

BENCH BAR 2020

# THE MAGAZINE OF THE BATON ROUGE BAR ASSOCIATION HE BATON ROUGE HE BATON ROUGE BAR ASSOCIATION HE BATON ROUGE BAR ASSOCIATION

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The BRBA's 2020 Bench Bar Conference takes place April 16-18, 2020, at the The Lodge at Gulf State Park in Gulf Shores, AL. This year's theme is "Spring Break: Coasting Through CLE." Spots are filling up, so register today! Online registration is available at www.brba.org.

Pictured: Judge Wilson Fields, Danny McGlynn and Cathy Giering.

Cover Photo by Landon T. Hester



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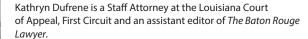


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# **EYE ON EVIDENCE**

### DO NOT LEAVE YOUR EVIDENCE AT THE DOOR: A TRIAL COURT'S "LEGAL ERROR"

An old adage remains true today, even in the legal world: never assume anything. As practitioners, filing motions and presenting legal argument based on evidence are routine, and assumptions are often made throughout the process. One common misconception is that documents attached to or filed in conjunction with any motion, exception or other pleading, without more, are sufficient for the trial court's consideration as evidence. However, appellate courts continue to warn practitioners, through reversal of pretrial rulings, about the consequences of failing to take the necessary steps to formally offer evidence at a hearing.

It is considered "legal error" when a trial court relies on or considers evidence not properly introduced to form a basis for its decision, even if the evidence was "physically placed in the record."<sup>1</sup>

In Louisiana, it is a well-established principle that any defenses raised by exception or motion, other than the peremptory exception of no cause of action<sup>2</sup> and motion for summary judgment,<sup>3</sup> "must be proven by evidence introduced at a hearing, where the trial court performs its function of weighing evidence, making credibility determinations, and making factual findings."<sup>4</sup> Except for summary judgment evidence, merely attaching a document to a motion or memorandum in the record or referring to it in oral or written argument does not constitute evidence and cannot be considered by the trial court.<sup>5</sup>

In a recent case, the trial court's judgment granting a motion in limine was vacated on the grounds that the parties failed to properly offer any evidence at the hearing.<sup>6</sup> The appellate court explained that, in oral argument, the parties referred to documents attached to memoranda filed in connection with the motion but neglected to officially introduce the documents into evidence.<sup>7</sup> Additionally, in making its decision on the motion, the appellate court held the trial court improperly considered an expert's written report attached to the memoranda in opposition and discussed at oral argument but was not offered into evidence at the hearing.<sup>8</sup>

Therefore, to ensure a trial court's decision is not vacated on the grounds of this procedural legal error, and to make a proper record for appeal, it is best practice for litigators to formally introduce all evidence into the record at the hearing on any motion, exception or other pleading (including, out of an abundance of caution, motions for summary judgment).

WRITTEN BY MELISSA PESTALOZZI

<sup>1</sup> See DePhillips v. Tech. Ins. Co., 19-0329, pp. 1-2 (La. App. 5 Cir. 10/2/19), \_\_\_\_So.3d\_\_\_, 2019 WL 4866777, at \*1 (citing Denoux v. Vessel Mgmt. Servs.,Inc., 07-2143, p. 6 (La. 5/21/08); 983 So.2d 84, 88; Jennings v. Ryan's

*Family Steak House*, 07-0372, p. 10 (La. App. 1 Cir. 11/2/07), 984 So.2d 31, 39. <sup>2</sup> "No evidence may be introduced at any time to support or controvert the

<sup>2</sup> "No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action." LA. CODE OF CIV. PROC. ART. 931.

<sup>3</sup> "The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made." LA. CODE OF CIV. PROC. ART. 966(D)(2).

<sup>4</sup> Draughn v. Thacker, 14-0216, p. 4 (La. App. 5 Cir. 11/25/14), 165 So.3d 1010, 1012.

<sup>5</sup> See DePhillips, 2019 WL 4866777, at \*1 (citing Denoux, 983 So.2d at 88).
<sup>6</sup> See id.; see also Alost v. Lawler, 18-1271, p. 6 (La. App. 1 Cir. 5/8/19); 277 So.3d 329, 334 n. 4.

<sup>7</sup> See DePhillips, 2019 WL 4866777, at \*1.

<sup>8</sup> See id.

<sup>9</sup> See id.

#### GAIL'S GRAMMAR

Em dashes are long dashes that emphasize material either at the beginning or end of a sentence or within a sentence. A single em dash can take the place of a colon, and a pair of em dashes can substitute for parentheses. Keep in mind that em dashes are bold punctuation marks; a pair of them emphasizes material that parentheses would deemphasize.

Most people use two hyphens for an em dash, but in MS Word, a proper em dash is available under Insert Symbols. When writing for publication, such as this magazine, a law review article or a newspaper op ed, do not insert spaces before and after the dash. When writing an office document, however, use a nonbreaking space (shift control space) before and a regular space after. (The nonbreaking space prevents the dash from ending up on the next line.)

#### EXAMPLES:

The days of students arriving at law school with a thorough grasp of grammar and punctuation are over—or so it seems.

FEMA is a government agency—a bureaucracy that creeps at a snail's pace—that is tasked with providing aid to Americans affected by natural disasters.

Fax ideas for future Gail's Grammar columns to 771-5913, call Gail at 771-4900 ext. 216, or e-mail her at Gstephenson@sulc.edu.

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The Baton Rouge Lawyer