather, Joseph Onebane ("Pop Pop" to me), another Lafayette attorney, whom I will always admire and love deeply (he passed away in 1987).

My grandfather grew up learning to recite poetry which he shared with me throughout my childhood. It stuck with me. I learned to recite the poems that meant something to him and to live by them, too. One of those poems resounds in my life and, in fact, is framed and hung where I can see it every day. The framed poem was a gift from my grandmother. The poem is "Invictus" by William Ernest Henley. I share it with you in the hope that it will inspire you in your greatest moments and darkest hours. It has always inspired me. I hope it does you, too.

Out of the night that covers me,
Black as the pit from pole to pole,
I thank whatever gods may be
For my unconquerable soul.

In the fell clutch of circumstance
I have not winced nor cried aloud.
Under the bludgeonings of chance,
My head is bloody, but unbowed.

Beyond this place of wrath and tears
Looms but the horror of the shade.
And yet the menace of the years
Finds, and shall find, me unafraid.

It matters not how strait the gate,
How charged with punishments the scroll.
I am the master of my fate,
I am the captain of my soul.

Resilience. Let it be your mantra for 2025 and let the Shreveport Bar Association be your place to find relationships that help you to be resilient this year no matter what you face personally or professionally.

I look forward to serving and am proud to serve our Bar this year as its president. I am also thankful for how graciously this Bar has embraced this South Louisiana girl into its fold over the last 25 years!

JAN 2025

THE SUPREME COURT OF LOUISIANA HISTORICAL SOCIETY

STEERING COMMITTEE TO COMMEMORATE THE BICENTENNIAL OF THE 1825 LOUISIANA CIVIL CODE

AND

THE SHREVEPORT BAR ASSOCIATION

CORDIALLY INVITE YOU TO JOIN THEM FOR A COCKTAIL RECEPTION TO COMMEMORATE THE

200TH ANNIVERSARY OF THE LOUISIANA CIVIL CODE OF 1825

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SBA Membership Renewal Forms have been mailed. Please renew by February 28, 2025

The 200th Anniversary of the Louisiana Civil Code of 1825
CLE and Cocktail Reception
Co-Sponsored By The
The Supreme Court of Louisiana Historical Society
Steering Committee To Commemorate The Bicentennial of the 1825 Louisiana Civil Code and The Shreveport Bar Association

Hon. Brady O'Callaghan

Clinton M. Bowers

When: 5:00 PM - 7:00 PM on Thursday, February 20

Where: Abby Singer's Bistro, 617 Texas Street, Shreveport

Presented by: Honorable Brady O'Callaghan, *First Judicial District Court,* and Clinton M. Bowers, *Bowers Law Firm, LLC*

"Tunc Pro Nunc-Modern Cases Through the Lens of the 1825 Civil Code"

This presentation is eligible for 1 hour CLE credit

The 1825 Louisiana Civil Code turns 200 years old this year. To commemorate the Civil Code's bicentennial, Judge Brady O'Callaghan and Clint Bowers will consider how the Louisiana Civil Code of 1825 would provide a framework for deciding modern cases.

Honorable Brady Dennis O'Callaghan received his B.A. with honors in philosophy from Yale University and his J.D. from LSU Law School. He was the 1996 write-on member of the Louisiana Law Review. He spent 2 years in general civil practice in Baton Rouge and 12 years as an assistant district attorney in New Orleans and Shreveport, prosecuting numerous murders and sex crimes. He tried nearly 100 jury trials and argued multiple cases to the Second Circuit Court of Appeal and the Louisiana Supreme Court. Judge O'Callaghan was elected in 2013 as a District Judge for the First Judicial District Court and has served on the criminal, family and civil benches. He is a past president of the Louisiana District Judges Association and past chair of the Louisiana Judiciary Commission. He has served as an instructor for the trial advocacy program at LSU Law School since 2018. Judge O'Callaghan has also lectured to the bar, the judiciary, civic organizations, child advocates, law enforcement and students on topics including judicial ethics, criminal constitutional law, jury selection, civics and capital litigation.

Clinton "Clint" M. Bowers is a 2009 graduate of the LSU Paul M. Hebert Law Center where he earned his Juris Doctor and Diploma of Civil Law, *magna cum laude*. He was also elected to membership in the Order of the Coif. He was admitted to the Louisiana Bar in October 2009. Clint primarily specializes in handling family disputes which includes divorce, child custody, child support, spousal support and division of community property. He also works on general civil litigation cases. He has been trained to work in high conflict cases as a mediator, and he employs those techniques in all cases to get the best outcome in your case. In addition to practicing as a litigator and mediator, Clint is an active member of the Louisiana State Law Institute's Marriage-Persons Committee and the Council of the Law Institute. As a member, he works closely with other attorneys, judges and law professors on legislative projects. Starting in 2021, Clint became a member of the planning committee for the annual LSU Law CLE Department's Family Law Conference. He will serve as planning committee and program chair for 2024 and 2025. Please confirm your reservation(s) by email to admin@shreveportbar.com.

Second Circuit Highlights

by Hal Odom Jr., rhodom@la2nd.org

The Causal Element. Mitchell was riding as a passenger in a 2007 Dodge pickup that was hauling a single-axle flatbed utility trailer. The owner and driver of the Dodge, Horton, was going north on North Market Street and stopped for the light at I-220, intending to turn right onto the Interstate. Before they could proceed, a Ford Fusion driven by Ms. Chambers ran into the rear of the trailer, which in turn struck the back of the Dodge truck. Claiming severe and excruciating injuries, Mitchell filed two suits. One, against Ms. Chambers and her insurer, alleged she was solely at fault for the accident; these parties settled and dismissed the suit. The other, against Ms. Chambers and her insurer *plus* Horton and his insurer, alleged Horton was also at fault because the brake lights on his trailer were not working. As noted, Ms. Chambers settled her claims, so the only issue remaining was Horton's liability for the inoperative lights; Horton moved for summary judgment on this point. The district court agreed, rendering summary judgment dismissing Mitchell's claim against Horton and his insurer. Mitchell appealed.

The Second Circuit affirmed, ***Mitchell v. Chambers,*** 55,949 (La. App. 2 Cir. 11/20/24), in an opinion by Judge Marcotte. The court first rejected Mitchell's argument that, somehow, Ms. Chambers faced a sudden emergency and could be excused for ramming the trailer; since she had already admitted her fault, she could not claim the doctrine. On the critical issue of causation, the court recognized Mitchell's argument that Horton may have neglected to plug in the trailer's brake lights that day but found (1) the accident occurred in broad daylight, making the brake lights less pertinent, and (2) the *truck's* brake lights were working, and photos showed the trailer did not obstruct their view. In short, the summary judgment evidence "may tend" to support a finding of negligence but not that the negligence had anything to do with the accident.

Not every negligent act results in liability, especially when someone else admits full responsibility for the accident. On the right showing, this can be resolved by MSJ.

Unfair Trade-In Practices. Ms. Taylor and her daughter, Jessica, went to Orr Nissan to buy a used car that Jessica could use to commute to school in Pineville. They selected a 2012 Chevy Cruze which the salesman advised was a "good car." They settled on a purchase price of $12,000 and the Taylors bought a warranty. Adding taxes and fees, less a cash payment of $2,000 and the trade-in of Jessica's current car, a 1995 Nissan Maxima, the balance due was $14,429, for which the Taylors filled out a finance application with Regional Acceptance Corp. They then executed a retail buyers order for the Cruze.

Three or four days later – in fact, on the road to Pineville – the Cruze started having serious mechanical problems. Jessica called the salesman, who told her to bring it back for repairs. She did so and, after waiting a few hours, was told the needed repairs were not covered by the warranty she'd bought. After another delay, Orr's credit manager advised her that Regional Acceptance had declined her loan application, so the sale was off; she would have to relinquish the Cruze. Jessica asked for the return of her trade-in, the Maxima, but they said Orr had already sold it at auction for scrap. As for a refund of her $2,000 deposit, deducting a "restocking fee" and mileage on the Cruze, they gave her a check for $1,144. To complete the perfect dealer experience, they ordered her to remove all her personal items from the Cruze, monitored her as she stuffed it in trash bags, and then escorted her out of the building, where she had to wait until somebody could come pick her up.

The Taylors demanded that Orr honor the sale agreement and return the Cruze, or rescind the sale for redhibition, or reduce the purchase price. After Orr refused, the Taylors filed this suit, for redhibition and violations of the La. Unfair Trade Practices Act. The city court found a completed sale of the Cruze, which had redhibitory defects, and fixed Jessica's damages at $24,192. The court found LUTPA did not apply. Orr appealed.

The Second Circuit affirmed in part and reversed in part, ***Taylor v. Orr Motors of Shreveport Inc.,*** 55,771 (La. App. 2 Cir. 11/20/24), in an opinion by Judge Robinson. In a fairly long opinion, the court agreed with Orr's argument that the parties' deal was not a sale; because completion was subject to credit approval by Regional Acceptance, it was a "contract to sell," La. C.C. art. 2623, and thus not subject to redhibition. However, failure of the condition was purely Orr's fault, so the sale was in fact completed. The court then parsed the items of damage, finding that most of them (loss of use, reimbursement of rental vehicle expense, part of the attorney fee) were simply not authorized under redhibition law. However, the totality of the evidence mandated finding a LUTPA violation: the unfair conversion of the Maxima, denying that repairs to the Cruze were covered by warranty, cancelling the loan only after she complained about the Cruze, not allowing her to pursue other financing, the humiliation of her expulsion from Orr's premises and the negative impact on her credit rating all amounted to "unethical, oppressive, and unscrupulous methods." The court therefore affirmed the total attorney fees, $9,000, as authorized by LUTPA. The court approved damages of $20,636.

To be sure, LUTPA, R.S. 51:1405, refers only to "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"; the details are fleshed out case-by-case. Jessica's experience is a substantial fleshing-out of a LUTPA claim, from the consumer's standpoint.

Lessor need not be owner. In January 2022, Ms. Light called Ketchum, a real estate investor and agent, to inquire about buying a large house on Fairfield Avenue, roughly across the street from St. Mark's Cathedral. Ketchum got her to complete a lease and option to purchase in favor of an entity called Surety Associates, gave her the name of a mortgage broker to prequalify for a conventional loan, and allowed her to move into the house. She paid $15,000 for the option to purchase, but soon found out she could not qualify for a loan on the $649,000 house. Ketchum tried to steer her to a more affordable property, farther north on Fairfield, but she declined. Instead, she quit paying rent, moved out of the house and took some of its furniture with her. Surety Associates, disclosed as trustee of the FairQ Trust, sued Ms. Light for unpaid rent, conversion of the furniture and amounts due on the option to purchase. Later it filed a MSJ, which the district court granted in part, casting her for unpaid rent of $20,975 and converted furniture of $2,500. Ms. Light appealed.

The Second Circuit affirmed, ***Surety Assocs. LLC v. Light,*** 55,948 (La. App. 2 Cir. 11/20/24), in an opinion by Judge Stone. Ms. Light raised two arguments. First, there was no valid contract because the lease documents listed Surety Associates as the owner instead of the true owner, FairQ. As C.C. art. 2674 directly states, "A

lease of a thing that does not belong to the lessor may nevertheless be binding on the parties," as long as the lessor provides the lessee's peaceful possession. Second, nobody ever told her she had to pay for the furniture. However, her admitted refusal to return the stuff when demanded met the definition of conversion, *La. State Bar Ass'n v. Hinrichs*, 486 So. 2d 116 (La. 1986).

Ms. Light initially appeared pro se and probably did not leave counsel much to argue. The opinion is a good review of basic Civil Code lease law and the tort of civil conversion.

No cause of ice on the road? December 23, 2022, was a cold morning in Shreveport; residents had been advised to wrap external water pipes and leave a drip in their lines. Ms. Dyer was driving her Ford pickup on East Kings Highway, near Southgate Estates, when she crossed a frozen patch on the pavement. She lost control, flipped over and sustained some injuries. The icy patch, it turned out, emanated from assisted living facilities on East Kings, Montclair Park and The Chateaus at Montclaire (*sic*; the spelling is inconsistent). She sued them alleging they (1) maintained their premises in an unsafe and hazardous condition, (2) failed to timely repair ruptured and leaking water lines, (3) failed to warn motorists of the ice that resulted, (4) failed to notify SPD of the condition, and (5) failed to put sand on the slick spot. The facilities filed an exception of no cause of action contending, under La. C.C. art. 2317.1, the owner of premises has no duty to protect a passing motorist from an allegedly dangerous condition outside the premises on a public road that the owner does not own, control or have any duty to maintain. The district court overruled the exception, and the facilities took a writ, which the Second Circuit granted to docket.

After full review, the Second Circuit recalled the writ and affirmed the lower court's ruling, ***Dyer v. Montclaire Parc LLC,*** 55,674 (La. App. 2 Cir. 11/6/24), in an opinion by Judge Robinson. The court reviewed the law of premises liability, La. C.C. art. 2317.1, as recently elaborated in *Farrell v. Circle K Stores Inc.*, 22-00849 (La. 3/17/23), 359 So. 3d 467, but found authority that a landowner may be liable for a defect in a public sidewalk if he "negligently caused" the defect, *Bufkin v. Felipe's La. LLC*, 14-0288 (La. 10/15/14), 171 So. 3d 851. Although *Bufkin* and other cases all involved sidewalks, the court considered these close enough to apply to the street and, given the substance of the allegations, there was indeed a "set of facts in support of any claim which would entitle [her] to relief," *Badeaux v. Sw. Computer Bur.*, 05-0612 (La. 3/17/06), 929 So. 2d 1211. Ms. Dyer gets to take her claim to court.

Factually, the case shows how unfamiliar Louisianans are with, and unprepared for, freezing conditions. Legally, it shows how difficult it is to win an exception of no cause.

Detailed descriptive list is maybe not self-proving. Ms. Madden owned a real-estate LLC; in 2002, she took in her daughter, Ms. Chumley, as co-owner; Ms. Madden died in 2016, and Ms. Chumley was appointed executrix of the succession. A few years later, however, some of Ms. Madden's other relatives moved to oust Ms. Chumley as executrix, at first claiming she omitted the LLC from the assets of the succession. The court removed Ms. Chumley for cause and appointed a Ms. LaCour instead. After some forensic work, Ms. LaCour filed a detailed descriptive list ("DDL") claiming the estate owned 74% of the LLC and that Ms. Chumley had "mismanaged, wasted, or disposed of improperly" assets worth at least $382,000. Ms. Chumley objected to the DDL; later, she renounced any and all claims to the succession. After a hearing, which Ms. Chumley did not attend, the district court homologated the DDL, adopted a new DDL ("DDL-2") and rendered judgment that Ms. Chumley owed the succession $531,838 plus a 20% statutory penalty. In part of a blizzard of motions, Ms. LaCour moved for summary judgment to enforce the earlier judgment. The district court granted the motion, finding no genuine issue of material fact as to the value of the LLC. Ms. Chumley appealed.

The Second Circuit affirmed in part and reversed in part, ***LaCour v. Chumley,*** 55,947 (La. App. 2 Cir. 11/20/24), in an opinion by Judge Stephens. The court rejected Ms. Chumley's arguments that the prior judgment was not valid and final, and that she was denied adequate notice of the hearing. On the merits, the court acknowledged that a DDL is to be accepted as prima facie proof of all matters shown therein, unless amended or traversed successfully, La. C.C.P. art. 3136. However, the DDL-2 failed to exclude all genuine issues of material fact regarding the debt. "A DDL is merely a device used to inform interested parties of the nature and the estimated value of succession property; it is not a method to establish a final judgment against an individual." *Succession of Price*, 197 La. 579, 2 So. 2d 29 (1941).

Come to the MSJ hearing with something more than just a DDL.

An update. In January 2024, I discussed the Second Circuit's opinion in *Howe v. Gafford*, 55,343 (La. App. 2 Cir. 11/15/23), 374 So. 3d 1065. It was a disturbing case in which a child born to a drug-addicted mother was declared in need of care and assigned to a foster parent, Ms. Gafford. Unfortunately, Ms. Gafford's fostering was deficient and, in a short while, the child sustained serious injuries deemed "non-accidental." The child's mother sued Ms. Gafford and DCFS, citing the latter's nondelegable duty as custodian of a CINC, relying on *Miller v. Martin*, 02-0670 (La. 1/28/03), 838 So. 2d 761.

DCFS defended with a statute, La. R.S. 42:1441.1, which limits state liability for the offenses and quasi offenses of any person who is not "expressly specified" as an official, officer or state employee entitled to indemnification under the statute. In a prior appeal, the Supremes stated DCFS would be liable only on a showing that Ms. Gafford was "a state office holder, employed by the state." *Kunath v. Gafford*, 20-01266 (La. 9/30/21), 330 So. 3d 161. The parties held a trial, after which the district court found Ms. Gafford was just a foster parent, never an employee, never compensated or paid any wages by DCFS; hence, her conduct did not make the state liable. The Second Circuit affirmed this finding; the biological mother took a writ.

The Supreme Court reversed, ***Howe v. Gafford,*** 23-01649 (La. 10/25/24), in an opinion by Justice Griffin. The court rejected the argument that "R.S. 42:1441.1 statutorily abrogated the non-delegable duty of care and well-being owed by DCFS to children in its legal custody," finding instead that this duty is so rooted in positive law that the "statute is inapplicable to the duty of care and well-being DCFS owes to children in its legal custody." Not only is the duty positive and nondelegable, but the result is confirmed by the legislative findings and purposes stated in R.S. 41:1441.4 and by the fact that legislature had taken no action to tighten up § 1441.1 after the ruling in *Miller v. Martin*. Two Justices concurred; the Chief Justice dissented, saying *Miller* was overbroad.

The opinion is a full-throated expression of the state's paramount duty toward foster children. Only time will tell if it alters the challenge of finding willing and competent foster parents.

Federal Update

by Chris Slatten, Chris_Slatten@lawd.uscourts.gov

Improper Joinder and Amended Complaint: Parent and child sued baby-food manufacturer Hain and retailer Whole Foods in Texas state court. Hain removed the case based on diversity jurisdiction even though the plaintiffs and Whole Foods were Texas citizens; Hain claimed that the citizenship of Whole Foods could be ignored because it was improperly joined. The district court agreed and dismissed Whole Foods. The case went to a jury trial. Hain won when the judge granted its motion for judgment as a matter of law.

Plaintiffs appealed, and the 5CA took a look at the improper joinder issue to make sure the federal court had jurisdiction. In a typical case, this is done by conducting a Rule 12(b)(6)-type analysis, looking at the complaint to determine whether it states a claim under state law against the in-state defendant. Circuit precedent says to evaluate a removed state-court petition under the federal *Twombly/Iqbal* pleading standard.

The plaintiffs' state-court petition alleged a breach of warranty claim against Whole Foods. After removal, the plaintiffs filed an amended complaint to clarify that claim under the federal pleading standard and add supporting facts. May the court consider the post-removal complaint when assessing improper joinder? Yes, said *Palmquist v. Hain Celestial Grp., Inc.*, 103 F.4th 294 (5th Cir. 2024), because a plaintiff should not be penalized for adhering to the pleading standard of state court where the case was filed. But a post-removal amendment may not be considered to the extent it presents new theories or causes of action not raised in the original petition.

When the 5CA looked at the amended complaint, it found that the plaintiffs *did* plead a plausible breach of warranty claim against Whole Foods. There was no improper joinder of the non-diverse defendant, so the court lacked jurisdiction, and the whole case had to be remanded to state court. That's a gamble a defendant takes when it removes based on improper joinder. Even if the district judge buys it, the 5CA may disagree and kick the case to state court to start over.

***Canter v. Koehring* and Piecing the Pleadings**: Most improper joinder disputes are assessed by conducting a Rule 12(b)(6)-type analysis. But the court may sometimes elect to "pierce the pleadings" and conduct a summary inquiry to determine whether a cause of action really exists against the non-diverse defendant despite the allegation of one in the complaint.

An example is *Jack v. Evonik Corp.*, 79 F.4th 547 (5th Cir. 2023), where the plaintiff sued the owner of a chemical plant and four non-diverse site managers. The managers filed affidavits contesting any contention that the plant specifically delegated to them individual duties to regulate the amount of EtO coming from the plant and warn residents of the risk of emissions. The 5CA noted ample authority allowing the consideration of such evidence in a *Canter v. Koehring* delegated-duty dispute. "What duties an employee was delegated by his employer can be a discrete fact that a court may properly pierce the pleadings to examine."

Motion to Dismiss and Amended Complaint: I've written before about the wisdom of a plaintiff promptly amending his complaint when hit with a motion to dismiss. If the plaintiff can plead additional facts to cure the arguments in the motion, bring them on. Rule 15 encourages the practice and may allow a plaintiff to amend without leave of court if he acts quickly.

Many plaintiffs sleep through the free amendment period and have to move for leave to amend. And many defendants will oppose the motion. But denial by the trial court will often be reversible error, as shown by *Jack v. Evonik Corp.*, 79 F.4th 547 (5th Cir. 2023). The 5CA noted: "Normally, a plaintiff should be afforded at least one chance to remedy all identified flaws in his pleadings. That did not occur, so the dismissal with prejudice was error. Plaintiffs should usually be able to amend at least once, because 'fairness requires' it." This does not mean one amendment per case; *Jack* shows that the opportunity to amend must come after a defense motion or court order points out a particular shortcoming in the complaint.

Malicious Prosecution and § 1983: Cops charged a jewelry store owner with two misdemeanors and a felony count of money laundering, and he was locked up for three days. Prosecutors later dropped all charges. Owner filed a Fourth Amendment malicious-prosecution claim under § 1983. Cops argued that they were entitled to summary judgment even if the felony count was bogus because they had probable cause for the misdemeanors.

The Supremes disagreed. "The question presented here arises when the official brings multiple charges, only one of which lacks probable cause. Do the valid charges insulate the official from a Fourth Amendment malicious-prosecution claim relating to the invalid charge? The answer is no: The valid charges do not create a categorical bar. We leave for another day the follow-on question of how to determine in those circumstances whether the baseless charge caused the requisite seizure." *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745 (2024).

Second Amendment: Diaz was convicted in state court of theft of a vehicle and evading arrest or detention with a vehicle, then he got another state conviction for possessing a firearm as a felon after he was caught breaking into a car while possessing a gun and meth. The next time he got caught with a gun and meth, the feds charged him with felon in possession under § 922(g). Diaz made facial and as-applied Second Amendment challenges, but the 5CA shot them down. *U.S. v. Diaz*, 116 F.4th 458 (5th Cir. 2024).

BAR BRIEFS

Portrait presentation. An official portrait of La. Supreme Court Justice **Newton Crain Blanchard,** who served on the court from 1897-1904, was formally presented to the Supreme Court on November 25, 2024. Justice (and later Governor) Blanchard was a founding member of Blanchard Walker. Heirs of Justice Blanchard acquired the picture from the estate sale of a Shreveport oilman and antiques collector and donated it to the LASC for its portrait gallery. Justice Jay McCallum accepted the picture for the LASC in a ceremony at the Second Circuit attended by the donors and current members of Blanchard Walker.

L-R: Mac Zentner, Curtis Joseph, Robin Jones, Scott Wolf, Melissa Flores, Mike Adams, Anna Claire Tucker, Justice McCallum

CLASSIFIEDS

Brief writing/legal research.

Columbia Law School graduate; former U.S. 5th Circuit staff attorney; former U.S. District Court, Western District of Louisiana, law clerk; more than 20 years of legal experience; available for brief writing and legal research; references and résumé available on request. Appellate Practice specialist, certified by the Louisiana Board of Legal Specialization.

Douglas Lee Harville, lee.harville@theharvillelawfirm.com, (318)470-9582.

Paralegal Needed

The law office of David L. White APLC is looking to hire a paralegal.

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For questions, contact Mary or Lenae at 747-7023

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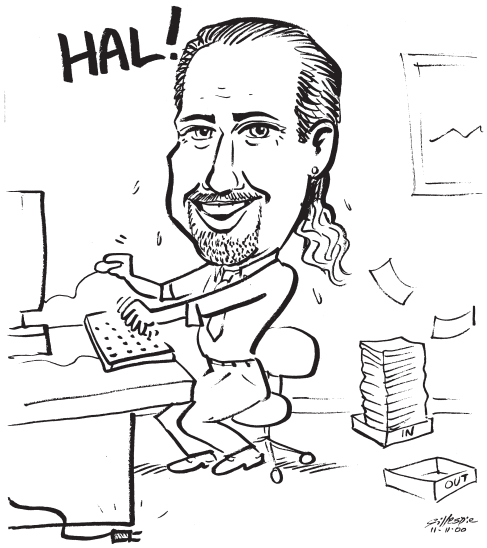
How Write You Are

by Hal Odom Jr., rhodom@la2nd.org



I'm not buying it. The defendant, riding in a car, fired a gun and struck a Mr. Frank, who was sitting on a bicycle. Affirming the defendant's conviction for manslaughter, the court quoted the trial judge: "Mr. Frank wasn't going to *peddle* furiously and catch the car." *State v. Skinner*, 23-508 (La. App. 3 Cir. 5/15/24), 388 So. 3d 505. An earlier opinion, involving controlled dangerous substances, stated that as officers "drew abreast of the defendant, they saw him * * * discard a plastic bag from his hand [and he] began to *peddle* away[.]" *State v. Brown*, 08-0256 (La. App. 4 Cir. 10/22/08), 1 So. 3d 504.

The word used, *peddle*, means to *sell itinerantly*, or to *distribute in small quantities*, with a suggestion of contraband or shoddy merchandise. "Hansen *peddled* his scam to other noncitizens too." *United States v. Hansen*, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023). The word intended, *pedal*, means to *move a lever with your feet*, and is the means of propulsion of a bicycle. "The officers had let the bicycle rider *pedal* away unimpeded[.]" *State v. Smith*, 12-2358 (La. 12/10/13), 130 So. 3d 874.

The first author meant to say Mr. Frank was not going to *pedal furiously*. As for Mr. Brown, he discarded the bag of marijuana and then began to *pedal away*, so obviously he did not *peddle* the rest of his weed.

Toward more florid usage. The pedal-peddle quandary reminds me of another close homophone. When asked if he perhaps pressed the accelerator instead of the brake, "Mr. Martin told him it could have happened, but he remembered the *gas petal* was 'stuck or something.'" *Trapp v. Allstate Prop. & Cas. Ins. Co.*, 18-544 (La. App. 3 Cir. 9/19/18), 255 So. 3d 639. A different court discreetly corrected a trial judge's reasons for judgment: "Plaintiff testified that he moved the gear shift without having first placed his feet onto the brake petal [*sic*]." *Klein v. BMW of N. Amer.*, 97-871 (La. App. 5 Cir. 12/30/97), 705 So. 2d 1200.

This is, honestly, a typo that we seldom catch whiff of.

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

The premise is sound: the word *shall* is mandatory and *may* is permissive. La. R.S. 1:3; La. C.C.P. art. 5053. The same rule applies to contract interpretation. *Bateman v. La. Public Emp. Council No. 17*, 94-1951 (La. App. 4 Cir. 7/26/95), 660 So. 2d 80.

However, the distinction gets fuzzy when the verb is negated. It's an arcane grammatical concept called "auxiliary negation," but the meaning is simple. When the sign says, "You may not smoke in this building," it does not mean you are granted the permission to refrain from lighting up. It means you are denied the right. In other words, "No Smoking."

Still, *may not* can suggest some level of discretion. Consider: "This office *may not consider* applications received after April 30." Arguably, this could mean the office has discretion whether to consider applications received after April 30; equally, it could mean some internal rule or regulation prohibits the office from doing so. Consider also how we say, casually, "That may not work."

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

Louisiana has not addressed the question directly, but the Supreme Court has used the terms in a way that leaves no doubt. "The time limits in Article 877 are *mandatory* and *may not* be extended absent a showing of good cause." *State in Interest of JM*, 13-2573 (La. 12/9/14), 156 So. 3d 1161. "[T]hese warranties are *mandatory*, and *may not* be waived by either party." *Carter v. Duhe*, 05-0390 (La. 1/19/06), 921 So. 2d 963. The Second Circuit has followed suit: "La. C.C.P. art. 694 is *mandatory* – parties *may not* derogate from its provision[.]" *Mullenix v. Mullenix*, 54,827 (La. App. 2 Cir. 1/11/23), 355 So. 3d 1140. (The court did not reach the issue in the case of the three-year employment agreement quoted earlier.)

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

Unfinished business. A court quoted an employment agreement as follows: "23. NON-*COMPLETE* CLAUSE. In the event that this Agreement is terminated, the AGENT agrees not to solicit and execute bail bonds * * * as long as GENERAL AGENT conducts a bail bond business[.]" *Bail Bonds Unlimited Inc. v. Chedville*, 01-1401 (La. App. 5 Cir. 10/29/02), 831 So. 2d 403. Another court noted a defendant's claim that it "would not enforce the non-*complete* and non-solicitation provisions of the Agreement." *Stewart v. H & E Equip. Servs. Inc.*, 2017 WL 388822 (M.D. La. 1/27/17). Perhaps owing to *incomplete* editing, these should be *noncompete* (no hyphen needed).

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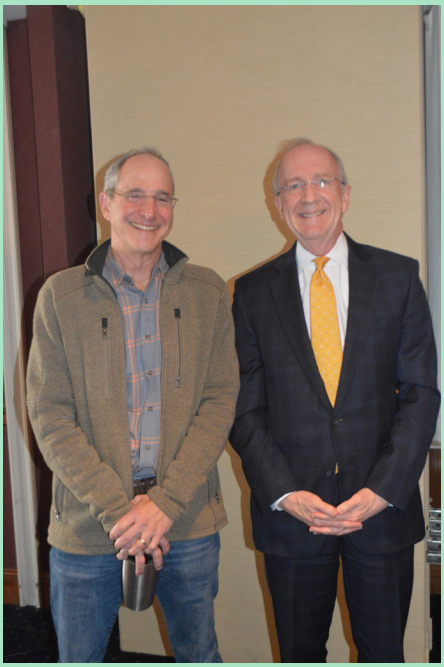

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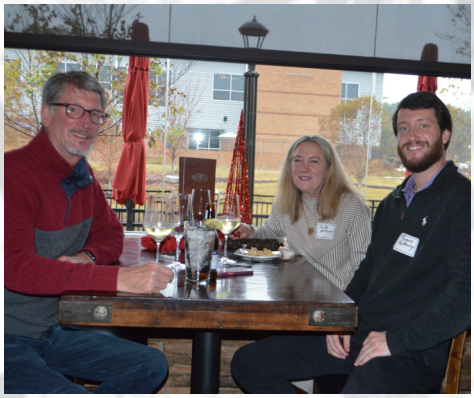
Shreveport Bar Association
Christmas Party

The Shreveport Bar Association hosted its annual Christmas party for its members and local law students at Silver Star Grille on Sunday, December 8, 2024.

Attendees gathered to visit with one another and enjoyed a spread of delicious food. It was great to see those who could come, and we understand for the ones who could not and look forward to seeing you at next year's party.

Christmas magic is in the air!



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UPCOMING EVENTS

*2025 SBA MEMBERSHIP LUNCHEON

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

*JANUARY 22

SBA MEMBER LUNCHEON
Guest Speakers: **Boyce Upholt,**
Author of *The Great River: The Making and Unmaking of the Mississippi* and founder of *Southlands,* a newsletter field guide to Southern nature and **Clinton S. Willson**, PhD, PE Callais and Woods Professor and Dean LSU College of the Coast & Environment

FEBRUARY 1

KREWE OF JUSTINIAN BAL
Horseshoe Casino Riverdome

FEBRUARY 22

KREWE OF CENTAUR PARADE
Krewe of Justinian Participates

*FEBRUARY 26

SBA MEMBER LUNCHEON
Speaker: Robert T. Mann
Author of *You are My Sunshine and the Biography of a Song*

MARCH 2

KREWE OF HIGHLAND PARADE
Krewe of Justinian Participates

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.

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SBA Luncheon Meeting – January 22

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

$50.00 for SBA members includes lunch and one hour of CLE credit or $30 for lunch only.

$60.00 for non-SBA members includes lunch one hour of CLE credit or $35 for lunch only.

Boyce Upholt

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

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

Featuring: **Dr. Clinton Wilson, Director of Louisiana State University Center for River Studies and professor of civil and environmental engineering and Boyce Upholt, author of The Great River: The Making and Unmaking of the Mississippi**

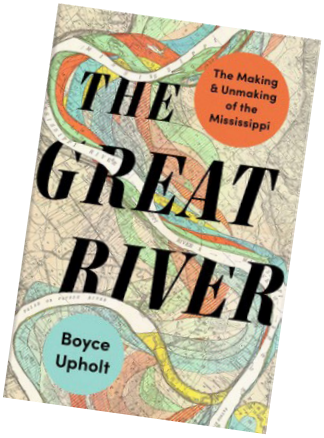
This presentation is eligible for 1 hour CLE credit.

ABOUT THE AUTHORS

Boyce Upholt is a journalist and essayist whose writing has appeared in *The Atlantic, National Geographic, Oxford American,* and *Virginia Quarterly Review*, among other publications. He is the winner of a James Beard Award for investigative journalism, and he lives in New Orleans, Louisiana.

Dr. Clinton Wilson

Dr. Clint Willson is the Callais & Woods Professor and Dean of the LSU College of the Coast & Environment and Director of the LSU Center for River Studies. He has been at LSU for over 26 years teaching and conducting research in water resources and environmental engineering.



We will have a limited number of books for sale ($35) at the luncheon. Books will be sold and signed by the author after the presentation.

Confirm your reservation(s) by email at **dsouthern@shreveportbar.com** or by phone at **703-8372.**
Please remember to call and cancel if you can't attend.
The SBA pays for each reservation made. No-shows will be invoiced.