



## The Criminal Act Exclusion in Homeowner's Policies When Negligence Goes Bad

By Jennifer Lee Parrish

Virginia courts have decided numerous cases involving various intentional act exclusions under both homeowner's and automobile liability policies. The Virginia Supreme Court, however, has not yet had the opportunity to decide any cases relating to the applicability of the criminal act exclusion in a Virginia homeowner's insurance policy as it relates to negligent acts that are also considered to be criminal. Recently, the Gloucester Circuit Court held that damages resulting from an accidental shooting, where the shooter pleaded guilty to "Reckless Handling of a Firearm," were excluded from coverage under a homeowner's policy, and that the insurance company had no duty to defend the shooter in a civil action or to pay for any damages resulting from the shooting.

### I. THE FACTS

The facts of the shooting incident were undisputed between the parties. During the evening of July 6, 2005, Sears drove over to Corbitt's house to spend the evening. They arrived at Corbitt's house between 9:30 and 10 p.m. They ate some dinner and watched a movie. Between 10:30 and 11 p.m., Corbitt's girlfriend came by the house for a visit that lasted about ten to fifteen minutes. As the girlfriend walked through the front door of

the house, she and Corbitt heard something scraping behind the door, and saw that it was Corbitt's shotgun, which had fallen down between the wall and the front door. Corbitt recalled having placed the gun in that location a couple of weeks before, with the barrel pointed toward the ceiling. Corbitt knew that the gun was loaded because he had put the shells in it in late April or early May. The gun was a 1980s model Smith & Wesson 1000M Autoloader shotgun, which Corbitt had acquired in 1997. Corbitt knew the shotgun was equipped with a "safety," but he was not certain whether it was on when the gun was behind the door.

Once the shotgun behind the front door of Corbitt's home fell to the ground, the girlfriend asked Corbitt whether it was loaded, and when she learned that it was, she expressed to Corbitt that she was uncomfortable with a loaded gun in the house. In response, Corbitt maintains that he removed the shells out of the gun. To remove the shells, Corbitt pressed a button on the right side of the shotgun and pulled it back until it locked into

*Criminal Act Exclusion — cont'd on page 4*

## Table of Contents

The Criminal Act Exclusion in Homeowner's Policies — <i>When Negligence Goes Bad</i> . . . . .	1
<i>by Jennifer Lee Parrish</i>	
Letter from the Chair . . . . .	2
<i>by R. Lee Livingston</i>	
In When Is Too Late? New Rule 3:21 and Jury Demands Virginia . . . . .	3
<i>by James R. Theuer, Esq.</i>	
Avoiding the Spoliation Trap --Tips for the Litigator . . . .	9
<i>by Scott C. Ford</i>	
Scott v. Harris - A New Weapon In the Summary Judgment Arsenal . . . . .	12
<i>by Sharon S. Goodwyn and Carl D. Gray</i>	
Recent Law Review Articles . . . . .	14
<i>by R. Lee Livingston</i>	
Litigation Section Board of Governors . . . . .	15

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## Letter From The Chair

by R. Lee Livingston

It's that time again. Maple trees don coats of many colors, soft leaves are pressed beneath our feet, the cadence calls of quarterbacks sound in the background of family rooms. Some of you already taste the sweetness of turkey and cranberry sauce. In this precious autumn season, we begin a new Board year.

We are mindful of you as you serve your clients and earn your living. We empathize with you, juggling communications in all forms, feeling the tensions of the adversarial process, exalting in victories, second-guessing defeats, laboring to do your best in an imperfect world. The assistance we offer to you surely will be modest, but we hope in some measure edifying.

I will enjoy working with a generous and gifted Board of persons who enjoy giving back and taking a break from the fuss of litigation to work in a collegial setting contributing to the greater good. We were led last year gently and effectively by Vicki Devine who turned in a stellar year in which we saw many of our programs thrive. For example, The Law in Society essay contest reached more students than ever before and the competition was excellent. I wish you all could have seen the award ceremony and witnessed the happy, proud expressions of high school students who won one of their first significant competitions, and a cash award to boot.

Kevin Holt continues to pull the laboring oar to move this Newsletter and to effectively allow it to be published to you electronically for easy search-ability and convenience. Steve Emmert's love for the law is contagious, and his enthusiasm for educating practitioners in appellate procedure serves us well.

Our Young Lawyers Committee has been active under the leadership of Sandra Chinn-Gilstrap who is preparing yet another major seminar in Southside Virginia almost by herself. Jennifer Parrish labored tirelessly to keep us financially secure and put on an outstanding CLE at the annual seminar and now takes up her position as vice-chair. I am relieved to know she will be available to clean up any damage I cause during my tenure.

Greg Haley steps into perhaps the most challenging position as our secretary, and he has already hit the ground running with a myriad of outstanding ideas for the annual meeting seminar next year. He has learned the awkward budget process of a group independently, vicariously funded but ultimately controlled by appropriations by the Commonwealth. (If this is vague to you, believe me you do not have time to read the piece I would have to construct to explain it.)

We are pleased to welcome new Board members, Thomas G. Bell, Jr., Maya Eckstein, Robert Garnier and Barbara S. Williams. These individuals have served other bar groups with distinction and we are grateful they are willing to help us. Likewise, our judicial members, Honorable Rodham T. Delk, Jr., Honorable William H. Ledbetter, Jr. and Honorable Michael F. Urbanski, appear to give more than they get from their participation and we are mindful of their thoughtful attention to us.

To wrap this column in a bow I must highlight the steady hand and keen mind of Patricia Sliger, who shepherds us with grace and gentleness. She deserves credit for most anything we accomplish.

It is easy to salute this group and yet we don't want well-deserved pats on the back to leave us at all complacent. We welcome your thoughts and ideas about how the Litigation Section can support you and expand our services to you. A list of Board members is published in every newsletter. We have open ears. As you enjoy the special season upon us, if you have a moment to send us your ideas or constructive criticism, we will listen and respond as best we can.

R. Lee Livingston XXXXXXXXXXXXXXXXXXXX

# In When Is Too Late?

## New Rule 3:21 And Jury Demands Virginia

*James R. Theuer, Esq.*

Until last year, Virginia had arguably the most liberal rule regarding jury demands in civil cases of any jurisdiction in the country. Historically, a jury demand could be made at any time before trial, and a jury trial could be ordered by the trial judge even in the absence of a jury demand. See Kent Sinclair, et al., Virginia Civil Procedure § 13.4 (4th ed. 2003). The demand for a jury was governed by Virginia Code § 8.01-336.

Section 8.01-336 is still the operative statute, but its practical application changed with the adoption of Rule 3:21 effective January 1, 2006.<sup>1</sup> Rule 3:21 provides:

### Rule 3:21. Jury Trial of Right.

(a) Jury Trial Situations Unchanged. - The right of trial by jury as declared by the Constitution of Virginia, or as given by an applicable statute or other authority, is unchanged by these rules, and shall be implemented as established law provides. Established practice for the trial and decision of equitable claims by the judge alone shall be continued.

(b) Demand. - Any party may demand a trial by jury of any issue triable of right by a jury in the complaint or by (1) serving upon other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand with the trial court. Such demand may be endorsed upon a pleading of the party. The

court may set a final date for service of jury demands. Leave to file amended pleadings shall not extend the time for serving and filing a jury demand unless the order granting leave to amend expressly so states.

[. . .]

(d) Waiver. - The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.

Further, Rule 3:22, Trial By Jury Or By The Court, also adopted effective January 1, 2006, provides in part:

a) By Jury. - When trial by jury has been demanded as provided in Rule 3:21, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury; or (2) the court upon motion or of its own initiative finds that a right of trial by jury on some or all of those issues does not exist under applicable law.

(b) By the Court. - Except as otherwise provided in this Rule, issues not demanded for trial by jury as provided in Rule 3:21, and issues as to which a right of trial by jury does not exist, shall be tried by the court.

The Virginia Rule uses similar language to the analogous Federal Rule, Rule 38(b), but the extent of similarity in application is another question because of differences between Virginia and Federal construction of key terms.<sup>2</sup>

Both Rules use the phrase "last pleading directed to the issues." There is no reported Virginia case law, either at the Circuit Courts, Court of Appeals, or Supreme Court, interpreting this phrase due to the recent date of the amendment. Since this language is identical to Federal Rule 38(b), Virginia courts may well apply the analysis of Federal cases on the subject.

Federal cases have strictly applied the requirement that the demand be timely, although motions for relief

## Criminal Act Exclusion *cont'd from page 1*

place. Two shells came out of the gun. Corbitt called the process “shucking the shells out.” Corbitt claimed that he visually looked at the weapon to make sure all the shells were out, but that he did not physically inspect the barrel with his fingers, which he admitted was a more fail-safe method to make sure the shotgun was fully unloaded.

After having removed two shells from the shotgun, Corbitt laid the gun down on his floor between his dining room and living room. After a few minutes, Corbitt walked his girlfriend outside. When he came back into his house, Sears was sitting on the couch in the living room talking on his cell phone. Corbitt picked up the gun from the floor and raised it up to where he could “clear it” for shells, even though he already believed he had done that. He raised the barrel up toward the light, pressed the button to close the breech, and the gun went off while it was pointed at Sears. Sears recalled that when Corbitt was holding the gun with the barrel pointed at him, he asked him whether it was loaded, and Corbitt responded, “I don’t think so.” Corbitt did not recall that conversation. Corbitt did not know whether or not the safety was on at the time he was pointing the gun at Sears.

Sears did not know why the barrel was pointing toward him, but it was long enough for Corbitt to “pick the gun up and walk and sight up.” Sears saw smoke coming out of the barrel and screamed. Corbitt recalled hearing Sears scream, after which he called 911. It was determined that Corbitt had shot Sears in the stomach, and that several pellets also hit him in the leg.

After a criminal investigation, Corbitt was indicted for two criminal offenses: Discharge Firearm in Occupied Building, in violation of Virginia Code

Section 18.2-279; and Reckless Handling of a Firearm, in violation of Virginia Code Section 18.2-56.1. He was represented by counsel, and pleaded guilty to Reckless Handling of a Firearm, in violation of Virginia Code Section 18.2-56.1. Pursuant to the Court’s Order, he was sentenced to twelve (12) months in jail, had to pay restitution of \$5,000 and court costs of \$1,900 and may not possess a firearm for three (3) years.

In July, 2006, Sears filed a civil lawsuit against Corbitt in Gloucester Circuit Court seeking \$1,000,000 in damages for the severe personal injuries

he sustained after being shot by Corbitt. The Complaint contained two counts – one for negligence, and one for negligence per se due to Corbitt’s violation of Virginia Code Section 18.2-56.1.

At the time of the shooting, Corbitt was insured under a policy of homeowner’s insurance issued by Farm Bureau that provided liability coverage for sums for which Corbitt became liable under law because of bodily injury caused by an occurrence to which the coverage applied and for which there was no lawful exclusion. That insurance policy

did not provide any insurance coverage or any liability defense for any claims of bodily injury that resulted from a criminal act of the insured.

## II. THE PROCEDURAL POSTURE

Virginia Farm Bureau filed a Motion for Declaratory Judgment, contending that because Sears’s injuries and damages arose as a direct result of the criminal act of Corbitt, its insurance was inapplicable to the underlying lawsuit. After the parties took depositions of Corbitt and Sears, counsel agreed that the essential facts were undisputed and that the depositions could be used to move forward on a Motion for Summary Judgment.

**Virginia courts have decided numerous cases involving various intentional act exclusions under both homeowner’s and automobile liability policies. The Virginia Supreme Court, however, has not yet had the opportunity to decide any cases relating to the applicability of the criminal act exclusion in a Virginia homeowner’s insurance policy as it relates to negligent acts that are also considered to be criminal.**

### III. THE POLICY LANGUAGE

The Farm Bureau Policy at issue in this case contains the following exclusion:

1. Exclusions That Apply to Coverages L (Personal Liability) and M (Medical Payments to Others) – This policy does not apply to:
  - i. “bodily injury” or “property damage”;
2. that is the result of a criminal act of an “insured”...

### IV. THE LEGAL ARGUMENTS

Following are summaries of some of the legal arguments made by the parties in support of their respective positions on Summary Judgment.

#### *A. Virginia Farm Bureau’s Arguments in Support of Summary Judgment*

##### **1. The Plain Language of Farm Bureau’s Insurance Policy Excludes Coverage and a Defense for Sears’s Claims of Bodily Injury that Resulted from a Criminal Act of Corbitt.**

The damages claimed by Sears in the underlying civil action were sustained as a result of Corbitt’s criminal act of recklessly handling a firearm, resulting in Sears being shot in the stomach and leg. Under the plain language of the policy, it was clear that bodily injury that is the “result of a criminal act” of Corbitt is excluded from coverage under the policy. It was important to note that this policy exclusion was distinct from another often used exclusion for “intentional acts” of the insured. The policy language was drafted so that intent would not be required for the criminal act exclusion to apply. The exclusion bars coverage for injuries that result from criminal acts, whether intentional or not.

##### **2. Corbitt’s Guilty Plea and other Admissions in his Deposition Prove that his Shooting Sears Was a**

##### **Direct Result of His Violation of a Criminal Law.**

There were at least two admissions by Corbitt in the record before the court regarding his reckless use of the firearm in this case, resulting in Sears’s injury. First, Corbitt pleaded guilty to a violation of Virginia Code § 18.2-56.1, which states that “it shall be unlawful for any person to handle recklessly any firearm so as to endanger the life, limb or property of any person. Any person violating this section shall be guilty of a Class 1 misdemeanor.” VA Code Ann. § 18.2-56.1 (1950, as amended). When he pleaded guilty to this charge, he had the benefit of counsel. His guilty plea serves as an admission

in this civil action that his reckless use of his firearm endangered the life and limb of Sears.

Second, when asked in his deposition about the reason for his plea of guilty to the criminal charge, Corbitt admitted that he felt he was reckless in his use of his firearm at the time of the accident.

##### **3. Sears’s Civil Claim Against Corbitt for Negligence Per Se Only Applies if Sears’s Injuries and Damages Result from the Violation of a Statute.**

Sears’s own Complaint for damages against Corbitt alleges that his injuries occurred as a proximate result of the criminal actions of Corbitt. In Count II of the Complaint, he alleged that Corbitt “violated Section 18.2-56.1 of the Virginia Code – Reckless Handling of a Firearm, which violation is negligence per se under Virginia law.” One of the requirements for proving a claim for negligence per se is that the statutory violation was a proximate cause of his injury. Because Sears’s own pleadings in the underlying personal injury case asserted that Corbitt’s criminal violation was a proximate cause of his injury, a point that he had to prove in order to achieve recovery under that legal theory, the clear application of the plain language

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## Criminal Act Exclusion *cont'd from page 5*

in the Farm Bureau insurance policy would lead to the conclusion that coverage was excluded for that claim.

### 4. Other State Courts Have Applied this Criminal Act Exclusion to Exclude Coverage in Similar Circumstances.

Although the Virginia high court had not yet had occasion to decide any disputes relating to the criminal acts exclusion in a homeowner's policy, other states have looked at such exclusions. In cases with very similar policy language and similar facts, the high courts in the states of Washington, Minnesota and Colorado had some very helpful cases that could be instructive to the court based upon their similar circumstances and their logical reasoning.

### *B. Corbitt's and Sears's Arguments in Opposition to Summary Judgment*

#### 1. The Criminal Act Exclusion is Ambiguous, and Therefore, Must Be Strictly Construed Against Virginia Farm Bureau in Favor of Coverage.

Corbitt and Sears argued that the exclusion was inherently ambiguous and that it was impossible to harmonize with other coverage provisions in the Policy. First, the Policy fails to define criminal acts or otherwise qualify the term with any reference to whether intent is required. Second, the criminal act exclusion is nestled between exclusions for losses which are "expected by, directed by, or intended by the insured," and losses that are "the result of an intentional and malicious act by or at the direction of the insured." As a result, the reasonable purchaser could have understood the basis of the criminal act exclusion to be intentional misconduct or intentional criminal acts, thereby permitting coverage for damages resulting from negligence or criminal negligence. Third, unintentional criminal acts are seemingly covered losses, since they are accidental by nature and

clearly within the policy's definition of an "occurrence".

#### 2. Virginia Farm Bureau's Coverage Denial Based on the Criminal Act Exclusion Disappoints the Insured's Reasonable Expectation of Coverage for an Unintended Negligent Act.

Since the criminal act exclusion is ambiguous and cannot be enforced as written, the Court should resolve the ambiguity by ascertaining the manner in which a reasonable insurance purchaser would construe the disputed exclusion relative to the other liability coverage provided in the Policy. The Court should then construe the Policy in light of those reasonable expectations. Losses resulting from negligence or unintentional conduct are precisely the types of losses a liability

policy purchaser expects to be insured against. By applying the criminal act exclusion to any criminal act without regard to intent, Virginia Farm Bureau artificially limits the coverage afforded under the Policy for "accidents" to such a minuscule level as to render the Policy illusory. This result can hardly have been anticipated by a reasonably prudent policy purchaser.

#### 3. Jurisdictions Are Spilt on the Application of the Criminal Act Exclusion.

Corbitt and Sears pointed out the non-Virginia cases cited by Farm Bureau were non-binding on the court, and that some other jurisdictions favored a narrow application of these exclusions, requiring coverage for unintentional criminal acts but excluding intentional acts.

#### 4. Virginia Farm Bureau's Interpretation of the Criminal Act Exclusion Runs Contrary to Virginia Public Policy Concerning the Compensation of Innocent Tort Victims.

Virginia's public policy favors the compensation of innocent victims of torts. Virginia Bureau's attempt to

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**The case was not appealed.**

extend the criminal act exclusion to an unintentional, inadvertent act of negligence runs contrary to this public policy. If the Court adopts Virginia Farm Bureau's position, then innocent victims who are substantially injured in a moment of inadvertence or negligence will be precluded from any viable recovery for their harm, even in the face of an insurance policy that likely covers bodily injury resulting from an accident.

#### V. THE DECISION

The Gloucester Circuit Court granted Virginia Farm Bureau's Motion for Summary Judgment, finding that the exclusionary language in the insurance policy did not create any ambiguity, and that there was no other reason that such exclusion should not be enforced. The court held that Virginia Farm Bureau did not owe any liability insurance coverage to Corbitt for the claim of Sears, and that it did not owe any legal defense to Corbitt in the civil case. The case was not appealed. ☐

## New Rule 3:21 *cont'd from page 3*

from waiver are available. See generally 9 Chas. Allen Wright, et al., *Federal Practice and Procedure* § 2320 (2d ed. 1995) (discussing waiver by failing to make demand); James Wm. Moore, et al., *Moore's Federal Practice* § 39.31 (3d ed. 2006) (discussing cases on relief from waiver). In general, failure to make demand in the answer, or the reply to a counterclaim, waives the right to a jury trial. Wright § 2320.

Yet the analogy to the Federal Rule breaks down, however, when one considers the different definitions of "pleadings" under the two sets of rules. Under the Federal Rules, pleadings are those papers defined in Federal Rules of Civil Procedure 7(a), i.e., complaint, answer, counterclaim, and reply to counterclaim. Moore's § 38.50[3][b]. The Virginia Rules define "pleadings" differently: "All motions in writing, including a motion for a bill of particulars and a motion to dismiss, are pleadings." Rule 3:18 (this rule was previously numbered 3:16 prior to the January 1, 2006 amendments, but the text is unchanged).

This raises the interesting question as to when is too late under the Virginia rule. Is a jury demand within ten days of a motion for summary judgment a timely demand under Rule 3:21. Under the Federal Rule, the answer is probably "no." See *Molinario v. Watkins-Johnson CEI Div.*, 359 F. Supp. 467, 474 (D. Md. 1973) (holding that a jury demand in a memorandum opposing summary judgment was not timely). But the Virginia Supreme Court has described an opposition to a summary judgment motion as a pleading. See *Renkey v. County Bd. of Arlington County*, 272 Va. 369, 372 n.4, 634 S.E.2d 352, 354 (2006) (stating that a party "filed a pleading opposing the . . . motion for summary judgment."). This language seems to contradict the differentiation made between pleadings, motions, and other documents elsewhere in Virginia law. See, e.g., Va. Code 8.01-271.1 (stating "if a pleading, motion, or other paper is signed or made in violation of this rule"). If anything filed is a pleading, then listing pleadings, motions, and other papers separately is tautological.

Applying the language used in *Renkey*, it may be that a party could file a motion for summary judgment as a means of reviving an otherwise waived right to trial

by jury. Query: Is a Motion in Limine a pleading? Under the text of Rule 3:18 and the language in *Renkey*, the answer may well be "yes." In that case, the adoption of Rule 3:21 may well be much ado about nothing. The better answer appears to be that Rule 3:21 and Federal Rule 38 should be analogously applied, and that the different definition of pleadings does not extend the term past those filings used to join the issues at the initial stage. Perhaps this result must await an amendment of Rule 3:18's definition of pleadings to bring it in harmony with Federal Rule 7(a).

Until that happens, if ever, practitioners have ample opportunity to advocate. Only time will tell whether Rule 3:21 has any teeth or simply perpetuates business as usual in Virginia practice. ☒

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

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

# Avoiding the Spoliation Trap — Tips for the Litigator

by Scott C. Ford

At the outset of every new litigation matter, the trial lawyer should counsel the client on the obligation to preserve evidence and the possible consequences for failing to do so. Moreover, the trial lawyer should examine whether any spoliation of evidence might have already occurred prior to the engagement. This article will examine the basic principles of the law of spoliation of evidence, the possible consequences for failing to preserve evidence, and some tips for avoiding the spoliation trap.

## Spoliation and the Duty to Preserve Evidence

Spoliation includes the intentional or negligent destruction, loss or alteration of material evidence.<sup>1</sup>

Federal and state case law both provide that the duty to preserve material evidence arises not only during litigation, but before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.<sup>2</sup> The duty extends to documents, whether in hard copy or electronic form, and things relevant and material to the litigation. Spoliation is often raised in products liability cases, but more and more is being raised in other litigation matters, particularly given the increased presence of electronic evidence.

The possible consequences for failing to preserve evidence may diverge slightly depending upon whether Virginia or federal law applies. When spoliation occurs in the course of pending federal litigation, federal law applies. However, when the spoliation occurs prior to federal litigation, a federal court exercising diversity jurisdiction will apply applicable state law.<sup>3</sup> When federal law applies the district court will

apply spoliation decisions of the regional circuit.<sup>4</sup>

## Virginia Cases

There are fewer Virginia than federal cases which address spoliation. Virginia courts, unlike others, have not recognized the independent tort of spoliation.<sup>5</sup> Virginia remedies for spoliation of material evidence include the dismissal of the action or the offering of an adverse inference instruction (i.e., an instruction that the missing evidence would have been unfavorable to the party that spoiled the evidence).<sup>6</sup> Virginia courts also require both a showing of bad faith by the litigant or his or her counsel and prejudice to the opposing party before granting the drastic relief of dismissal for spoliation.<sup>7</sup>

*Gentry v. Toyota Motor Corporation* remains the most recent Supreme Court of Virginia decision addressing spoliation.<sup>8</sup> In this closely divided 1996 decision, the Court reversed the trial court's dismissal of the complaint based upon spoliation of evidence.<sup>9</sup> The plaintiff in *Gentry* alleged that her Toyota pickup suddenly accelerated, causing her to crash.<sup>10</sup> The plaintiff's expert—without permission from the plaintiff or her attorney—used a hacksaw to remove the engine component which he identified as the cause of the crash.<sup>11</sup> The plaintiff then asked for a continuance, which was granted.<sup>12</sup> At trial, the plaintiff used another expert to advance a new theory of liability for the accident which was unaffected by the previous expert's destruction of evidence.<sup>13</sup> The trial court dismissed the case as a sanction for the earlier destruction.<sup>14</sup> The Supreme Court reversed the trial court, finding that the trial court abused its discretion in dismissing the action since neither the plaintiff nor her

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*Avoiding the Spoliation Trap — cont'd on page 10*

## Avoiding the Spoliation Trap *cont'd from page 9*

attorney acted in bad faith (the expert had acted on his own without the consent or knowledge of the litigant or her counsel) and the expert's act did not prejudice the defendant (given the new theory advanced by the new expert).<sup>15</sup>

### Fourth Circuit Cases

The federal courts have noted that they possess broad discretion in electing an appropriate sanction for spoliation.<sup>16</sup> Sanctions may include dismissal, entry of summary judgment, offering of an adverse inference instruction, or exclusion of evidence. A showing of some degree of fault is required to impose sanctions.<sup>17</sup> The federal courts have described that the purpose of imposing a sanction for spoliation is to level the evidentiary playing field and to sanction improper conduct.<sup>18</sup>

It has been observed that spoliation is not a substantive claim or defense but a "rule of evidence," to be "administered at the discretion of the trial court."<sup>19</sup> Accordingly, the decision of the district court will stand unless it is found to be an abuse of discretion.<sup>20</sup>

Whether and what sanctions are appropriate depends upon a variety of factors, including without limitation, the spoliator's state of mind, bad faith, the kinds of evidence destroyed, and the consequences of the destruction to the adversary's case.<sup>21</sup> The federal courts have noted that the ultimate sanction of dismissal should be avoided if a lesser sanction will level the playing field and sanction improper conduct.<sup>22</sup> In *Silvestri v. Gen. Motors. Corp.*, the Fourth Circuit noted:

[T]o justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.<sup>23</sup>

Although the drastic remedy of excluding evidence or granting a summary dismissal due to spoliation requires that bad faith be proven, bad faith is not required in order to warrant an adverse inference instruction in the federal courts.<sup>24</sup> However, an adverse inference will not be offered unless there is a showing that: "(1) the party 'knew the evidence was relevant to some issue at trial'; and (2) the party's 'willful conduct resulted in its loss or destruction.'"<sup>25</sup> The federal courts have noted that the adverse inference "stems from the 'common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to be threatened by [that evidence] than a party in the same position who does not destroy the [evidence].'"<sup>26</sup>

### Tips for the Litigator

#### Some tips related to the issue of spoliation include:

- Advise the new litigation client of the duty to preserve relevant evidence and the consequences for failing to do so. The client should be advised orally and in writing, preferably in the initial engagement letter.
- Clients with document retention/destruction policies should be advised that they must impose a document hold (electronic and hard copies) on relevant evidence once litigation is anticipated.
- Send a writing advising opposing counsel of his or her obligation, and that of the client, to preserve relevant evidence. This reminder may be helpful in securing appropriate remedies should spoliation subsequently occur.
- Advise clients to image computer hard drives that may contain relevant data once litigation is anticipated. This is helpful in deflecting later claims that electronic evidence was altered or removed.

## Tips Specific to Product Cases

- Promptly provide the opportunity for inspection by the opposing party of the allegedly defective product, preferably before removing or tampering with the product and the surrounding scene in any way.
- Do not engage in any destructive testing of the product absent agreement with the other side as to the protocol for doing so.
- Properly store the allegedly defective product to avoid spoliation.
- Thoroughly photograph the product and the surrounding scene immediately after the occurrence of injury or loss. Also, record and photograph any pertinent measurements.
- Place all manufacturers and retailers (and their respective insurers, if applicable) on notice of potential claims and offer an opportunity to inspect the allegedly defective product.

In sum, counseling clients on their obligation to preserve evidence and potential consequences for failing to do so is vital. Otherwise, your clients may face sanctions, up to and including dismissal of their cause of action. ☒

<sup>1</sup> Wolfe v. Va. Birth-Related Neurological Injury Comp. Program, 40 Va. App. 565, 581, 580 S.E.2d 467, 475 (2003).

<sup>2</sup> Id.; Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001).

<sup>3</sup> Ward v. Texas Steak Ltd., No. 7:03cv00596, 2004 U.S. Dist. LEXIS 10575, at \*7 (W.D. Va. May 27, 2004).

<sup>4</sup> Rambus, Inc. v. Infineon Techs., 222 F.R.D. 280, 287 (E.D. Va. 2004).

<sup>5</sup> Austin v. Consolidation Coal Co., 256 Va. 78, 83, 501 S.E.2d 161, 163 (1998) (declining to recognize a third-party action in tort for spoliation of evidence based upon the facts presented in a matter of first impression in the context of a certified question of law from the federal court in West Virginia).

<sup>6</sup> Wolfe, 40 Va. App. 565, 580, 580 S.E.2d 467, 475 (2003). See also Blue Diamond Coal Co. v. Aistrop, 183 Va. 23, 29, 31 S.E.2d 297, 299 (1944); Neece v. Neece, 104 Va. 343, 348, 51 S.E. 739, 741 (1905).

<sup>7</sup> Gentry v. Toyota Motor Corp., 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996). See also Benitez v. Ford Motor Co., 69 Va. Cir. 323, 326-27 (Fairfax 2005); Wade v. Fleetwood Homes of North Carolina, Inc., 66 Va. Cir. 472, 473 (Nelson 2001).

<sup>8</sup> 252 Va. 30, 471 S.E.2d 485.

<sup>9</sup> Id. at 34, 471 S.E.2d at 488.

<sup>10</sup> Id. at 31, 471 S.E.2d at 486.

<sup>11</sup> Id. at 32, 471 S.E.2d at 486.

<sup>12</sup> Id. at 32-33, 471 S.E.2d at 487.

<sup>13</sup> Id.

<sup>14</sup> Id. at 33, 471 S.E.2d at 488.

<sup>15</sup> Id. at 34, 471 S.E.2d at 488.

<sup>16</sup> Silvestri, 271 F.3d at 590. Trigon Ins. Co. v. United States, 204 F.R.D. 277, 285 (2001).

<sup>17</sup> Silvestri, 271 F.3d at 590.

<sup>18</sup> Id.

<sup>19</sup> Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155 (4th Cir. 1995).

<sup>20</sup> Cole v. Keller Indus., Inc., 132 F.3d 1044, 1047 (4th Cir. 1998).

<sup>21</sup> Rambus, 222 F.R.D. at 299.

<sup>22</sup> Silvestri, 271 F.3d at 590.

<sup>23</sup> Id. at 593. See also Stallings v. Bil-Jax, Inc., 243 F.R.D. 248 (E.D.Va. 2007) (discussing sanction of dismissal as inappropriate where plaintiff returned allegedly defective scaffold to operator and operator had no ability to identify or produce scaffold; evidence was provided to insurer prior to return of scaffold that notice was provided to operator's insurer that an injury occurred, that the scaffold was defective, and that the plaintiff told the operator that he had been hurt).

<sup>24</sup> Kribbs v. Wal-Mart, No. 4:05cv159, 2006 U.S. Dist. LEXIS 43453 at \*30 (E.D.Va. June 27, 2006) (rejecting customer's spoliation of evidence claim, holding that there was no evidence that the store destroyed evidence when it eventually remodeled because it believed that all evidence had been obtained by way of photograph). See also Woods v. Wal-Mart, No. 3:05CV048, 2005 U.S. Dist. LEXIS 45404 at \*13 (E.D.Va. Oct. 11, 2005) (holding that absent evidence of bad faith conduct dismissal was inappropriate).

<sup>25</sup> Kribbs, 2006 U.S. Dist. LEXIS 43453 at \*30 (quoting Vodusek, 71 F.3d at 156).

<sup>26</sup> Anderson v. Nat'l R.R. Passenger Corp., 866 F. Supp. 937, 945 (E.D. Va. 1994) (quoting Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.

# Scott v. Harris - A New Weapon In the Summary Judgment Arsenal

by

Sharon S. Goodwyn  
Carl D. Gray

A litigator with an active Federal Court practice can appreciate the benefits of summary judgment under Fed. R. Civ. P. 56. At best, a successful summary judgment motion results in a happy client and avoids the time and expense of trial. In other cases, summary judgment may be used to narrow the triable issues or as a negotiating tool in settlement discussions.

New Federal Court litigators quickly learn the “go to” cases to include in summary judgment briefs. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) are frequently cited for the proposition that to defeat a summary judgment motion, a plaintiff must present “specific facts showing that there is a *genuine issue for trial*.” *Guinness PLC v. Ward*, 955 F.2d 875, 882 (4th Cir. 1992), in which the Fourth Circuit further defined a court’s role in assessing a motion for summary judgment, is another favorite. Specifically, *Guinness* explains that a court “must perform a dual inquiry into the *genuineness* and *materiality* of any purported factual issues” and only factual disputes “that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Guinness PLC v. Ward*, 955 F.2d 875,

882 (4th Cir. 1992).

The U. S. Supreme Court’s recent decision in *Scott v. Harris*, 127 S.Ct. 1769 (April 30, 2007), is yet another case destined to be frequently cited on summary judgment. In *Scott*, the Supreme Court granted a police officer qualified immunity from a lawsuit filed by a driver who was severely injured in a high-speed police chase. The police officer used his police cruiser to nudge the driver’s car off the road, which caused the driver to lose control of his car and crash, rendering the driver a quadriplegic. The driver sued the police officer claiming that the officer used excessive force in violation of the 4th Amendment.

While the qualified immunity ruling is interesting, the most significant aspect of the opinion involves the standard for granting summary judgment. The Supreme Court held that summary judgment should have been entered for the police officer despite a conflicting factual record. The lower courts believed that they were prohibited from entering summary judgment because the plaintiff’s statements conflicted with the defendant’s statements and a video of the high-speed chase. Plaintiff claimed that while he was trying to escape the police, he was not endangering other drivers on the roadway. Indeed, he alleged that “there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [Plaintiff] remained in control of his vehicle.” *Scott*, 127 S.Ct. at 1775. This version conflicted with the police officer’s statements that Plaintiff’s high-speed driving presented a danger to others on the roadway. Most significantly, however, Plaintiff’s version of the events conflicted with a videotape of the high-speed chase introduced on summary judgment which showed,

plaintiff’s car racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast . . . swerv[ing] around more than a dozen other cars, cross[ing] the double-yellow line, and forc[ing] cars traveling in both directions to their respective shoulders to avoid being hit . . . run[ning] red lights and travel[ing] in the

occasional left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.

*Scott*, 127 S.Ct. at 1775. (footnote omitted).

The Supreme Court concluded that the video demonstrated clearly that the plaintiff forced other drivers off the road and committed other driving maneuvers that endangered other drivers.

While the district court and the court of appeals believed that the conflicting evidence on summary judgment prohibited entry of summary judgment, the Supreme Court held otherwise, reversing the court of appeals in an 8 - 1 decision. The Supreme Court evaluated all of the evidence on summary judgment and found that the plaintiff's "version of events is so utterly discredited by the record that no reasonable jury could have believed him." *Scott*, 127 S.Ct. at 1776. The Supreme Court then held that the "Court of Appeals should not have relied on such visible fiction [as found in the plaintiff's statements]; it should have viewed the facts in the light depicted by the videotape." *Id.*

*Scott* provides important guidance for the summary judgment analysis. A federal court in evaluating a summary judgment motion must do more than simply assess whether there is a factual dispute. It must weigh the evidence. And where a party's version of the events is implausible in light of the other evidence before the court, summary judgment may be entered against that party. A lawyer contemplating a motion for summary judgment should not overlook *Scott* as an additional weapon in the arsenal of summary judgment cases. ☒

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