Journal of Civil Law Studies

Volume 6
Issue 2 *Winter 2013*

Article 11

12-31-2013

Bloxom v. City of Shreveport

Garrett Condon

Follow this and additional works at: http://digitalcommons.law.lsu.edu/jcls

Part of the Civil Law Commons

Repository Citation
Garrett Condon, *Bloxom v. City of Shreveport*, 6 J. Civ. L. Stud. (2013)
Available at: http://digitalcommons.law.lsu.edu/jcls/vol6/iss2/11

This Civil Law in Louisiana is brought to you for free and open access by the Law Reviews and Journals at DigitalCommons @ LSU Law Center. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized administrator of DigitalCommons @ LSU Law Center. For more information, please contact sarah.buras@law.lsu.edu.

BLOXOM V. CITY OF SHREVEPORT, BEHIND THE VEIL: A PROXIMATE CAUSE CASE

Garrett M. Condon*

May the president of a company be held personally liable for the criminal conduct of an employee he chose to hire? In a sharply divided court on re-hearing, the Louisiana Second Circuit in *Bloxom v. City of Shreveport*[1] recently held yes.

I. BACKGROUND

Brian Horn, a convicted and registered sex-offender, murdered twelve-year-old Justin Bloxom.[2] Horn, a taxi driver, had been posing as a young female in text messages to the boy.[3] These texts tricked Justin into sneaking out of his parents' house late at night and getting into Horn's taxi, believing the young girl had sent a cab to him so they could rendezvous.[4] Horn had successfully lured Justin into the trap, from which there was no escape from Horn's brutality. Justin's mother filed survival and wrongful death actions against a number of defendants, including the president of the taxi company David McFarlin—in his personal capacity—for hiring Horn as a taxi driver.[5]

Prior to these events, Horn had been convicted of felony sexual assault in Missouri.[6] After being released from prison, he moved to Louisiana and applied for a job as a taxi driver.[7] McFarlin

---

* J. D., Hofstra University (2001), LL.M. Candidate, LSU Law Center (2013).

1. Bloxom v. City of Shreveport, 47,155 (La. App. 2 Cir. 8/31/12); 103 So. 3d 383.
2. *Id*. at 384.
3. *Id*. at 384-85.
4. Vickie Welborn, *Man indicted in death of Justin Bloxom*, SHREVEPORT TIMES (Apr. 12, 2010), http://www.shreveporttimes.com/article/20100413/NEWS03/4130319/Man-indicted-death-Justin-Bloxom.
5. Bloxom, 103 So. 3d at 385.
6. *Id*. at 384.
7. *Id*.

interviewed Horn for the position, and chose to hire him while having full knowledge of his prior conviction and registered sex offender status.[8] While McFarlin made the hiring decision, multiple layers of corporate and contractor entities separated McFarlin from the driver employees.[9] McFarlin was the president of Blue Phoenix Trading Company, which did business as Action Taxi. Action Taxi used a subcontractor, Moore's Consulting, to employ the drivers.[10]

McFarlin moved for summary judgment to dismiss him as a defendant in his personal capacity.[11] In that motion, he admitted to hiring Horn despite having knowledge of the conviction and registered sex offender status, but argued that because he acted in his capacity as president of Blue Phoenix Trading Company, the company should hold the potential liability and not McFarlin personally.[12] Ms. Bloxom argued that McFarlin owed a personal duty to Justin and that his own fault caused the injury.[13] The trial court granted McFarlin's motion and Ms. Bloxom appealed.[14]

II. DECISION OF THE COURT

On appeal with the Louisiana Second Circuit, a three-judge panel originally decided the case in favor of McFarlin, with one judge dissenting.[15] The majority held that McFarlin owed no personal duty to Justin, stating "a corporate officer making a hiring decision is primarily acting on behalf of his or her company [and] owes a duty of reasonable care which does not extend to all torts that all employees might commit."[16] However, the Second Circuit granted a re-hearing, and in a three-to-two decision vacated the

8. *Id.* at 385.
9. *Id.* at 384.
10. *Id*.
11. *Id.* at 385.
12. *Id.* at 385.
13. *Id.* at 385.
14. *Id*.
15. Bloxom, 103 So. 3d at 383.
16. *Id.* at 388.

original opinion and reversed the trial court's summary judgment decision. The majority on re-hearing said the facts of the case were a "perfect storm" that created personal liability on the part of McFarlin.[17] All the written opinions (majority and dissent in both the original hearing and the re-hearing) are based on Second Circuit jurisprudence, viewing the issue as one of "piercing the corporate veil." In that vein, the analyses in the opinions strongly integrate corporate limited liability policies in determining whether McFarlin should be exposed to personal liability or not.

III. COMMENTARY

Bloxom is a recent example of the Second Circuit's line of confusing cases involving personal liability on the part of corporate officers, specifically in cases where officers personally act within the scope of their employment.[18] These cases appear to mix two different theories of personal liability for corporate officers, labeling any instance of personal liability as an issue of "piercing the corporate veil."

A corporation is a legal person, an entity distinct from the individuals who comprise it.[19] Generally, the owners and officers of a limited liability company are not personally liable for the debts, obligations, or liabilities of the corporation.[20] The Louisiana Supreme Court, in *Riggins v. Dixie Shoring Co., Inc.*,[21] stated that this protection is meant to encourage business growth because individuals can invest in a company while insulating their personal assets from liability. "Piercing the corporate veil" is an equitable means by which a court can hold a shareholder or officer personally liable for the liabilities of the company despite the general protections of the corporate structure, generally when a

17. *Id.* at 390.
18. *See infra* note 32.
19. LA. CIV. CODE ANN. art. 24 (2013).
20. LA. REV. STAT. ANN. §§ 12:93, 12:1320 (2013).
21. 590 So. 2d 1164, 1167-68 (La. 1991).

corporation is in reality the alter ego of the owner or when the entity is not truly operated as a corporation.[22] The opinions in *Bloxom* recognize what the Louisiana Supreme Court has stated in *Riggins* and elsewhere, all stating directly or in essence that "Louisiana courts are reluctant to hold a shareholder, officer, or director of a corporation personally liable for corporate obligations, in the absence of fraud, malfeasance, or criminal wrongdoing."[23]

A corporate bankruptcy scenario provides a good example of this limited liability protection. Imagine a person has a business idea. He incorporates, becomes the single shareholder, and hires someone to be the president of the company to operate the business. In an attempt to run the business legitimately, the owner and president authorize several obligations on behalf of the company, such as long-term contracts and loans. Unfortunately, the business ultimately fails and its assets can only cover the repayment of a small fraction of the total amount owed to its creditors. Absent the existence of extraordinary circumstances as outlined in *Riggins*, such as fraud or running a sham corporation, the limited liability construct would protect both the shareholder and the president from being personally liable for the remaining debts of the failed corporation, despite the money still owed to the business' creditors. A court would only be authorized to pierce the corporate veil (resulting in personal liability on the part of the shareholder or officer) if the corporation was actually set up as a sham to illegitimately try to protect the officers and shareholders.

---

22. Like in other jurisdictions, factors to consider when determining whether to pierce the corporate veil include "1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings." *Id*. at 1168. The Second Circuit previously applied these factors in *Cahn Electric Appliance Co., Inc. v. Harper*, 430 So. 2d 143 (La. App. 2 Cir. 1983). The *Cahn* case involved a traditional "piercing the corporate veil" issue of an attempt to reach the president and sole shareholder of a company personally for the obligation of the company.

23. Riggins, 590 So. 2d at 1168.

The facts in the *Bloxom* case offer a wholly distinct form of corporate officer personal liability, and really do not relate to the notion of what commonly is referred to as piercing the corporate veil. A corporate officer who takes a *personal action*, even if undertaken as part of his or her duties to the corporation, is not somehow shielded from personal liability because of the existence of the corporation. The Louisiana statute on point specifically excludes from the general corporate limited liability protection situations where a third party has a legal right against an officer who commits a negligent or wrongful act.[24] Further, this distinction was made in *Canter v. Koerhing Co.*,[25] where the Louisiana Supreme Court explained that a corporate officer does owe a duty of care under the general tort liability article[26] to third persons when personally acting on behalf of the corporation.[27] This distinction was actually emphasized in the law recitation within the original *Bloxom* majority opinion, where it summarized the holding in *Canter* by stating "[i]f an officer or agent of a corporation through his fault injures another to whom he owes a personal duty, whether or not the act culminating in the injury is committed by or for the corporation, the officer or agent is liable personally to the injured third person, and it does not matter that liability might also attach to the corporation."[28] Unfortunately, the

---

24. LA. REV. STAT. ANN. § 12:1320(D) (2013).
25. 283 So. 2d 716 (La. 1973).
26. LA. CIV. CODE ANN. art. 2315 (2013).
27. *See also* Lytell v. Hushfield, 408 So. 2d 1344 (La. 1982) (holding certain corporate officials personally liable for injury caused by forklift when those officials were delegated the duty to provide a safe working environment and personally knew of the forklift defects but did nothing to correct them).
28. Bloxom, 103 So. 3d at 386. The final phrase "it does not matter that liability might also attach to the corporation" is in reference to the issue of vicarious liability under the doctrine of *respondeat superior*. Generally, a corporation as an employer may be deemed vicariously liable for the actions of its employees taken within the scope of their employment. *See* LA. REV. STAT. ANN. § 9:3921 (2013). For instance, the taxi company may be liable if one of its taxi drivers negligently causes a car accident. However, the corporate officer will not be personally liable for the torts of corporate employees based on his general administrative responsibility in the corporation. *See* Canter, 283 So. 2d at 721. This theory would be inapplicable in this case because it requires a

original majority did not apply this law in their analysis, and, puzzlingly, the majority on re-hearing failed to cite to it at all, even though it is directly on point and tends to support their holding.

These same general principles exist in other jurisdictions. While not part of Louisiana jurisprudence, the distinction between piercing the corporate veil and personal liability for personal actions was succinctly made by the Pennsylvania Supreme Court:

> Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity.[29]

"Participation theory" is not a term of art used in Louisiana, but its essence exists both in legislation and case law.[30]

The *Bloxom* case follows a stream of Second Circuit cases that mix these two concepts. For years, the conflated analysis has extended Louisiana's corporate limited liability protections to the personal acts of corporate officials taken in the scope of employment, despite the distinction made in *Canter*. The analysis in each opinion in this line of cases cites to *Riggins v. Dixie Shoring Co., Inc.*,[31] despite the fact that *Riggins* was not a case involving a corporate officer's personal action. The cases citing

---

showing that the employee was acting in the scope of his employment, which Horn was clearly not. *See* Roberts v. Benoit, 605 So. 2d 1032, 1037 (La. 1991).

29. Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 90 (Pa. 1983).

30. For an excellent and in-depth review on both topics, *see* Glenn G. Morris, *Personal Liability for Corporate Participants without Corporate Veil-Piercing*, 54 LA. L. REV. 207 (1993) (discussing Louisiana law on personal liability for tortious conduct of corporate officers) and Glenn G. Morris, *Piercing the Corporate Veil in Louisiana*, 52 LA. L. REV. 271 (1991) (discussing Louisiana law on piercing the corporate veil).

31. 590 So. 2d 1164 (La. 1991).

Riggins incorrectly use the lack of "fraud, malfeasance or criminal wrongdoing" as a factor in not finding personal liability, as those factors are only relevant in determining whether to hold an officer or shareholder personally liable for the liabilities of the corporation. They are not relevant in cases like *Bloxom*. Further, Second Circuit opinions discuss policy justifications for treating corporations as separate entities to rationalize why corporate officers should be shielded from personal liability for their acts on behalf of the corporation.[32] Again, that rationale is only applicable for traditional piercing-the-corporate-veil situations and not in situations like *Bloxom*. Even the majority opinion on re-hearing in *Bloxom* strains to keep intact the Second Circuit's jurisprudence on limited liability generally for the personal actions of a corporate officer taken within the scope of their duties. With tortured reasoning, the opinion tries to separate McFarlin's actions as somehow extraordinarily unique compared to the personal acts of most corporate officers.

Based on *Canter*, the analysis of whether McFarlin owed a personal duty in this case should have been relatively straightforward. The issue is whether he was negligent in hiring Horn. Negligent hiring cases are based purely on the standard negligence provision of article 2315 of the Louisiana Civil Code,[33]

---

32. In *Kemper v. Don Coleman, Jr., Builder, Inc.*, 746 So. 2d 11 (La. App. 2 Cir. 1999), plaintiffs sued the president of a construction corporation for failing to warn that their newly built houses were susceptible to flooding. The president personally knew of the flooding concern and did nothing to disclose the information. The Court held that the president was protected from personal liability because he was acting in his capacity as corporate president and that the sales were between the plaintiffs and the corporation. In *Carter v. State*, 46 So. 3d 787 (La. App. 2 Cir. 2010), a plaintiff sued the president of a corporation in his personal capacity after a car accident caused injury. The allegations were that he "conducted a negligent inspection of the tractor-trailer and determined that the vehicle was roadworthy when it was not, made the negligent decision to instruct his employee to drive the vehicle from the auction yard to his wrecker yard at night and negligently entrusted the vehicle to an unqualified driver," all of which were done in the scope of his employment. The Court held the president could not be held personally liable because these actions were taken in his "corporate capacity" rather than his "individual capacity."

33. *See* Roberts v. Benoit, 605 So. 2d 1032 (La. 1992) (on re-hearing).

which is cited in the *Bloxom* original opinion and the re-hearing dissent, but again, strangely, is not cited by the majority on re-hearing. The duty-risk analysis used under article 2315 "requires proof by the plaintiff of five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause in fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) the actual damages (the damages element)."[34] Whether a duty exists is a matter of law, in which courts must make a policy decision in light of the unique facts and circumstances presented along with reviewing laws (statutory, jurisprudential, or arising from general principles of fault).[35] Louisiana Supreme Court jurisprudence does not factor the benefits of the corporate structure as part of the duty analysis, but rather declared them distinctly separate issues in *Canter*. Other Louisiana appellate courts have applied this distinction.[36]

While not used in their analyses, both the original majority opinion[37] and the majority opinion on re-hearing[38] cite the same line of negligent hiring cases.[39] These cases all state that *a duty exists* (although limited in scope, like all negligence cases) on the part of an employer to exercise reasonable care in the hiring of an employee who, in the performance of his duties, will have a unique

34. Lemann v. Essen Lane Daiquiris, Inc., 923 So. 2d 627 (La. 2006).
35. *Id*. at 633.
36. *See* Hemphill-Kunstler-Buhler, Auctioneers and Appraisers v. Davis Wholesale Electronics Supply Co., Inc., 516 So. 2d 402 (La. App. 3 Cir. 1987); and Indest-Guidry, Ltd. v. Key Office Equipment, Inc., 997 So. 2d 796 (La. App. 3 Cir. 2008).
37. Bloxom, 103 So. 3d at 387.
38. *Id.* at 392.
39. Both opinions cite the same three cases: Cote v. City of Shreveport, 73 So. 3d 435 (La. App. 2 Cir. 2011); Kelley v. Dyson, 10 So. 3d 283 (La. App. 5 Cir. 2009); and Taylor v. Shoney's Inc., 726 So. 2d 519 (La. App. 5 Cir. 1999).

opportunity to commit a tort against a third party. The Louisiana Supreme Court has also certainly acknowledged a general cause of action against an employer for negligent hiring, analyzed using the standard negligence test of article 2315 of the Louisiana Civil Code, such as in *Roberts v. Benoit*.[40] In *Roberts*, a sheriff deputized a cook and gave general instructions to carry a firearm at all times while off duty. Minimal training was given, but a manual told the new deputy not to carry a firearm while drinking alcohol and that the weapon should only be drawn if life is in danger. The deputy later went to a social gathering where he drank alcohol and engaged in horseplay with his firearm, during which he negligently shot another person. The Louisiana Supreme Court held that despite the fact that the sheriff may have been negligent in deputizing and arming the cook with insufficient training, the scope of the duty did not extend to this particular harm because it was too attenuated and too unforeseeable that the new deputy would use the firearm in such a manner in clear violation of both the manual and common sense.

The case of *Jackson v. Ferrand*[41] is remarkably similar to *Bloxom*. The victim in *Jackson* had locked herself out of her hotel room. A hotel worker assisted her by getting a master key and letting her into her room. While doing so, he invited her to go on a date with him and she agreed. While out, she alleged he drugged and sexually assaulted her. The victim filed a cause of action against the hotel for, among other things, the negligent hiring and supervision of the alleged assailant, stating that the hotel knew the assailant had a criminal history. The Court affirmed a summary judgment in favor of the hotel, finding that even if the hotel knew of his criminal history, hiring him was neither the cause-in-fact nor

40. 605 So. 2d 1032, 1041 (La. 1992) (on re-hearing). *See* the entire *Roberts* opinion for an in-depth discussion of the differences between the *respondeat superior* and negligent hiring theories of employer liability.

41. 658 So. 2d 691 (La. App. 4 Cir. 1994).

the legal cause of the damages because the hotel could not foresee the sexual assault despite his criminal history.[42]

Because it incorporated elements of "piercing the corporate veil" doctrine, the final *Bloxom* majority opinion failed to use the correct analysis in determining that McFarlin owed a personal duty. Limited liability should have been relegated to nothing more than a footnote to state that McFarlin's personal conduct put him personally at risk based on Section 12:1320(D) of the Louisiana Revised Statutes and *Canter*. The true issue of the case is whether McFarlin is liable under article 2315 of the Louisiana Civil Code for negligently hiring Horn. The operative questions should have been, first, whether McFarlin could reasonably have foreseen Horn's actions when he was hired such that McFarlin owed a duty to Justin and his mother in this situation; and second, whether McFarlin's hiring of Horn was a proximate (or legal) cause of the damages suffered by Justin and his mother.

While there may be many foreseeable risks in hiring a convicted and registered sex offender as a taxi driver, it is a far stretch to say that Horn's murder of Justin was one of them. Perhaps foreseeable would have been that Horn would recidivate by either sexually assaulting a passenger he happened to pick up, or noting a victim's address in dropping them off and using that information to come back later to commit a sexual crime.[43] But using the taxi as part of a greater plan to murder someone? That was not reasonably foreseeable. Moreover, even assuming a duty,

---

42. *Id*. at 702.

43. Close to this example is *Smith v. Orkin Exterminating Co., Inc*., 540 So. 2d 363 (La. App. 1 Cir. 1989). There, the employer pest control service (Orkin) was found liable for the rape of a customer committed by an Orkin employee, because the company failed to enforce its yearly polygraph requirements. The employee had unlocked a window while treating the victim's home, and later entered through that window and raped the victim. The Court found Orkin should have foreseen this kind of harm (which they actually did foresee because they had a policy in place for annual polygraphs of employees), and thus had a duty to protect this type of victim. However, had the assailant simply used his Orkin truck to kidnap and kill some random person he picked up off the street, it is hard to imagine the Court reaching the same result.

the link between the hiring of Horn and the murder of Justin is so attenuated that it is doubtful a reasonable jury could find that McFarlin proximately caused these damages. From the facts available, it seems to be an unfortunate truth that Horn was going to prey on Justin regardless of his taxi driver status. The taxi happened to be of convenient assistance in his horrible plan, but Horn easily could have substituted this with any other means imaginable—his job as a taxi driver was not a proximate cause of the damages here.

IV. CONCLUSION

The majority decision on re-hearing, holding that McFarlin's duty extended to the harm Justin and his mother suffered, is of dubious rationale as a matter of law. Of more widespread relevance beyond this individual case, however, is that the Second Circuit's analysis follows a line of cases that incorrectly conflates two distinct theories of personal liability and fails to follow the Louisiana Supreme Court case of *Canter*. This jurisprudence should be reviewed to align itself with *Canter* to state, generally, that corporate officers should be protected from personal liability for both the general obligations of the corporation as well as vicariously for the actions of its employees, but should not be protected when they commit personal torts in the scope of their employment or personal torts committed in their "corporate capacity."