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The Merits of the Boyd-Graves Proposal to Merge Law and Equity

by Robert C. Wood, III

In the Winter 2003 issue of *Litigation News*, Samuel W. Meekins, Jr. commented on the proposal of the Boyd-Graves Conference that the law and equity distinction under Virginia civil practice be replaced by a uniform set of procedural rules. He posed a good question: "Is this a good idea?" He asked for the thoughts and input of the members of the bar on this issue "so that this [Litigation] section can be heard as regards to the ultimate resolution of the unified proposal system."

Let me state unequivocally that a change from a dual to a unified system, or one form of action, is a good idea for many reasons, but in my opinion the overriding reason is that a unified system is in the best interests of the public — it will promote a better, more efficient, and more economical civil justice system.

I would like to give a short summary of my background. I have been practicing for over 38 years, primarily in business and commercial litigation. I am a past chairman of the Litigation Section of the Virginia State Bar. I have served as chairman of the Boyd-Graves Conference and have been a member of the Conference for over 20 years. I served as chairman of the original Boyd-Graves Committee on the merger of law and equity. I participated in several presentations to the

members of the Conference where the proposal to merge, or unify, our civil procedural system has been debated. The Conference has always, almost unanimously, endorsed (and re-endorsed) the proposal. I have taught Virginia Law and Procedure at Washington & Lee Law School for over 23 years. Third-year students become glassy-eyed when they are introduced to our law-equity dichotomy in our procedural system. I include, in my materials, cases where the parties expended unnecessary time, money, and energy in the litigation only because the lawyers and the court could not agree on which side of the court the case should be

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Letter from the Chair

Help Us Help You

One of the main goals this year for the Litigation Section is to get a functional website up and running which will be of use to Section members. Through the great efforts of Lee Livingston and, now, Kevin Mottley as editors of *Litigation News*, we have a wonderful resource available to our Section members. The articles produced by Section members and other contributors to *Litigation News* are focused on timely and often difficult topics, many of which reoccur in our practices. I suspect that more than one of us keeps an article handy in a desk drawer for frequent reference. In a perfect world, the database would be searchable.

Putting the website together has proven easier said than done, and the only thing on the website now is a list of the Section's Board of Governors. That does have some

use, however, because you can use those names to help us help you.

Over the years, we have worked hard to get *Litigation News* out to Section members, not only to present articles, but to address issues that come before our Section through the Virginia State Bar. However, we would like to hear more from you, the Section members. What issues do you see on a larger basis that the Litigation Section might be able to address that would benefit the Section as a whole? Members of the Board of Governors have a broad practice background, with plaintiff's lawyers, defense lawyers, and commercial litigators included among them. No one practice area dominates the board. We also have members of the judiciary participating, who provide a different insight and a sounding board for the issues we address. Our Board meets several times a year in Richmond, and if you have a matter that you feel could use the attention of our Board, please do not hesitate to contact any member listed on the website.

Last, on a different note, I want to thank Tom Albro for his outstanding leadership as our past chair, and Bob Scully for his contribution putting together the program at the Virginia State Bar summer meeting. Sam Meekins, our new secretary of the Board, has also provided valuable assistance in handling our budget — no small task. We have a quality Board. Don't be hesitant to contact them. We all look forward to the coming year.

Paul M. Black
Chair, Litigation Section

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Dubious Achievements in Defamation

by Robert E. Scully, Jr.

Most defamation plaintiffs are unwittingly suicidal. Few have the unblemished record of a Mother Teresa that is needed to succeed in reputation-al litigation. The rest of those who sue for damage to their "good reputations" should be reminded of the fate of Oscar Wilde and Alger Hiss, among others. Both Wilde and Hiss ended up in the "big house" after losing libel actions.

Alger Hiss, a former law clerk for Justice Oliver Wendell Holmes, the secretary of the San Francisco Conference that drafted the United Nations Charter, and the president of the Carnegie Endowment, lost his infamous defamation case against Whittaker Chambers, was convicted of perjury for denying he was a Soviet spy, served 44 months in a federal penitentiary, and was disbarred. Allen Weinstein, *Perjury: The Hiss-Chambers Case*, Random House (1978).

Oscar Wilde brought a criminal libel prosecution against the Marquess of Queensberry (author of the eponymous rules of modern prize fighting). The Marquess was enraged by Wilde's openly homosexual infatuation with his twenty-two-year-old son, Lord Alfred "Boysie" Douglas. He threw down a gauntlet of sorts by leaving a note with the doorman of Wilde's dining club addressed: "For Oscar Wilde posing as sodomite." Wilde was badly advised by his lawyers. They made no investigation into whether he and young Lord Douglas shared "the love that dare not speak

its name" (as Wilde famously quipped) or committed "the sin which takes its name from one of the cities of the Plain" (as Douglas pithily rejoined). As a result, Wilde was destroyed on cross-examination at trial.

Early in his testimony, Wilde was confronted with a letter he had addressed to Boysie as "Dearest of all Boys" in which he gushed: "I must see you soon. You are the divine thing I want, the thing of grace and beauty; but I don't know how to do it. Shall I come to Salisbury?" When asked if that was an "ordinary" sentiment for him, he replied: "Everything I write is extraordinary. I do not pose as being ordinary. Great heavens!" Later, Wilde completely self-destructed when asked whether he had ever kissed a sixteen-year-old servant boy named Walter Grainger: "Oh, dear no. He was a perfectly plain boy. He was, unfortunately, extremely ugly. I pitied him for it." The next question, which of course was not a question at all, was deadly: "Was *that* the reason you did not kiss him?" Wilde, the brilliant playwright, instantly knew he had hung himself. The notes of the official court reporter confirm that he came unglued: "[Here the witness began several answers almost inarticulately, and none of them he finished. His efforts to collect his ideas were not aided by Mr. Carson's sharp staccato repetition: Why? Why? Why did you add that?" At last the witness answered]: You sting me and insult me and try to unnerve me; and at times one says things flippantly when one ought to speak more seriously. I admit it." *The Trials of Oscar Wilde*, 150 (H. Montgomery Hyde ed., The Notable Trials Library 1989) (William Hodge & Company, Ltd., London 1948).

Defamation plaintiffs also should be advised of Jacob Stein's observation that sub-

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stantial damages for injury to reputation are usually very hard to prove because: "The friends of the defamed person do not believe the lies, and his enemies already believe them. [It is] a proximate cause issue." Jacob A. Stein, *Defamation*, *The Washington Lawyer*, November, 2001, at 48. The thoughtful trial lawyer should avoid defamation cases for another compelling reason. The law of libel and slander is a mess. As Stein eloquently put it: "Defamation law is unsettled, and unsettled law triggers pleadings, motions and papers." *Id.* Unless you are a frustrated legal academic masquerading as a trial lawyer, pleadings, motions and other papers are things mostly to be avoided. Recent Virginia cases confirm Stein's wisdom. Here is a sampling of several "unsettling" opinions that have further obscured the already incomprehensible jurisprudence of defamation in the Commonwealth.

Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002). In this case, the Fourth Circuit weighed into the morass of personal jurisdiction over defamation on the Internet. The Court held that posting an allegedly defamatory article, that was originally published in an out-of-state newspaper with three Virginia subscribers, on a website that had been designed to interest only a local audience in the paper's hometown in Connecticut, could not create personal jurisdiction over the defendants in Virginia. The three-judge panel reversed U.S. District Judge Williams on the grounds that he had focused excessively on the

injury done in Virginia to the plaintiff, the Warden of a Virginia prison, and not enough on the defendants' lack of intent to communicate with a Virginia audience. The opinion surveyed the contents of the newspapers' websites and found that they contained information about local weather, traffic and links to local Connecticut websites. The Court concluded that the newspapers maintained their websites to serve local readers in Connecticut and to expand the reach of their newspapers within that market. Since the websites were not designed to attract a Virginia audience, the newspapers could not have posted the materials on the Internet with the intent of targeting Virginia readers. Accordingly, they could not have reasonably anticipated being hailed into

court in Virginia to answer defamation charges. 315 F.3d at 263-264. The decision will make it difficult to reach small, local, out-of-state publishers whose defamatory online publications can be accessed worldwide, but whose websites are otherwise of purely local interest. As for national publishers like *The Washington Post*, *The New York Times*, *The Wall Street Journal* and *The Christian Science Monitor*, the national

focus and local subscriber base in Virginia probably creates personal jurisdiction. The difficulty will lie, as always, in the "in-between" case. Whether the Cleveland Plain Dealer's website, for instance, has enough national content to justify personal jurisdiction over it in Virginia with respect to defamation of Virginia citizens, remains to be seen.

Cha v. Korean Presbyterian Church of Washington, 553 S.E.2d 511 (Va. 2001); *cert.*

Defamation law in Virginia remains a complicated, convoluted, mishmash of state law and constitutional First Amendment jurisprudence. If past is prologue, the confusion and complexity will continue to increase at an exponential rate.

denied, 535 U.S. 1035 (2002). In this case, the Virginia Supreme Court held that the trial court had no subject matter jurisdiction over a defamation claim made by an assistant pastor against church elders who accused him of misappropriating between \$100,000.00 and \$165,000.00 from members of the congregation and then fired him. The Court concluded that civil courts are simply not constitutionally-permissible forums for review of ecclesiastical disputes. The Court held that it could not consider the allegations of defamation against the individual defendants in isolation, apart from the church's decision to terminate the pastor's employment. The Court observed that most courts that have considered the issue have held that the free exercise clause of the First Amendment to the United States Constitution divests civil courts of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials. Unfortunately, the opinion failed to explain why church officials who accuse a pastor of stealing money are not liable in their individual capacities for the false statements. The Court correctly decided that whether the individuals were acting within the scope of their church duties and in conformity with church doctrine, and, thus, whether the church was vicariously liable for their conduct, would require inappropriate consideration of the church's doctrine and beliefs, as well as its ecclesiastical structure. However, the Court's conclusion that a trial court would have to consider church doctrine and beliefs in adjudicating claims against the individuals because such matters would "undoubtedly affect the plaintiff's fitness to perform pastoral duties and whether the plaintiff had been prejudiced in his profession," 553 S.E.2d at 615, rings hollow. Any priest, rabbi, minister or imam accused of stealing money from individuals he is supposed to serve would be "prejudiced in his profes-

sion." That is not a matter over which the world's great religions have any dispute.

Perhaps the best explanation for the Court's decision on this issue can be found in Section D of the opinion. There, the Court tersely chided Cha for contending, on appeal, that the actions of the individual defendants were outside their agency relationship with the church and, therefore were not entitled to First Amendment protection. The Court observed that Cha's Motion for Judgment claimed the opposite — that the defendants were acting as church officials — and, therefore, that the church should be liable for their actions. It condemned his cynical appellate about-face. Whether defamation actions still can be maintained against such individual defendants who are not alleged to have been acting as church officials when they made the false statements remains to be seen.

Larimore v. Blaylock, 528 S.E.2d 119 (Va. 2000). In this case the Virginia Supreme Court demolished the intra-corporate immunity doctrine in defamation cases. For many years, it had been popular wisdom among defense counsel that there was no publication of a libel if the defamatory communication occurred solely among persons within a corporate entity who had a duty and interest in the subject matter of the communication. As recently as February 2000, U.S. District Judge Moon surveyed the legal landscape and concluded that "...[N]o publication occurs when the communication, which regards a matter of corporate interest, remains entirely within a corporate entity. *Childress v. Clement*, 44 Va. Cir. 169, 175 (Richmond Cir. Ct. 1997)." *Cobb v. The Rector and Visitors of the University of Virginia*, 84 F.Supp. 2d 740, 750 (W.D. Va. 2000). In *Larimore*, the Court rejected that idea: "We find nothing in these

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cases to suggest, as the defendants contend, that all transmissions of defamatory statements between members of a corporate entity are entitled to absolute immunity." 528 S.E.2d at 123. The Court held, instead, that tenure recommendations from professors in the College of Business and Economics at Radford University to the Board of Visitors were entitled to a qualified privilege that shielded the defendants from liability unless they acted with malice, proven by clear and convincing evidence. *Id.* A favorite shibboleth of the defense bar is gone and, as a result, the murky half-light of "qualified privilege" now illuminates the netherworld of internal corporate defamation cases.

America Online, Inc. v. Nam Tai Electronics, Inc., 571 S.E.2d 128 (Va. 2002). In this Uniform Foreign Depositions Act case the Court ruminated, somewhat inconclusively, on the application of the First Amendment to a claim that unfair business practices were accomplished through false and defamatory messages posted on an Internet message board devoted to discussion of a publicly-traded stock. In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 99 L.Ed. 2d 41, 108 S.Ct. 876 (1988), the United States Supreme Court held that First Amendment protections apply to a suit by a public figure alleging that an obvious parody subjected him to intentional infliction of emotional distress. The Court noted that since Falwell was a public figure, he had to demonstrate falsity and "constitutional malice" before he could recover. In *America Online, Inc.*, the Virginia Supreme Court nodded in deference to the U.S. Supreme Court's opinion in *Hustler Magazine, Inc.*, but concluded that *Maximus, Inc. v. Lockheed*

Information Management Systems Co., 254 Va. 408, 412, 493 S.E.2d 375, 377 (1997), which was decided after *Hustler Magazine, Inc.*, had declined to extend First Amendment principles to a tortious interference with contract cause of action. Justice Kontz, applying an abuse of discretion standard of review as appropriate in a Uniform Foreign Deposition Act proceeding, concluded that the trial judge did not abuse his discretion in finding the California statute that allowed recovery for statutory unfair business practices without proof of actual malice, was both comparable to the law of Virginia and not repugnant to Virginia's public policy. Whether in a future direct appeal from a final judgment in a tortious interference with contract case, applying a less deferential standard of review, the Court will hold that an interference with contract claim made by a public company or public figure, based entirely on defamatory statements, is subject to First Amendment "constitutional malice" standards is an open question.

Fuste, M.D. v. Riverside Healthcare Association, Inc., 2003 Va. Lexis 13 (Va. 2003); *WJLA-TV v. Levin*, 564 S.E.2d 383 (Va. 2002); and *American Communications Network, Inc. v. Williams*, 568 S.E.2d 686 (Va. 2002). In this trilogy of cases the Virginia Supreme Court reaffirmed the continuing validity of the fact versus opinion distinction in Virginia defamation law. Virginia recognizes a separate state constitutional protection for pure statements of opinion. *Chavez v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101-102 (1985). However, the distinction between fact and opinion in the law of defamation "...has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice." *Goldwater v. Ginzburg*, 261 F.Supp. 784, 786

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