



## Considerations for the Unserved Lawsuit – Rule 3:5, Virginia Code § 8.01-277, Nonsuits, and “Due Diligence”

By Robert L. Garnier

For many reasons, sound and otherwise, plaintiffs often file lawsuits in Virginia circuit courts only to allow them to lay idle for some period of time before the lawsuits are served on the defendants. Given a common interest among litigants and the judiciary in the expeditious resolution of cases filed in our courts, this article explores various competing considerations implicated by the unserved lawsuit, including the right of plaintiffs to prosecute claims, the ability of defendants to challenge unserved suits, and the power of circuit courts to actively control their dockets and move cases along for prompt resolution.

### SERVICE BY COMPULSION WITHIN ONE YEAR?

In an apparent effort to resolve pending actions within their courts within one year of filing, various circuit courts in the Commonwealth often endeavor, by varying means, to compel plaintiffs to serve suits before a year has run from the date suit was filed, sometimes starting even within a few short months after the filing date. The manner by which circuit judges have, with varying amounts of pressure, impelled service has ranged from simple requests made at status conferences, to securing an agreement from plaintiff’s counsel to nonsuit a case if service is not achieved before some time certain,<sup>1</sup> to even as much as threatening the outright dis-

missal of an action should a plaintiff not achieve service of process within a timeframe demanded by the court.

A plaintiff pushed toward service, however, may find himself on the horns of a dilemma, particularly when facing the threat of a dismissal before a year has run from the filing date. Indeed, should a plaintiff have reason to choose to continue to delay service and thereby defer an acceleration of litigation, a threatened dismissal sanction may force him into what might be characterized as a Hobson’s choice between using and burning his first nonsuit of right on the one hand, or pressing the issue and possibly alienating the judge and/or gambling against the threat of dismissal on the other. Given the difficult position a plaintiff may find himself under such circumstances, a brief examination of whether a court has the power to compel service within a year in the first place is appropriate.

Reflecting a purpose to promote the timely prosecution and resolution of lawsuits, Rule 3:5(e)<sup>2</sup> of the Rules of the Supreme Court of Virginia provides in pertinent part:

No order, judgment or decree shall be

*The Unserved Lawsuit — cont’d on page 4*

### Table of Contents

Considerations for the Unserved Lawsuit – Rule 3:5, Virginia Code § 8.01-277, Nonsuits, and “Due Diligence” . . . . .	1
<i>by Robert L. Garnier</i>	
Letter from the Chair — <i>Battlefield Tranquility</i> . . . . .	2
<i>by R. Lee Livingston</i>	
The Virginia Supreme Court: Court of Error or Court of Law? . . . . .	10
<i>by William H. Hurd</i>	
The Measure of Punitive Damages Under the Virginia Computer Crimes Act . . . . .	12
<i>by Christopher L. Spinelli</i>	
Recent Law Review Articles . . . . .	14
<i>by R. Lee Livingston</i>	
Litigation Section Board of Governors . . . . .	15

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## Letter From The Chair • Battlefield Tranquility

by R. Lee Livingston

Researchers at Johns Hopkins University Medical School studied 104 occupations to come to a scientifically based conclusion about which members of those occupations suffer from the highest level of stress. You will guess the answer without a drum roll – attorneys. Especially those of you in the trenches of a litigation practice are not surprised.

Stress contributes to physical illness and some studies have concluded stress takes years off life. So, you are a member of the most stressful profession, and stress can literally kill you. Sobering. (You may now be thinking, hold on Livingston, columns like this are supposed to be “nice.” I hear you; I will at least aim at something hopeful in a moment.)

The case for attorneys taking first place in level of stress becomes clear even upon a cursory review. Consider the following:

1. No other profession regularly is as adversarial. For example, a surgeon undergoes higher levels of acute stress while trying to save a dying patient. Rarely in other professions, however, does one have a duty bound adversary like lawyers face – one who strives to undo or defeat what you aim to accomplish. In many cases your adversary enjoys the same or even a superior skill level or experience to you, or lacks the experience to handle matters efficiently which creates its own unique migraine stimulus.

2. In most professions people are assigned work by someone aware of one’s overall workload. Even for self-employed individuals in other professions who do not enjoy this structure, none of them have regular, binding judicial deadlines imposed without regard for other ongoing labors.

3. Lawyers often rely on information collected and verified (or not verified) by others, and they often present this information in a public setting.

4. Many lawyers work long hours and stay perpetually tired and sleep deprived.

5. Lawyers work with clients who are themselves stressed and often in less than a settled state of mind.

6. There is no clear demarcation between when a job is done and when more could be done. Most often, one more witness could be interviewed, another interrogatory propounded, or case read.

7. The profession is increasingly competitive.

8. Lawyers are not respected by society.

9. The Blackberry, e-mail and other forms of technology become a tether and create expectations of perpetual availability and rapid response.

So now you have it. You have objective data to support the reality of your stressful existence, and to explain it. You could tell your roommate, children, friends and others who experience the fallout from your stress. They in turn might slide two fingers together in a display of the world’s smallest violin, in expression of sympathy. Better, let’s consider a remedy. After all, we attorneys excel at finding a remedy, fixing a problem. (Sometimes we thrive at doing this for our clients, but we rationalize in creative ways to avoid caring for ourselves and each other.)

Consider the words of a famous Illinois lawyer, Abraham Lincoln:

Discourage litigation. Persuade your neighbors

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to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has *a superior opportunity of being a good man*. There will still be business enough.<sup>1</sup>

No doubt Lincoln would have been a charter member of The McCammon Group if he practiced in the modern era, but his comment offers more of a solution to stress than merely discouraging litigation. Lincoln recognized that lawyers have unique opportunities to do good.

We know members of the Bar who have inspired us by exemplifying a special attentiveness to the unique opportunities attorneys have to do good. Often this is as simple as taking a step or two deeper into the painful troubles of our clients. Simple idea, but not easy. As Pat Benatar sang in her 1983 hit, even “Love is a Battlefield.”

A great paradox which has been passed on by sages throughout time holds true: when we turn to give rather than receive, we receive. Lose your life to gain life. Counter-intuitive, but as true a principle of peaceful, beautiful living as gravity is to the physics of falling objects. The battle continues, yet we access tranquility through service to others. The mind escapes a stress vortex when the frame of reference changes. Many lawyers have taught me this lesson (which I still often forget).

Our profession, although it may be the most stressful, somehow captures persons who possess exceptional talents. Many of you have an innate ability to see what is good and true, to work with difficult people in a constructive manner, and to motivate others. On bad days you feel like enemies – deadlines, evaporating time, unmet expectations, and grumpy people – have overrun your well dug front line. Even mature practitioners who appear to have an “easy button” find it faulty some

days and feel like throwing it through a window. In these times, recall your exceptional opportunity as a lawyer to do good. Even modest steps to see and attend to the needs of others are like warm rays of light on frosty, furrowed brow.

1 The Collective Works of Abraham Lincoln edited by Roy P. Baslar, Volume 2, “Notes for a Law Lecture” (July 1, 1850), page 81.

## The Unserved Lawsuit *cont'd from page 1*

entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant.

Additionally, Virginia Code § 8.01-275.1 provides:

Service of process in an action or suit within twelve months of commencement of the action or suit against a defendant shall be timely as to that defendant. Service of process on a defendant more than twelve months after the suit or action was commenced shall be timely upon a finding by the court that the plaintiff exercised due diligence to have timely service made on the defendant.

Although these authorities denote a clear objective to move lawsuits forward within a year after filing and set a one-year limit on service in the absence of the use of due diligence to secure timely service on a defendant, Code § 8.01-275.1 unequivocally permits service accomplished at *any* time within one year. Virginia law does not dictate the level or manner of diligence if service is in fact made within that first year and circuit court judges lack the authority to proactively compel a plaintiff to serve a defendant before one year has run after suit was filed.

Long ago, the Supreme Court of Virginia specifically concluded that the precursor to current Rule 3:5(e) “gives a court authority to dismiss an action because of delay in the service of process *only if process is served more than one year after the motion for judgment is filed . . .*”<sup>3</sup> In the case of *Nelson v. Vaughan*,<sup>4</sup> a circuit judge had dismissed a plaintiff’s lawsuit on the basis that the plaintiff’s “long delay” of approximately

ten months in service of process resulted from the plaintiff’s “deliberate action and lack of due diligence.” The Supreme Court reversed the dismissal on appeal, however, concluding that a delay of less than a year to serve process is an improper basis for dismissal, notwithstanding whatever lack of diligence the plaintiff may have exhibited.<sup>5</sup>

After having later once observed that under then existing Rule 3:3, a “plaintiff normally may have process served *at any time within a year thereafter*,” the Supreme Court still later again noted that Code § 8.01-275.1 “defines timely service as one year.”<sup>6</sup>

**In an apparent effort to resolve pending actions within their courts within one year of filing, various circuit courts in the Commonwealth often endeavor, by varying means, to compel plaintiffs to serve suits before a year has run from the date suit was filed, sometimes starting even within a few short months after the filing date.**

Unequivocally, our circuit court judges lack the power to dismiss a case for want of service during the first year after filing, and thus should refrain from threatening the sanction of dismissal, or otherwise applying undue pressure, as a means to promote the court’s appropriate interest to expedite the resolution of claims on their dockets. Whatever reason a plaintiff may have to delay service, whether because he has been unable to locate a defendant despite diligent efforts to do so, or because circumstances of the claim warrant holding off on effecting service, or even simply due to procrastination, the plaintiff has a vested right under Code § 8.01-275.1 that must not be

inappropriately denied. By threat of dismissal, a court may improperly force a plaintiff to choose between exhausting his only nonsuit of right or facing a possibility that he will be left only with an appeal to the Supreme Court of Virginia – although one would hope that the Supreme Court would readily grant a petition for appeal of a clearly improper dismissal of such nature, that would remain within the discretion of the Court, affording insufficient security to the plaintiff. Moreover, the very circumstances of a plaintiff’s claim that bring about a delay in service may also render the cost and effort of an appeal undesirable and leave the plaintiff with no true recourse.

Virginia circuit court judges also frequently ask

counsel about the status of service attempts at initial status conferences. While simple inquiry alone may be appropriate given the courts’ interest to control their dockets and move cases along, judges should be cautious about the responsive information they might require from a plaintiff who has not sought service of process on a defendant; given the right to defer service during the course of the initial year after service, requiring a plaintiff to explain the basis for such delay may well encroach upon privileged attorney work product. Indeed, a plaintiff should not be pressured by the court to disclose what might be privileged strategic decisions about a delay in service.

**DISMISSAL MOTIONS AFTER ONE YEAR WITHOUT SERVICE**

When a plaintiff fails to have a lawsuit served within one year after its filing, Virginia Code § 8.01-277 now provides the unserved defendant a means to appear before the court specially in order to attack untimely service and seek to have the case dismissed. Specifically, Code § 8.01-277(B), as amended in 2006, provides in pertinent part:

A person, upon whom process has not been served within one year of commencement of the action against him, may make a special appearance, which does not constitute a general appearance, to file a motion to dismiss. Upon finding that the plaintiff did not exercise due diligence to have timely service and sustaining the motion to dismiss, the court shall dismiss the action with prejudice. Upon finding that the plaintiff did exercise due diligence to have timely service and denying the motion to dismiss, the court shall require the person filing such motion to file a responsive pleading within 21 days of such ruling. Nothing herein shall prevent the plaintiff from filing a nonsuit under § 8.01-

380 before the entry of an order granting a motion to dismiss pursuant to the provisions of this section.

Prior to the 2006 amendment adding subsection (B) to Code § 8.01-277, however, defendants throughout the Commonwealth were appropriately concerned about whether a defendant who had not yet been served with a lawsuit could make a special appearance to move a court to dismiss the suit under Rule 3:5(e). Because of this intrepidation, plaintiffs’ unserved suits often languished on courts’ dockets for years with no activity. The defendants’ doubt rested primarily in the 1999 decision by Virginia’s Supreme Court in *Gilpin v. Joyce*.<sup>7</sup> While not uniformly acknowledged, an apparent consensus of opinion feared that under *Gilpin*, a defendant who had *not* been served could not wield Rule 3:3 (the precursor to Rule 3:5) as a “sword” to make a “special” appearance alone to ask that the case be dismissed for untimely service without undue risk that the very act of doing so might constitute a general appearance and, paradoxically, waive the very service defect raised.

**Long ago, the Supreme Court of Virginia specifically concluded that the precursor to current Rule 3:5(e) “gives a court authority to dismiss an action because of delay in the service of process only if process is served more than one year after the motion for judgment is filed . . .”**

In the *Gilpin* case, sixteen months after a plaintiff had filed suit without ever requesting service of process, a defendant filed a

plea in bar pursuant to Rule 3:3 and simultaneously (ostensibly pursuant to Code §8.01-277 as it then existed) filed a grounds of defense, a counterclaim, and discovery requests. Strictly construing Code § 8.01-277 and noting that it spoke of and applied only to a party upon whom process ... has been served,@ the Court concluded that the statute did not permit a defendant who had *not* yet been served to simultaneously make a general appearance and assert the protection of the bar provided in Rule 3:3.<sup>8</sup> The Court similarly reasoned that Rule 3:3 was unavailing as a “sword” to an unserved defendant because it, too, spoke of and provided protection to a defendant having been served with process.<sup>9</sup> Because the defendant had not been served with process, the Court emphasized that the defendant’s general appearance had been

*The Unserved Lawsuit — cont’d on page 6*

## The Unserved Lawsuit *cont'd from page 5*

“entirely voluntary.” Specifically, the Court stated, “We believe that this is the very distinction the legislature intended to create when it enacted Code § 8.01-277 permitting only a defendant who has been *actually served with process* to raise specific jurisdictional challenges prior to or simultaneously with the filing of any pleading to the merits.”<sup>10</sup>

On its facts, the *Gilpin* decision might reasonably have been limited to instances where an unserved defendant filed responsive pleadings *while at the same time* seeking a dismissal under Rule 3:3. The Court’s opinion, however, caused consternation among the defense bar because many circuit courts broadly interpreted the decision to render *any* special appearance by a defendant who had not yet been served with process as a *Ageneral@* appearance, regardless of whether or not the defendant contemporaneously filed any other pleadings or motions with the court. Such courts opined that Rule 3:3 could only be used as a shield, and not as a sword, and construed any special appearances by defendants who had not been served as general appearances.<sup>11</sup>

A more recent decision from the Virginia Supreme Court confirms that its *Gilpin* decision might reasonably have been limited to those cases where a defendant filed general pleadings together with a special appearance contesting service – and thus should not have invalidated “special” appearances alone. Although admittedly *dicta* in a case addressing the propriety of a defendant filing a motion contesting service *after* he had already filed an answer to the merits of the lawsuit, the Court observed in its decision in the case of *Lyren v. Ohr*.<sup>12</sup>

An appearance for *any other purpose than questioning the jurisdiction of the court* — because there was no service of process, or the process was defective, or the service thereof was defective, or the

action was commenced in the wrong county, or the like — is general and not special, although accompanied by the claim that the appearance is only special.<sup>13</sup>

**Whatever reason a plaintiff may have to delay service, whether because he has been unable to locate a defendant despite diligent efforts to do so, or because circumstances of the claim warrant holding off on effecting service, or even simply due to procrastination, the plaintiff has a vested right under Code § 8.01-275.1 that must not be inappropriately denied.**

By implication, an appearance made for the sole purpose of questioning the jurisdiction of the court – specifically, because there was no service of process – may properly have been considered an appropriate special appearance, the *Gilpin* decision notwithstanding.

Nonetheless, as noted above, seven years after the *Gilpin* decision, the General Assembly amended Code § 8.01-277 to specifically authorize a defendant upon whom process has not been served within one year of commencement of the action against him to make a special appearance, which does not constitute a general appearance, to file a motion to dismiss the action on

the grounds of untimely service.

While the amended Code provision rectifies the difficulty previously encountered by defendants and allows them to proactively challenge inactive lawsuits, the statute as presently written may give defendants cause for other concern about a potential waiver or loss of tenable challenges to service that otherwise may have arisen if suit were eventually served. If a plaintiff survives a § 8.01-277 challenge to untimely service, the defendant shall be required by the statute “to file a responsive pleading within 21 days” of the court’s ruling denying his dismissal motion.<sup>14</sup> As such, if the plaintiff has failed to secure service on the defendant before that time (thereby instigating the denied motion in the first place) and the defendant must nonetheless file pleadings in response to the action, the statute apparently may work to bar any other challenge to the manner of service that might otherwise have become available to the defendant if service were required. While a plaintiff’s showing of diligent efforts sufficient to defeat a § 8.01-277 motion may often render substi-

tuted service on the Secretary of the Commonwealth available and thus inevitable, a plaintiff might conceivably still have other means of service available to him and an unsuccessful § 8.01-277 motion apparently will release the plaintiff from that task and thereby deprive the defendant of the opportunity to challenge any defect in service that might otherwise be made.

A defendant contemplating a service challenge under Code § 8.01-277 and Rule 3:5(e) should, of course, also evaluate whether he might benefit by simply allowing the unserved action to remain dormant. Given the statutory mandate that responsive pleadings be filed after an unsuccessful challenge, thereby triggering active litigation, it is wise to first consider whether the defendant's interests might be better served by allowing a sleeping dog to lie undisturbed.

#### **SUA SPONTE DISMISSAL BY THE COURT AFTER ONE YEAR?**

With an understanding that the expeditious resolution of lawsuits generally serves the best interests of litigants, the bar, the bench, and even Virginia's judicial system as a whole, the Commonwealth's circuit courts are increasingly under considerable pressure to control the volume of "active," or unresolved, cases on their dockets, and many commonly share a goal of concluding most civil cases within twelve months of filing. As a means of controlling their dockets, many courts throughout the Commonwealth have implemented various local rules and procedures intended to promote the prompt conclusion of civil cases. Given the Virginia Code's definition of timely service as one year, and recognizing an inability under Rule 3:5 to enter judgment against a defendant not timely served (unless due diligence can be shown), one might argue that a court may properly implement procedures to proactively bring unserved cases before the court for a Rule 3:5 diligence evaluation and to weed appropriate cases from the docket by dismissal.

In the very recent case of *Collins v. Shepherd*,<sup>15</sup> however, the Supreme Court of Virginia declared that a circuit court's local rule providing for the sua sponte dismissal of cases not served upon a defendant within one year of filing was invalid. In the *Collins* case, the Circuit Court of the City of Norfolk had implemented a local rule<sup>16</sup> by which the court could, on its own ini-

tiative and after notice to the plaintiff, dismiss an action that had not been served within one year after it had been filed. The rule in question called upon the clerk of the court to prepare and issue to the plaintiff a notice of dismissal for any case not served within the one year timeframe set forth in Supreme Court Rule 3:5(e).

Pursuant to that rule, after a year and eight days without service on the defendant had passed since plaintiff Collins had filed his personal injury suit, the clerk sent a "Notice of Dismissal" to the plaintiff's attorney advising him that the court would dismiss the suit twenty-two days later, unless the court were to find that the plaintiff had exercised due diligence to have the defendant timely served. When the plaintiff and his attorney failed to appear on the designated date, the court then dismissed the action "with prejudice in accordance with Supreme Court Rule [3:5(e)] and *Nelson v. Vaughan*, 210 Va. 1 (1969)" due to the plaintiff "having failed to show that due diligence was exercised to have timely service upon the defendant." After an ensuing procedural wrangle<sup>17</sup> involving an initial reinstatement of the plaintiff's case and arguments addressing, in part, whether the court had the power to dismiss the plaintiff's case in the first place, the circuit court ruled that its earlier dismissal order had been valid and it again dismissed the plaintiff's case.

On appeal, the plaintiff argued that Norfolk court's local rule was invalid because it abridged his substantive right to proceed with his lawsuit, noting that even after he failed to serve the defendant with process within one year of filing his lawsuit, he still retained the right to take a nonsuit under Code § 8.01-380 and then refile the action. He also argued that the rule conflicted with Code § 8.01-335, which provided for the discontinuance and dismissal of certain inactive cases.

Agreeing with the plaintiff, the Supreme Court concluded that although Code § 8.01-4 gives circuit courts the authority to promulgate local rules regarding the management of their courts and the cases they handle, the Norfolk Circuit Court did not have the authority under Code § 8.01-4 to adopt a local rule permitting the sua sponte dismissal with prejudice of cases not served within a year of the filing date.<sup>18</sup> The Court reasoned that by dismissing the plaintiff's case with prejudice solely by operation of local rule, without the case being heard on the merits, the trial court

*The Unserved Lawsuit — cont'd on page 8*

## The Unserved Lawsuit *cont'd from page 7*

had deprived the plaintiff of his vested right to take a nonsuit under Virginia Code § 8.01-380 and to refile his civil action beyond the one-year limitation period established by the local rule.<sup>19</sup> “The dismissal under a local rule of a case that the plaintiff would otherwise be able to pursue under the Code, case law, and Rules of Court,” the Supreme Court stated, “exceeds the authority delegated to circuit courts under Code § 8.01-4.”<sup>20</sup> The Court further agreed that Norfolk’s local rule conflicted with Code § 8.01-335, which provides mechanisms (commonly known among attorneys as the “two year rule” and the “three year rule”) for the removal and/or dismissal of dormant cases from court dockets after two or three years of inactivity and which allows for reinstatement of such cases upon appropriate request by the plaintiff.<sup>21</sup> Because the circuit court had implemented a rule it did not have the legal authority to adopt, a majority of the Supreme Court held that the original dismissal order had been invalid, and the case was remanded to the trial court.

Notably, because the trial court’s actions in dismissing the Collins lawsuit occurred before subsection (B) was added to Code § 8.01-277, neither the parties nor the Court addressed the possible impact that a defendant’s right to proactively seek the dismissal of an unserved lawsuit may have had on the trial court’s ability to implement its own mechanism to cull inactive suits. Defense counsel might reasonably argue that if appropriate notice is given to the plaintiff with an opportunity to appear before the court, his right to nonsuit his case is no more abridged than if the defendant were the party to initiate the dismissal request under Code § 8.01-277. A defendant may argue that § 8.01-277 exhibits an intention to advance the expeditious resolution of inactive suits provided that a plaintiff is afforded appropriate due process.

On the other hand, a plaintiff may respond that Code § 8.01-277 notwithstanding, the trial court still lacks authority to initiate an attempt, *sua sponte*, to dismiss unserved cases except as might be provided under the two and three year rules set forth in Code § 8.01-335. Specifically, the plaintiff might reason that Code § 8.01-277 must be strictly construed and that by its terms, only the defendant has been provided the authority to seek the dismissal of the unserved suit.

## NONSUITING THE UNSERVED ACTION

Without question, provided an action has not been submitted to the court for determination of a dispositive issue, if it is the first time the lawsuit has been filed, a plaintiff can take his first nonsuit of right under Virginia Code § 8.01-380 even if he has allowed more than a year to elapse without service and regardless of whether he has exercised due diligence to have the defendant served.<sup>22</sup> In light of a plaintiff’s ability to wait until shortly before the expiration of a statute of limitations to file suit in the first place and to refrain from requesting service for a year or more before nonsuiting a case, many defendants in the past have been troubled by the ability of a plaintiff to defer litigation for many years after the cause of action accrued.

Such concern was only heightened further on occasion where a plaintiff might not serve the second action within a year and again submit a nonsuit order for entry by the court. Often receiving simply a proposed nonsuit order without knowledge of the history of the case before the court, judges frequently entered second nonsuit orders, unwittingly allowing plaintiffs to defer litigation longer. In some such instances,<sup>23</sup> defendants successfully persuaded circuit court judges that the second nonsuits were invalid as they were not nonsuits of right and had been procured without appropriate notice to the defendants to give the defendants an opportunity to contest the nonsuit and also that appropriate leave of court had not been obtained because the plaintiffs had not appropriately apprised the court of the circumstances of the cases so as to afford the courts the opportunity to make meaningful determinations whether to allow the additional nonsuits. Underscoring the benefit to defendants of receiving notice of a second requested nonsuit, at least one circuit court is known to have denied a second nonsuit request by a plaintiff where the court concluded simply that the plaintiff had failed to exercise appropriate diligence to serve the lawsuit and that a nonsuit was not merited.<sup>24</sup>

To the relief of the defense bar, the General Assembly amended Code § 8.01-380 to include certain notice requirements for a second nonsuit request. Specifically, Code § 8.01-380 now reads, in pertinent part:

B. Only one nonsuit may be taken to a

cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits upon reasonable notice to counsel of record for all defendants and upon a reasonable attempt to notify any party not represented by counsel, or counsel may stipulate to additional nonsuits. . . . When suffering a nonsuit, a party shall inform the court if the cause of action has been previously nonsuited. Any order effecting a subsequent nonsuit shall reflect all prior nonsuits and shall include language that reflects the date of any previous nonsuit together with the court in which any previous nonsuit was taken.<sup>25</sup>

As a result of the amendment, a plaintiff's ability to request a second nonsuit is preserved, but defendants now have a means to endeavor to use a plaintiff's lack of due diligence in serving a defendant not only as the basis for a § 8.01-277 dismissal motion, but also as a challenge to the requested second nonsuit.<sup>26</sup>

## CONCLUSION

While Virginia law still affords plaintiffs substantial latitude with respect to time constraints in which to serve process on a defendant, and plaintiffs should indeed continue, where appropriate, to resist judicial efforts to compel service well before a year has passed after filing, recent statutory changes have likewise afforded defendants the opportunity to challenge and seek dismissal of those cases where a dilatory plaintiff has allowed inactive, but pending, litigation to languish. Having afforded defendants the means to seek the dismissal of unserved cases in appropriate circumstances under Virginia Code § 8.01-277, the General Assembly should consider also authorizing Virginia's circuit courts to implement procedures by which the courts, too, may similarly seek to promote the expeditious resolution of lawsuits and manage the burgeoning case loads before them. ☒

<sup>1</sup> Indeed, on the very date of submission of this article, the author attended a status conference approximately nine months after the suit was filed at which the court persuaded a plaintiff to nonsuit an action solely because of the lack of service of process.

<sup>2</sup> Rule 3:5(e) (formerly Rule 3:3(c)).

<sup>3</sup> *Nelson v. Vaughan*, 210 Va. 1, 1-2 (1969) (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Waterman v. Halverson*, 261 Va. 203, 207 (2001).

<sup>7</sup> 257 Va. 579 (1999).

<sup>8</sup> *Id.*, at 582.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 583.

<sup>11</sup> For some time, various circuit courts apparently differed as to the reach of the *Gilpin* decision as a number of courts allowed unserved defendants to wield Rule 3:3 as a sword, particularly in instances where plaintiffs failed to raise waiver, or general appearance, in opposition to the defense motions.

<sup>12</sup> 271 Va. 155 (2006).

<sup>13</sup> *Id.*, at 159 (emphasis added).

<sup>14</sup> Virginia Code § 8.01-277(B).

<sup>15</sup> 274 Va. \_\_\_ 061728 (2007).

<sup>16</sup> Circuit Court of the City of Norfolk, Civil Case Management Administrative Plan, Local Rule 2(F)(3).

<sup>17</sup> The procedural wrangle, although not material to this article, involved the question of whether or not the dismissal order was void or voidable and was central to a split in opinion among the justices of the Virginia Supreme Court.

<sup>18</sup> *Collins v. Shepherd*, 274 Va. \_\_\_ 061728 (2007)

<sup>19</sup> *Id.*, (citing Virginia Code § 8.01-380; *Berry v. F&S Financial Mktg. Inc.*, 271 Va. 329, 332-33 (2006); *Waterman v. Halverson*, 261 Va. 203, 208 (2001); *McManama v. Plunk*, 250 Va. 27, 32 (1995)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *Berry v. F & S Financial Marketing, Inc.*, 271 Va. 329, 333 (2006); *Waterman v. Halverson*, 261 Va. 203, 540 S.E.2d 867 (2001); *Clark v. Butler Aviation*, 238 Va. 506 (1989).

<sup>23</sup> See *Houben v. Duncan*, 19 Cir. L196429, 58 Va. Cir. 391 (Fairfax 2002); *Hicks v. Harrison*, 35 Va. Cir. 219 (Spottsylvania 1994).

<sup>24</sup> See *Nichols v. Moss*, 4 Cir. L052115 (Norfolk 2007).

<sup>25</sup> Virginia Code § 8.01-380(B).

<sup>26</sup> For further considerations about dismissals of unserved lawsuits and nonsuit requests, readers might find interest in an article in Volume XVIII (Fall 2006) of *The Journal of Civil Litigation*, by William J. Pfund, entitled *Dismissal For Failure to Serve P* ☒

# The Virginia Supreme Court: Court of Error or Court of Law?

William H. Hurd

Appellate lawyers who practice in the federal courts are keenly aware of a fundamental difference between the U.S. Court of Appeals and the U.S. Supreme Court. The former sits as a *court of error*. The latter sits as a *court of law*.

In our state system, a question that has sometimes arisen is how to classify the Virginia Supreme Court. Is it a court of error like the Fourth Circuit? Or, is our highest state tribunal a court of law like its federal counterpart? It is a question to which no one-word answer can be given, and attempts to fit the Virginia Supreme Court neatly into a federal model yield more confusion than clarity.

In the federal system, the Fourth Circuit – like its sister circuits – is said to be a *court of error* because litigants who lose in the trial court are entitled to an appeal of right so any harmful error can be corrected. See 28 U.S.C. § 1291; *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 865 (1994).

On the other hand – and often to the surprise of laymen – the principal task of the U.S. Supreme Court is *not* to correct errors that lower tribunals may have made. Instead, its task is to resolve conflicts between appellate courts on questions of federal law and, sometimes, even in the absence of a conflict, to decide a particularly important federal question that needs to be decided at the national level. See Rule 10, Rules of U.S. Sup. Ct. Thus, the U.S. Supreme Court is sometimes called a *court of law* and, given the nature of its task, every appeal it hears is a matter of discretion. There is no appeal of right.

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In the Virginia Supreme Court, there is likewise no appeal of right (with very few exceptions, such as capital cases). Because appeals are discretionary – and because a panel of three Justices acts for the entire Court – it may appear that our highest state tribunal is also a court of law, rather than a court of error. But this is not the explanation given by the Court, which has repeatedly explained that its denial of a petition for appeal is based on the *merits* of the case.

The question provoked some dissent in the early 1970s with the publication of an article by two University of Virginia law professors, Graham C. Lilly and Antonin Scalia (now Justice Scalia). Entitled *Appellate Justice: A Crisis in Virginia*, 57 Va. L. Rev 3 (1971), the article compared the increase in petitions filed to the decline in petitions granted. “[T]he statistics suggest that in the face of its increasing workload the Court has altered the criterion for granting appeals, so that a denial can no longer be considered a ‘merits’ determination.” *Id.* at 14. The article suggested that the Court had abandoned its merits standard “in favor of a test more closely tied to the societal importance of the issues presented.” *Id.* at 15.

The criminal defense bar seized on the article to attack convictions where no appeal had been granted. Filing a state petition for habeas corpus, a prisoner claimed that the federal Equal Protection Clause was violated by the Virginia Supreme Court because it granted appeals to some convicted felons while refusing appeals to him and others. *Saunders v. Reynolds*, 214 Va. 697, 699-700, 204 S.E.2d 421, 423 (1974) (citing Lilly/ Scalia).

The Virginia Supreme Court responded in no uncertain terms. While acknowledging that “societal importance” of the question presented “may, and properly should, play some part” in deciding whether to grant an appeal, it explained that this “has always been true.” *Id.* at 700, 204 S.E.2d at 423-24. Then, rebuffing the equal protection claim, the Court stated “unequivocally... a decision to grant or refuse a petition for writ of error is based on one equally-applied criterion – the merits of the case.” *Id.* at 700, 204 S.E.2d at 424.<sup>1</sup>

The idea that appeals remain “discretionary” may appear in conflict with the idea that appeals are granted on the merits; however, it is a conflict easily resolved. The key is the standard by which the discre-

tion is guided. As Lilly and Scalia acknowledged, “discretion” in the Virginia system historically served “primarily as a means of summary affirmance, enabling the Court to dispose of the clearer cases without the need for a full hearing and written opinion.” 57 Va. L. Rev. at 14. Thus, although absent in *form*, there has been in Virginia “the *substance* of an appeal of right.” *Id.* (emphasis added) (quoting A. Vanderbilt, Minimum Standards of Judicial Administration 399 (1949)).<sup>2</sup>

The fact that the Court “delegates” its discretion to a panel of three Justices – often including a retired Justice – likewise presents no conflict, especially given the right of a disappointed petitioner to seek rehearing of his petition by the entire Court. Rule 5:20, Rules of Va. Sup. Ct. It is, perhaps, a right that too often goes unexercised.

The fact that petitions for appeal are decided on the merits suggests an important collateral question – what is the precedential effect of a denial? By finding “no reversible error,” does the Virginia Supreme Court give its imprimatur to the trial court judgment? Given the merits-based nature of the denial, some lawyers logically thought the answer would be “yes;” however, for a panel of only three Justices to set binding precedent is obviously problematic.

The conundrum was solved in a unanimous opinion authored by Justice Lemons in 2002, which reaffirmed that petitions for appeal are decided on the merits, but then explained that a denial is *not* precedential. *Sheets v. Castle*, 263 Va. 407, 559 S.E.2d 616 (2002). In *Sheets*, the Court quoted its typical order refusing a petition, which succinctly states that “there is no reversible error in the judgment complained of.” Given this language, “the *grounds* upon which the Court relied as a basis for denial cannot be determined.” *Sheets*, 263 Va. at 412, 559 S.E.2d at 619 (emphasis added).

While it may be that no error was found, other possibilities exist as well. Perhaps, there was error but it was harmless, or the trial court reached the right result for the wrong reason, or there was an independent basis for the trial court’s decision that was not argued as error, to name a few. There is simply no way of telling the *reason* for the denial without “sifting through the records of cases buried” in clerks’ offices, *id.*, an uncertain and unreliable procedure the Court was not willing to countenance. The rule in Virginia is

this: “unless the grounds upon which the refusal is based is discernible from the four corners of the Court’s order, the denial carries no precedential value.” *Id.*

Thus, albeit by a different route, the Virginia Supreme Court has reached the same result as the U.S. Supreme Court, which has long rejected the idea that its denial of certiorari carries precedential value. *E.g.*, *Singleton v. Commissioner*, 439 U.S. 940, 944 (1978) (“[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted... such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.”).

In sum, insofar as there is no appeal of right, the Virginia Supreme Court may be compared to its federal counterpart. Yet, insofar as every petition is considered on the merits, it is more closely akin to the U.S. Court of Appeals. And, insofar as no precedential value attaches to the denial of a petition, it is again similar to the U.S. Supreme Court. No carbon copy of a federal model, the Virginia Supreme Court is decidedly a *Virginia* institution. ☐

<sup>1</sup> As a procedural rule, Rule 3:21 probably has retroactive application to all cases then pending at the date it became effective. *See Harris v. DiMattina*, 250 Va. 306, 312, 462 S.E.2d 338, 340 (1995) (holding that amendments to notice of claim provisions for medical malpractice actions were legislative enactments that “control only the method of obtaining redress or enforcement of rights” were procedural in nature and have retroactive effect); *Sargent Elec. Co. v. Woodall*, 228 Va. 419, 424, 323 S.E.2d 102, 105 (1984) (holding that Industrial Commission rule amendments were legislative enactments that would apply retroactively if procedural in nature); *Walke v. Dallas, Inc.*, 209 Va. 32, 35, 161 S.E.2d 722, 724 (1968) (holding that long-arm statutes applied retroactively as procedural rules). Accordingly, for cases filed before January 1, 2006, the timelines in the new rules are likely applicable, and a failure to make a jury demand in accordance with them likely has waived the right to trial by jury by the application of Rule 3:21(d) and Section 8.01-336.B.

<sup>2</sup> That rule provides “Any party may demand a trial by jury on any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue . . . .” Fed. R. Civ. Pro. 38(b). ☐

# The Measure of Punitive Damages Under the Virginia Computer Crimes Act

by Christopher L. Spinelli

Statutes always seem to be slightly behind the times when it comes to civil liability for computer crimes. It is just hard to stay up to stay current with the speed of technology. In some instances under the Virginia Computer Crimes Act, the civil liability on the books fails to match the relative severity or triviality of the bad conduct. One way to get around this problem is to provide a relief valve by way of language allowing the Court a measure of discretion.

Virginia Code §18.2-152.12(B) lacks that relief valve. As the statute is currently written, it forecloses judicial discretion. However, the statute can be fixed to more accurately suit varying circumstances by way of a simple amendment already included in other sections of the same Act. Here is what I mean:

## I. The Relevant Code Sections

18.2-152.12(A) and 18.2-152.12(B) currently read,

- A. Any person whose property or person is injured by reason of a violation of any provision of this article ... regardless of whether such act is committed with malicious intent may sue therefor and recover for any damages sustained and the costs of suit. Without limiting the generality of the term, "damages" shall include loss of profits.
- B. If the injury under this article arises from the transmission of unsolicited bulk electronic mail ... the injured person, other than an electronic mail service provider, may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the lesser of \$ 10 for

each and every unsolicited bulk electronic mail message transmitted in violation of this article, or \$ 25,000 per day....

As Section 18.2-152.12(B) currently reads, if over a two-day period, Sam Spammer sends thousands of marketing e-mails to thousands of e-mail addresses, advertising, say, bad-credit refinancing, he could be liable for ten dollars to each recipient for damages, or a cap of \$25,000.00 per day, whichever is lesser. Because spamming is a for-profit operation that exploits the minimal costs associated with sending e-mails, this assignment of damages appears to make sense on first impression. It is also an easy way to punish Spammer without the plaintiff having necessarily to discovery just how many e-mails have been sent.

## II. An Example of The Problem

However, let's change the situation. Suppose someone else, say, a young woman, Emma Mailer has just broken up with her dirty-dealing law-student boyfriend, and in a fit of pique wants to get back at him. Emma Mailer then knowingly and without permission makes a nuisance of herself by bombarding the boyfriend's e-mail address with thousands of non-commercial nuisance messages over a two-day period, with no financial harm to her ex-boyfriend. Childish? Yes. Does it happen? Sure. Setting aside criminal charges and protective-order issues, what kind of civil penalty, if any, would be appropriate here? Or, at the very least, what sort of civil penalty could be threatened to leverage settlement? And let's just say for the sake of argument that the dirty dealing ex-boyfriend is really vindictive enough to bring civil suit in this instance.

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According to Section 18.2-152.12(B) as it is currently drafted, Emma could have to pay the recipient \$50,000.00 in statutory damages!

Assuming a civil suit is actually brought, rather than merely threatened, does this outcome sound like an unconstitutionally high sum for defendant Emma to be obligated to pay? Wouldn't liability under the Code section, in the circumstances of a vindictive civil prosecution, potentially run afoul of the Virginia and United States Constitution for depriving Emma of substantive due process and property? *See, e.g., Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). While Code Section 18.2-152.2(B) penalizes Sam Spammer for sending thousands of marketing e-mails to thousands of e-mail addresses as a shady profit-driven scheme with a low overhead, right now the Virginia Code is not subtle enough to allow the courts to craft a civil remedy that distinguishes between Sam and Emma. Emma could be really taken advantage of here in the event that civil suit is even threatened.

### III. A Possible Cure

Curiously, the third part of the Section, that is, Section 18.2-152.12 (C), which addresses damages done to e-mail service providers, has the following additional language:

In calculating the statutory damages under this provision, the court may adjust the amount awarded as necessary, but in doing so shall take into account the number of complaints ... generated by the defendant's messages, the defendant's degree of culpability, the defendant's prior history of such conduct, and the extent of economic gain resulting from the conduct.

This language is absent from Section 18.2-152.12(B), Emma's hypothetical. If the above language

were added to Section 18.2-152.12(B), courts could more easily capture the nuances of the individual conduct and the relative economic harm, if any, in these occasions. In so doing, Virginia could continue to balance the authority of the statute with the discretion necessarily afforded the courts in their assignment of punitive damages for wrongful acts. Also, it would not take much more drafting to arrive at appropriate additional language. The appropriate additional language is already there, and can be taken right from Section 18.2-152(C).

What is the actual likelihood of civil suit being brought under this statute as it reads now in a non-commercial situation, such as that with Emma in my hypothetical? You may be thinking the likelihood is small. It is not just the likelihood of suit actually being brought that should come into any evaluation of the statute's drafting, however. We all know that sometimes the mere potential for civil liability has an effect, in, say, settlement negotiations. To deal with the subtle interplay of a useful and relatively new media and its potential for abuse, Section 18.2-152(B) should give the courts and counsel a scalpel rather than a bludgeon. ☒

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