



What Happens in Bankruptcy Stays in Bankruptcy, Right? Not Always.

What Every Litigator Should Know about Claims Disclosure

by Charlotte Ritz and Tara Elgie

Unless you represent debtors or creditors in bankruptcy cases on a regular basis, you may think that bankruptcy law has little, if any, relevance to your civil-litigation cases. And, for the most part, you're probably right. But if the plaintiff in a case that you are handling has ever filed for bankruptcy, you should determine whether the claims currently being prosecuted were disclosed in the bankruptcy proceedings. If the claims were not disclosed, and the plaintiff knew or should have known of their existence, the claims may be barred or the claim may belong to a bankruptcy trustee, not the plaintiff.

Regardless of whether you represent the plaintiff or defendant in an action, the sooner you determine whether any parties have failed to disclose claims in a bankruptcy proceeding, the better. If you represent a plaintiff whose claims were not disclosed in bankruptcy, you may be able to keep the claims alive by taking the steps outlined below. If you represent the defendant in such a case, you may be able to secure a dismissal or increase your client's settlement leverage based on the doctrines discussed below.

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Bankruptcy Disclosure Requirements

A voluntary bankruptcy case begins when the debtor files a petition for relief under the Bankruptcy Code.¹ Once a petition is filed, the debtor's "bankruptcy estate" is created.² Subject to certain exceptions set forth in the Code, the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case,"³ including any claims that the debtor may have against third parties.⁴ Some courts have found that the bankruptcy estate includes "not only claims that had accrued and were ripe at the time the petition was filed, but also those claims which accrued postpetition, but that are 'sufficiently rooted in the pre-bankruptcy past.'"⁵

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Letter From the Chair • Robert Leonard Garnier

With this edition of *Litigation News*, I want to take the opportunity to bring you up to date on current activities of your Litigation Section.

We had a good response to this year's Law In Society essay competition for Virginia high school students. This contest—sponsored by the Virginia State Bar and our Litigation Section in cooperation with the Virginia State Department of Education—aims to increase awareness and appreciation of our legal system among high-school students. It asks students to address contemporary legal issues affecting our everyday lives.

This year, 175 students—representing 50 schools and 2 home-schools—have evaluated First Amendment and other considerations implicated by restrictions place on a hypothetical construction of a religious center. A panel of volunteers, composed of Virginia educators and members of our Bar, are now judging the entries, evaluating the students' abilities to demonstrate a superior understanding of the role and value of our legal system in our everyday lives.

We will present the first-place Law In Society award to our winner at the Showcase CLE (“Judiciary Squares—Interactive Review of Evidentiary Matters”) at the Virginia State Bar's Annual Meeting in Virginia Beach in June. You can find more information about the competition, including the winning essay from 2010, at <http://www.vsb.org/site/public/law-in-society/law-in-society>. We would like to improve high-school participation in this competition for future years, so please help us spread the word about this contest to high schools in your locale.

Robert L. Garnier is Chair of the Litigation Section's Board of Governors and practices in Falls Church.


Speaking of CLE seminars at the Annual Meeting, the Litigation Section—through the hard work of Gary Bryant and others—will host an invaluable course on the use of expert-witnesses. The presentation, titled “Litigation Experts: How to Pick Them; How to Prep Them; and How to Use Them,” will be at 11:00 a.m. on Friday, June 17, in the Cape Henry room of the Holiday Inn & Suite - North Beach. A panel of speakers will address various expert-witness issues, including: (1) determining the need for expert witness, (2) picking the right expert for your case, (3) preparing and presenting your expert witness, (4) surviving challenges to your expert, and (5) challenging your opponent's expert witnesses. I encourage you to attend and I trust that any litigator in our Section will leave the CLE better informed and prepared for trial.

Our Section will also co-sponsor a CLE workshop on improving our communication skills. The program, titled “Can We Have a Conversation? Improved Communications Skills in Negotiation and Litigation,” is co-presented with the Virginia ADR Joint Committee, the Family Law Section, and the General Practice Section, and is scheduled for 2:00 p.m. on June 17, in the Cavalier Oceanfront hotel. It will be an interactive CLE program in which a panel of attorneys will demonstrate effective communication techniques when negotiating and litigating cases. The presenters will also encourage and moderate audience participation.

In addition to these and other useful and interesting CLE workshops, the Bar's Annual Meeting promises to provide great entertainment and opportunity to meet with other attorneys from throughout Virginia. You can register for the meeting at <http://www.vsb.org/special-events/annual-meeting/index.php>.

Later this summer, the Appellate Committee of the Virginia State Bar, with the diligent help of Monica Taylor Monday, plans to present a free appellate CLE symposium in or near the Roanoke area on how to effectively handle an appeal to the Court of Appeals of Virginia. With this encore presentation of a symposium recently held in Richmond, a panel of notable appellate minds will provide attendees with keys to successful appellate lawyering.

If you have not attended in past years, you might consider traveling with the Virginia State Bar to Athens, Greece, in November to attend the 38th Annual Midyear Legal Seminar. The venue will be excellent, and the agenda should follow suit. Among other available CLE offerings, our Section will be presenting an interactive clinic on making and meeting evidentiary objections at trial, in which the panel and audience will explore and examine both recent and “vintage” evidentiary issues of relevance and importance to Virginia litigators in both state and federal trial practice. The program will give audience members the chance to serve as “judges” — ruling on evidentiary issues in an engaging and entertaining forum.

These are just a few of the activities our Litigation Section has been working on this year. As I did in my first letter to you some months ago, I invite you to consider how you might become more actively involved with the Section and the Virginia State Bar—both to improve your own practice of law and to help other Virginia litigators. Together, we can better serve our Section’s purpose “to provide a forum for the discussion of matters affecting the way in which litigation is conducted in the Commonwealth of Virginia, to sponsor projects and programs of educational value or special interest and relevance to the members of the Section; and to promote efforts aimed at improving the efficient, affordable, ethical and just resolution of societal disputes.” 

What Happens in Bankruptcy *cont'd from page 1*

A debtor in bankruptcy must submit a schedule of assets setting forth all of the debtor's "legal or equitable interests."⁶ The debtor is required to disclose all "contingent and unliquidated claims of every nature," including both filed and unfiled causes of action against any person or entity.⁷ This disclosure requirement exists so that the trustee in bankruptcy may analyze the debtor's potential claims to determine whether they should be pursued for the benefit of the debtor's creditors,⁸ and to inform creditors and the court in making decisions throughout the bankruptcy case. Failure to disclose the existence of potential claims against a third party can result in the severe consequences described below.

Consequences of Failing to Properly Disclose Claims in Bankruptcy

If a debtor fails to disclose claims in bankruptcy, the debtor may be barred from asserting the claims later. When a petition is filed, the debtor's causes of action become part of the bankruptcy estate, even if they are not disclosed.⁹ In general, in a chapter 7 case only the bankruptcy trustee, as the representative of the estate, has standing to assert the debtor's claims against third parties.¹⁰ The debtor does not regain standing to bring such claims in any court or proceeding unless and until they have been "abandoned" within the meaning of the Bankruptcy Code, in which case they revert to the debtor.¹¹ In order for the trustee to affirmatively abandon property, the trustee must give notice of the proposed abandonment and an opportunity for a hearing to all creditors and the United States Trustee.¹² At the close of a bankruptcy case, certain claims may be deemed abandoned, but only if they were previously disclosed.¹³

Absent a court order holding otherwise or a formal abandonment of claims by the trustee after notice and a hearing,¹⁴ claims that were not properly disclosed on the debtor's schedule of assets will *not*

be abandoned back to the debtor.¹⁵ Instead, they will remain the property of the estate, and generally only the trustee will have standing to assert them.¹⁶ Consequently, if a debtor later attempts to assert claims that were not disclosed in a bankruptcy proceeding, the action may be dismissed based on the debtor's lack of standing.¹⁷

Claims that were not disclosed in bankruptcy proceedings also may be barred by the doctrine of judicial estoppel. This doctrine seeks to "prevent a litigant from asserting a position that is inconsistent with one asserted in the same or a previous proceeding,"¹⁸ "prevent litigants from playing 'fast and loose' with the Courts,"¹⁹ and "protect the integrity of the judicial process."²⁰

In the Fourth Circuit, courts generally require the presence of the following elements before invoking the principle of judicial estoppel: (1) the party sought to be estopped is seeking to adopt a position that is inconsistent with a stance taken in prior litigation; (2) the position is one of fact, not law; (3) the prior inconsistent position was accepted by the Court; (4) the party against whom judicial estoppel is to be applied intentionally misled the Court to gain unfair advantage.²¹ The fourth factor—whether the litigant intentionally misled the court to gain unfair advantage—is the determinative one.²² Some courts have concluded that the first three factors are satisfied where the Debtor fails to list a potential claim on the schedules, and fails to amend the schedules once the claim becomes known.²³

Potential Relevance to Your Cases

In light of the above, when a client asks you to file a lawsuit on his or her behalf, you must inquire as to any prior bankruptcy proceedings. If the client has previously filed for bankruptcy, you should review documents filed in that bankruptcy case to determine whether your client's claims arguably

If a debtor fails to disclose claims in bankruptcy, the debtor may be barred from asserting the claims later.

would be barred by the legal doctrines discussed above. If you learn that the claims are potentially barred and the bankruptcy case is ongoing, you can move the bankruptcy court for permission to amend your client's bankruptcy schedules and then ask the trustee or the Court to formally abandon the claims at issue. In order to make these requests in a bankruptcy case that has already been closed, you would need to first move to reopen the case. The case will not be reopened automatically upon request. Rather, bankruptcy courts have discretion in deciding whether to reopen a case to allow a debtor to disclose claims.²⁴ Similarly, courts will not permit a motion to reopen a bankruptcy case where it appears that doing so would be futile and a waste of judicial resources.²⁵ You should also be careful to properly value the claims when adding them to the amended schedules.²⁶

If you have been asked to serve as defense counsel in a legal action, you also must find out whether the plaintiff has ever filed for bankruptcy. You can do this by conducting a search of public bankruptcy dockets, informally asking opposing counsel, or through formal discovery requests. Then you should carefully analyze all pleadings and orders filed in any prior or ongoing bankruptcy proceedings to determine whether you have a basis to argue that the plaintiff's claims are barred by the doctrines discussed above. If a basis exists, you can then file a dispositive motion, or seek to deal directly with the trustee in the bankruptcy case, who usually is motivated to obtain a reasonable recovery for creditors and may provide an easier way to settle than dealing with the plaintiff and plaintiff's counsel. ☒

1. 11 U.S.C. § 301.

2. 11 U.S.C. § 541(a).

3. 11 U.S.C. § 541(a)(1).

4. *Field v. Transcontinental Ins. Co.*, 219 B.R. 115, 119 (E.D. Va. 1998).

5. *Id.* (concluding that a bad faith claim against an insurance company arising from a prepetition accident was a prepetition cause of action even though the request for indemnification, and subsequent denial, did not occur until after the petition date), *aff'd* 1999 U.S. App. LEXIS 2367 (4th Cir. Va. 1999); *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) (estate includes all legal or equitable interests of the debtor in property, including choses of action).

6. 11 U.S.C. § 521(a)(1)(B)(i); *In re Wilmoth*, 412 B.R. 791, 795

(Bankr. E.D. Va. 2009).

7. Fed. R. Bankr. P. 9009; Official Bankr. Forms 6, Schedule B; *In re Wilmoth*, 412 B.R. at 795.

8. *In re Wilmoth*, 412 B.R. at 795.

9. *Luzardo v. America's Servicing Co. (In re Jose Gregorio Caminero Luzardo)*, 2008 Bankr. LEXIS 4344 at *6 (Bankr. E.D. Va. 2008).

10. *Steyr-Daimler*, 852 F.2d at 136; *Luzardo*, 2008 Bankr. LEXIS 4344 at *6; *see also* 11 U.S.C. § 323.

11. *Luzardo*, 2008 Bankr. LEXIS 4344 at *6.

12. Fed. R. Bankr. P. 6007(a).

13. 11 U.S.C. § 554(c); *In re Wilmoth*, 412 B.R. at 795.

14. 11 U.S.C. § 554(a), (b), (d).

15. *See, e.g., In re Wilmoth*, 412 B.R. at 795.

16. *In re Luzardo*, 2008 Bankr. LEXIS 4344 at *6.

17. *See, e.g., In re Luzardo*, 2008 Bankr. LEXIS 4344 at *6.

18. *Whitten v. Fred's Inc.* 601 F.3d 231, 241 (4th Cir. 2010).

19. *Whitten v. Fred's Inc.*, 601 F.3d at 241; *Canterbury v. J.P. Morgan Mortg. Acquisition Corp.*, 2010 U.S. Dist. LEXIS 134278, *10 (W.D. Va. 2010).

20. *Id.*

21. *See e.g., Bland v. Doubletree Hotel Downtown*, 2010 U.S. Dist. LEXIS 18514, at *8-9 (E.D. Va. Mar. 2, 2010) (quoting *Folio v. City of Clarksburg*, 134 F.3d 1211, 1217 (4th Cir. 1998)); *see also Whitten v. Fred's Inc.*, 601 F. 3d at 241.

22. *See Bland*, 2010 U.S. Dist. LEXIS 18514, at *9-10; *In re Thompson*, 344 B.R. 461 (Bankr. W.D. Va. 2004) (denying motion to reopen and declining to apply judicial estoppel where debtor's failure to disclose cause of action was not in bad faith and where confirmed chapter 13 plan had been successfully completed by the debtor and her discharge entered)

23. *Bland*, 2010 U.S. Dist. LEXIS 18514, at 10, n. 3.

24. *In re Wilmoth*, 412 B.R. at 795 (applying excusable neglect standard to deny motion to amend schedules where debtor failed to disclose the existence of a personal injury claim and later moved to re-open his case to schedule the claim and list it as exempt on Schedule C).

25. *In re Walker*, 198 B.R. 476, 478 (Bankr. E.D. Va. 1996).

26. *Bland*, 2010 U.S. Dist. LEXIS 18514, at *15 (finding that the debtor acted in bad faith when she initially failed to disclose a cause of action and subsequently amended the schedules to list the claim at one dollar, noting "the Court cannot ignore or discount the undisputed fact that [the debtor] valued the claim at such a negligible amount while seeking a bounty in this litigation"). ☒

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT: A Critical, But Often Mishandled, Evidentiary Process

*by Hon. B. Waugh Crigler
United States Magistrate Judge*

In last Winter's edition of this newsletter, I wrote on the techniques for witness examinations. *VSB Litigation News*, Vol. XV, No. 1, Winter 2010. The central theme of the article was that employing good techniques for both direct- and cross-examination make the examiner a more effective and persuasive trial advocate.

Impeachment and rehabilitation are essential examination techniques. It is axiomatic that—whether in state or federal court—no case goes to trial unless there are genuine issues of material fact. Jurors are instructed that they are the sole judges of the facts of the case and the credibility of the witnesses. From the evidence in the case, they must determine what the facts are. In so doing, they must decide who to believe, who not to believe, and how much of any witness's testimony to accept or reject. Verdicts hinge on credibility. Thus, the extent to which a witness has been impeached and/or rehabilitated is vital to any party's case.

Impeachment is both process and evidence at the same time. It often is defined as the process by which an opponent challenges the veracity or credibility of an adversary's evidence, whether that evidence con-

sists of testimony or exhibits. Impeachment may take the form of the presentation of evidence that simply contradicts a witness's testimony or evidence that challenges a witness's character for truthfulness.¹ The bulk of impeachment occurs on cross-examination of an adverse party—or of that party's witness—by confronting the witness either with a record of criminal conviction,² a prior inconsistent verbal or written statement, or prior conduct that is inconsistent with the witness's in-court testimony. Rehabilitation follows impeachment. It is the process by which the proponent of the witness attempts to restore witness's credibility on redirect.

Unfortunately, experience shows that many trial lawyers do not conduct impeachment and rehabilitation effectively. This is not because they lack ability. Rather, it is because they do not employ well-known techniques—techniques that make impeachment and rehabilitation easy and effective.

This article focuses on impeachment by prior inconsistent statement and rehabilitation of a witness who thus has been impeached. It is intended to offer trial advocates more easily understood, simplified, and effective techniques for impeaching by prior inconsistent statement and for rehabilitating that witness.

SOME BASIC PRINCIPLES

The purpose of impeachment by prior statement is to show that at some other time and place and under some other set of circumstances, the witness has said or done something different from what the witness has said or done while testifying in court. This raises hearsay issues. Federal Rule of Evidence 801(a) defines "statement" to be either (1) a written or verbal assertion, or (2) non-verbal conduct that is intended to act as an assertion.³ FRE 801(a). "Hearsay," in turn, is a statement made by a declarant, other than while testifying, that is offered for the truth of the matter asserted. FRE 801(b). But a statement offered against a party opponent—either in an individual or representative capacity—is, by definition, not hearsay and may be offered for the truth of the matter

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asserted. FRE 801(d)(2). Thus, whether or not the evidence relied on to impeach by prior inconsistent statement will also be received for the truth of the matter asserted depends on whether the witness is a party. Otherwise, evidence of a prior inconsistent statement or conduct simply goes to the weight the jury eventually will assign to the witness in arriving at a verdict.

DECIDING WHETHER THERE IS A PRIOR INCONSISTENCY

There can, of course, be no impeachment by prior inconsistent statement unless there is a prior statement—whether sworn or not. While impeachment opportunities usually arise when a witness makes a statement in court that is inconsistent with a prior out-of-court statement, the witness may also create the opportunity simply by offering inconsistent statements during the course of his or her trial testimony.

The first practical hurdle is making sure that the prior statement the examiner wishes to use for impeachment is *actually inconsistent* with the statement the examiner seeks to impeach. This sounds fundamental, but many trial counsel attempt to impeach with a prior statement that is not, in fact, inconsistent with the witness's testimony.

An assessment of whether to impeach always begins with the precise language of the prior statement or conduct. Counsel must avoid, at all costs, the temptation of making the assessment based upon mere summaries or the "essence" of the prior statement or conduct. Rather, counsel must personally review the opposition witness's prior statements and assess them on a word-for-word basis. This is difficult work. But it is only by employing this technique that the examiner equips himself to demonstrate that the witness's testimony is inconsistent with his prior statements. Unfortunately, this process may not resolve all uncertainty about whether the statements

or conduct are inconsistent. Counsel always could ask for a recess to buy time for further consideration. Either way, counsel should be prepared to handle the results of the court's ruling one way or the other.

DECIDING WHETHER TO IMPEACH

The next decision counsel must make is *whether to impeach*. Many practitioners have a difficult time assessing how effective impeachment might be, even if proper techniques for impeachment are employed. Worse, such decisions must often be made in an instant. There is no pat resolution for the dilemma. But there are some considerations to help practitioners decide whether to impeach.

The importance and degree of the inconsistency is the key to the decision. If the inconsistency involves a rather unimportant detail in the case or is only slight, counsel should consider the risk of making it more important than it is worth by conducting an impeachment examination. Moreover, impeaching on an unimportant or slight issue may cause the jury to think that counsel is "beating up" on the witness for little reason. Conversely, it is equally risky not to impeach where the inconsistency involves an important fact or is significant, particularly if the witness is a party. Again, success depends on arduous trial preparation. There is no substitute for knowing the facts revealed by discovery *before* they are heard or understood by you at trial.

A second factor is whether the inconsistency actually harms, helps, or is neutral to your case. Where there is no harm—and certainly where the evidence *helps*—please resist impeachment.

Finally, counsel should assess whether the witness will present *other* evidence that actually advances your case. Counsel should impeach only where he or she wishes to put the credibility of the witness in issue. Thus, if counsel desires to rely on the witness to bolster factual points in his or her case,

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serious consideration should be given to abandoning impeachment. It will appear disingenuous to the jury to argue, on the one hand, that the witness should be believed for the fact you wish established but disbelieved on another fact because of some prior inconsistent statement.

Counsel, having made the determination that the witness has made an inconsistent statement or engaged in inconsistent conduct and the decision to examine, then turns to conduct an impeachment examination.

THE THREE C'S TECHNIQUE

An easy mnemonic for how to conduct impeachment is the three "C's": (1) confirm/commit, (2) credit, and (3) confirmation.

Confirm/Commit. The examiner first must have the witness confirm and commit to the statement the examiner wishes to impeach. To do this, use a *leading* question like, "Now you testified or claimed in response to counsel's question on direct that _____" or "You said earlier in your response to questions by opposing counsel that _____." If that draws an objection from opposing counsel for being repetitious, simply inform the court that you are laying a foundation for impeachment.

Credit. Next, call the witness's attention to the circumstances under which a prior statement was made, taking care to build up the credibility of that prior occasion. The circumstances include, for example, a deposition, the signing of an affidavit, a recorded statement, or an interview. The statement could be at the event in question or sometime later—either option is closer in time to the events giving rise to the case. The statement's reliability will be particularly heightened if the prior statement was made under oath.

Keep in mind that FRE 613(a) sanctions an examination concerning a prior statement without disclosing its contents to the witness. The better practice

is to make a virtue of this necessity.⁴ To that end, it is critical to elicit testimony about the circumstances surrounding the prior statement *before* addressing the substance of the prior statement. For example: "On 00/00/0000, you were examined in my office? At that time, you were under oath and swore to tell the truth, and both the questions to you and your answers

were transcribed? And you provided truthful answers to the questions posed, intending those who heard them to rely on them? That session was closer in time to the events which are involved in this case?" Equally: "Just a little while ago, you were asked by opposing counsel _____? And, you intended all who heard it in this courtroom to rely on your answer?"

The stage is thus set for the next stage of the process.

Confront. Draw the court's, opposing counsel's, and the witness's attention to the precise place in the writing, document, or transcript containing the prior statement. Use an introduction like: "Let the record reflect I am reading from the transcript of X's deposition at page ___, beginning with line _____. Now, Mr./Ms. X, the following question was asked and you gave the following answer under oath: Question _____; Answer _____."

At that time the witness will have the following choices: deny the prior statement, equivocate on whether it was made, or admit that it was made. If the witness denies the prior statement, then the examiner will need to "prove up" the statement by alternative means, e.g., call the court reporter or a witness to the prior statement. If the witness equivocates, then simply force the witness to admit or deny by repeating the same question until the witness settles on the answer, the other side objects, or the court terminates that portion of the examination.

If the witness admits making the prior state-

An easy mnemonic for how to conduct impeachment

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(1) confirm/commit,

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ment *impeachment has occurred* and there need be no further question on the subject. Hold off until summation, at which time counsel can argue its effects—either as a prior inconsistent admission of a party opponent for the truth of the matter asserted or as a challenge to the credibility of a witness not a party.

REHABILITATION

As the name suggests, rehabilitation is the process by which counsel restores the impeached witness's lost credibility. The goal is to give the trier of fact some explanation for the inconsistency in the party's or witness's testimony.

PREPARING A WITNESS FOR POTENTIAL REHABILITATION

While counsel will know whether there have been inconsistencies in a witness's statements or testimony during discovery, it is difficult to predict whether one of counsel's witnesses actually will testify inconsistently during trial. Thus, counsel should consider preparing a witness for the potential of his or her offering evidence inconsistent with prior testimony. Counsel certainly can inform the witness that if impeachment by opposing counsel takes place, then there will be a rehabilitation examination on redirect. Then counsel should cover the lines of questions that will be posed should rehabilitation be necessary.

A NON-LEADING REDIRECT

As with direct examination, rehabilitation should be done with non-leading questions. As mentioned in last Winter's *Litigation News*, an examiner will never lead a witness if each question begins with any one of the following words: Who, What, Why, When, Where and How (the 5 W's) or Tell, Describe, Explain, Show, Relate, Demonstrate, and the like. This form of questioning should be used on redirect for witness rehabilitation. The goal of the redirect is to establish the context for the witness's inconsistent statements so the trier of fact may understand how and why they occurred.

First lay once more the foundational circum-

stances under which the original statement was made. The examiner may garner an objection for being repetitious or cumulative. In response the examiner should inform the court that he or she simply is laying a foundation for rehabilitation. Next, have the witness identify any intervening circumstance that may have caused the testimony to change. Finally, ask the witness to explain why there has been a change in testimony.

With that, rehabilitation is complete. Whether it is effective is left to the ability of the proponent of the witness's evidence to convince the trier of fact in summation of the weight it should accord the witness's testimony.

SUMMARY

Impeachment and rehabilitation are trial techniques with substantive consequences. Impeachment of a party licenses the trier of fact to consider the prior statement for the truth of the matter asserted. And whether a party or non party, successful impeachment—and its counterpart, rehabilitation—affects the weight that the trier of fact will accord the witness's testimony. A litigator's success in this area requires mastery of the above techniques. A favorable verdict may hang in the balance. ☒

1. Fed. R. Evid. 608.
2. Fed. R. Evid. 609.
3. Because the definition of "statement" includes conduct, the term will be used interchangeably in this article.
4. This distinguishes impeachment by prior statement from refreshing a witness's recollection which generally occurs on direct. FRE 612. ☒

The Clergy Confidentiality Privilege in Virginia

by James C. Martin, Esq.

I recently encountered a situation involving an unusual application of the Clergy Confidentiality Privilege, known traditionally as the Priest-Penitent Privilege or Minister Confidentiality Privilege (hereinafter “The Privilege”).¹ The experience both acquainted me with the scope of the privilege, and taught me certain practical limitations to its exercise.

The Privilege originated from the Roman Catholic Church’s Seal of Confession requirement, a strict rule that provided for the excommunication of any priest who revealed information that he gained from the Sacrament of Penance—i.e., what was told to him in confession. It imposed the same penalty on anyone who overheard a confession and revealed its contents.² After the Reformation, the Privilege was apparently applied inconsistently in England. Today it is intact in the Catholic and Orthodox churches, but its application varies widely in other denominations.

The Privilege has evoked interest and fascination in circles outside the law and the church. For instance, in the 1953 Alfred Hitchcock movie *I Confess*, Montgomery Clift played a priest who heard a criminal’s confession admitting to a crime, but was later accused of committing the crime himself.

The modern secular Privilege varies from state to state, and is generally not confined to sacramental confession. Because of the changes brought on by the Reformation—which included hostility to the confessional itself—it is debatable whether the Privilege is

part of the common law.³ In Virginia, however, the Privilege is codified, with modifications, at Va. Code § 19.2-271.3 (criminal cases) and § 8.01-400 (civil cases), giving a minister or priest the right to refuse to divulge or testify concerning information communicated to them by an accused in a confidential manner. The two statutes, civil and criminal, read as follows:

§ 8.01-400. Communications between ministers of religion and persons they counsel or advise.

No regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

(Code 1950, § 8-289.2; 1962, c. 466; 1977, c. 617; 1979, c. 3; 1994, c. 198)

§ 19.2-271.3. Communications between ministers of religion and persons they counsel or advise.

No regular minister, priest, rabbi or accredited practitioner over the age of eighteen years, of any religious organization or denomina-

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tion usually referred to as a church, shall be required in giving testimony as a witness in any criminal action to disclose any information communicated to him by the accused in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, where such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

(1985, c. 570.)

There are two very important points in which Virginia law differs from the traditional Privilege: (1) the Virginia Privilege is held by the witness or minister rather than by the penitent⁴; and (2) in criminal cases it applies only to communications made by the defendant.⁵ Thus, a litigant or an accused who has confided in his pastor may be surprised to know that the pastor has decided to waive the privilege and testify about this communication. Furthermore, a situation may arise in a criminal case where someone *other than* the accused has confessed the crime to a minister, and the minister refuses to testify to this without the penitent's permission.

My problem arose in a criminal context where a client had several very serious felony charges set for a jury at the request of the Commonwealth. I believed that it would be advantageous for my client to speak with his pastor before speaking further with me. Therefore, with the permission of my client, I

tried to arrange a confidential meeting between them in the jail for this purpose.

The Petitioner in the mandamus and prohibition suit I filed was the minister herself, which was necessary since Virginia's law gives the privilege to the

witness rather than to the penitent. Although her church—unlike the Catholic Church—had no written rule on minister confidentiality, its custom was to follow the practice.

I therefore was able to make averments that tracked the language of Code § 19.2-271.3⁶, specifically stating in the Petition that it had “always been a practice, tradition and custom that any information communicated to a minister in a confidential manner, properly entrusted to the minister in his or her professional capacity, being necessary to enable the minister to discharge the functions of his or her office according to the usual course of his or her practice

or discipline, where such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, is deemed to be confidential and not subject to dissemination in court or otherwise.” The minister/petitioner also happened in this case to be the mother of the criminal defendant.⁷

The Respondent in the petitions for mandamus and prohibition was the elected Sheriff of the county in his capacity as a constitutional officer of the Commonwealth of Virginia, which meant that he was in charge both of the jail and of all criminal investigations that his office conducted.

Until several months prior to my petitions, the county jail had allowed contact visits to prisoners

There are two very important points in which Virginia law differs from the traditional Privilege: (1) the Virginia Privilege is held by the witness or minister rather than by the penitent⁴; and (2) in criminal cases it applies only to communications made by the defendant.⁵

from ministers of religion. But this privilege had been rescinded without explanation, and notice was posted near the entrance to the visitation room that ministers would no longer be allowed contact visits.

Even though contact visits were discontinued for ministers, they were still for a time able to avail themselves of non-contact visits to prisoners, which could still be done in a confidential manner by means of intercom-like telephones whereby the visitor talks to the prisoner through a glass window. But several weeks prior to my petitions, new telephones were installed at these windows in which a recorded voice informs the parties that their conversation is being tape-recorded.

I argued that ministers could not reasonably exercise their confidential-communication rights if the state agency charged with investigating the accused was allowed to tape-record such conversations. I also pointed out that in my experience—both as a defense attorney and as a prosecutor—criminal defendants often wish to consult a minister, priest, or other religious professional concerning what would be the morally right choice for them in response to the allegations against them. Allowing them to do so in confidence often benefits both the defense and the Commonwealth. Conversely, recording such conversations impairs a defense attorney's ability to defend the accused. Knowing that a conversation with a religious professional was being recorded, and could be used against the accused, obviously would destroy the value of such communications.

In my particular case, I noted that my client—charged with multiple serious felonies—wished to

consult his minister in the confidential and spiritual manner described in Va. Code § 19.2-271.3, before speaking to me further about the case. The minister had agreed to speak with him in this capacity. But because of the jail's policy regarding the tape-record-

ing of these conversations, I had to advise them *not* to speak with each other concerning the client's case.⁸

Unfortunately, the circuit court sustained the locality's demurrers to the petitions for writs of mandamus and prohibition. It commented that there may be other remedies,⁹ but that as to mandamus and prohibition, the sheriff had discretion to decide the conditions under which prisoners may receive visitors, and that therefore the writs were not available.¹⁰

I had several ministers¹¹ available from the local ministerial alliance who were concerned with the situation and were avail-

able to give whatever testimony might be allowed concerning their desire to have the opportunity to consult confidentially with inmates. But by sustaining the demurrers the trial court deprived me of any realistic opportunity to present them as witnesses.

Given the closeness of the trial date as well as other factors, I did not have the opportunity to try other legal remedies—if, indeed, any existed. Perhaps others who encounter a similar situation could file a declaratory-judgment or some sort of injunction, but I really did not believe these or any other remedies I could think of would avail me under my particular circumstances.

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The practical problem of how to implement the Privilege in jails that record conversations with all non-lawyers remains, at least in this particular jurisdiction.

...

Lawyers thus need to be aware of the need to assure confidentiality for a defendant who wants to talk to his minister or priest during a jail visit.

non-lawyers remains, at least in this particular jurisdiction. Without legislation prohibiting the recording of conversations between jail inmates by ministers of religion, it will continue to be a potential problem. But no such legislation appears to be in the offing. Lawyers thus need to be aware of the need to assure confidentiality for a defendant who wants to talk to his minister or priest during a jail visit.

All practitioners—civil and criminal—should be aware that the Clergy Confidentiality Privilege belongs to the priest, not the penitent. Clients may be surprised to learn that a statement he thought was confidential is actually admissible in Virginia. Clients who wish to confide in a pastor thus should first determine the denomination's rules regarding disclosure of such communications. Virginia law says it is up to the minister. In the unlikely event that an innocent accused finds out that the real culprit has told his pastor about it, the client can only hope that the pastor either chooses to talk or is able to convince the guilty party to allow him to do so.

Too bad Alfred Hitchcock isn't around to show us how Montgomery Clift would have dealt with these problems! ☒

1. See Charles Friend, *The Law of Evidence in Virginia*, § 7-5 ("Priest and Penitent") (6th ed, 2003). Regarding the traditional Privilege and the situation in other states, see Annot., 93 A.L.R.5th 327 ("Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Advisor") by Claudia G. Catalano, J.D. (2001 with 2010 pocket part update); see also *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) and the authorities cited therein.
2. See Code of Canon Law, Canons 983, 984 & 1388.
3. Virginia Code § 1-200 continues the common law of England as law of Virginia as it was in 1607, where it does not contradict any current constitutional or statutory law. So it is, I believe, arguable, that the Privilege survived the Reformation and became part of the common law as handed down to Virginia in 1607 (73 years after Henry VIII's final break with Rome in 1534), but I could find no Virginia authority for this proposition and the out-of-state research was unclear. Since the matter is now covered by statute in Virginia, a finding that the common law privilege still existed would only avail counsel in situations not covered by the statutory provisions,

e.g., in a criminal case where a priest had heard the confession of someone other than the accused and the penitent would not allow the priest to divulge this information.

4. *Nestle v. Commonwealth*, 22 Va.App. 336, 470 S.E.2d 133 (1996).
5. Friend, *id.*
6. It is clear from the statute that the Privilege does not apply to offhand communications which are not made in a confidential context, nor to conversations which are not imparted to a minister in a professional capacity by one who is seeking spiritual counsel. This is consistent with the traditional Privilege, which only applied to sacramental confession.
7. The mother-child relationship had no legal significance, but was significant in a practical way because of the confidence I believed the client would be likely to have in his mother's judgment.
8. The Sheriff had offered to let the minister and prisoner speak (or rather yell) at each other through the glass separating the non-contact room from the visitation cell, without the use of the recording phones. This option was rejected by my client because of the danger that the conversation would be overheard by other visitors in the nearby waiting room.
9. This is a typical result in petitions for writs of mandamus and/or prohibition because of their status as "extraordinary remedies." See, e.g., *Gannon v. State Corp. Comm'n.*, 243 Va. 480, 416 S.E.2d 446 (1992) (mandamus) and *Elliott v. Great Atlantic Management Co., Inc.*, 236 Va. 334, 374 S.E.2d 27 (1988).
10. The judge also commented that he knew the sheriff to be a good Christian man, and that he did not believe he would deny a prisoner any opportunity to speak with his minister. Of course, there was never any question that the jail would be glad to provide the defendant with the opportunity meet with his minister whilst being tape-recorded! Or to yell through the glass to avoid the recording phones, creating the possibility that he would be overheard.
11. All the ministers were Protestants. ☒

EDVA Endorses American College of Trial Lawyers' Code of Conduct

by Robert A. Angle
David N. Anthony
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On November 23, 2010, the United States District Court for the Eastern District of Virginia (“EDVA”) endorsed the American College of Trial Lawyers’ *Code of Pretrial and Trial Conduct*. As Chief Judge Spencer explained in an introduction on the Court’s website, “In recent years, the Judges of this Court have supported the bar in their efforts to foster professional civility and respect for the Judicial Process We believe that the Code reflects the standards of professionalism that are expected in the Eastern District of Virginia.”

The Code of Conduct provides “aspirational, rather than minimal, guidelines for trial lawyers and judges.” The authors pinpoint, among other reasons, “the gradual corrosion of the profession’s traditional aspirations,” including “[h]onor for . . . honesty, respect and courtesy toward litigants, opposing advocates and the court,” and “[a] distaste for meanness, sharp practice, and unnecessarily aggressive behavior” as the bases for the Code’s aspirational standards.

In an effort to restore these lost—or corroded—standards of professional behavior, the Code of Conduct proffers a number of rules intended to foster cooperation between opposing counsel and to prevent behavior that would waste judicial resources before and during trial. These rules in large part reinforce and emphasize analogous provisions in the EDVA’s

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Local Rules and the traditional practices of the court. Below are some highlights:

Pretrial Scheduling—The Code of Conduct provides that opposing counsel “should schedule pretrial events cooperatively,” and that “[a] lawyer receiving a reasonable request to reschedule an event should make a sincere effort to accommodate the request unless the client’s legitimate interests would be adversely affected.” In addition, lawyers should counsel their clients “that cooperation among lawyers on scheduling is an important part of the pretrial process and expected by the court.” These scheduling provisions are similar to the goals embodied by the EDVA’s Local Rule 26(D)(1), which provides that “Counsel are encouraged to agree upon the sequence and timing of the expert disclosures required in Fed. R. Civ. P. 26(a)(2).” The Code of Conduct appears to go a step beyond Local Rule 26(D)(1) to impose a general measure of restraint on scheduling efforts.

Pretrial Conferences—Under the Code, lawyers “should seek to reach agreement with opposing counsel to limit the issues to be addressed before and during trial,” and prior to conferences should determine “the trial judge’s custom and practices in conducting such conferences.” In addition, prior to any pretrial conferences, “a lawyer should ascertain the willingness of the client . . . to participate in alternative dispute resolution.” This provision reinforces the EDVA’s stance encouraging such methods for obtaining settlement as embodied in Local Rule 83.6(a).

Discovery—The Code also states that “[a] lawyer must conduct discovery as a focused, efficient, and principled procedure to gather and preserve evidence in the pursuit of justice. Discourtesy, obfuscation, and gamesmanship have no proper place in this process.” To that end, lawyers should not use discovery to “harass” or “unduly burden” another party or witness; requests should not be interpreted “in a strained or unduly restrictive way;” and objections should be “adequately explained and limited.” Further, lawyers should act cooperatively to attempt to resolve disputes and refrain from seeking court

intervention “unless they have genuinely tried . . . to resolve the dispute through all reasonable avenues of compromise and resolution.” This rule is analogous to the EDVA’s Local Rule 37(E), which states that “Counsel shall confer to decrease, in every way possible the filing of unnecessary discovery motions,” and which requires such conferences as a prerequisite for hearing a discovery motion.

Trial—As would be expected from a Code of Conduct seeking to stem “corrosive” disrespectful behavior, the Code pays particular attention to courtroom decorum at trial: “Proper decorum in the courtroom is not an empty formality. It is indispensable to the pursuit of justice at trial.” The Code also provides several examples of prohibited conduct, such as alluding to irrelevant matters, interrupting or interfering with an examination, improperly circumventing evidentiary rulings, engaging “in acrimonious conversations or exchanges with opposing counsel,” asserting facts not supported by evidence, knowingly mischaracterizing documentary evidence, and proposing “a stipulation in the jury’s presence unless the lawyer knows or has reason to believe the opposing lawyer will accept it.” These provisions provide more concrete standards of behavior to support and enhance the EDVA’s general admonishment in Local Rule 57.4(J) that “[c]ounsel shall at all times conduct and demean themselves with dignity and propriety.”

The numerous similarities between the Code of Conduct and the EDVA’s Local Rules suggest that the overall effect of the Court’s endorsement of the Code will be to flesh out and enhance the more general standards of behavior already in place. For all lawyers practicing in the EDVA, the Code of Conduct may provide citable authority in instances when the respectful and courteous behavior the Code

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contemplates is lacking. For lawyers who are less experienced, the Code of Conduct should serve as a primer that may fill in the blanks the Court’s Local Rules do not address with the same level of detail.

Adhering to the Code of Conduct is especially important—both to the Court and for lawyers—given the ever-increasing complexity of discovery in many cases and the EDVA’s continually swelling dockets. Indeed, the demands of electronic discovery and the sheer volume of documents it generates have created an even greater need for the cooperation amongst counsel exemplified by and the respectful behavior illustrated by the Code of Conduct. Given the realities of modern practice, the EDVA’s endorsement of the Code of Conduct not only sets aspirational goals, it also provides helpful benchmarks against which to measure and help root out sharp practices. ☒

SUMMARY JUDGMENT IN VIRGINIA: ONE SOLUTION TO THE LIMITATIONS OF RULE 3:20 (A RESPONSE TO THE FALL 2010 LITIGATION NEWS)

by Shari L. Klevens, Randy Evans, Alanna Clair

As Gary Bryant noted in the last issue of *Litigation News*, obtaining summary judgment in Virginia can be quite difficult. The rules do not permit summary judgment based on discovery depositions unless all parties consent to it. This article presents one solution to that challenge, showing how the doctrines of judicial notice and collateral estoppel can be combined to create a factual record adequate to support summary judgment.

Use of Judicial Notice

The narrow confines of Virginia Code § 8.01-420 and Supreme Court Rule 3:20 make it difficult for Virginia practitioners to establish an “undisputed” factual record. Practitioners may, however, use judicial notice to avoid litigation of well-known facts. Code §§ 8.01-386 and -388 provide that a court may take judicial notice of official publications or laws of other jurisdictions. Additionally, a “trial court may take judicial notice of those facts that are either (1) so ‘generally known’ within the jurisdiction or (2) so ‘easily ascertainable’ by reference to reliable sources that reasonably informed people in the community would not regard them as reasonably subject to dispute.” *Taylor v. Commonwealth*, 502 S.E.2d 113, 116 (Va. Ct. App. 1998) (citations omitted). Applying

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these principles, courts have recognized that it is appropriate for a “trial court [to take] judicial notice of the records of [an] underlying action.” *Titan America, LLC v. Riverton Inv. Corp.*, 264 Va. 292, 305 (2002).

An important corollary to this power is the rule that Virginia trial courts have discretion in determining the scope of judicial notice: “Judicial notice permits a court to determine the existence of a fact without formal evidence tending to support that fact.” *Scafetta v. Arlington County*, 13 Va. App. 646, 648, 414 S.E.2d 438, 439, *aff’d on rehearing*, 14 Va. App. 834, 425 S.E.2d 807 (1992). To maximize the impact of judicial notice, however, a Virginia practitioner should combine its tenets with the doctrine of collateral estoppel.

Use of Collateral Estoppel

Virginia’s collateral estoppel doctrine “serve[s] the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation.” *Alderman v. Chrysler Corp.*, 480 F. Supp. 600, 604 (E.D. Va. 1979). Collateral estoppel allows a trial court to conclude that there are no factual matters remaining because all legal issues have been resolved. *See, e.g., Alderman*, 480 F. Supp. at 604; *Dorn v. Commonwealth*, 348 S.E.2d 412 (Va. Ct. App. 1986).

To prove that collateral estoppel should apply: (a) the parties to the two proceedings, or their privies, must be the same; (b) the factual issue sought to be litigated must have been litigated in the prior action and must have been essential to the prior judgment; and (c) the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action. *Transduller Ctr., Inc. v. Sharma*, 252 Va. 20, 22-23 (1996). Courts also must examine whether there is “mutuality,” *i.e.*, whether a party to a current litigation would have been bound by the prior litigation if the factual issues in the prior action reached the opposite result. *Id.* at 23; *Nero v. Ferris*, 222 Va.

807, 812 (1981). Litigants have some flexibility in what evidence they use in seeking the application of collateral estoppel, as the doctrine of collateral estoppel does not prevent a party from relying upon or using the same evidence in subsequent proceedings to prove a fact other than that for which it was offered in prior proceeding. *Dorn*, 348 S.E.2d 412.

Although successful application of these factors does require careful drafting and argument, the relevant case law makes it possible to establish collateral estoppel in Virginia state courts. For example, Virginia courts have discretion to determine “that a party’s interest is so identical with another that representation by one party is representation of the other’s legal right.” *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214 (2001) (recognizing that there is “no single fixed definition of privity”) (internal citations omitted). The Virginia Supreme Court has also said that “the mutuality doctrine should not be mechanistically applied.” *Bates v. Devers*, 214 Va. 667, 671 n.7 (1974). Accordingly, the doctrine of collateral estoppel can be a useful tool in the belt of a Virginia litigator.

Practical Applications

By adopting a hybrid approach—combining the concepts of judicial notice and collateral estoppel—Virginia attorneys may improve their chances of recovery on summary judgment. Litigants will often find that there are issues in their cases that have been litigated before by at least one of the parties. By using the principles of judicial notice and collateral estoppel, therefore, a Virginia litigator may succeed in establishing the requisite undisputed factual record to win summary judgment in circumstances where it

otherwise might be elusive.

Litigators can—and should—use the Commonwealth’s permissive collateral estoppel standard to streamline and resolve disputes prior to the investment and expense of trial. Although collateral estoppel can be argued in a wide range of lawsuits, there are certain recurring types of actions where parties regularly rely on the combination of judicial notice and collateral estoppel to avoid an otherwise costly trial. These include: (1) matters that deal with a “case within a case,” such as legal malpractice; (2) cases involving a series of court decisions on legal and/or factual issues, such as any dispute over a contract that has been the subject of other litigation; or (3) any case following a bankruptcy of one of the parties.

This approach is well-suited for legal malpractice actions, where the litigation often stems from an attorney’s previous representation of a client. This “case within a case” scenario lends itself well to the judicial notice/collateral estoppel hybrid summary judgment approach, because issues central to the current action may have been addressed by a prior court. For example, in a previous litigation, the trial judge may have decided issues related to the effectiveness of an agreement drafted by a malpractice defendant. Or an underlying case, its orders, and its pleadings may prove a breach of the malpractice defendant’s duty.

Further, certain aspects of the Virginia collateral estoppel requirements, such as the mutuality doctrine, appear less difficult to prove in matters of legal malpractice. *See, e.g., Weinberger*, 510 F.3d at 495 (holding that mutuality did not bar attorney from estopping malpractice suit because the attorney would have been bound by the underlying ruling with respect to liability in a malpractice action); *Hozie*

By adopting a hybrid approach—combining the concepts of judicial notice and collateral estoppel—Virginia attorneys may improve their chances of recovery on summary judgment.

v. Preston, 493 F. Supp. 42, 44-45 (W.D. Va. 1980) (finding mutuality requirement met where plaintiffs unsuccessfully claimed that their attorney did not act within his express authority in an action to enforce settlement agreement by entering into the agreement).

There are other matters in which the hybrid approach—combining the concepts of judicial notice and collateral estoppel—may be advantageous. Indeed, in this age of financial upheaval and insolvency, parties in litigation may have previously litigated financial matters in bankruptcy or other financial litigation. As such, these types of cases can also be a basis for a judicial notice/collateral estoppel action. Courts have recognized that “[a]ny attempt by the debtor to resurrect a claim against a creditor which could have been brought in a prior bankruptcy proceeding is barred by the doctrine of res judicata.” *Bill Greever Corp. v. Tazewell Nat’l Bank*, 504 S.E.2d 854 (Va. 1998). In addition, issues critical to a subsequent litigation—such as the validity of a contract or the reasonableness of a settlement—may have already been litigated or adjudged in a bankruptcy proceeding involving any of the parties.

Virginia litigators should view their case, its parties, and the subjects of the litigation (such as a deed, contract, or product) critically, with an eye to whether any of the parties or subjects have been involved in prior litigation. This is the first step in the practical application of this theory. Once the litigator has identified such an issue and any prior court decision, order, rule, or other item of which a judge could take judicial notice, the next step is to file a motion alerting

the court to this prior litigation and requesting the court to take judicial notice of the relevant proceeding or fact. This motion should be drafted separately but can be filed concurrently with a motion for summary judgment based on collateral estoppel.

A motion for summary judgment applying this hybrid approach, therefore, should analyze the collateral estoppel factors and their applicability to the prior litigation. In this way, Virginia litigators can avoid the pitfalls of summary judgment. A motion for collateral estoppel does not rely on information obtained in discovery (whether through documents or depositions), but relies exclusively on court records and other items a litigant may permissibly bring before the court.

There is some flexibility, though, in how a party can use this approach. A separate motion requesting a court to take judicial notice of some prior proceeding or fact at issue can be used in a wide range of cases. Because this combination is uncommonly seen in Virginia courts, it is not thoroughly tested. But litigants faced with the costs and burdens of proceeding to trial in a case in which they have the law and facts on their side may benefit from it. ☐

Recent Civil Cases from the Supreme Court of Virginia

MARCH SESSION 2011

Civil Procedure

Case: *AME Financial Corp. v. Kiritsis, 091244*
(3/4/2011)

Author: Goodwyn

Lower Ct.: Chesterfield County (Rockwell, Frederick G., III)

Disposition: Affirmed

Facts: Plaintiffs obtained a mortgage from a Georgia mortgage company. After closing, the mortgage company wanted plaintiffs to sign a new promissory note, which had less favorable terms. Plaintiffs refused to do so. A mortgage-company employee then signed his name to the note as plaintiffs' attorney-in-fact. He had no authority to do this. The company sold the note to a third party.

Plaintiffs brought an action against the two companies and obtained service over the Georgia mortgage company. Plaintiffs' counsel told one of its executives that the company would have to retain Virginia counsel to represent the corporation. But the Georgia company did not hire counsel, and instead filed a pro se answer.

Plaintiffs filed a motion to strike the answer and a motion for default judgment. The mortgage company failed to attend the properly noticed hearing. The trial court struck the answer and found the company in default. Six weeks later, the company asked the trial court to vacate the default, which the trial court refused to do.

Ruling: The SCOV affirmed.

It noted that, under Rule 3:19(b), a trial court may vacate a default for "good cause." Although the rule does not define "good cause," the court cited various factors that might show good cause, including the lack of prejudice to the opposing party, the good faith of the moving party, the promptness of the moving party, the existence of a meritorious claim or substantial defense, the existence of legitimate extenuating factors, and the belief that the suit has been abandoned. This list is neither exhaustive nor determinative--it just shows the broad scope of a trial court's discretion in determining whether there was good cause.

The SCOV also noted that Rule 3:19(b) only says the trial court "may," upon good cause shown, grant leave to file a late pleading. This implies that even if there is good cause, the trial court may in its discretion refuse to allow late pleading. Ultimately, the matter rests in the discretion of the trial court.

Citing, *inter alia*, the defendant's delay in finding counsel and

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

requesting leave to file a late pleading, the SCOV held that the trial court did not abuse its discretion in refusing to allow late pleading.

The SCOV also rejected the argument that the trial court wrongly refused to consider the mortgage-company's demurrer. It conceded that failure to state a claim will invalidate a default judgment. But it held that the trial court specifically ruled that the plaintiffs' claims against it were sufficiently pled, so the rule did not apply.

Key Holding(s):

- Under Rule 3:19(b), a trial court may--but need not--allow late pleading upon good cause shown.
- The trial court enjoys broad discretion in determining whether good cause for late pleading has been shown.
- A default judgment may be invalidated where the complaint fails to state a claim.



Real Property

Case: *Fairfax County Redevelopment and Housing Authority v. Rieske, 092486* (3/4/2011)

Author: Mims

Lower Ct.: Fairfax County (Smith, Dennis J.)

Disposition: Affirmed

Facts: Fairfax county conveyed property to a married couple, subject to the county's right to repurchase at a specified price upon the grantees' death or decision to sell. The deed stated that the restriction was a covenant that ran with the land.

A trustee under a deed of trust foreclosed on it and sold the property to third parties. Those third parties then sold it to another buyer.

The county brought a declaratory judgment action, asking the circuit court to declare that the transfer effected by the last sale was "void ab initio." The trial court refused, holding that the appropriate way for the county to enforce the right of first refusal was to bring an action of ejectment to re-enter the property.

Ruling: The SCOV affirmed. It distinguished other cases in which the failure to honor a right of first refusal voided the transaction. In those cases, the purchasers and sellers were aware of the right and colluded to avoid it. Here, however, there was no evidence that the ultimate purchasers had any

actual knowledge of the right of first refusal.

The SCOV also distinguished the line of cases voiding trustee sales. The transaction at issue in this case--between the purchasers at the trustee's sale and a subsequent third-party buyer--was *not* itself a trustee sale. It was a conveyance between an owner of a fee simple interest and another party.

Finally, the SCOV distinguished two other cases in which the court had ordered specific performance of an agreement granting a right of first refusal. There, unlike the present case, the party against whom specific performance was sought retained title to the property.

Key Holding(s):

- A conveyance that ignores a third party's right of first refusal is not void ab initio where the purchaser lacks actual knowledge of the right of first refusal.
- The appropriate claim for an unknowing violation of a right of first refusal is an ejectment action brought by the rightholder against the titleholder to re-enter the parcel.
- A court cannot order a party to specifically perform an agreement granting a right of first refusal where that party no longer retains title to the property.



Civil Procedure

Case: *Johnson v. Woodard*, 092323 (3/4/2011)

Author: Millette

Lower Ct.: Gloucester County (Parker, Jeffrey W.)

Disposition: Reversed

Facts: Forty county citizens petitioned the circuit court to remove four members of the county board of supervisors. The trial court issued a rule to show cause under Code § 24.2-235 and appointed a special prosecutor to litigate the action to remove the members.

The special prosecutor moved to nonsuit the action. The trial court order granting the nonsuit specifically retained jurisdiction to adjudicate sanctions. More than 21 days after the court entered the nonsuit order, it entered an order sanctioning the citizens for misusing the judicial system and for violating § 8.01-271.1.

Ruling: On appeal, the SCOV reversed.

As an initial matter, the SCOV held that the trial court had jurisdiction over the sanctions issue. Citing *Williamsburg Peking Corp. v. Kong*, it held that even after issuing a nonsuit order, a trial court could rule on a sanctions motion. Furthermore, in the case before it, the nonsuit order itself specifically reserved jurisdiction to decide sanctions. So the passage of 21 days from the nonsuit did not deprive the circuit court of jurisdiction.

On the merits of the sanctions issue, however, the SCOV held that only "parties" and their counsel could be sanctioned under § 8.01-271.1. Citizens who present a petition to remove members of a board of supervisors are not "parties" to such an action. Their role was akin to that of a crime victim initiating a criminal prosecution. It is the Commonwealth, not the citizen petitioners, who is the true party plaintiff in such an action. Because the citizens were not parties to the removal action, the trial court lacked authority to sanction them under § 8.01-271.1.

Key Holding(s):

- A trial court retains jurisdiction to assess sanctions after entering a nonsuit order where the nonsuit order specifically reserves jurisdiction to decide the matter.
- Under § 8.01-271.1, a trial court can only assess sanctions against parties and their counsel.
- Citizens who commence a proceeding to remove a member of a county board of supervisors pursuant to § 24.2-233 are not "parties" to an action and so may not be sanctioned under § 8.01-271.1 for their conduct in the litigation. The true party plaintiff in a removal proceeding is the Commonwealth.



Negligence and Contract

Case: *Kaltman v. All-American Pest Control, Inc.*, 092541 (3/4/2011)

Author: Koontz

Lower Ct.: Fairfax County (Williams, Marcus D.)

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

Facts: A pest control company employed an unlicensed pesticide technician who failed to properly clean his pesticide equipment before treating plaintiffs' home. As a result, the employee sprayed a foul-smelling commercial pesticide--not licensed for residential use--in the plaintiffs' home. The employee also falsified the work order, stating that he had used chemicals different from what he actually used.

Plaintiffs contended that this was negligence. And they also claimed that the conduct violated Va. Code § 3.2-3939(B), which makes it unlawful to use a pesticide in a manner inconsistent with its labeling. So they asserted claims against the company and its employee for negligence, willful and wanton negligence, and negligence per se.

The defendants demurred to these claims, arguing that the parties' relationship was governed by the contract between them. The trial court sustained the defendants' demurrers to these claims.

Ruling: The SCOV reversed in part and affirmed in part.

It reversed the demurrer to the negligence claim, noting that a

single act or occurrence can support causes of action both for breach of contract and for breach of a tort duty. To determine whether a particular claim sounds in contract or tort, one needs to look at the *source* of the duty alleged to have been breached. An allegation that the defendant negligently performed duties that he assumed only under a contract gives rise to a contract claim. But an allegation of negligent performance of general tort duties gives rise to a tort claim--*even if the negligence occurs in the context of performing a contract.*

Although the parties in this case were in a contractual relationship, the duties of care that the defendants allegedly breached were ones that arose independently of any contractual relationship between the parties. They “breached common law and statutory duties independent of the company’s contractual duty to control pests.” Thus, the SCOV reversed the trial court’s decision sustaining the demurrer to the negligence claim.

The SCOV affirmed the ruling sustaining the demurrer to the willful and wanton negligence claim, however. It held that such a claim requires a showing that the negligent action was “taken in conscious disregard of another’s rights, or with reckless indifference to consequences that the defendant is aware, from his knowledge of existing circumstances and conditions, would probably result from his conduct and cause injury to another.” As plaintiffs had not alleged any fact showing that the pest-control company or its employee knew that their actions likely would cause injuries to anyone, the trial court properly sustained the demurrer to that claim.

Finally, the SCOV held that the plaintiffs had stated a claim for negligence per se. Code § 3.2-3939(B) was enacted for the public safety, plaintiffs were among the persons for whose benefit the statute was enacted, and the harm was the sort against which the statute was designed to protect.

Key Holding(s):

- A single act can support causes of action for both breach of contract and breach of a tort duty of care.
- To determine whether a claim sounds in tort or contract, one must determine whether the duty alleged to have been breached arose from a contract between the parties or whether, instead, it was a duty of care imposed by common law or statutes.
- A party bringing a claim for willful and wanton negligence must establish that the wrongful acts were performed with conscious disregard of the risks or with reckless indifference to the consequences that were likely to result.
- Va. Code § 3.2-3939(B), which forbids using a pesticide in a manner inconsistent with its labelling, is a public safety statute that can give rise to a claim for negligence per se.



Land Use

Case: *Lee v. City of Norfolk, 092385 (3/4/2011)*

Author: Mims

Lower Ct.: City of Norfolk (Fulton, Junius, III)

Disposition: Affirmed

Facts: The owner of a nonconforming structure undertook repairs after a fire. While the repairs were ongoing, a city inspector examined the building and revoked the building permit, claiming that it violated the 50% rule (i.e., that repairs to non-conforming structure must not exceed 50% of total value). The city then sent the owner a letter declaring that the structure was unsafe, was a public nuisance, and must be demolished. The letter notified the owner of his appeal rights.

The owner, his attorney, and his engineers negotiated with the city, and were able to put off demolition for a while. But ultimately the city found that the owner’s efforts to correct the conditions were inadequate. 107 days after the initial letter, the city demolished the building under the emergency provisions of the Uniform Statewide Building Code. During the 107 days between the letter and the demolition, the owner had not exercised any appeal rights.

The owner brought a due-process action against the city, claiming that the demolition violated his state and federal due-process rights. He also brought inverse-condemnation and common-law property-damage counts. The city demurred to the due-process claim, arguing that the availability of a state inverse-condemnation procedure vitiated any claim. It filed pleas in bar to the state-law claims, arguing that the owner’s failure to avail himself of appeal processes barred those causes of action.

The trial court sustained the demurrer on the due process claims, and granted the plea in bar on the inverse-condemnation and property-damage claims.

Ruling: The SCOV affirmed.

The SCOV held that there was no due process violation because the plaintiff had not been deprived of any property--the structure had been determined to be a nuisance and the plaintiff had not challenged that determination in any appeal. The plaintiff plainly received the notice. After getting it, he retained counsel and consulted with the city about how to remedy the problems that it identified. Although there may have been irregularities in the notice, the plaintiff had not detrimentally relied on those irregularities. Having received the notice, and having not appealed the finding of a nuisance, the plaintiff “acquiesced in that determination.” So not only was his procedural due process argument without merit, but so too was the appeal from the ruling sustaining the plea in bar to the inverse condemnation claim.

The SCOV found that the property-damage claim was barred by sovereign immunity. Sovereign immunity protects municipalities from tort liability for exercising governmental functions, including police powers. In demolishing the building, the city was abating a public nuisance. Abatement of public

nuisances is an exercise of the police power. So the plaintiff's claim against the city was barred by sovereign immunity.

Key Holding(s):

- A property owner's failure to appeal a municipality's finding that his building was a public nuisance constitutes acquiescence in the nuisance finding and bars the owner from later bringing an inverse condemnation action based on the city's demolition of the building.
- A municipality is immune from liability for its actions in abating a public nuisance, as this constitutes an exercise of the police power, to which sovereign immunity attaches.



JANUARY SESSION 2011

Civil Procedure

Case: *Addison v. Jurgelsky, 092361 (1/13/2011)*

Author: Mims

Lower Ct.: Tazewell County (Johnson, Patrick)

Disposition: Reversed

Facts: A timely wrongful-death case was brought by one of two co-administrators. After the statute of limitations expired, the complaint was amended to add the other co-administrator. The defendants filed pleas of the statute-of-limitations, urging that (1) a single co-administrator lacks standing to commence a wrongful-death claim, and (2) an amendment to add a necessary party is too late if it comes after the expiration of the limitations period.

The trial court sustained the pleas and dismissed the amended complaint.

Ruling: The SCOV reversed.

It agreed that a single co-administrator could not solely prosecute a wrongful death claim. But it held that this did not mean that a single co-administrator lacked standing. Rather, it meant that the other co-administrator was a necessary party.

The SCOV held that, under Code Section 8.01-5(A), a necessary party plaintiff could be added at any time, as justice requires. And it distinguished earlier cases holding that an action time-barred as to one necessary party is time-barred in its entirety. Those cases--*Mendenhall v. Douglas L. Cooper, Inc.*, and *Ahari v. Morrison*--all involved necessary parties who were defendants. In the case before it, however, the necessary party was a plaintiff. Adding a plaintiff does not raise the

same statute-of-limitations policy issues as adding a defendant.

Key Holding(s):

- All co-administrators must bring a wrongful-death action jointly.
- A single co-administrator has standing to sue, though he may not do so solely.
- An absent co-administrator may be joined as a party plaintiff to a wrongful-death claim even after the original limitations period has expired.



Civil Procedure

Case: *CNH America LLC v. Smith, 091991 (1/13/2011)*

Author: Lemons

Lower Ct.: Smyth County (Sergent, Birg E. (Judge Designate))

Disposition: Reversed

Facts: Plaintiff, a farmer, was injured by the bursting of a hydraulic hose that connected a tractor to a disc mower. The plaintiff alleged that the hose was defective, causing it to coil, and that the mower was defectively designed, having pinch points that could entrap and puncture a coiled hose. He claimed that the combination of those two defects led the hose to burst, causing his injury.

To establish that the hose was defective, the plaintiff relied on the testimony of an engineer who had previously worked for hose manufacturers. The engineer inspected the hose, but could see nothing visibly wrong. He admitted that he had not performed the tests necessary to determine whether the hose was defective. But he opined that the hose must have been defective because it had failed so early.

To establish that the mower's design was defective, the plaintiff relied on the testimony of another engineer. Although the witness was familiar with hydraulic hoses, this was in the context of mining machinery, not farm equipment. The engineer suggested different designs for the mower, but admitted that he did not know how those changes would affect the overall safety and operability of the mower.

The trial court denied the manufacturer's motion to exclude these experts, and denied the manufacturer's motion to strike their testimony at trial. The jury returned a \$1.75 million verdict for the plaintiff.

Ruling: The SCOV reversed, finding that this expert testimony was inappropriate.

First, it found that the hose expert's opinion that the hose was defective lacked a factual foundation. The expert failed to perform the tests that would have established a defect, and instead based his testimony solely on the fact that the hose had failed early in its life-cycle. The SCOV held that this

evidence was insufficient to support the opinion about the alleged defect.

Second, the SCOV found that the machinery expert was not qualified to testify about the design and operation of farm equipment. He was an expert in mining equipment, not disc mowers. And he admitted that he was unfamiliar with the hydraulic system of the mower in question. So his opinions about the design of the mower were not supported by the facts and fell outside his area of expertise.

Key Holding(s):

- An expert opinion is inadmissible if it rests on an insufficient factual basis or fails to take into account relevant variables.
- An expert opinion that a product must have been defective because it failed so early in its expected life span is inadmissible where the expert failed to perform the tests that could have determined whether the product was, in fact, defective.
- The fact that a person is a qualified expert in one field does not necessarily make him an expert in another field, even if the two fields are closely related.



Constitutional Law

Case: *DiGiacinto v. Rector and Visitors of George Mason Univ.*, 091934 (1/13/2011)

Author: Goodwyn

Lower Ct.: Fairfax County (McWeeny, Michael P.)

Disposition: Affirmed

Facts: GMU promulgated a regulation that prohibited carrying and possessing weapons in GMU facilities or at GMU events. The regulation did not prohibit possession of weapons on GMU's grounds, however, if the person carrying them did not enter GMU facilities or attend GMU events.

Plaintiff was a member of the general public who used GMU's library. He argued that the GMU regulation violated the Second Amendment and Article I, Section 13 of the Virginia Constitution, both of which protect the right to bear arms. The trial court, however, found that the regulation did not violate those constitutional provisions.

Plaintiff also challenged the GMU regulation on procedural grounds, claiming that it violated the "uniformity" provision of Article I, Section 14 of the Virginia Constitution. The trial court disagreed, holding that sovereign immunity barred this claim and that, in any event, the regulation did not violate the uniformity provision.

Ruling: The SCOV affirmed.

The SCOV recounted the historical origins of Article I, Section 13, of the Virginia Constitution, concluding that "the protec-

tion of the right to bear arms expressed in Article I, Section 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution."

Applying the U.S. S. Ct.'s recent *Heller* decision, the SCOV stated that "the right to carry a firearm is not unlimited" and that the *Heller* decision did not affect prohibitions on the carrying of firearms in "sensitive places such as schools and government buildings."

The SCOV then reasoned that "[T]he fact that GMU is a school and that its buildings are owned by the government indicates that GMU is a 'sensitive place.'" Furthermore, the regulation was not a blanket ban. It allowed persons to possess and carry arms on campus, provided they did not enter GMU facilities or attend GMU events. Accordingly, the SCOV found that the regulation was constitutional.

On the alternate claim under the uniformity provision, the SCOV stated that sovereign immunity did *not* apply because the state constitutional provision in question was self-executing. On the merits, however, the SCOV held that the uniform-government provision did not apply because, in enacting the regulation, GMU was not attempting to create a separate government. To the contrary, it was exercising the powers that the General Assembly conferred on it under Code § 23-91.24.

Key Holding(s):

- The protection of the right to bear arms in Article I, Section 13 of the Virginia Constitution is coextensive with the right under the Second Amendment to the United States Constitution.
- A university is a "sensitive" place where the government lawfully can restrict the right to bear arms.
- A university does not violate the uniform-government provision in Article I, Section 14 of the Virginia Constitution when it promulgates a regulation pursuant to authority conferred on it by the General Assembly.



Real Property

Case: *Harkleroad v. Linkous*, 092299 (1/13/2011)

Author: Koontz

Lower Ct.: City of Bristol (Kirksey, Larry B.)

Disposition: Affirmed

Facts: Transferor had an undivided one-half interest in

property, and a life estate to the remaining half. But she purported to convey it in fee simple to Transferee. The date the Transferor died--and, thus, the date the life estate lapsed--was unknown.

The Transferee occupied the property to the exclusion of all others and without challenge from 1982 to 1991.

The property was sold for delinquent taxes in 1991. (This extinguished the life-estate reserved by Transferor, if it had not already been extinguished.) The purchasers at tax sale ("Purchasers") occupied property to exclusion of all others from 1991 to 2007. Purchasers were unaware of the existence of other co-tenants.

In 2007, cotenants representing the remainder interest in the original undivided one-half interest ("50% Remaindermen") asserted a claim to property.

The Purchasers asserted that they had obtained full title to the property through adverse possession.

The 50% Remaindermen disagreed, arguing that possession of property by a party with a one-half interest--even though the party was without notice of those other interests and believed itself to own that property in fee simple--is not "hostile" for purposes of adverse possession.

Trial court disagreed, found adverse possession, and entered judgment for Purchasers.

Ruling: The SCOV affirmed. It found that Purchasers had established title by adverse possession because their possession had ousted the other co-tenants.

The SCOV conceded that there was a presumption against ouster where two parties acquire property as co-tenants. But it held that this presumption does not apply when a stranger to the original transaction acquires property through a transaction in which one of the co-tenants purports to convey the entire property. So it *was* an ouster when Purchasers acquired property, purportedly in fee simple, and then occupied it to exclusion of the rights of the 50% Remaindermen. This was so, even if (1) Purchasers were unaware of rights of others, and (2) Purchasers never gave notice to the 50% Remaindermen of Purchasers' intent to occupy property exclusively. As more than 15 years elapsed between 1991 and 2007, the Purchasers had acquired title through adverse possession.

Key Holding(s):

- A transferee who (1) acquires a partial interest in property in a transaction in which the transferor purports to transfer the entire property, and (2) exclusively occupies the property thereafter, has effected an "ouster" that starts the running of the 15-year adverse-possession period, regardless of whether the transferee knows of the interests of other persons in the property.



Defamation

Case: *Isle of Wight County v. Nogiec, 091693, 091731 (1/13/2011)*

Author: Millette

Lower Ct.: Isle of Wight (Shadrick, Thomas S.)

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

Facts: Former director of county parks and recreation department was put on administrative leave and chose early retirement. The severance agreement included a provision barring the county from disparaging him.

After a flood that inundated the county museum, an assistant county administrator told the board of supervisors that the former director had suppressed facts showing that county museum was prone to flooding. The administrator also said that the director's actions bordered on negligence.

The former director brought a contract claim against the county for breach of the severance agreement and against the county administrator for defamation.

The case went to trial on both claims. The former director, however, had no evidence of any contract damages other than his own testimony about (1) the costs incurred by choosing early retirement and (2) his embarrassment and humiliation after the remark.

At trial, the county and the assistant administrator moved to strike. The county cited both the absence of damages evidence on the contract claim. The county administrator claimed that the statements to the board of supervisors were absolutely privileged. The trial court rejected both arguments. The jury returned a verdict for \$45,000 on the contract claim and \$150,000 (\$50,000 actual damages and \$100,000 punitive damages) on the defamation claim. The trial court entered judgment on the verdict.

Ruling: The SCOV reversed the judgment on the contract claim. It held that the costs of early retirement were irrelevant, as they were unrelated to the allegedly wrongful act. And it held that the emotional-distress evidence was insufficient to support the contract claim because, absent an accompanying tort, emotional-distress damages are not available in a contract action. Plaintiff argued that the rule should not apply where the breach of the contract provision at issue is likely to cause emotional upset. But the SCOV refused to carve out an exception to the rule that emotional-distress damages are unavailable in contract claims.

The SCOV affirmed the judgment on the defamation claim, however. It found that absolute immunity for legislative proceedings did not apply because the board-of-supervisors meeting where the assistant administrator uttered the statement was an supervisory/administrative meeting of the board of supervisors. It was not meeting that concerned the creation of legislation. Absolute immunity is an affirmative defense, and the defendant presented no evidence that the board of supervisors meeting was legislative in character. Although the statements still were covered by a qualified privilege, there was sufficient

evidence of malice to overcome that privilege.

Key Holding(s):

- Without an accompanying tort, damages for humiliation or injury to feelings are not recoverable in a contract action.
- An absolute privilege attaches to statements made in the course of legislative proceedings.
- Although county boards of supervisors are legislative bodies, they also act in supervisory and administrative capacities. Statements made during a board of supervisors meeting regarding supervisory/administrative matters does not qualify for the absolute privilege that attaches to legislative proceedings.



Civil Procedure

Case: *Jenkins v. Mehrah, 092272 (1/13/2011)*

Author: Kinser

Lower Ct.: Fairfax County (Williams, Marcus D.)

Disposition: Dismissed

Facts: County official obtained a consent order requiring landowner to correct drainage on property. The owner failed to do so, so the official moved for a rule to show cause why the landowner should not be held in contempt. The trial court issued the rule, but after a hearing on the matter dismissed it because it found that the violation of the court order was not willful or contemptuous.

The county official appealed this ruling to the SCOV. The SCOV granted the appeal, but sua sponte requested that the parties brief whether the SCOV had jurisdiction to entertain it.

Ruling: The SCOV held that it lacked jurisdiction to hear the appeal.

As a threshold matter, the court noted that the common-law rule was that there was no appeal whatsoever from a trial court's contempt ruling. So the SCOV had jurisdiction only if the General Assembly clearly evidenced an intent to modify this common-law rule.

The statutes at issue did not clearly manifest an intent to modify the common-law rule. Although Code Section 19.2-318 allows an appeal to the Court of Appeals "[f]rom a judgment for any civil contempt," it was silent as to appeals from a ruling refusing to hold a party in contempt. The history of that section evinced no intent to give the Court of Appeals appellate jurisdiction over rulings refusing to find a party in civil contempt.

Nor did § 8.01-670(A)(3), which gives the SCOV jurisdiction over final judgments, confer jurisdiction over such refusals. This section does not plainly manifest any intent to abrogate the common-law rule forbidding appeals from trial court decisions

regarding civil contempt. And interpreting it to confer jurisdiction over refusals to issue a contempt ruling would have anomalous results--among other things, appeals of orders finding a party in contempt would go to the Court of Appeals (per § 19.2-318) but appeals of orders refusing to hold a party in contempt would go to the SCOV (under § 8.01-670(A)(3)).

Key Holding(s):

- Neither the SCOV nor the Court of Appeals has jurisdiction over appeals from a trial court's refusal to find a party in civil contempt.



Malicious Prosecution

Case: *O'Connor v. Tice, 091941 (1/13/2011)*

Author: Koontz

Lower Ct.: Northumberland County (Grissom, E. Preston, Jr.)

Disposition: Affirmed

Facts: Painters were hired by building Owners to paint commercial building. Owners paid a deposit. After Painters commenced work, a disagreement arose and Painters abandoned the project, keeping the deposit.

Owners filed a warrant in debt in GDC, but could not obtain service on Painters. The judge recommended that Owners go to sheriff's office to get the correct address. Owners told Deputy their story, and Deputy told them that Painters may have committed construction fraud. Deputy advised Owners that, for criminal charges to be brought, they must send Painters a "15-day letter" demanding return of deposit.

Owners sent 15-day letter demanding return of deposit and threatening a criminal action if they did not receive it. Painters' attorney agreed to accept service of warrant in debt. But instead of filing civil claim, Owners returned to sheriff's office and got Deputy to bring criminal charges against the owner of the painting business. Criminal charges were dismissed at preliminary-hearing stage.

The owner of the painting business brought a malicious-prosecution action against Owners and obtained a \$200,000 verdict. The trial court denied the Owners' motion for judgment notwithstanding the verdict and entered judgment against them.

Ruling: The SCOV affirmed. It stated that a malicious prosecution claim must show that the prosecution was (1) malicious, (2) instituted by or with the cooperation of defendants, (3) without probable cause, and (4) terminated unfavorably to defendants.

The Owners claimed that the facts were insufficient to find that they had "initiated" the prosecution or that the charges were without probable cause. The SCOV rejected these arguments.

First, it held that, by sending a letter threatening prosecution unless the Painters paid the sums demanded in the warrant in

debt, the Owners “clearly availed themselves of a criminal process in order to collect a civil debt.” It also held that they “unmistakably authorized” the Deputy to proceed criminally. So the jury could have found that the Owners instituted the prosecution.

Second, it held that there was no probable cause, which in the malicious-prosecution context is defined as “knowledge of such facts and circumstances to raise the belief in a reasonable mind, acting on those facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected.” This is determined at the time the defendant initiated criminal charges. Although Owner pointed out that law enforcement officials had opined that there was construction fraud, this was based solely on facts the Owners provided, and so did not insulate them from liability. Among other things, Owners neglected to mention that they were in touch with Painters’ attorney, who characterized the dispute as civil in nature. As Plaintiff had presented evidence that one of the Owners had agreed with the Painters’ proposal to keep the deposit, the jury could have concluded that Owners did not have probable cause to believe construction fraud occurred.

Key Holding(s):

- A defendant who (1) has invoked criminal process to collect a civil debt and (2) has authorized a law enforcement officer to prosecute, has “initiated” prosecution for purposes of the law of malicious prosecution.
- A defendant cannot defend itself in a malicious prosecution action by pointing to law-enforcement officer’s conclusions that criminal conduct had occurred where the law enforcement officers’ conclusions are themselves based upon the incomplete or inaccurate information provided by the defendant.



Estates and Trusts

Case: *Parish v. Parish, 092279 (1/13/2011)*

Author: Mims

Lower Ct.: City of Norfolk (Thomas, Norman A.)

Disposition: Affirmed

Facts: Decedent was victim of brain injury and had recovered \$3.5 million in a legal action. He resided at a nursing home, had one son, and was under the conservatorship of his brother and his sister-in-law.

The brother and sister-in-law helped the decedent to prepare a will, which left the brother 25%, the sister-in-law 25%, the son 25%, and remaining family members 25%. The son was not told of this will.

There was evidence that the decedent was “not all there” at the time he executed the will—he was forgetful, mistook his son for his brother, and was confused about the value of money. But

both the paralegal who assisted decedent in drafting the will and the witness to the will said that he knew what he was doing. Various other persons, too, testified that the decedent was lucid around the time he signed the will.

After decedent’s death, the decedent’s son challenged the will on the grounds that the decedent lacked testamentary capacity and was subjected to undue influence by the brother and sister-in-law.

The trial court found that, notwithstanding the fact that the decedent was under a conservatorship at the time of executing the will, he had testamentary capacity and was not subject to undue influence by his brother and sister-in-law.

Ruling: The SCOV affirmed.

To begin, it found that there was sufficient evidence that the decedent had testamentary capacity. The mere fact that decedent was under a conservatorship at the time he drafted his will did not establish a presumption that he lacked testamentary capacity. The SCOV then went through a burden-shifting analysis. First, it found that the fact that the will complied with all the statutory requirements gave rise to a rebuttable presumption that the decedent had testamentary capacity. Second, the SCOV assumed, without deciding, that the son’s evidence was sufficient to overcome this presumption and to establish a countering presumption of incapacity. Third, the SCOV held that there was sufficient evidence that the decedent was capable of understanding, at the time he executed his will, the extent of his property and to persons to whom he was giving it. So even if the countervailing presumption of incapacity had attached, it was sufficiently rebutted.

The SCOV also rejected the undue-influence argument. It held that in a case involving a decedent with “weakness of mind,” a presumption of undue influence arises where (1) the decedent names as a beneficiary a person with whom the testator stood in a relationship of confidence or dependence, and (2) the decedent, prior to the weakness of mind, either expressed no intent to benefit that person or expressed no opinion on the subject whatsoever. Although these conditions were met, the evidence was sufficient to rebut this presumption of undue influence because there was strong evidence that the decedent, though brain-damaged, “was a stubborn man . . . if he did not want to do something, he damn well knew how to resist.”

Key Holding(s):

- The mere fact that a testator is under a conservatorship does not create a presumption that he lacks testamentary capacity.



Products Liability

Case: *Royal Indemn. Co. v. Tyco Fire Prods., 091993,*

092567 (1/13/2011)

Author: Millette**Lower Ct.:** Prince William County (Johnston, Craig D.)**Disposition:** Aff'd in Part, Rev'd in Part

Facts: Exterior sidewall sprinkler heads failed to activate in a fire, causing the fire spread to other parts of the building and to adjoining buildings. The sprinkler heads were manufactured and installed before June 1997. The fire occurred in February 2003.

The plaintiff brought a products-liability action against the manufacturer and installer of the sprinklers, asserting claims for negligent design, negligent manufacture, failure to warn, and breach of warranty.

The trial court held that the negligence claims were barred by the statute of repose, § 8.01-250, because they were "ordinary building materials." It held that the warranty claim against the manufacturer was barred by the UCC's four-year limitations period.

Ruling: On appeal, the SCOV affirmed in part and reversed in part.

The plaintiff claimed that § 8.01-250 did not bar the negligence claim because the case fell under the statutory exception that allowed claims against "the manufacturer or supplier of any equipment" installed in the structure. The SCOV analyzed both the "equipment" and the "manufacturer or supplier" prongs of this exception.

To begin, it found that the sprinklers were "equipment," not ordinary building materials. The sprinkler heads were "fully-assembled" and "self-contained" mechanical devices. They were not "structural components" or other "functional components" in the construction of a building. They served an "adjunct function." They were "subject to close quality control at the factory." And they were potentially encompassed by a manufacturer's warranty. So they did not qualify as "ordinary building materials" as developed in the SCOV's line of cases on Code § 8.01-250.

To shelter under § 8.01-250's exception, however, the plaintiff also needed to show that each defendant was a "manufacturer or supplier" of the sprinklers. The court held that the installer of the sprinklers did not fall under this category. Accordingly, the exception did not apply to the installer, and the statute of repose barred plaintiff's claim against it. The manufacturer, on the other hand, squarely fell within the exception. So the statute of repose did *not* bar the negligence claim against it.

On the warranty claim, the court noted that such claims were governed by a four-year limitations period under § 8.2-725. And in the absence of warranty language to the contrary, breach-of-warranty claims accrue when the defendant delivers the product. As more than four years had elapsed since delivery, the plaintiff's claim was time-barred unless there was an express warranty that extended the period.

The SCOV rejected plaintiff's argument that a "technical data

sheet" accompanying the sprinkler heads, which described their proper functioning, was equivalent to a representation that the sprinkler heads would indefinitely perform as described. It noted that the product descriptions in the data sheets did not satisfy § 8.2-313's requirements for an express warranty, as there was no indication that the supplemental information was "part of the basis of the bargain."

Key Holding(s):

- Under the SCOV's "ordinary building materials" line of cases, sprinklers are not "equipment" for purposes of the exception to the statute of repose.
- A sprinkler installer is not a "manufacturer or supplier" of sprinklers, and so is not encompassed by the equipment exception to the statute of repose.
- Technical data sheets describing the operation of a manufactured product do not create an express warranty that the product will indefinitely perform as described.

**Workers' Compensation**

Case: *Simms v. Ruby Tuesday, Inc.*, 091762 (1/13/2011)

Author: Goodwyn

Lower Ct.: Court of Appeals (Court of Appeals)

Disposition: Reversed

Facts: A waiter injured his shoulder after being struck by a piece of ice thrown playfully by a co-worker.

The Workers' Compensation Commission and Court of Appeals denied his workers' compensation claim, reasoning that the injury did not "arise out of" his employment. They concluded that the SCOV's 2008 decision in *Hilton v. Martin*-in which one co-worker electrocuted another by using a defibrillator paddle on her--altered the "innocent victim of horseplay" rule, and required that there be a connection between the workplace conditions and the injury. Finding no such connection, they denied his claim.

Ruling: The SCOV reversed.

It recited the history of the "horseplay doctrine" famously expounded by Judge Cardozo in *Lonbruno v. Champlain Silk Mills*. And it held that injuries from workplace horseplay are an actual risk of the workplace, because it is the workplace that creates the situation resulting in the injury.

The SCOV distinguished horseplay from assaults. Horseplay is a natural incident of work. An assault is not. Thus, "when a fellow employee engages in horseplay by doing something in a playful or joking manner that injures an innocent nonparticipating co-worker, such injury is inherent to the injured co-worker's employment or is directed toward the co-worker as

an employee.”

In deciding the *Hilton* case the SCOV did not intend to scuttle the horseplay doctrine.

Key Holding(s):

- For purposes of the Workers’ Compensation Act, injuries that playful horseplay inflicts on an innocent nonparticipating co-worker is inherent to the injured co-worker’s employment and/or is directed toward the co-worker as an employee.



Personal Injury

Case: *Vuich v. Great Eastern Resort Corp.*, 092249 (1/13/2011)

Author: Lacy

Lower Ct.: City of Charlottesville (Hogshire, Edward L.)

Disposition: Reversed

Facts: Defendant owned snow-tubing park with steeply inclined slope, chute-like lanes, and a conveyor belt to take riders to the top. At the bottom of the ride was a wall with stadium padding.

Plaintiff was severely injured on ride. She brought suit, claiming, *inter alia*, that the ride was covered by the portion of the Virginia Amusement Device Regulations pertaining to gravity rides.

The circuit court, however, determined that the ride was not an “amusement device”--and, hence, not a “gravity ride”--because

“amusement device” is defined to be a “device or structure” and a slope is not a “device or structure.”

The plaintiff sought an interlocutory appeal, which the SCOV allowed.

Ruling: The SCOV reversed.

It first noted that neither the relevant code section, Va. Code § 36-98.3, nor the regulations that the Board of Housing and Community Development promulgated under it, 13 VAC 5-31-10 *et seq.*, actually defined “device or structure.” But it noted that, in other contexts, the Board had applied the definition of “amusement devices” broadly.

The SCOV held that the snow tubing ride qualified as an “amusement device.” The route the rider took was not the natural shape of the hillside--the shape of the hillside was altered and chutes were created to guide riders down the slope. A padded wall, too, was integral to the ride. And the ride “conveyed or moved” the riders through the chutes “in an unusual manner for diversion.” Together, these showed that it was an amusement device.

Key Holding(s):

- A snow tubing ride is an “amusement device” for purposes of the Virginia Amusement Device Regulations.



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