



A “DAY” IS A DAY AGAIN: Proposed New Rule 6 and Other Important Changes to the Federal Rules of Civil Procedure

by: *Kevin W. Holt and Travis Graham*

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed changes to 21 of the Federal Rules of Civil Procedure as part of the Committee’s “Time-Computation Project.” The changes result from a decision to modify the way days are counted under the Federal Rules of Civil Procedure. The proposed rule changes were approved by the United States Supreme Court in March and will take effect on December 1, 2009, absent Congressional action.

Under the current Rule 6, when a time period in which to take action is shorter than 11 days, intermediate Saturdays, Sundays, and legal holidays are not counted. If the time period is 11 days or longer, all days are counted. This rule can cause no small amount of confusion, especially once concepts like adding additional time for responses after certain kinds of service are considered. Further, it can yield bizarre results. For instance, last year, 10 days from May 15 under the Federal Rules would have been June 4, a total of 20 actual days. However, 14 days from May 15 would have been June 1, 17 actual days. While the federal courts are extremely powerful, their ability to bend space

and time in this manner can leave a practitioner perplexed. This will change under the proposed new Rule 6.

The proposed new Rule 6 adopts what the Committee calls a “days are days” approach to computing all time periods, and makes no distinction between weekdays, weekends, and legal holidays that fall within time periods. The proposed new Rule 6 states, “When the period is stated in days or a longer unit of time:...exclude the day of the event that triggers the period; ... [and] count every day including intermediate Saturdays, Sundays, and legal holidays.” Even as the Committee recognizes the “days are days” approach, the proposed new Rule 6 retains the current provision that if the last day being counted falls on a Saturday, Sunday or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.¹

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Letter From the Chair

by Gregory J. Haley

Virginia lawyers take the smooth operation of the Virginia State Bar for granted. The Bar, however, is a diverse operation with many discrete programs, including its specialized Sections. The Bar periodically asks the Sections to define and refocus each Section's mission and plan how the Section intends to accomplish its mission. Under the gentle direction of Manny Capsalis, the Litigation Section Board of Governors approved a new Five Year Strategic Plan in April, 2009. A copy of the Section's Five Year Strategic Plan is set out below.

The Section also conducted an e-mail survey of its members to find out what the members wanted the Section to be doing. Members responded that they want high quality, practical, timely, and inexpensive resources—including publications and continuing legal education programs, that will improve their litigation practice. The Section has turned its focused attention to meeting these expectations.

The Section's top priority will be publishing the Litigation Newsletter with a variety of high quality articles and features addressing litigation topics and skills. Joe Rainsbury has done incredible work as the Newsletter Editor. The Section is also working on providing a word-search feature available on the Section's website to allow quick research of old newsletter issues.

The Section will also present a continuing legal education program at the Annual Meeting in Virginia Beach in June 2010. Scott Ford is leading that effort. The Section typically presents its Annual Meeting Program in cooperation with another Section, often the Bench Bar Committee.

The Appellate Committee presented CLE programs in Alexandria and Richmond in July and October, 2009. Justice Barbara Keenan and Senior

Justice Elizabeth Lacy participated in these programs, which Monica Monday organized. The Appellate Committee will also be presenting an "Appellate Summit" in Richmond in 2010, in conjunction with the Virginia Bar Association's Appellate Section. Finally, the Appellate Committee will release a new edition of the Appellate Handbook after the Supreme Court's approval of new appellate rules in Virginia.

The Section is also involved in important efforts to further relationships among groups in the Bar. Representatives of the Senior Lawyers Conference and the Young Lawyers Conference serve as members of the Section's Board of Governors. The Section also promotes a dialogue between lawyers and judges through the participation of judicial members on the Board of Governors. Circuit Court Judge Rod Delk and United States Magistrate Judge Waugh Crigler serve as judicial members of the Section's Board of Governors.

Finally, the Section sponsors the Law in Society Award essay competition for high school juniors and seniors. The Section's involvement includes judging the essays, participating in the award ceremony at the Annual Meeting, and providing funds for scholarship awards. The Law in Society Award competition is an important program for the Bar's outreach efforts, sparking the interest of high-school students in legal issues that affect them. The hard work for the Law in Society Award program is done by Bar staffers Nancy Brizendine and Rod Goggin.

Patricia Sliger has provided staff and Bar liaison services for the Section for many years. Pat will be retiring at the end of 2009. The Section will miss her knowledge, skill, competence and guidance in the future.

This review illustrates that the Section works on many programs that benefit the practice of litigation

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lawyers in Virginia. The Section could not operate without the support of its members and the Bar staff. Many great lawyers participate in the Section's activ-

ities. I believe they do so because they expect that the knowledge, experience and relationships that result will improve the quality of their practice. ☒

LITIGATION SECTION VIRGINIA STATE BAR • FIVE YEAR STRATEGIC PLAN

The Litigation Section is a voluntary association of members of the Virginia State Bar. The purposes of the Section include:

- (a) Improving the practice of litigation attorneys at both the trial and appellate court levels.
- (b) Improving the ability of Virginia lawyers to serve their clients.
- (c) Facilitating the administration of justice by promoting the public understanding of the justice system and improving the access of litigation services to the public.

The Section shall further its purposes by:

- (a) Promoting and presenting continuing legal education and training programs including the Annual Meeting Program, the Mid-Year Legal Seminar, the Appellate Symposia, the Appellate Summit, and regional training with the Young Lawyers Conference.
- (b) Promoting publishing efforts including the Litigation Section Newsletter, the Virginia Lawyer Magazine and the Appellate Handbook.
- (c) Fostering relationships among attorneys, the judiciary, the Young Lawyers Conference, and senior lawyers.
- (d) Promoting professionalism and Bar leadership activities and opportunities.
- (e) Fostering public understanding of the justice system through participation in programs such as the Law in Society essay contest.
- (f) The Section has amended its Bylaws to bring them current including establishing the separate offices of Secretary and Treasurer and a new Purposes Section.
- (g) The Section will continue to consider specific future initiatives and special projects as the need or opportunity for such efforts are identified.

Approved by the Board of Governors, April 3, 2009.

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In order to ensure that the change to Rule 6 does not shorten any deadlines, almost all of the time periods of less than 11 days under the Federal Rules of Civil Procedure will be lengthened under the new rules, as will certain of the longer time periods. Most deadlines will be stated in multiples of seven, in an effort to avoid having deadlines fall on weekends. As a result, most deadlines occur some number of calendar weeks after the event to which it relates.

For example:

- The deadline to file an Answer or to serve a Counterclaim or Cross-claim will be 21 days, instead of 20 days, after service of the Complaint; Rule 12(a)(1)(A)(C).
- The deadline to serve a responsive pleading after the denial of a Motion to Dismiss or the granting of a Motion for a More Definite Statement will be 14 days instead of 10 days; Rule 12(a)(4).
- A plaintiff may amend as a matter of course 21 days, instead of 20 days, after serving a pleading if no response is required; Rule 15(a) (other changes to this rule are discussed below).
- The deadline to respond to an amended pleading will be 14 days, not 10 days, after service or the time remaining to respond to the original pleading, whichever is longer; Rule 15(a)(3).
- A party must give 14 days', instead of 11 days', notice of the taking of a deposition to avoid an objection; Rule 32(a)(5)(A).
- A party must serve a jury demand within 14 days, instead of 10 days, after service of the last pleading directed to the issue; Rule 38(b)-(c).

The proposed new Rule 6 adopts what the Committee calls a “days are days” approach to computing all time periods, and makes no distinction between weekdays, weekends, and legal holidays that fall within time periods.

- A party must file a motion for a new trial within 28 days of the verdict instead of within 10 days; Rule 59(b).
- The clerk may tax costs on 14 days' notice (instead of 1), and the other party may ask for court review within 7 days (instead of 5); Rule 54(d).
- Temporary restraining orders will expire after 14 days, instead of 10 days, unless extended; Rule 65(b)(2).

- A party must serve an objection to an order of a Magistrate Judge within 14 days, instead of 10 days; Rule 72(a).

- A defendant must answer after removal within 21 days (instead of 20 days) after receiving the initial pleading, 21 days (instead of 20 days) after service of the initial pleading, or 7 days (instead of 5 days) after filing a Notice of Removal, whichever is longest; Rule 81(c).

Because almost all of the deadlines under the Rules of Civil Procedure have been lengthened, there may be some temptation to simply ignore the changes, under the theory that if one uses the old shorter deadline, there is no way to run afoul of the Rules. This is not so, because not all time periods are calculated from an event into the future. Some, such as the notice period for taking a deposition, are calculated backward, i.e., notice must be provided at least 14 days before the deposition. When these periods are lengthened, as they will be under the new rules, one must act sooner rather than later.

Similarly, there may be a temptation to equate the Federal Rules with the rules for practice in the Virginia state courts, as the two will soon be much more similar. They will not, however, be identical. Not only are many of the time periods different, the calculation of the additional time one has to respond after certain

kinds of service is different. In federal court, 3 days are added to any time period that begins with the service of a paper by any method other than hand delivery under Rule 6(d). In state court, 3 days are added if the service was by mail, but only 1 day is added after service by fax or electronic means. In short, while days will be counted in the same manner in the Virginia and federal courts under the new rule, the similarity ends there and one must still be cognizant of the differing rules.

In addition to the time calculation amendments, other important new rule changes will take effect.

For example, Rule 15 now provides that a party may amend its pleading once as a matter of course before being served with a responsive pleading or within 20 days after serving the pleading, if a responsive pleading is not allowed and the action is not yet on the trial calendar. Proposed new Rule 15 will provide that a party may amend its pleading once as a matter of course within 21 days after serving it or, if the pleading is one to which a responsive pleading is required, 21 days after the earlier of service of a responsive pleading or a motion under Rule 12(b), (e), or (f).²

The impact of this change is significant. If a plaintiff files a Complaint and the defendant files a Motion to Dismiss for failure to state a claim under Rule 12(b)(6), the plaintiff, without leave of Court, may serve an Amended Complaint within 21 days after service of the Motion to Dismiss. The plaintiff would be able to cure, or at least attempt to cure, any pleading deficiency that occasioned the Motion to Dismiss. The plaintiff could amend once in response to the Motion to Dismiss before the motion is heard or decided, and without leave of Court. The Committee states that the proposed new rule “will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion.” Proposed Rule 15, Committee Note.

Rule 56 will be amended to provide that either a plaintiff or defendant may move for summary judgment at any time.³ Unless the court orders otherwise, a Motion for Summary Judgment may be filed at any time until 30 days after the close of all discovery. The party opposing the summary judgment motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later. The moving party may file a reply within 14 days after the response is served.

The practical effect of the proposed new Rules is significant. If you have been practicing law for any appreciable period of time, you likely know by heart many of the deadlines in the Federal Rules of Civil Procedure. After December 1, we suggest you crack open your Virginia Rules Annotated, turn to the section containing the Federal Rules of Civil Procedure and double check them. You might be surprised. ☒

¹ The time-computation provisions apply only when a time period must be computed. They do not apply when a fixed date to act is set by Rule, Court Order or statute. Proposed Rule 6, Committee Notes at Subdivision (a).

² As part of the proposed new Rules, Rule 13(f), governing the amendment of pleadings to add an omitted Counterclaim, is deleted because it is deemed to be “largely redundant and potentially misleading.” Proposed Rule 13, Committee Note. “An amendment to add a counterclaim will be governed by Rule 15.” *Id.*

³ “The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action.” Proposed Rule 56, Committee Note. ☒

To Arbitrate or Not To Arbitrate

by Gary A. Bryant and Michael R. Katchmark

Congress enacted the Federal Arbitration Act in 1925 to address the “costliness and delays of litigation.” A majority of states, including Virginia, have adopted the Uniform Arbitration Act, endorsing arbitration as an effective alternative dispute resolution process. See Va. Code § 8.01-581 *et seq.* The National Arbitration Forum claims that arbitration is easier, cheaper and faster than traditional litigation and that the outcome is essentially the same. Surveys and Ballots, Inc., ADR Preference and Usage Report (2006). But are the benefits of arbitration real? If so, do they outweigh the disadvantages? The purpose of this article is to explore the advantages and disadvantages of arbitration in the context of choosing arbitration as an ADR over traditional litigation.

Any decision to arbitrate must be mutual. The decision can be made before a claim arises, such as when an arbitration provision is included in a contract. This decision is mutual in the sense that both parties must agree to the contract. This is so, even if the contract is one of adhesion (e.g., in an employment contract or franchise agreement). The parties also can agree to arbitration after a claim arises. In either case, once the parties decide on binding arbitration, either party can enforce the decision just as they could any other agreement. See Va. Code § 8.01-581.01 (governing the validity of arbitration agreements). See also *TM Delmarva Power, LLC v. NCP of VA, LLC*, 263 Va. 116, 557 S.E.2d 199, 120-21 (2002).

Cost Considerations

Arbitration traditionally is viewed as a less-expensive alternative to traditional litigation. This may

or may not be true. Arbitration sometimes will reduce litigation expenses by cutting down on discovery, requiring fewer pretrial hearings, and allowing a more streamlined evidentiary hearing instead of a full trial. But these savings can be illusory if the applicable arbitration procedures mirror the procedural rules governing traditional litigation. Moreover, the amount of savings in the form of attorney’s fees depends largely on whether *both* parties are interested in taking advantage of streamlined arbitration procedures. Indeed, arbitrators may be more reluctant than judges to “rein in” an attorney who drives up legal fees with overreaching discovery and aggressive litigation tactics.

Even in circumstances when the arbitration rules limit discovery, a lawyer may appeal to the panel to “deviate” from the rules, arguing exceptional circumstances. Most arbitration rules give arbitrators a great deal of discretion. For example, the American Arbitration Association’s (“AAA’s”) Commercial Rules address discovery in a single rule (Rule 21) that gives the arbitrator discretion “consistent with the expedited nature of arbitration” to direct the production of documents and other information and to identify witnesses to be called. The rule gives the arbitrator authority “to resolve any disputes concerning the exchange of information.” While the rule does not provide for depositions of witnesses, an appeal to an arbitrator may result in depositions if a party makes a compelling case. Again, this falls under the “exchange of information” which is left to the discretion of the arbitrator. John A. Sherrill, a senior litigator with the firm of Seyfarth Shaw, noted that “one of the complaints about arbitrations these days is that it has become pretty expensive,” explaining that “if you allow full-blown discovery in an arbitration... it can end up costing as much as litigation.” *Arbitration v. Litigation: Which is More Effective*, Atlantic Business Chronicle (January 27, 2006).

Regardless of how the panel resolves various discovery issues, the dispute itself represents an additional arbitration cost. Moreover, if one party is successful in expanding available discovery, the other party likely will follow suit. Indeed, the discretion of the arbitrators

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seems to be governed by one simple rule—treat everyone equally. For example, Rule 30 of the AAA’s Commercial Rules provides that, with regard to the “conduct of proceedings,” the arbitrator “has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.” In short, these “streamlined procedures” can vary, depending on the arbitrator. Thus, to secure the advantage of a streamlined discovery process in arbitration, the streamlined procedural rules either must be set in stone, or the parties must agree that they will use the streamlined process. But this is something that the parties just as easily could do in the traditional litigation setting.

One area in which the client *will not* save through arbitration is in the cost of the arbitration itself. Unlike courts, the arbitration associations that administer cases and the arbitrators who decide cases are paid by the parties. This means that the client not only will pay the administrative fees associated with the arbitration—the fees that fund the association—but the client also will pay the hourly rate of the arbitrator. The charges of the arbitrator can be significant and difficult to control, particularly with regards to the arbitrator’s review of material and preparation for a hearing. In essence, every arbitrator assigned to the case is one more lawyer that the parties have to pay to prepare for and participate in the presentation of the case. By contrast, judges and juries are free.

The consumer advocacy group Public Citizen issued a report in 2002 challenging the notion that arbitration is less expensive than traditional litigation, concluding that (1) filing fees are higher, (2) legal fees are equal, as the same professionals handle both arbitration and traditional litigation, and (3) an adversary can drive up the cost of dispute resolution just as in traditional litigation by filing motions to dismiss or for summary judgment, the difference being that the parties *pay* the arbitrator to decide these motions. The report concludes that “in the vast majority of cases, arbitration will

necessarily *increase* the transaction costs of litigation.” See Public Citizen Report, *Cost of Arbitration: Executive Summary* (May 1, 2002) (emphasis in original).

A Quicker Resolution of Claims?

Just as arbitration is perceived to be less expensive, it also is perceived to result in a quicker resolution of claims. Whether this is so depends on the available judicial forum. For example, few arbitrations will result in as quick a resolution as is available in the “rocket docket” of the Eastern District of Virginia. Additional factors may lengthen the arbitration procedure. Many arbitrations involve three panel members. Unlike a judge who theoretically is available on an ongoing basis, arbitrators often maintain a private practice, and coordinating the availability of a panel to hear a case, particularly one that could take several days, may be challenging, pushing back the final hearing.

Arbitration procedures usually are streamlined, with less formal rules and limited discovery. This could result in a quicker resolution, but only if both parties are interested in the benefits available through the more streamlined process. As noted above, however, litigants in the traditional judicial forum can secure many of these same benefits by agreeing to a streamlined process. No judge is going to complain if the parties agree to an order that limits discovery and sets a quick trial date. The converse is also true. If a lawyer perceives an advantage to aggressive litigation in the traditional forum, that lawyer likely will take the same aggressive stance in arbitration. It is ultimately the litigants, not the rules of procedure, that drive up legal fees.

Arbitrators as Decisionmakers

Perhaps the most significant difference between arbitration and traditional litigation is that in arbitrations the parties have more control over exactly who will decide the claim. In traditional litigation, the claim is decided either by a jury, or by whichever judge is assigned to the case. By contrast, an arbitration is

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decided by one or more arbitrators usually chosen from a group approved by both parties. Many arbitration procedures provide that the two parties pick their own arbitrator, and the arbitrators choose the third arbitrator to serve on a panel. The arbitrators usually are practicing lawyers or retired judges, and the parties have some control over whether the arbitrators have experience in the issues that may arise in the dispute.

The choice of arbitration over traditional litigation *does not* turn on whether a client wants to avoid a jury. Clients who have control over the manner by which disputes are resolved, such as in a franchise agreement or employment contract, can include a waiver of a jury just as easily as an arbitration provision. *See, e.g., Azalea Drive-In v. Sargoy*, 215 Va. 714, 720-21, 214 S.E.2d 131 (1975). The real question is whether a client is interested in having control over the decision maker, and the ability to choose someone more familiar with the types of issues that may arise in the dispute. If the claim arises out of a failed real-estate transaction, the parties may want an arbitrator with a real-estate background. If the dispute is over a construction contract, the parties may be interested in an arbitrator who has actually handled construction litigation. Such choice is unavailable in traditional litigation.

While arbitrators effectively act as judges, they do not always act like judges. For the most part, judges are unbiased, neutral decision makers. While arbitrators, too, should rule objectively and “call the claim” exactly as he or she see it, experience suggests that arbitrators often do not live up to this ideal. In panel arbitrations where each party chooses an arbitrator, the adversary process can extend to the arbitrators themselves. Some arbitrators act as a “quasi advocate” for the party who has chosen the arbitrator. An arbitrator’s desire for repeat business may color his conduct. For this reason, arbitrators—whether serving as a single arbitrator or on a panel—often reach compromise decisions unavailable in traditional litigation. While arbitration provisions allow for summary decisions, they are rare. The arbitrators

likely will hear the claim and find some “middle ground” resolution. Arbitrators do not like “zero sum” outcomes.

Unlike judges, whose decisions may be scrutinized on appeal, arbitrators have a relatively free hand to decide cases as they see fit. This makes compromise decisions, regardless of how one-sided a case may be, even more likely. The arbitrator knows that, absent something extraordinary, the decision will stand. Such a compromise resolution may be good for clients with disputed claims that “could go either way,” but it is less appealing for clients with clear claims or defenses.

A Less Formal Forum

Generally, arbitration hearings are less formal—and in many instances much less formal—than a traditional trial. Arbitrators are less likely to strictly apply the rules of evidence, and they typically will give attorneys wide latitude in leading witnesses. Whether this is an *advantage* depends on the circumstances. For example, a party attempting to enforce a relatively clear contract provision may prefer traditional litigation where a judge is likely to enforce the parol-evidence rule. An arbitrator, by contrast, is more likely to allow a party to present evidence that might alter the meaning of a provision (e.g., as prior negotiations or industry standards).

The streamlined arbitration proceedings are less conducive to extensive discovery. For example, the AAA’s Commercial Rules do not provide for depositions. While arbitrators have the authority to issue subpoenas, not all states have adopted the Uniform Arbitration Act and the procedures for enforcing an arbitration subpoena in those states vary. In light of arbitrators’ significant discretion with regard to controlling discovery, there is an inherent risk that the arbitration forum will not provide the tools to develop the evidence necessary to present a complex claim. The relaxed rules on the presentation of evidence means little if you do not have the tools to discover the evidence. Nevertheless, there is empirical evidence to suggest that the discovery limitations have no real impact on the

outcome of a claim. See Barkai and Kassebaum, *The Impact of Discovery Limitations on Pace, Cost and Satisfaction in Court and Arbitration*, 11 U. Haw. L. Rev. 81 (1988).

Finality of Decision

Arbitration decisions essentially are final and unappealable. Assuming an award is the result of a valid, enforceable arbitration agreement and that the arbitrators acted pursuant to the agreement, an award will be set aside only if it is procured by something akin to fraud or a party is effectively denied a hearing. Virginia Code Section 8.01-581.010 governs the grounds for vacating an arbitration award. The court is required to vacate an award that was "procured by corruption, fraud or other undue means" or if "there was evident partiality by an arbitrator appointed as a neutral, corruption of any of the arbitrators, or misconduct prejudicing the rights of any party." Notably, the Code makes clear that an award would not be set aside merely because the relief would not be available at law or equity. Improper conduct does not include mistakes. It does not matter if the arbitrator misinterprets a contract or commits errors of law. See *Farkas v. Receivable Fin. Corp.*, 806 F.Supp. 84, 87 (E.D. Va. 1992).

Courts also will set aside an arbitration award if either party is deprived of an opportunity to be heard. Virginia Code Section 8.01-581.010 specifically states that an award shall be vacated if "the arbitrators refuse to postpone the hearing upon sufficient cause" or "refuse to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 8.01-581.04, in such a way as to substantially prejudice the rights of a party."

In essence, the parties are entitled to a fair hearing, though not necessarily one free from errors. The resulting decision governs notwithstanding that the arbitrators make mistakes such as admitting hearsay evidence. See *Farkas v. Receivable Fin. Corp.*, 806 F.Supp. at 87. As long as the arbitrators are honest, give the parties a hearing which is free from corruption and fraud,

the ultimate decision will be binding. A client should avoid arbitration if it thinks it might wish to appeal an adverse ruling.

Closing Considerations

Arbitration is probably best suited for specialized claims that may require a particular expertise, or custom procedural and evidentiary rules. While essentially the same evidentiary and procedural rules govern all civil claims filed in the Commonwealth, the AAA offers more than fifteen separate sets of rules tailored to specific types of complaints. These "custom" rules have become popular for resolving certain claims such as construction and securities disputes. This is particularly true when the arbitration is included in a contract of adhesion where one party is likely to have extensive experience with the unique arbitration rules that apply to the industry.

Arbitration can be beneficial. It gives the parties the opportunity to choose a decision maker that may be more familiar with the issues that can arise in the case. Further, arbitrations usually allow a party greater latitude in presenting evidence, including documents that might otherwise be inadmissible, and testimony that might be difficult to introduce in the traditional litigation forum. While the streamlined procedures of arbitration are designed for a quicker, less expensive resolution, these benefits depend on cooperation of the parties. And the same level of cooperation can result in a quick, and maybe even less expensive resolution in a traditional forum. Absent extraordinary circumstances, arbitration decisions are final, and for this reason are ideal for parties interested in a simple resolution that ends the controversy regardless of the outcome. ☒

View From the Bench

by Rodham T. Delk, Jr.

Herewith, I offer miscellaneous thoughts on the conduct of litigation in the general chronological order of how things might occur, in order to help assure a fair and economical resolution of the case, either by settlement or trial. The following thoughts and comments are based upon my observations from sixteen years on the bench, and which, in hindsight, I wish I myself had known and practiced as a lawyer.

Let me first say that I enjoy enormous fulfillment in presiding over trials where the lawyers are skilled in litigation and well-prepared for trial. Judges appreciate the efforts expended by counsel in preparing and trying such cases. But there are public benefits as well: the clients have a fair trial; justice is done; and, importantly, the experience of jurors in those trials is far more positive, leading to their greater appreciation for jury service, the court system, and the legal profession.

These days, it is apparent to everyone involved in civil litigation that the vast majority of lawsuits are settled before trial. Whether by pretrial resolution, including arbitration, mediation or some other settlement process, or by full-scale trial, the successful conclusion of a lawsuit is directly dependent upon, and derived from, sound and thorough preparation.

Jury Instructions

Once the suit has been filed, served and answered, and preliminary dispositive motions have been resolved, a trial date will be set. In the Fifth Circuit, the goal of the Court is to fix trial dates as soon as these motions have been decided, with a trial date within or shortly after one year from filing.

It is never too early to prepare jury instructions, in order to tailor the proof of the case to the specific instructions which will likely become the law of the

case. Conscientious and early selection of jury instructions may well expose the strengths as well as weaknesses in a case, eventually leading to significant trial economies or to settlement.

Trial evidence is expensive to produce, especially with forensic and expert evidence, and unnecessary or needlessly redundant evidence is wasteful in terms of time and financial expense. While it might seem that more witnesses and exhibits make a more impressive and persuasive case, a trial lawyer should realize that judges and juries are not in the business of weighing the evidence “by the pound.” Early identification of all relevant issues of law and evidence and thoughtful preparation of jury instructions will tend to streamline those cases that actually go to trial, thereby focusing the jury’s attention upon what is of real importance in the case and making the trial more “juror friendly.”

Trial Briefs and Notebooks

Almost invariably, in the course of a trial, one or more legal issues will arise, requiring a ruling by the Court. The early preparation of a trial brief will identify possible evidentiary and procedural issues and facilitate advance preparation for such contingencies. This will not only lead to the possibility of pretrial, lawyer-to-lawyer resolution of the issues, but will also enable the Court to quickly and more accurately dispose of the issues both before and during trial.

A comprehensive trial notebook is also a valuable tool, leading to orderly presentation of evidence and cross-examination, as well as facilitating the handling of objections and motions. A trial notebook also aids in minimizing the paper clutter during trial, which also can lead to favorable juror impressions of the lawyers and their organization of the trial. A disorganized trial lawyer will make for a disorganized case, which will surely make an impression on the judge and the jury.

View From the Bench — cont'd on next page

Judge Delk is Circuit Judge for the Fifth Judicial Circuit.

Witness Subpoenas

A great way for a lawyer to raise the blood pressure of a trial judge is move for the continuance of a case due to unavailability of a crucial witness. It is not impressive to the judge that the witness was served with a subpoena in the late stages of pre-trial preparation, or, worse, was given unfairly short notice of the trial date by counsel.

Even in "rocket docket" jurisdictions, trial dates are of necessity set months out in the future. Conscientious lawyers know to obtain available dates of all known witnesses expected to testify *ore tenus* before the trial date is set and then promptly subpoena the witnesses once the date is fixed. Delay in requesting or issuing witness subpoenas poses substantial risks to all of the parties and witnesses, especially if the Court, as usual, denies requests for continuances based upon witness unavailability.

Discovery Disputes

I have previously written in this column on discovery disputes. See, "How to Present Discovery Disputes to a Busy Judge," Winter 2001. Most of these disputes can be resolved through common courtesy and professionalism between the lawyers, and, to the benefit of the profession and the public, most are resolved without the intervention of the Court.

Continuances

Trial lawyers should think twice or even thrice before requesting a continuance, where the request is based on an issue or problem which should have been resolved by adequate pre-trial preparation or cooperation between the lawyers. Continuances are "docket busters," and trial counsel should expect them to be denied in all but the most necessitous of circumstances.

Audio-Visual Media

The state of trial technology continues to leap ahead at warp speed with respect the quality and effectiveness of audiovisual evidence. A prior-generation VCR cassette and bulky television are no longer the sign of a technologically savvy lawyer; today, it is a DVD in

a lap-top or, even better, the lap-top's hard drive alone, with a flat-panel screen or rear-projection on a single screen which is visible to the lawyers, the Court and the jury simultaneously.

A sure-fire way to test the patience and good will of the Court and, especially, a jury is to demonstrate ill preparation or even incompetence with technology. A lawyer who is concerned with her image before the jury has enough to do in the trial, without having to deal with audio-visual technology from a position of ineptness or inexperience.

The lawyer risks showing herself and her client's case in the worst light, not only to the Court but also to the jury.

On the other hand, there are risks in "over-teching" an otherwise straight forward case, including juror boredom and impatience with the pace of a trial which becomes too deliberate.

Finally, trial counsel should consider collaborating on and sharing technology in order to make for a more efficient and uniform presentation of evidence.

Concerning the Jury

Once the trial commences, all lawyers should want to gain the respect and friendship of the jury. That can be accomplished by all of the lawyers in the case, through treating the jury with respect during *voir dire* and when addressing the jury; speaking in plain, conversational language; resisting over-complication of the trial; and, always, exhibiting courtesy and respect to everyone in the courtroom, especially witnesses, whether party or non-party.

Make a Record

When parties appear on pre-trial matters, particularly dispositive motions, without a court reporter, it might seem to cynics that the Court's day is made: in the absence of a full record, the Court's ruling is virtually non-reviewable. To the contrary, a record should be made of any pre-trial hearing which could have significance in the resolution of the case. The absence of a court reporter may, indeed, signal the Court that the moving party is more interested in making the issue than actually obtaining relief.

I would suggest, however, that in such situations, well-crafted order for the hearing, with detailed exceptions and objections set forth in the endorsement, will be of significance in making an adequate record of pre-trial matters.

As for the trial itself, there is simply no substitute for a court reporter's transcript of the trial. In the event of an appeal of a case without the benefit of a transcript, the parties will have to produce the Rule 5:11(c) Written Statement, and it is the duty of the trial judge to certify the statement. In the case of Rule 5:11(d) disputes or objections over the statement, the trial judge must, in the end, rely upon his or her recollection of the trial testimony and evidence. Please do not foist this upon the judge.

Principles of Professionalism

My thoughts on litigation practice in general, as well as pre-trial conduct, would be incomplete without reference to the professionalism expected of trial lawyers by the courts and appreciated by parties and witnesses.

In 2003, United States Supreme Court Chief Justice Rehnquist commended to the trial bar, law schools and the judiciary the Code of Pretrial Conduct and Code of Trial Conduct published by the American College of Trial Lawyers.

More to the point in Virginia, in 2008, the Virginia Bar Association Commission on Professionalism promulgated Principles of Professionalism for Virginia Lawyers. After endorsement by every state-wide bar organization in Virginia, the Principles of Professionalism received the endorsement of Virginia Supreme Court Chief Justice Hassell. Every trial lawyer should read and re-read the Virginia Principles until they become part of his or her DNA, and this alone would not only promise, but also produce enormous benefits not only to the court system and its users, but the public as a whole.

Conclusion

To be sure, extensive pre-trial preparation has costs, not only in terms of financial costs to the parties, but in the risks posed to the goodwill of the lawyers in the eyes of the jurors and the Court. However, if the goal is a fair, economical and well-presented trial, without the distractions of technological glitches, clumsiness and extensive hearings on objections and motions which necessarily involve jury exclusion from the courtroom, then solid pre-trial preparation is money well-spent and a good investment in a fair and favorable outcome for the case, whether by settlement or trial. ☒

THE EVIDENCE CORNER *by R. Lee Livingston*

Question: What is the extent to which a prior criminal conviction is admissible in a civil case?

Evidence that a party in a civil case has been convicted of a felony or misdemeanor involving moral turpitude is admissible for impeachment. *Payne v. Carroll* 250 Va. 336, 461 S.E.2d 837 (1995). The number of such convictions may be proved by extrinsic evidence, but the name or nature of the offense is not admissible, except for perjury, which may be specifically stated. *Id.* See also Virginia Code § 19.2-269 and *Hackman v. Commonwealth* 220 Va. 710, 261 S.E.2d 555 (1980).

An adverse witness may not be called to impeach the adverse witness with a prior conviction. *Smith v. Lohr* 204 Va. 331, 130 S.E.2d 433 (1963). ☒

Challenges to the Admission of a Will to Probate—the Distinction Between Appeal of a Clerk’s Order of Probate, and a Bill to Impeach a Will

by William Glover

Your client brings you the will of his father. His father leaves everything to your client in his will, and names him executor. You go with your client to the office of the Circuit Court Clerk in the jurisdiction where the testator lived at the time of his death. The original will is accepted by the Clerk, and your client is qualified by the Clerk as executor. Six months have nearly gone by. Can you advise your client that he may, after paying all bills and taxes owed by the estate, transfer the remaining assets into his name and begin spending his inheritance? Not yet. An appeal of probate may be coming, or a challenge to the will.

The admission of a will to probate creates the imprimatur of the court for the administration of the estate pursuant to the terms of the will. While most practitioners understand that a circuit court clerk may admit a will to probate, many are unaware of the ways that the probate of a will may be challenged. Two separate and procedurally distinct avenues are created by statute: (1) an appeal of a clerk’s order of probate, or (2)

a bill to impeach the will—an action known as “devisavit vel non.” Both of these actions must be brought in circuit court.

The clerk of any circuit court has the jurisdiction to probate wills, within his respective territorial jurisdiction, as defined by law. Virginia Code § 64.1-75. (1950, as amended). In admitting a will, the clerk “acts in a judicial capacity and the order made by him, admitting or rejecting a will, is as much a judgment as though entered by the court.” *First Church of Christ v. Hutchings*, 209 Va. 158, 160, 163 S.E.2d 178, 179-80 (1968). The validity of this judgment may only be drawn into question “in the manner and within the time prescribed by law.” *Id.* at 160, 163 S.E.2d at 180. *Matthews v. Matthews*, 277 Va. 522, 675 SE2d 157, 2009.

The admission of a will to probate by the clerk is the most common method of probate. Most clerk’s offices have a designated probate clerk who is familiar with the forms and information required for admission of a will and the legal requirements for a valid will. An ex parte probate of a will requires only the production of the original will and, if the will is self-proving, little additional beyond the payment of the clerk’s fees.

The act of admitting a proffered testamentary instrument to probate constitutes an official adjudication of both due execution and testamentary capacity. A line of Supreme Court authority states that a presumption of proper will execution arises if the will has been admitted to probate. This presumption is founded on the premise that a clerk’s entry of a proffered instrument to probate constitutes a legal judgment: “In admitting a will to probate the clerk acts in a judicial capacity and the order made by him, admitting or rejecting a will, is as much a judgment as though entered by the court. His judgment is a judgment *in rem* whose validity can be drawn in question only in the manner and within the time prescribed by law.” *First Church of Christ, Scientist v. Hutchings*, 209 Va. 158, 160, 163 S.E.2d 178, 179 (1968); *see also In re Bentley’s Will*, 175 Va. 456, 462, 9 S.E.2d 308, 311 (1940) (“The order of probate of the first will settles all questions as to the formality of its execution and

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the capacity of the testator.”) (emphasis added). As a result, an order admitting a will to probate serves to resolve all issues related to due execution and testamentary capacity.

Appeal of Clerk’s Order Admitting Will to Probate

However—perhaps because the clerk’s order of probate is *ex parte*—the Code allows an interested party to appeal this order to circuit court without giving any bond:

Any person interested may, within six months after the entering of such an order, appeal therefrom as a matter of right, without giving any bond, to the court whose clerk, or deputy, has made the order. Upon application being made for such appeal, the clerk or deputy shall enter forthwith in his order book an order allowing such appeal, and docket the same as a preferred cause for trial at the next term of the court. The court at any term shall hear and determine the matter as though it had been presented to the court in the first instance, and shall cause a copy of the order on the order book of the court embracing its final action to be copied by the clerk, or deputy, into his order book. At any time after such appeal is allowed the court, or the judge thereof in vacation, may make any such order for the protection of the parties interested or for the protection or preservation of any property involved as might have been made had the matter been originally presented to the court, or as may seem needful.

Virginia Code § 64.1-78. Although Virginia Code § 64.1-78 permits the court to make “any such order for

the protection of the parties interested or for the protection or preservation of any property” as it deems appropriate, the statute stops short of stating that the clerk’s order is rendered a nullity by the appeal. In the absence of an order from the court restricting the actions of the executor appointed by the clerk, the executor retains his power. Some practitioners noting an appeal of a clerk’s order of probate also note an appeal of the clerk’s appointment of the executor. The clerk’s authority to appoint is set out explicitly in Virginia Code § 64.1-77, and the order of appointment is usually a separate order from the order admitting the will to probate. Only a review of the clerk’s file will clarify this.

There is little case law on the ambit of the court’s inquiry as it hears the appeal of a clerk’s order. One may argue that the issues to be determined by the court on appeal of a clerk’s order of probate relate to the sufficiency of the document offered to be admitted—ruling out challenges in such a proceeding based on lack of capacity or undue influence. This argument finds merit in the text of Code § 64.1-78 “The court at any term shall hear and determine the matter as though it had been presented to the court in the first instance...” suggesting that the court, offered the document for admission to probate, would only conduct the inquiry made by the clerk covering the basic threshold requirements for admission of the document—original, holographic or typed, signed by the testator, witnessed if not holographic, and generally testamentary in nature.

The contrary position asserts that the court’s review of the offer of a paper for probate is both *de novo* and plenary—any issue that would invalidate the document offered may be considered by the court. This position permits challenges of competence and allegations of undue influence to be made in the context of an appeal of the clerk’s order. The significance of this argument is greatest where the proponent of the will is the executor and sole beneficiary, who is entitled to an abbreviated accounting and approval process six months after qualification. The requirement that an appeal of the clerk’s order of probate be made within six months permits the conclusion, where no appeal is filed, that a statement in lieu of an accounting may be

filed with the Commissioner of Accounts after six months, and the executor discharged where he is the sole beneficiary.

A challenger to a will offered in the circumstance where a statement in lieu of an accounting is permitted should file his appeal of probate and move the court for an order of protection in advance of the six month deadline to permit the court to act before the commissioner of accounts approves a statement in lieu.

Bill To Impeach a Will

The second way to challenge a clerk's order admitting a will to probate is via a bill to impeach a will. A person who is not a party to the probate of a will may bring such an action under Virginia Code § 64.1-88. After a bill to impeach is filed, that statute provides that a trial by jury shall be ordered to ascertain the validity of the will admitted to probate by the clerk. Virginia Code § 64.1-89 provides that the bill to impeach the will must be filed within one year of the order establishing the will—whether that be a clerk's order or the order of the court itself, and regardless of whether the court's order was an order of original jurisdiction, or an order sustaining or rejecting the order of the clerk:

After a decree or order under Sec. 64.1-85 or under Sec. 64.1-77, a person interested, who was not a party to the proceeding, may proceed by bill in equity to impeach or establish the will, on which bill a trial by jury shall be ordered to ascertain whether any, and if any how much, of what was so offered for probate be the will of the decedent. The court may also, if it deem proper, require all testamentary papers of the same decedent to be produced and direct the jury to ascertain whether any, or if there be more than one which, of the papers produced, or how much of what was so produced, be the will of the decedent. Virginia

Code § 64.1-89.

Virginia Code § 64.1-89. The bill to impeach brought under this section is directed to be tried to a jury. While the bill was traditionally a chancery action, the jury was (and is) charged with determining the ultimate issue—"devisavit vel non" (i.e., "Is it the will or not."). Rather than being sent interrogatories, the jury is to be given a verdict form to find whether the will is established or impeached.

The proponent of the will has the burden of going forward, but can satisfy that burden by establishing the admission of the will by the clerk and the basic elements necessary for probate—a valid will signed by the testator in front of witnesses. A self-proving will satisfies these requirements on its own terms.

The burden then shifts to the challenger to prove why the purported will is not the will. Undue influence and lack of capacity are among the bases which may be proved by the challenger at this stage.

Which Route To Choose?

The "devisavit vel non" statute specifically provides for jury trials, but Virginia Code § 64.1-78 does not. Nevertheless, courts may permit a jury trial in appeals from a clerk's order. The mandates of the Virginia Constitution and the lack of any other meaningful distinction between these processes leaves the determination of which statute to proceed under to two factors. The first consideration is a simple matter of timing: Has more than six months (but less than a year) passed since the will was admitted to probate? If so, you file an action *devisavit vel non*. The second consideration looks to the standard of review. If less than six months have passed *and* the executor of the purported will is the sole beneficiary, an appeal of the clerk's order of probate gives the challenger the benefit of the *de novo* standard. This advantage may weigh heavily on the decision of the court to direct the executor to stand down while the challenge is heard. And it also provides a straightforward basis for the court to grant an injunction prohibiting the dissipation of estate assets by the

putative executor. Counsel for the challenger may even ask the court to prohibit the use of estate funds for legal expenses incurred in advocating for the will's admission to probate. Thus, even though the two processes raise similar factual issues, Virginia Code § 64.1-78 affords

certain procedural advantages—particularly in the executor/sole beneficiary circumstance. But these advantages are available only during the six-month window for appeals of a clerk's order. ☒

UPDATE: THE *REAL TRUTH* IS THAT *BLACKWELDER'S* PRELIMINARY INJUNCTION TEST MAY NO LONGER BE APPLIED by Bradfute W. Davenport, Jr. and Joshua D. Heslinga

In the Spring 2009 issue of the VSB Litigation News, our article posited that the well-known standard for preliminary injunctions adopted in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), was no longer good law. The Fourth Circuit recently agreed.

In *The Real Truth About Obama, Inc. v. Federal Election Commission et al.*, 575 F.3d 342, 346 (4th Cir. 2009), a unanimous panel explained that the “*Blackwelder* standard in several respects now stands in fatal tension with the Supreme Court’s 2008 decision in *Winter [v. Natural Resources Defense Council, Inc.]*, 555 U.S. ___, 129 S.Ct. 365 (2008).”

The Court then held that “[b]ecause of its differences with the *Winter* test, the *Blackwelder* balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.” *Id.* at 347.

Practitioners will need to insure that their briefs discuss and apply the *Winter* test moving forward, and litigants seeking a preliminary injunction will have to meet the *Winter* test’s somewhat more demanding standards. See 129 S.Ct. at 374 (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

Real Truth does not have controlling effect in Virginia state courts, of course, but Virginia circuit court cases applied *Blackwelder*, and it can be expected that Virginia circuit courts will now apply *Real Truth* instead. See, e.g., *Strong Found. Youth Initiative LLC v. Ashford*, no. CL09-4538, Order (City of Richmond Cir. Ct. Nov. 6, 2009) (citing and applying *Real Truth* in reaffirming a temporary injunction). ☒

Recent Civil Cases from the Supreme Court of Virginia

SEPTEMBER SESSION 2009

Real Property

Case: *Anderson v. Delore, Record No. 82416 (9/18/2009)*

Author: Keenan

Lower Ct.: Bedford County (Updike, James W.)

Disposition: Affirmed

Facts: Two neighboring landowners had property adjoining Smith Mountain Lake. A strip of land owned by Appalachian Power lay between the landowners and the lake. Each of the landowners had an easement across the strip to the lake shore. But the easements did not specify what portion of the strip the easement encompassed. The defendants' predecessors-in-interest built a dock and a beach on a portion of the strip that lay between the plaintiffs' property and the lake. The plaintiffs claimed that this encroached on their easement, which they argued was defined by extending their "lot lines" to the lake.

Ruling: Because the easement was created in a deed, the SCOV used "the customary rules governing the construction of written documents" and ascertained the parties' rights from the words used in the deed. The SCOV noted that deeds sometimes do not specify the precise dimensions of easements. In such a case, the party seeking to enjoin an encroachment on an easement must present evidence that the grantor of the easement intended to convey an easement with the claimed dimensions. Because the plaintiff failed to present any such evidence, the circuit court properly refused to issue an injunction. The SCOV also rejected the plaintiff's request for an injunction based on a zoning-ordinance violation, noting that "zoning ordinances do not create a private right of action."

Key Holding(s):

- The party asserting an easement bears the burden of showing the grantor's intent where the instrument granting the easement does not specify the easement's scope.
- Zoning ordinances do not create a private right of action.

* * *

Fraud

Case: *Dunn Construction Co. v. Cloney, Record No. 81741 (9/18/2009)*

Author: Koontz

Lower Ct.: Mecklenburg County (Osborne, Leslie M.)

Disposition: Rev'd

Facts: Plaintiff contracted with defendant contractor to build a house. The defendant improperly built a foundation wall and performed inadequate repairs. In order to obtain final payment, the contractor deliberately misrepresented the extent of the repairs that he had performed on the wall. Plaintiff brought suit for breach of contract

Case summaries are prepared by Joseph Rainsbury, Editor of *Litigation News*. Mr. Rainsbury is a partner in the Roanoke office of LeClairRyan.

and fraud. On the fraud claim, he sought \$100,000 in punitive damages. The jury returned a verdict for \$33,838.27 in compensatory damages and \$25,000 in punitive damages. The trial court entered judgment on this verdict. The defendant appealed the award of punitive damages.

Ruling: The SCOV reversed the punitive-damages award because it found that there was no viable fraud claim. It acknowledged that "a single act or occurrence can, in certain circumstances, support causes of action for breach of contract and for breach of a duty arising in tort." But it noted that the fraud claim in this case was "entwined" with the contract claim insofar as it "related to a duty that arose under the contract." The SCOV noted that to hold otherwise would risk "turning every breach of contract into an actionable claim for fraud."

Key Holding(s):

- A plaintiff cannot base a fraud claim on a misrepresentation that relates to a contractual duty.

* * *

Medical Malpractice

Case: *Howell v. Sobhan, Record No. 81800 (9/18/2009)*

Author: Kinser

Lower Ct.: City of Hampton (Taylor, Wilford, Jr.)

Disposition: Rev'd

Facts: Plaintiff was found to have two polyps on her colon. To remove them, defendant doctor performed surgery that took out nearly all of her colon. The plaintiff subsequently developed a fistula and diarrhea. Plaintiff's experts said that removing the entire colon was improper, and that if the defendant physician had performed one of the procedures they recommended, she would not have suffered diarrhea and would have had a lower chance of developing a fistula. Nevertheless, the trial court granted the physician's motions to strike.

Ruling: The SCOV held that trial court erred in striking the evidence. Questions of causation are ordinarily ones left for the jury and, based on the facts in evidence, the trial court erred in deciding the causation question as a matter of law.

Key Holding(s):

- The issue of proximate causation is ordinarily a question of fact for a jury to decide.

* * *

Real Property

Case: *Burdette v. Brush Mountain Estates, Record No. 82079 (9/18/2009)*

Author: Kinser

Lower Ct.: Montgomery County (Turk, Robert M.D.)

Disposition: Rev'd

Facts: In a plat accompanying a deed from one landowner to another, there was a notation stating that an easement was granted in favor of a third party. The deed itself, however, did not mention the easement. The third party sought a declaration that it had a valid easement.

Ruling: The SCOV held that the third party did not have an easement. Although it held that easements were not estates in property and, hence, did not need to be conveyed by deed under Code § 55-2, it held that the notation on the plat did not sufficiently demonstrate language of conveyance so as to give the third party an easement. Among other things, the plat did not show the extent of the dominant parcel. Thus, there was no way of determining the extent of the burden on the servient parcel. Further, the plat did not manifest an intent to grant the easement. The deeds themselves did not reference the plat when they recited boilerplate language about the deed being subject to easements etc. By itself, a plat cannot serve as deed. It does not convey. It only describes what otherwise has been conveyed.

Key Holding(s):

- An easement is not an estate in land and, hence, is not required to be conveyed in accordance with Code § 55-2.
- Simply noting an easement on a plat that accompanies a deed is insufficient to convey the easement. The document conveying the easement must itself manifest an intent to grant the easement. The plat, which only mentioned the easement and did not purport to convey it, was insufficient to effect a conveyance.

* * *

Wills and Estates

Case: *Keener v. Keener*, Record No. 82280 (9/18/2009)

Author: Russell

Lower Ct.: Prince William County (Hamblen, William D.)

Disposition: Rev'd

Facts: Decedent had a "pour-over" will, in which all the decedent's assets were left to a trust. The trust included a "no-contest" clause under which anyone who objected to or contested the trust forfeited any rights thereunder.

After the decedent's death, the trustee—the decedent's son—did not offer the will into probate, believing it to be unnecessary. He told his estranged sister that the original will had been lost. The sister, believing him, then had herself appointed as administrator of her father's estate. She represented to the clerk that her father had died intestate.

The brother then probated the original will and argued that the sister—by seeking appointment as intestate administrator—had forfeited any rights to her father's estate.

Ruling: The court disagreed. First, it held that the trust's forfeiture clause was valid. The principles that apply to such no-contest clauses apply with equal force when they appear in a trust or a will. But it held that the sister's commencement of intestate administration did not trigger the trust's no-contest clause application because the act of commencing administration did not amount to a challenge to the trust. At most, it was a challenge to the will. Because the no-contest clause applied only to actions challenging the trust, not the will, the court held that the sister did not forfeit her claim.

Key Holding(s):

- Forfeiture clauses in trusts are to be given the same effect as forfeiture clauses in wills.
- The fact that someone challenges a pour-over will does not mean that they ipso facto have challenged the pour-over trust so as to trigger a forfeiture clause in the trust.

* * *

Medical Malpractice

Case: *Graham v. Cook*, Record No. 82292 (9/18/2009)

Author: Keenan

Lower Ct.: Loudoun County (Chamblin, James H.)

Disposition: Affirmed

Facts: The patient suffered complications from hip surgery. The trial court permitted the defendants to present deposition testimony from treating physicians that (1) there was a "possibility of avascular necrosis" and that "avascular necrosis cannot be excluded," (2) there was a "suspicion for avascular necrosis" and that a bony defect suggested "fracture and avascular necrosis," (3) the witness "did not see any gouging of the femoral head from any hardware," and (4) the patient "clearly had Stage III avascular necrosis as his major problem." The treating physicians did not make any of these specific statements "to a reasonable degree of medical probability." But at the beginning of their testimony they stated that all their opinions would be stated to a reasonable degree of medical probability. Plaintiff appealed the trial court's rulings on the grounds that the doctor's statements were not made to a reasonable degree of medical probability.

Plaintiff also objected to purported "habit" testimony, to the trial court's rulings regarding excluded evidence, and to the trial court's decision that precluded him from comparing X-rays during closing arguments.

Ruling: In its analysis of the treating physicians' testimony the SCOV distinguished between testimony that imparts a medical diagnosis, which needs to be given to a reasonable degree of medical probability, and "testimony that conveys impressions that are 'factual in nature,'" which need not be. The court held that statements (1) through (3) were factual in nature and need not have been stated to a reasonable degree of medical probability. But it held that statement (4) was a "diagnosis" because it "purported to identify specifically the cause of Graham's health condition." Nevertheless, the court did not reach the question whether the doctors' general statements at the beginning of their testimony that their opinions were stated to a "reasonable degree of medical probability" was sufficient to establish that the particular statement complied Va. Code § 8.01-399(B). It found that the plaintiff had waived any such argument by not objecting on this ground during the deposition.

The Court also ruled (1) that plaintiff waived his objection to habit testimony because he signalled his assent to ruling by saying "I don't have a problem with that," (2) that he waived objections to rulings excluding evidence during cross-examination of a defense witness because he failed to make a sufficient proffer, and (3) that the trial court correctly barred plaintiff from comparing x-rays during closing argument because there had been no expert testimony comparing them.

Key Holding(s):

- Va. Code § 8.01-399(B) requires that statements of medical diagnoses must be made to a reasonable degree of medical probability.
- To preserve an argument that a physician witness failed to state his opinion to a reasonable degree of medical probability, a party must object to the form of the question at the time the question is asked.
- To preserve an argument that the trial court improperly excluded evidence, a party needs to proffer what the excluded evidence would have been.
- During closing argument, a party may not argue as evidence matters that do not appear in the record.

* * *

Civil Procedure

Case: *City of Suffolk v. Lummis Gin Co.*, Record No. 82345 (9/18/2009)

Author: Koontz

Lower Ct.: City of Suffolk (Delk, Rodham T., Jr.)

Disposition: Rev'd

Facts: City brought two actions to sell a particular parcel to satisfy tax liens. The first action, filed in 1995, named the Lummis Gin Co—the owner of the property—as a defendant. This was nonsuited in 1996. The second action, filed in 2006, also sought to satisfy a tax lien against the property. It named the Lummis Gin Co. and certain other persons who also had an interest in the property, the “Baker Heirs.” In 2008, the city sought to nonsuit this second suit, but the Baker Heirs opposed this, arguing that it was a second nonsuit. The court granted the nonsuit but purported to retain jurisdiction to decide the question of attorney’s fees under 8.01-380(B). Several months later, it held a hearing and then entered an order awarding attorney’s fees for the second nonsuit. The City appealed.

Ruling: The court held that the 2008 nonsuit was a first nonsuit as to the Baker Heirs because the 2006 tax-lien suit and the 1995 tax-lien suit sought to recover for delinquent taxes owed in different tax years. Because there was no second nonsuit as to the Baker Heirs, there was no basis for attorney’s fees.

Although that disposed of the case, the court also addressed the force of the trial court’s ruling on attorney’s fees, made months after the order granting the nonsuit. The court held that the order granting the nonsuit was a final order under Rule 1:1 and that the circuit court lacked jurisdiction after the lapse of 21 days. Thus, the trial court’s order awarding attorney’s fees was a “nullity.”

Key Holding(s):

- Where a plaintiff brings two actions against the same defendant, a nonsuit of the second action is not a second nonsuit where the second action seeks to recover for different conduct from the first action.
- Nonsuit orders are final orders under Rule 1:1 and a trial court lacks jurisdiction to award statutory attorney’s fees after 21 days has elapsed, even if the court has stated that it was “retaining jurisdiction” to address the attorney’s fees issue.

* * *

Real Property

Case: *de Benveniste v. Aaron Christensen Family, LP*, Record No. 82387 (9/18/2009)

Author: Lemons

Lower Ct.: Loudoun County (McCahill, Burke F.)

Disposition: Affirmed

Facts: Four cotenants owned property in Loudoun County. Over the objection of one cotenant, the other cotenants subdivided the property. In doing so, they incurred substantial engineering expenses. The subdivision substantially increased the value of the tract, which was sold to a third party. The three cotenants who had favored subdivision argued that the subdivision was a “permanent improvement,” and sought to deduct the objecting cotenant’s proportionate share of the engineering expenses from her share of sale proceeds.

Ruling: The SCOV held that the cost of making an intangible improvement to property—i.e., subdividing the tract—was an improvement that was chargeable to a cotenant. Its decision rested on the trial court’s factual findings that: (1) the subdivision plan increased the value of the land and (2) this increased value was realized when the property was sold. The Court affirmed the trial court’s decision that had required the cotenant to pay her share of the expenses incurred in subdividing the land.

It also affirmed the trial court’s ruling denying the nonconsenting cotenant’s argument that the other cotenants had engaged in “unclean hands” by proceeding with the subdivision notwithstanding her stated objections. The SCOV noted that during the subdivision and sale process, the nonconsenting cotenant gave “mixed signals” about her opposition to subdivision.

Key Holding(s):

- Costs incurred in making non-tangible improvements to property can be charged to cotenant in sale of property.
- Cotenants did not engage in unclean hands by proceeding with subdivision without consent of other cotenant where nonconsenting cotenant vacillated in her opposition to subdivision.

* * *

Civil Procedure/Contract Law

Case: *VEPCO v. Norfolk Southern Ry. Co.*, Record No. 81294 (9/18/2009)

Author: Lacy

Lower Ct.: Halifax County (Shelton, William R.)

Disposition: Aff’d in Part, Rev’d in Part

Facts: Two utilities contracted to have a railroad supply them with coal. The contract price varied over time according to the ICC’s “rate adjustment factor.” The problem was that the agency had *two* such factors: one that was “adjusted” for productivity gains and one that was “unadjusted” for those gains. The contract did not identify by name which factor to apply. Rather, it directed the parties to use the rate “prescribed by the ICC in Ex Parte No. 290 (Sub. No. 2).” The factor prescribed in the referenced proceeding was the “unadjusted” factor. (The proceeding in which the ICC prescribed the “adjusted”

factor was “Ex Parte No. 290 (Sub. No. 4).” Nevertheless, for the first 14 years of the contract, the parties used the “adjusted” rate, which resulted in a lower transportation cost.

Ruling: The SCOV held that the contract unambiguously specified the unadjusted rate. The text of the contract referenced the ICC proceeding creating this rate, “Subdocket No. 2,” and did not reference the later proceeding that created the adjusted rate, “Subdocket No. 4.” The court rejected the utility’s “latent ambiguity” argument. A latent ambiguity occurs where, in light of extrinsic facts, language that appears at first blush to be unambiguous is shown to be capable of different interpretations. The mere fact that the parties mistakenly used the “adjusted” factor for 14 years did not mean that the contract contained a latent ambiguity.

The SCOV also upheld the trial court’s use of judicial estoppel to preclude the utilities from amending their answer to assert defenses that were inconsistent with the factual assertions in their bill of complaint. The trial court had “relied upon” those assertions in granting the railroad’s earlier motion to strike. The SCOV rejected the utilities’ argument that a party can be judicially estopped only where it obtains a favorable ruling. And it rejected the assertion that the party asserting estoppel must establish prejudice. The court stated that the purpose of the doctrine is to prevent parties from “playing fast and loose” with the court, which can occur even where (1) the estopped party did not obtain a favorable ruling and (2) the party asserting estoppel has not been prejudiced by the other party’s change in position.

The SCOV rejected the utilities’ argument that the railroad’s breach-of-contract claim was time-barred because it was not asserted for the first 14 years of the parties’ contract. It noted that, as the railroad was responsible for computing the rate, its error in demanding a lower rate was not a breach of contract. The breach of contract occurred when

the railroad demanded payment using the “unadjusted” factor and the utilities refused. And that occurred within 5 years of initiating suit.

The SCOV also rejected arguments that the trial court erred in (1) denying the utilities leave to amend their bill of complaint, and (2) awarding pre- and post-judgment interest.

But applying the terms of the agreement, the SCOV held that the court erred in using the “unadjusted” rate from the start of the contract to compute damages for the relevant period. Instead, the court held that the “unadjusted” rate should be computed only from 2003, the point when the railroad asserted it was entitled to the “unadjusted” rate rather than the adjusted rate. (This reduced damages from approximately \$78 million to approximately \$3.8 million.)

Justice Koontz, joined by Chief Justice Hassell and Justice Millette, dissented in part, arguing that the majority had misapplied the doctrine of judicial estoppel. In particular, the dissent argued that there was no inconsistency in the facts between the bill of complaint and the amended answer—at most, the two pleadings gave inconsistent accounts of the legal consequences of those facts. Thus, the dissent would have allowed the utilities to present their affirmative defenses to a jury.

Key Holding(s):

- The mere fact that the parties misapplied a contract term for 14 years does not show that there was a latent ambiguity in the contract.
- For judicial estoppel to apply, the estopped party need not have obtained a successful ruling. Nor does the party asserting estoppel need to establish prejudice. The critical factor is whether the court, in its earlier ruling, “relied upon” the estopped party’s contrary assertions of fact.

NOVEMBER SESSION 2009

Civil Procedure

Case: *Hutchins v. Talbert*, Record No. 081632 (11/5/2009)

Author: Goodwyn

Lower Ct.: City of Alexandria (Kemler, Lisa Bondareff)

Disposition: Dismissed

Facts: The jury awarded the plaintiff \$4 million in a medical-malpractice case, which the trial court reduced to \$885,000. On April 25, 2008, the circuit court entered an order entitled “Final Order.” On the same day, the trial court entered a “Suspending Order,” stating that it would suspend the final order for 14 days, allowing 35 days for an Amended final judgment to be entered. The defendant moved to set aside the verdict. On May 25, 2008, the trial court entered an order denying the defendant’s motion to set aside the verdict. Defendant filed a notice of appeal on June 19, 2008.

Ruling: The SCOV found that the appeal was not timely because the notice of appeal was not filed within 30 days of the final judgment. By its own terms, the order suspending judgment only suspended the final order for 14 days. Thus, the final order took effect 14 days after April 25, 2008—i.e., on May 9, 2008. Because the defendant did not file the notice of appeal within 30 days of this date, the appeal was barred. The motion to set aside the verdict did not extend the period for filing a notice of appeal.

Key Holding(s):

- An order suspending final judgment for a fixed amount of time is self-executing and final judgment takes effect at the expiration of the period specified in the order.
- Filing a motion to set aside the verdict does not extend the period for filing a notice of appeal.

* * *

Personal Injury

Case: *Kellermann v. McDonough*, Record No. 081718 (11/5/2009)

Author: Hassell

Lower Ct.: Henrico County (Balfour, Daniel T.)

Disposition: Aff’d in Part, Rev’d in Part

Facts: Plaintiffs entrusted the decedent, their 14-year-old daughter, to the care of her friend’s parents. When dropping the daughter off, the decedent’s father specifically instructed her friend’s mother that the decedent was not to ride in any car driven by young male drivers. Disregarding these instructions, the friend’s mother allowed the dece-

dent to ride home from a movie theater with a boy. Decedent was killed in a car crash caused by the boy's reckless driving. Plaintiffs brought a wrongful-death action against their daughter's friend's parents. The trial court sustained defendants' demurrer.

Ruling: The SCOV partially reversed the ruling sustaining the demurrer. First, it held that a person supervising and caring for a child owes a common-law duty of care where the child's parents have entrusted him or her with responsibility for such supervision and care. The allegations in the complaint were sufficient to state a claim for a breach of this duty against both of the decedent's friend's parents. Second, it held that parents who explicitly undertake a duty to protect the child from a specific risk—e.g., riding in a car driven by inexperienced drivers—can be held liable for their failure to discharge that duty with care. It held that the allegations were sufficient to support this cause of action against the friend's mother. The friend's father, however, was not alleged to have made this undertaking, so this count failed against him. Third, it held that the relationship between adults and a child houseguest was *not* a "special relationship" that could ground a duty to protect the child from injury from the conduct of third parties. So it sustained the demurrer to that extent. Fourth, the SCOV held that the question whether the boy who caused the accident was an "intervening cause" was a jury question. The jury must determine whether the boy's conduct so entirely superseded the defendants' negligence that it alone, without any contributing negligence by the defendants, caused the injury.

Justices Koontz and Kinser concurred in part and dissented in part.

Key Holding(s):

- Adults owe children houseguests a duty to use reasonable care in supervising and caring for them.
- Adults who voluntarily undertake a duty to prevent a specific harm to a child houseguest must exercise reasonable care in discharging that duty.
- Adults do not stand in a "special relationship" with children houseguests and, thus, do not owe a common-law duty to protect them from injury by third parties.
- An intervening cause is a cause that so entirely supersedes the operations of the defendant's conduct that it alone, without the defendant's contributing negligence, caused the injury.

* * *

Estates and Trusts

Case: *Harbour v. SunTrust Bank*, Record No. 082023 (11/5/2009)

Author: Keenan

Lower Ct.: Patrick County (Williams, David V.)

Disposition: Rev'd

Facts: Grantor created an inter vivos trust to be used for her benefit during her lifetime. The trust directed that, upon her death, it was to be used for benefit of her husband, if he predeceased her. It further specified that, upon her husband's death, the trust corpus was to be distributed in four equal parts, with equal shares going to her three siblings and to a church. But it said that if any of her siblings prede-

ceased her, then that sibling's share was to lapse and the church was to be given the lapsed share.

One sibling predeceased the grantor. The grantor was survived by her husband and two siblings. Those two siblings, however, predeceased the husband. So at the time of the husband's death, none of the three siblings was still alive. The trial court held that the church was entitled to the entire trust corpus.

Ruling: The SCOV reversed. Although the decision discussed the "early-vesting rule," the SCOV resolved the case on the plain language of the trust instrument. It held that the plain language of the trust vested the siblings' interest at the time of the grantor's death, not the husband's death. Thus the rights of the two siblings who survived the grantor vested at the time of grantor's death. Their heirs were entitled to the one-quarter shares of the trust assets. But the rights of the sibling who predeceased grantor had lapsed, thereby entitling the church to one-half of the trust assets. The mere fact that the trust res was to be distributed upon the husband's death did not alter the plain language of the trust, which vested the siblings' rights as of the time of the grantor's death.

Key Holding(s):

- Where trust language is unambiguous, it must be applied according to the plain terms the grantor used.

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