



You May Need to Object Twice... What *A Few Good Men* Taught Us About Preserving Error for Appeal

Monica Taylor Monday

Hollywood makes trials far more interesting than reality. Perhaps that is why most lawyers love a movie featuring a good trial. We don't watch these movies for educational purposes. Rather, they are purely for entertainment. There is a guilty pleasure in watching cinematic trials, which actors can stage without those persnickety rules of evidence and civil procedure. But, sometimes Hollywood gets it right.

Take the movie *A Few Good Men*. Tom Cruise and Demi Moore play military attorneys who are representing two young marines accused of killing a fellow marine in Guantanamo Bay, Cuba. In the court martial that serves as center stage for the movie, the young and inexperienced attorneys learn how to try their first case. The movie is most often remembered for Tom Cruise's dramatic cross-examination of the military colonel played by Jack Nicholson, who warns defense counsel that he "can't handle the truth" before admitting the facts that not only seal the Colonel's fate, but also save the defendants from a murder conviction.

However, it is a less dramatic scene in the movie that provides the backdrop for this article. Demi Moore's character is trying to convince the trial judge to exclude testimony from an expert witness who will provide evidence damaging to the defense, and she objects to the introduction of this testimony. When the trial judge allows the testimony, however, Moore is not satisfied that the trial judge appreciated her argument. Therefore, she boldly rises again, proclaiming that the defense "strenuously objects" to

the trial court's decision to admit this testimony. The trial judge was unmoved by the renewed objection, even though it was *strenuously* made, and the jury received the evidence. Moore's co-counsel criticized her for renewing her objection, pointing out that the repeated objections had alerted the jury that the defense was afraid of the testimony.

Well, the "double" objection may not have been so far from the mark. In a recent opinion, the Supreme Court of Virginia refused to review an assignment of error, which challenged a trial court's admission of double hearsay evidence, because defense counsel did not renew the objection to the evidence. The trial court ruled that the evidence was admissible, finding that the first level of hearsay satisfied an exception to the hearsay rule; however, the trial court did not rule on the defendant's challenge to the second level of hearsay – the double hearsay. Although the Supreme Court had no concerns about the quality of defense counsel's objection, it held that the defense had waived the issue by failing to renew the objection or remind the trial court that it had only ruled on part of his objection.

The case, *Riner v. Commonwealth*,¹ was decided last year by a divided Court. The decision represents an expansion of the waiver doctrine to require renewal of objections or motions raised at trial that are not fully resolved by the trial court. Further, the decision places on trial counsel an affirmative duty to alert the

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Letter From The Chair

Reading Law

By Robert E. Scully, Jr.

“Reading is dead” – so says the advertisement I recently received from the Virginia Quarterly Review. If true, it’s sad. There are classics of litigation literature just as there are classics of prose, poetry, philosophy, science and religion. To my knowledge, no one has compiled the “Great Books” of western judicature. Thus, any selection necessarily must be highly-personal and idiosyncratic. Here are five of my favorites. I hope there are many others that will come to your mind as you read this column, and that you will recommend your favorites to your friends and colleagues at the Bar.

My greats, not listed in order of merit, are: “The Art of Advocacy, a Plea for the Renaissance of the Trial Lawyer” by Lloyd Paul Stryker (Simon & Schuster, New York 1954); “The Twelve Men” “in” “Tremendous Trifles” by G.K. Chesterton (Methuen & Co., London 1909); “The Art of Cross-Examination,” by Francis L. Wellman (4th ed. Dorset Press, New York 1986); “The Trial” by Franz Kafka (Alfred Knopf, New York 1956) and “Judge Dave and the Rainbow People” by David B. Sentelle (Green Day Press, Washington, D.C. 2002). These pieces range from the sublime (“The Twelve Men”) to the ridiculous (“Judge Dave and the Rainbow People”). Yet each one teaches an important lesson about trial lawyering or judging in an unforgettable way.¹

Lloyd Paul Stryker is forgotten by most current trial lawyers. In his day he was the premier criminal trial lawyer in New York City. When Alger Hiss was indicted for perjury in the Southern District of New York in December 1948, Hiss’ good friends, Dean Acheson and Justice Felix Frankfurter, urged him to hire Stryker. Stryker got Hiss a hung jury at his first trial. This displeased Hiss. He replaced Stryker and was subsequently convicted at his retrial.

In the “Art of Advocacy” Stryker is at his best when describing the importance of defending the unpopular client – something Stryker did throughout his career. He quotes John Quincy Adams’ letter to his own father explaining his much maligned decision to defend the nine British soldiers who fired into a mob of protestors in 1770, and thereby committed what became known as the “Boston Massacre:”

I have little leisure, and less inclination, either to know or take notice of these ignorant slanderers who

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1. I left out “To Kill a Mockingbird” (with apologies to Rob Stoney). But what could I say about it that has not already been said?

have dared to utter their ‘bitter reproaches’ in your hearing against me Let such be told, sir, that these criminals charged with murder are not yet legally proved such, and therefore, however criminal, are entitled by the laws of God and man to all legal counsel and aid; and that my duty as a man obliged me to undertake the defense, that my duty as a lawyer strengthened the obligation.

“The Art of Advocacy” at 211.

Adams and Josiah Quincy, Jr. won an acquittal for the British captain and six of the eight accused soldiers from a Boston jury less than five years before the battle of Bunker Hill. Stryker’s comment on Adams’ decision to defend the British troops is salutary in light of Virginia’s gubernatorial campaign rhetoric:

Today, I wonder if a lawyer who had conducted such a defense could become President of the United States? Could he do so if he had only acted as a character witness? For there is today, I think, a stronger feeling of public intolerance for any who have in any way participated in an unpopular cause than this country has ever known before. There is less understanding of the true nature of our American system than ever has been seen in our whole history

Id. at 212.

Buy a copy of “The Art of Advocacy” for those days when you wonder why you ever decided to become a trial lawyer. Stryker will remind you why you did and he will shove you back into the fight with renewed conviction of its worth (and yours).

G. K. Chesterton was not a lawyer. He was a Roman Catholic convert, newspaper columnist, essayist, pundit, short story writer and political foil for George Bernard Shaw and the Fabians. He wrote “The Father Brown Mystery Series” (describing crimes solved by a fictional Roman Catholic priest a la Sherlock Holmes) and a long religious essay, “Orthodoxy,” that is a classic of its genre. But my favorite piece is his essay “The Twelve Men,” a brief (just six pages long) and powerful defense of the English jury system. I cite it when defending our jury system against those who claim it is an absurd instrument of justice that rounds up twelve local imbeciles to decide an important question they know nothing about and will never fathom. Here is Chesterton’s classic

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Arresting Officers, Treating Physicians, and Virginia's Outrageous Double Standard: When May a Witness Testify to What Others Told Him for the Purpose of Explaining His Conduct?

Professor James J. Duane

Every trial lawyer eventually becomes intimately familiar with the steps of an elaborate *pas de deux* that is danced at almost every trial. The steps go like this:

1. One party, known as the proponent, asks a witness to testify about some information that the witness received from someone else.
2. The opposing party objects, naturally, that this is inadmissible hearsay.
3. The proponent, who implicitly admits that the evidence would not be admissible under any other exception to the hearsay rule, replies: "It's not being offered for its truth, but merely so that the jury can understand *why* this witness believed what he did, and took the actions that he did, on the basis of what he was told beforehand." In other words, the

statement is being offered merely to show what the textbooks and cases often call its "effect on the hearer." By making this response, the proponent is tacitly conceding that the opposing counsel will be entitled to a limiting instruction if he has the good sense to request one.

4. The objecting party then responds that the evidence, if it is being offered solely for that limited purpose, is not worth the trouble it would cause, because its probative value would be substantially outweighed by its risk of unfair prejudice. This requires the objecting party to persuade the court that (a) the question of *why* this witness did what he did, and how that decision was affected by what others *told* him, is not that central to the case, and (b) the danger is great that the jury would disregard the necessary limiting instruction.

5. The proponent then predictably disagrees, arguing that the probative value is fairly high and that there is nothing unusual about the case to justify a departure from the law's ordinary presumption that jurors can be trusted to follow the instructions of the court. He also points out, correctly, that the admission of the evidence carries literally no risk of unfair prejudice to anyone if the jury can be counted upon to follow a court order that the evidence "may not be considered for its truth."

How should the judge rule? It depends on the circumstances of each case. It all comes down to whether the conduct and motives of the witness are important for the jury to decide, and the likelihood that the jury can be safely trusted to follow an instruction to use the evidence only for that purpose and not as proof of the truth of what the witness was told.¹

This intricate facet of hearsay doctrine has caused a great deal of confusion in the courts. As we shall see, it has accounted for several of the most poorly reasoned evidence rulings that have ever come out of the Supreme Court of Virginia, all involving this precise question of whether to admit a statement allegedly offered to explain why the witness took certain actions on the basis of what he had been told by others. These cases include some of the clearest imaginable situations where the admission or the exclusion of such evidence was obviously the right course. Indeed, the cases discussed in this article would have furnished textbook examples that could have been used to teach future generations of lawyers about this area of hearsay law and doctrine, except for one little problem. The courts of Virginia got them all dead wrong.

Arresting Police Officers

Courts generally have wide discretion in deciding whether to let a witness testify "I did what I did because of what someone else told me." But the admission of such testimony is always most

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trial court if it has failed to address part of an objection or motion. Consequently, *Riner* warns us that the task of preserving issues for appellate review requires greater attention to the trial court's disposition of motions and objections at trial.

The Basics – The Contemporaneous Objection Rule

A brief review of the basic requirements for preserving issues for appeal provides a meaningful preview for a discussion of the decision in *Riner*. The “contemporaneous objection rule” forms the bedrock for preserving error for appeal. This rule, which is codified in Rule 5:25 of the Rules of the Supreme Court of Virginia, provides:

Error will not be sustained to any ruling of the trial court or the commission² before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.³

The purpose of the contemporaneous objection rule is to inform the trial judge of the action complained of in order to give the judge the opportunity to consider the issue and to take timely corrective action, if warranted, in order to avoid unnecessary appeals, reversals and mistrials.⁴ The rule was adopted to protect the trial court from appeals based upon undisclosed grounds and to prevent the setting of traps on appeal.⁵ Under this rule, the appellate court will not consider issues raised for the first time on appeal.⁶

Generally, to satisfy the requirements of the contemporaneous objection rule, an objection must be made contemporaneously with the introduction of the objectionable evidence or at a point in the proceeding when the trial court is in a position to consider the asserted error and to rectify the effect of the asserted error.⁷ However, simply making an objection at the proper time is not enough. The contemporaneous objection rule also requires the objection to be stated with reasonable certainty.⁸ Thus, all grounds for the objection must be stated in such a manner so as to give the trial court notice of the substance of the objection.

The contemporaneous objection rule compels litigants to present to the appellate court the same issues they raised below. With a proper application of this rule, there are no surprises on appeal – the issues have already been raised below.⁹

The Case from Wise County

The facts of this case could have come straight from a Hollywood script. Riner was convicted by a jury in Wise County Circuit Court of first degree murder of his wife Denise, arson and petit larceny. Denise died in an early morning fire in the parties' home. Her body was found in the master bedroom

on the first floor of the home. Riner and their children escaped unharmed from the second floor of the home, where they had been sleeping.

The Commonwealth's theory of the case was that Riner set the fire to kill Denise because Denise was going to divorce him and take their children. The defense, in contrast, claimed that the fire, and therefore Denise's death, was accidental. Riner, who was arrested in Panama, was charged with capital murder, arson and robbery. At the time of his arrest, Riner was carrying with him items that had been in the marital home prior to the fire.

During the trial, the Commonwealth called Donna Brickey to testify about threats Riner made to Denise before her death. Specifically, Brickey would testify that Denise told her that Riner told Denise “that if she tried to leave him and take the kids that he would kill her.”

Defense counsel objected to this testimony, stating that it is “double hearsay” and does not show Denise's state of mind. The Commonwealth argued that it was admissible to show “the relationship of the parties” as well as Riner's “motive and intent.” The trial court overruled the objection and admitted Brickey's testimony to show Riner's state of mind and threats he had made to his wife.

On appeal, the defense argued that the trial court erred in permitting the introduction of the double hearsay evidence from Brickey. A majority of the Supreme Court, however, found that the defense had waived the issue. Therefore, the Court did not decide whether the objection was well-taken. Instead, in an opinion authored by Justice Cynthia D. Kinser, the majority explains how the defense waived the assignment of error.

The Majority: You May Need to Object Twice to Preserve an Issue for Appeal

According to the majority, the defense failed to alert the trial court that it had not ruled on the admissibility of both levels of the hearsay contained in Brickey's statement. The trial court only addressed the first level of hearsay, concluding that Riner's threat to Denise was admissible under an exception to the hearsay rule to show Riner's state of mind. However, the trial court never addressed the second level of hearsay – Denise's statement to Brickey. The majority held that “by failing to bring to the court's attention the fact that it had ruled only on the admissibility of the primary hearsay in the statement, Riner did not afford the trial court the opportunity to rule intelligently on the issue now before us.”¹⁰

The majority held that when the trial court decided to admit the testimony to show Riner's state of mind, the defense had a duty at that point to “remind” the trial court that it had not ruled on the admissibility of both levels of hearsay. To satisfy this duty, the defense should have renewed its objection or

reminded the trial court that it had not expressly ruled that the second level of hearsay fell within an exception to the hearsay rule.¹¹

In finding that the defense had waived the objection to the double hearsay evidence, the majority relied upon its 2003 decision in *Green v. Commonwealth*.¹² In *Green*, the defense filed a motion challenging venue prior to the trial. The trial court took the motion under advisement without objection. The defendant never renewed the venue motion at trial, but raised the issue on appeal. The Supreme Court held that the issue had been waived:

Because the defendant did not object to the trial court's decision to take the change in venue motion under advisement pending outcome of voir dire, we held that it was "incumbent upon [the defendant] to renew the motion before the jury was empanelled and sworn, or at least remind the court that it was still pending and that he wanted the court to rule on it."¹³

The decision in *Green* also figured prominently in the *Riner* Court's analysis of Riner's challenge on appeal to the trial court's failure to grant his pre-trial motion challenging venue. Prior to reaching the double hearsay issue, the Supreme Court had applied *Green* to find that Riner had waived his objection to the venue issue by failing to renew the objection or remind the trial court about the objection before the jury was empanelled and sworn.¹⁴ Like *Green*, Riner did not object to the trial court's decision to take his venue motion under advisement. Therefore, the Court concluded that "it was incumbent upon him to renew that motion or remind the court that it was still pending at some point before the jurors selected to hear the case were sworn."¹⁵

The Dissent: One Well-Stated Objection will Preserve an Issue for Appeal

The dissenting justices found *Green* inapplicable in deciding whether Riner had waived his objection to the double hearsay claim.¹⁶ That case, reasoned the minority, concerned the failure to renew a pre-trial motion on which the trial court had never ruled. By contrast, Riner made the objection "at the point at which the evidence was to be admitted at Riner's trial."¹⁷

Justice Lawrence L. Koontz, Jr., writing for the minority, relied primarily upon Virginia Code § 8.01-384(A).¹⁸ That

statute provides, in relevant part, that "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court." The statute, which makes it unnecessary to "except" to rulings of the trial court, further provides that "it shall be sufficient that a party at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court

to take or his objections to the action of the court and his grounds therefor."

According to the dissent, Riner's objection to the double hearsay was sufficient under § 8.01-384(A) to preserve that issue for appeal.¹⁹ Indeed, the dissent maintained that § 8.01-384(A) expressly made it unnecessary for Riner to renew his double hearsay objection after the trial court ruled that the evidence was admissible.²⁰

Justice Koontz concluded that the majority's expectations were unrealistic: "The view taken by the majority would place every criminal defendant in the position of having to request full and express rulings from the trial court on every objection in order to avoid

the waiver applied in this case, a practice that is wholly impractical."²¹

The Lesson? Double Your Effort

The majority's finding that the defense had waived its double hearsay objection manifests an extension of *Green* beyond the context of pre-trial motions. Thus, trial counsel may encounter opportunities for waiver at every stage of the trial. Moreover, nothing in *Riner* suggests that its holding is limited to criminal cases. Indeed, the contemporaneous objection rule has been applied in both criminal and civil appeals. Counsel in criminal and civil trials, then, should embrace the message contained in this case.

The Supreme Court's message in *Riner* is clear – simply making an objection and stating the basis for your objection is not sufficient in all circumstances to preserve your claim for appeal. *Riner* requires litigators to exercise special attention at trial to ensure that the record demonstrates that the trial court is aware that it has left part of a motion or objection unanswered. There is no question that trial attorneys can no longer feel comfortable that they have preserved an objection by simply making it and stating with specificity the grounds for their position. Under the scenario presented in *Riner*, where the trial

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The trial court ruled that the evidence was admissible, finding that the first level of hearsay satisfied an exception to the hearsay rule; however, the trial court did not rule on the defendant's challenge to the second level of hearsay – the double hearsay.

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court has not fully addressed a party's objection or motion, litigants cannot rely upon § 8.01-384(A) to provide a safe harbor from the doctrine of waiver.

So, how does the decision in *Riner* impact the way we try cases? In short, if the trial court does not fully address your objection or motion, you must renew it or remind the court that it has not considered all of the grounds you have raised in support of your position. At a minimum, trial counsel has an affirmative duty to alert the trial court that it has not considered all grounds for an objection or motion. However, the *Riner* Court does not go so far as to require litigators to ensure that the trial court actually rules on every ground raised in support of an objection or motion, as such a requirement plainly would be beyond the control of even the most skilled litigator. Rather, a litigator's duty is to take every step available to assist the trial court in ruling intelligently on the issue before it.

An illustration underscores the point. If you object to the admission of evidence on two grounds, but the trial court only addresses one of those grounds, you must alert the trial court that it has not ruled on the other ground for your objection. For example, if you object to the admission of evidence on the basis that it lacks a proper foundation and constitutes inadmissible hearsay, but the trial court overrules your objection finding that the evidence satisfies an exception to the hearsay rule, you must alert the trial court that you also have objected that the evidence lacks a proper foundation. Similarly, if your objection or motion requires the trial court to answer more than one question to reach a decision, you apparently have a duty to ensure that the trial court is aware that it must answer all of those questions in resolving the issue. Thus, addressing the threshold issue of relevance does not answer the question whether the evidence is so prejudicial that its probative value is outweighed by the danger of unfair prejudice to the opposing party. If you object on dual grounds of relevance and prejudice, then, be sure that the trial court is aware that you have urged both grounds in support of exclusion.

Moreover, *Green* reminds us that a pre-trial motion that a trial court takes under advisement also requires special attention if that motion will serve as the basis for an appeal. If the trial court does not rule on a pre-trial motion, either by taking it under advisement or otherwise deferring a ruling, trial counsel has a duty at trial to renew the objection or remind the court that it has not ruled on the motion. The timing of the renewed motion is critical – it must be made before the trial court takes the action that serves as the basis for the motion. In *Green* and *Riner*, the motion for a change in venue should have been renewed at trial before the court empanelled and swore the jury; thereafter, the motion was waived as it is too late for the trial court to take corrective action.

Although motions to change venue may be rare, the holding in *Green* appears equally applicable to motions *in limine*, which are routinely filed in civil cases. When a trial court takes a motion *in limine* under advisement, (perhaps, for example, if the issue involves a question of relevance that cannot be addressed until placed into context at the time of trial), *Green* and *Riner* appear to require trial counsel to renew the objection or remind the trial court that it has not ruled on the objection; and, such action must be taken before the evidence is admitted.

So, Hollywood got it right this time. Although Moore's character in *A Few Good Men* was chided for renewing her objection, her efforts, even if a overly enthusiastic, ensured that the issue would be preserved for appeal. A little dose of cinematic reality never hurts.



1. 268 Va. 296, 601 S.E.2d 555 (2004).
2. As the plain language of Rule 5:25 indicates, the contemporaneous objection rule also applies in workers' compensation cases. *Best Masonry, Inc. v. Wilkins*, Record No. 1121-92-4 (Ct. of Appeals, Oct. 15, 1992) (unpublished) (on appeal in workers' compensation cases, the Court of Appeals considers only those issues raised before the full Commission and properly appealed to it from the decision of the deputy commissioner).
3. Rule 5A:18 sets forth the version of the contemporaneous objection rule that applies in appeals to the Court of Appeals of Virginia. It reads: "No ruling of the trial court or the Virginia Workers' Compensation Commission will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal."
4. *E.g., Robinson v. Commonwealth*, 13 Va. App. 574, 576, 413 S.E.2d 885, 886 (1992).
5. *Fisher v. Commonwealth*, 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988), *cert. denied*, 490 U.S. 1028 (1989); *Norfolk Southern R. Co. v. Lewis*, 149 Va. 318, 141 S.E. 228 (1928).
6. *Berner v. Mills*, 38 Va. App. 11, 18, 560 S.E.2d 925, 928 (2002), *aff'd*, 265 Va. 408, 579 S.E.2d 159 (2003). The contemporaneous objection rule does not apply to jurisdictional defects. *Wackwitz v. Roy*, 244 Va. 60, 63, 418 S.E.2d 861, 863 (1992). For example, challenges to a court's subject matter jurisdiction can be raised at any time, even for the first time on appeal. *Po River Water & Sewer Co. v. Indian Acres Club*, 255 Va. 108, 112, 495 S.E.2d 478, 481 (1998).
7. *E.g., Reid v. Baumgardner*, 217 Va. 769, 773-74, 232 S.E.2d 778, 781 (1977).
8. *Oden v. Salch*, 237 Va. 525, 533, 379 S.E.2d 346, 350 (1989) (when the basis of an objection is that an instruction "did not correctly state the law as applicable to the facts of the case," the objection is too general to be of any assistance to the trial court and is a plain violation of the letter and spirit of Rule 5:25).
9. *Shocket v. Silberman*, 209 Va. 490, 494, 165 S.E.2d 414, 418 (1969).
10. 268 Va. at 325, 601 S.E.2d at 571.
11. *Id.* at 324, 601 S.E.2d at 571.
12. 266 Va. 81, 580 S.E.2d 834 (2003).
13. *Riner*, 268 Va. at 310, 601 S.E.2d at 562 (quoting *Green*, 266 Va. at 94, 580 S.E.2d at 842).
14. *Id.* at 310, 601 S.E.2d at 562-563.
15. *Id.* at 310, 601 S.E.2d at 563.
16. *Id.* at 332-333, 601 S.E.2d at 576.
17. *Id.* at 333, 601 S.E.2d at 576.
18. The majority did not address the applicability of § 8.01-384.
19. *Id.*
20. *Id.*
21. *Id.* at 335, 601 S.E.2d at 577.



Letter from the Chair *cont'd from page 2*

rejoinder:

The trend of our epoch up to this time has been consistently towards specialism and professionalism. We tend to have trained soldiers because they fight better, trained dancers because they dance better . . . and so on and so on. The principle has been applied to law and politics by innumerable modern writers. Many Fabians have insisted that a greater part of our political work should be performed by experts. Many legalists have declared that the untrained jury should be all together supplanted by the trained judge . . .

Now, it is a terrible thing to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and the coarse faces of the policemen and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a play hitherto unvisited.

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or a solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary

men standing around. The same thing was done, if I remember right, by the Founder of Christianity. "Tremendous Trifles" at 65-68.

You don't have to be a Christian to be persuaded by Chesterton's powerful and practical explanation why we must never let go of our jury system.

Franz Kafka was a lawyer. He took his law degree in 1906 from the Karl-Ferdinand University in Prague, spent a year in practical training in the Prague Law Courts, and in 1908 accepted a position as a workman's compensation insurance claims adjuster with the Workers Accident Insurance Company in Prague. While he made his living as a claims adjuster, his real love was fiction writing. "The Trial" is his posthumously published masterpiece. It describes the terrifying plight of a client caught up in a legal system which is apparently sensible to its functionaries but incomprehensible to Joseph K., the accused. Seldom has the complete loss of control over one's own fate, which is the central experience of being accused, been better depicted in fiction. Kafka captures the inhumanity of the "The Court" in the closing lines of Chapter 9, "In the Cathedral," when Joseph K. meets the prison chaplain who tells him the parable of the "doorkeeper:"

"You were so friendly to me for a time," said K." and explained so much to me, and now you let me go as if you cared nothing about me." "But you have to leave now," said the priest. "Well, yes" said K. "You must see that I can't help it." "You must first see who I am," said the priest. "You are the prison chaplain," said K., groping his way nearer to the priest again; his immediate return to the Bank was not so necessary as he had made out, he could quite well stay longer. "That means I belong to the Court," said the priest. "So why should I want anything from you? The Court wants nothing from you. It receives you when you come and it dismisses you when you go." "The Trial" at 243-244.

Francis Wellman was also a lawyer. He was a leading insurance defense lawyer in New York City. He spent part of his summer vacation in Maine in 1903 assembling classic examples of cross-examination. (What did you do during your last summer vacation besides get a sunburn?)

Sample cross-examinations conducted by the greats of the day, in every kind of case, are included. The litany of luminaries includes: Max D. Steuer, Emory R. Buckner, Herbert C. Smyth, Henry W. Taft, Lloyd Paul Striker, George W. Whiteside, Charles H. Tuttle and Joseph H. Choate, Jr. My favorite is Chapter XV: "The Cross-Examination by Lee Parsons Davis of Leonard Kipp Rhinelander, in his Notorious Annulment Action Against his Colored Wife, Alice Jones

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Rhinelander.”

Lee Davis was the former District Attorney of Westchester County, New York. He was a friend of my maternal grandmother who worked as a probation officer in the Westchester County Juvenile Court after she was widowed at an early age. She was proud of him for taking on the defense of Alice Jones Rhinelander despite the substantial racial prejudice of the day. Davis' cross-examination of Rhinelander destroyed his claim (which his wealthy parents insisted he assert and had their own lawyer draft) that he was a weak-minded innocent who had been trapped into marriage by an unscrupulous, gold digging, “colored girl.” Here is a sample of the proceedings:

Q. “Now, the next classification we come to of the plaintiff's case is innocence. You were not so awfully innocent when you met Alice, were you, frankly?”

A. “I was.”

Q. “You were, eh?”

A. “Yes.”

Q. “You knew how to play stud poker and straight poker?”

A. “Yes.”

Q. “For money?”

A. “Yes.”

Q. “You had had a drink before you met Alice, hadn't you?”

A. “I might have had; yes.”

Q. “You made love to Alice?”

A. “Yes.”

Q. “You knew how to do that?”

A. “Yes.”

Q. “You were not innocent about that, were you?”

A. “It was —”

Q. “You see, we had been running right through on the cross-examination on the different titles that the plaintiff's case has presented to the jury. We are down to the third one now. You were not innocent so far as being able to make love to a girl is concerned?”

A. “I was, yes.”

Q. “You didn't know how to go about it?”

A. “No.”

Q. “Let me see. Did you know how to hold the hand of a girl?”

A. “Yes.”

Q. “Did you know how to put your arm around her?”

A. “Yes.”

Q. “Did you know how to kiss a girl?”

A. “Yes.”

Q. “I don't know as there is much else to do. You knew all those things. I'm talking about decent love.”

A. “Yes.”

Q. “Nothing much to it, is there?”

A. “No.”

Q. “So you knew those things when you met Alice?”

A. “Yes.”

Q. “So, so far as your case was concerned, you were not innocent on those subject, were you? Do you hesitate because you feel your case slipping out from under you, or just that you want to think?”

A. “No. I knew that.”

Q. “How did you go about making love to Alice? You see, I want to see just how innocent you were.”

A. “We rode around in the automobile.”

Q. “Now, if everybody who rode around in an automobile is made love to, we would have a lot of it. What did you do to make love to her? That is what I am after. You see why I have to ask you these questions, don't you, Mr. Rhinelander?”

A. “Yes.”

Q. “Well, you rode around in an automobile. Now, how did you start making love to her?”

A. “I put my arm around her.”

Q. “In the automobile?”

A. “Yes.”

Q. “So your first move to make love to Alice Rhinelander was to put your arm around her? Is that right?”

A. “I believe it was, yes.”

Q. “What did you say to her when you put your arm around her?”

A. “I don't remember.”

Q. “Could one forget?”

A. “Yes.”

Q. “You have forgotten then?”

A. “Yes.”

Q. “Did you say anything to her?”

A. “I have no recollection of it.”

Q. “What?”

A. “I haven't any recollection of it.”

Q. “What was your next move in making love to Alice Rhinelander, the one whom they claim snared you, or tried to?”

A. “I believe I kissed her.”

Q. “Oh, you kissed her?”

A. “Yes.”

Q. “The same evening?”

- A. "I believe so; yes."
 Q. "Did you tell her you loved her?"
 A. "I don't think I did."
 Q. "Now, you were not putting your arm around a girl and kissing her without being in love with her, were you?"
 A. "I liked her. I was attracted."
 Q. "Oh, you liked her?"
 A. "Yes."
 Q. "But you didn't have any thought then of real love?"
 A. "No."

....

- Q. "When did you first tell her you loved her?"
 A. "Several weeks after that."
 Q. "Well, did she return your love when you told her that you loved her?"
 A. "Yes."
 Q. "You were the first person to mention that, weren't you – that you loved her?"
 A. "I believe I was, yes."
 Q. "You were taking the initiative, weren't you?"
 A. "Yes."
 Q. "Did you love her?"
 A. "I did, yes."

"The jury's verdict was for the Defendant"
 The Art of Cross Examination , at 278-281

Last, and probably least, is "Judge Dave and the Rainbow People" by David B. Sentelle. Judge Sentelle currently serves as a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. This is how his friend and former White House Counsel C. Boyden Gray introduced the book:

The story is about a group of largely, but not exclusively, middle-aged hippies who want to have their annual camp-out meeting at a National Park in the beautiful mountains of Western Northern Carolina. State and federal officials believed the hippies are in violation of the applicable law controlling the size of camp sites. The hippies, on the other hand, believed that controlling law violates their rights of free speech.

The many legal questions that come to mind quickly land on the desk of Judge David Sentelle, a federal District Court judge just recently nominated by President Reagan to the D.C. Circuit. What law

applies, federal or state; does a federal judge have jurisdiction; is the North Carolina law, which strictly construed may not permit the gathering, subject to be ruled unconstitutional by a federal judge; and even if it is, is David Santelle such a judge, considering that he grew up in the area, is a conservative republican, and is, at the time the crisis erupts, hoping to get confirmed by the Democratic Senate to the Court of Appeals for the D.C. Circuit? And why cannot Judge Dave, as the hippies came to call him, duck this whole thing anyway and ship it down to the local courts?

In this delightful book, Judge Dave runs through the legal issues in a way that can be easily understood by the layman, and then basically sidesteps them all together. For me, this is the most instructive part of the book, because of the obvious tension between the need to observe the rule of law and the need to maintain peace and tranquility, sometimes otherwise known as common sense.

"Judge Dave & the Rainbow People," Introduction at xix.

Great legal literature need not be high minded or humorless. Judge Dave takes two "jury views" of the festival in the company of his female law clerks. They are hilarious. His description of his discomfort, and his law clerks' glee, when he is filmed for local television at the "camp" in conversation with a completely naked young woman, while his nomination to the Court of Appeals was pending before the Senate Judiciary Committee, is priceless. You will also learn the dangers of eating "Ramps" – onion-like roots that grows wild in the mountains of Western North Carolina.

Reading about litigation is seldom this much fun. ☒

Arresting Officers *cont'd from page 3*

suspect when it comes from the lips of a law enforcement officer in a criminal case. One of the leading reference works on American evidence law, *McCormick on Evidence*, specifically cautions that the “one area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime.”² Statements by the police relating “complaints and reports of others containing inadmissible hearsay ... are sometimes *erroneously* admitted under the argument that the officers are entitled to give the information upon which they acted,”³ but that is usually an abuse of discretion, since “the need for this evidence is slight, and the likelihood of misuse great.”⁴ Since the police officer is not a party to the case, his conduct and motives and the reliability of his sources are irrelevant to anything the jury has to decide, except for the rare case where the defendant chooses to make an issue out of them.⁵ Such matters are often relevant to the judge ruling on a pretrial suppression motion, but not to the jury at trial. The jury’s only assignment is to decide whether the accused is guilty on the basis of the evidence admitted at trial, not whether the police had probable cause for his arrest. Moreover, as the Sixth Amendment Confrontation Clause confirms, the risk of unfair prejudice is greatest when the opposing party is the accused on trial for his liberty or life.

This point has been well understood for many years by the United States Courts of Appeals, which have held time and time again that it is error for police officers to relate the details of incriminating complaints they received about the accused for the supposed purpose of explaining how and why they suspected, located, or arrested him.⁶ The highest courts of many other states have done the same.⁷ Such evidence has the greatest imaginable potential for unfair prejudice and little or no probative value, since the jury ordinarily has no reason to learn anything about when or why the accused was suspected or charged.

Once upon a time, that was the law here in Virginia too. Exactly half a century ago, in *Sturgis v. Commonwealth*,⁸ the Supreme Court of Virginia reversed a conviction because the arresting officer testified at trial that he was patrolling a certain highway on the night in question after he had “received some information” that the defendant was hauling illegal whiskey in that area, just before he found and arrested that same defendant

and charged him with that same offense. The Supreme Court properly ruled that this testimony was “clearly inadmissible” and “pure hearsay” because “it conveyed to the jury the information that these officers had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried.”⁹

Just a few years later, however, the wisdom of that case began to unravel in a pair of terribly reasoned cases. Ironically, both of them involved the fatal shootings of police officers, as if the court was unwittingly destined to prove that tragic cases make very bad law.

In 1960, in *Fuller v. Commonwealth*,¹⁰ the defendant was charged with capital murder for shooting one of two police officers who had been placing him under arrest for an unrelated charge. Over a hearsay objection, the other officer testified that, at the time of the murder, they had been placing Fuller under arrest because earlier that day they had met a man who was bleeding profusely from a wound on his head, and who told the police that he had been assaulted by Fuller at an address where they might also find a dead woman.¹¹ This testimony about the details of the other assault charge was obviously hearsay, terribly prejudicial, and irrelevant. Incredibly, however, the Supreme Court of Virginia held that this evidence was properly admitted

“not for the purpose of showing the guilt or the innocence of the defendant; but for the purpose of showing the reason for the police officers’ action in arresting him.”¹² That reasoning was exceptionally dubious, because the jury at Fuller’s capital murder trial only needed to be told, at most, that Fuller was resisting some sort of an arrest when he shot the arresting officer; the jury had no need to know anything about *why* he was being arrested, much less that it was for another unrelated crime of violence.¹³

As bad as the holding was in *Fuller*, at least its logic was originally limited to the special situation where a defendant is charged with crimes he committed *while* resisting arrest, and the prosecution wanted merely to prove why he was being arrested at the time of his crimes against the arresting officer. But any possible limits on that once narrow case were unwittingly obliterated by the disastrous decision of the Supreme Court of Virginia in *Weeks v. Commonwealth*.¹⁴

The defendant in *Weeks* was one of two men in a car that was stopped by a state trooper for speeding, moments before one of them apparently shot and killed the trooper during that routine traffic stop. Some time later, Weeks was detained by the police

Indeed, the cases discussed in this article would have furnished textbook examples that could have been used to teach future generations of lawyers about this area of hearsay law and doctrine, except for one little problem. The courts of Virginia got them all dead wrong.

for several hours of questioning. Over a hearsay objection, the police officer who was questioning Weeks about the murder was permitted to offer the terribly damning testimony that he eventually decided to arrest Weeks after hearing that *another* officer had allegedly been told by the vehicle's other occupant (who was also the defendant's uncle) "that Lonnie Weeks did, in fact, shoot the trooper." The Supreme Court of Virginia affirmed the admission of this hearsay within hearsay on the absurd grounds that it was merely offered to "explain" something the jury had absolutely no need to know: namely, why the officer decided to arrest the defendant and charge him with the murder. Quoting but utterly failing to comprehend the language from its earlier holding in *Fuller*, the court stated that "[t]he hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused 'but for the purpose of showing the reason for the police officers' action in arresting him.'"¹⁵

The court's careless extension of its holding in *Fuller* was so preposterous that it takes your breath away. In *Fuller*, remember, the defendant allegedly committed capital murder while resisting arrest on *another* charge, and the otherwise inadmissible hearsay was offered merely to explain why he was being arrested *during* the murder. The arrest was part of the crime, and there was no way the jury at that murder trial could have decided that case without learning at least the bare fact that it was committed while he was being arrested (although, as I have pointed out, they had no need to know *why* he was being arrested). If the Supreme Court had understood and truly followed the logic of its earlier holding in *Fuller*, all it would have approved in *Weeks* would have been the admission of evidence as to why the slain police officer had stopped the accused for speeding just moments *before* the murder, not why a *different* officer decided several hours *later* to arrest him and charge him with the murder based on inadmissible third-hand information. That testimony should have been excluded on the grounds of its sheer irrelevance. There is no need for a jury to learn *anything* about whether the defendant was ever arrested *on the charge for which he is now being tried*, much less when or by whom or *why*.¹⁶ On the contrary, even in cases where it is impossible to keep the jury from learning or inferring such facts, the admission of such evidence must be treated with extraordinary delicacy and restraint, since the United States Constitution commands that a jury must *not* be "permitted to draw inferences of guilt from the fact of arrest and indictment."¹⁷ The fact that the Supreme Court of Virginia could not immediately perceive this great difference is nothing short of astounding, to put it charitably.

In fact, although the court did not realize this point, its decision in *Weeks* was plainly controlled by *Sturgis*, which had correctly recognized that it is improper to tell the jury that the police

"had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried."¹⁸ Yet that is exactly what the testifying officer did in *Weeks* with the later blessing of the state Supreme Court. Although the court did not say so, and probably did not even realize that it was doing so, its decision in *Weeks* unmistakably overruled *Sturgis*, and represented a complete change in the law of Virginia.

For the reasons outlined above, *Weeks* is perhaps the most poorly reasoned opinion I have ever seen written by any court on any aspect of hearsay law; I will note only in passing (because that is not our central concern here) that it is also unquestionably wrong under the Confrontation Clause of the United States Constitution, which plainly forbids any court from doing what the trial judge did in that case.¹⁹

There have been outrageous cases from other jurisdictions where police officers were allowed to relate inadmissible hearsay only because a bungling defense lawyer made the execrable mistake on cross-examination of asking why they arrested the defendant the way they did. For example, in one Ohio case where the defendant was charged only with drug possession, the testifying officer revealed that a team of seven officers was assembled to make the arrest because "there were other allegations that he was beating the children at the residence."²⁰ In a Connecticut case, an officer explained that he arrested the defendant with his gun drawn because the police "had information given to us by other police departments that [the defendant] has carried weapons on his person, that he has also said he wouldn't be taken again, and that he'll shoot it out with the police if he had to."²¹ Another police officer suspected the accused of criminal activity after calling headquarters to run his name through "a criminal history check" which revealed that "he [had] past convictions for burglaries as well as larcenies."²² In all three cases, the admission of this clearly inadmissible hearsay was affirmed only because the error was invited by a foolish question on cross-examination by defense counsel. If those same cases had been tried here in Virginia after *Weeks*, there would have been no need to wait until cross to make such devastating disclosures; they could have been volunteered on direct examination with a limiting instruction that the officer was merely exercising his supposed "right" under Virginia law to explain why and how he placed the defendant under arrest!

Predictably, the horrendous decision in *Weeks* has led the lower Virginia courts to sustain some of the most egregious examples one could imagine of inadmissible hearsay smuggled into the record under the ridiculous pretense of telling the jury why the police did what they did. For example, just last year in *Fisher v. Commonwealth*,²³ the accused was a felon charged with illegal possession of a firearm found in the trunk of a car he was driving. The arresting officer testified that he stopped

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Arresting Officers *cont'd from page 11*

the car because, among other reasons, he saw that the defendant (1) had no inspection or rejection sticker on his car, (2) made an illegal turn, and (3) pulled into a private apartment complex where the officer knew the defendant did not live. The officer testified that he decided to have the car towed in accordance with county policy because it had no inspection or rejection sticker, that he then found a bottle of pills in the car during a routine inventory search that tested positive for cocaine, and that he therefore obtained a search warrant for the search of the trunk that turned up the gun.²⁴ That should have been the end of the matter. That was far more than adequate explanation for the stop, and the search. No jury on earth confronted with that explanation would have ever suspected the police of anything suspicious or improper, and the defendant did not suggest otherwise at trial.²⁵

But the prosecutor did not stop there, probably because he feared the jury might not convict on the gun possession charge when there was no admissible testimony by anyone who had ever seen the defendant touch the gun, or who could say who had put the gun in the trunk. So, with the consent of the trial judge and the later blessing of the court of appeals, the arresting officer was *also* allowed to testify that one of his *other* reasons for stopping the car was that it had matched the plates and description of a car that had been the subject of a “be on the lookout” (BOL) broadcast, which had allegedly advised the officer that the defendant “had brandished a shotgun and put it in the trunk of his car the week before the stop.”²⁶

The potential of this evidence for unfair prejudice was off the charts; it was the *only* evidence in the entire trial that anyone had ever seen the accused actually touching the gun, which was the central issue at the trial! Incredibly, however, this testimony was admitted by the trial judge, and unanimously approved by the court of appeals, on the theory that its potential for unfair prejudice was outweighed by its supposed probative value in explaining for the jury “what this officer did upon receiving that information.”²⁷ This ruling was indefensible for three independent reasons, any one of which should have been a decisive reason for reversal.

First, as the Supreme Court of Virginia once understood and cogently stated in the completely indistinguishable case of *Sturgis v. Commonwealth*,²⁸ testimony by an arresting officer is “clearly inadmissible” and “pure hearsay” if “it conveyed to the jury the information that these officers had been told by other

persons that the defendant was or had been engaged in the very illegal act for which he was then being tried.”²⁹ That is exactly what the witness did in *Fisher*. Exactly two weeks after *Fisher* was decided, by the way, a federal appeals court held in a case with an uncannily similar set of facts that the admission of such testimony was plain error. In *United States v. Williams*,³⁰

another prosecution for possession of a firearm by a convicted felon, the court correctly held that it was plain error to allow the arresting officer to testify that others had told him that they had earlier seen the accused holding a gun, especially since the prosecution easily could have disclosed that the officers had information leading them to question the accused without revealing that it involved a report that he had been *armed*. Could anything possibly be more obvious?

Second, even if we concede that Virginia law after *Weeks* now apparent-

ly allows the police, at least as a *general* rule, to narrate inadmissible hearsay in order to explain their decision to arrest the accused, it boggles the mind to suppose that such testimony might be properly admitted even in a case like *Fisher*, where the officer had already testified without contradiction that he had seen with his own eyes plenty of lawful reasons to stop the accused and search his car, and the “one last reason” the prosecution wanted to sneak into the record was an otherwise inadmissible third-hand report that the defendant was guilty of the very charge for which he was on trial! If *that* is proper under Virginia law, then I say with no exaggeration that we might as well come clean and admit that Virginia hearsay law imposes absolutely *no* limits on what police officers can tell the jury, as long as the prosecutor will naturally and gleefully accept a pathetic limiting instruction that even the rankest hearsay rumors and reports are being admitted not for their truth but “merely” to explain why some expert in the police department thought they were reliable enough to act on!

Finally, even if one were to agree with the Virginia Court of Appeals that such testimony is properly admitted but not for its truth, it is sheer folly to suggest that any typical jury would have understood that was what was happening when the trial judge told them in *Fisher* merely that “whether or not this incident was reported or is true or not is *not the issue*; it’s only being offered to you for your consideration to show what this police officer did upon receiving that information, not whether it was true one week earlier.”³¹ This limiting instruction appeared to tell the jury only that it was not crucial or important whether the BOL warning was true or false, which no jury would understand or believe. That is a far cry from what would have been a minimal-

You have heard that the arresting officer stopped the defendant’s car because he said he had heard from the police dispatcher that someone else said they saw the accused put a gun in the trunk of this car.

ly adequate limiting instruction under the facts of a case like *Fisher*, where the accused was entitled to insist, at a minimum, that the jury be told something like this:

You have heard that the arresting officer stopped the defendant's car because he said he had heard from the police dispatcher that someone else said they saw the accused put a gun in the trunk of this car. That multiple hearsay has not been admitted as evidence that what this anonymous source said was true, and you may not consider it as evidence that such a report was true. Indeed, because there has been absolutely no admissible evidence that the report was true, and because the defendant is presumed to be innocent of all misconduct in the absence of admissible evidence to the contrary, I am ordering you that you must proceed on the assumption that the report was, in fact, *false*.

An instruction like that would be worlds apart from the instruction actually given in *Fisher*, where the jury was merely given a cryptic, baffling, and unpersuasive assertion by the judge that the truth of the out-of-court statement "was not the issue" and was not being given to the jurors to assist them in deciding "whether it was true."

Treating Physicians

If one were pressed to identify a situation where a witness *should* generally be allowed to testify to what someone else told him, not for its truth but for the purpose of explaining why he later did the things he did, it would probably be impossible to imagine a better case than a medical malpractice defendant attempting to explain that he made the decision that constituted his alleged malpractice only after seeking and relying upon the factual reports and advice of doctors with other pertinent medical specialties.

Unlike the arresting officer in a criminal case, a malpractice defendant is a *party* to the case, and the reasonableness of his conclusions and conduct is the central issue in the litigation, so any evidence bearing on that matter naturally has the highest degree of probative value. Besides, apart from the special case of police officers, leading evidence texts agree that when a witness wishes to testify to what he was told in order to explain his subsequent decisions and conduct, "unless the need for the evidence for the proper purpose is substantially outweighed by the danger of improper use, the appropriate result is to admit the evidence with a limiting instruction."³³ All this is obviously consistent with the law's presumption that a jury ordinarily "follows an explicit cautionary instruction given by the trial court,"³⁴ because if a jury can be trusted to follow a clear instruction that an otherwise relevant statement may not be considered for its truth, there is literally no risk of unfair preju-

dice to anyone. And let's not forget that, even in the context of testimony by officers explaining the irrelevant reasons for their decision to arrest the accused, the Supreme Court of Virginia has said that "[t]he hearsay rule does *not* operate to exclude evidence of a statement, request, or message offered for the mere purpose of explaining or throwing light on the conduct of the person to whom it was made."³⁴

So this should be a no-brainer, right? Surely that logic must follow with incomparably greater force when a malpractice defendant, seeking to explain why he made the decision that constituted his alleged malpractice, wishes to testify to facts and opinions that he *first* solicited and relied upon from doctors with other medical specialties. Right?

Wrong. In a pair of astounding cases decided just last year, the Supreme Court of Virginia has apparently eliminated any possibility that a medical malpractice defendant will be allowed to explain that he made his treatment decisions only after consulting with other doctors who had seen the same patient, even if the testimony is offered merely to prove the extent of his efforts to obtain appropriate consultation with relevant specialists.

In *Wright v. Kaye*,³⁵ the defendant, Dr. Kaye, was accused of malpractice during the surgical excision of a urachal cyst. The plaintiff charged that Dr. Kaye was negligent in using a stapling device to close the affected area and in failing to perform a cystoscopy to visually inspect the dome of the bladder. In his defense, Dr. Kaye testified that he did not complete the surgery until after he sought an intraoperative consulting opinion from a urologist who came into the operating room and then "informed him that he was far enough from the bladder to safely use the Endo-stapler and that no cystoscopy was needed prior to closing the surgery."³⁶ Dr. Kaye testified that he arranged this intraoperative consultation because he wanted the opinion of a urologist to assure "that the anatomy was properly identified."³⁷ The plaintiff's hearsay objection was overruled, according to the trial judge, because the testimony was admissible not "for the truth of what the [urologist] said, ... but simply to show why Dr. Kaye did what he did in this particular matter."³⁸

In another case decided last year, *Chandler v. Graffeo*,³⁹ an emergency room patient complained of chest pains to Dr. Graffeo, who diagnosed the patient "as suffering from a non-dissecting lower thoracoabdominal aortic aneurysm."⁴⁰ When the patient's pain subsided, he was released with instructions to see another doctor the next day, but died a few days later. After Dr. Graffeo was sued for his alleged "negligence in discharging [the patient] from the hospital,"⁴¹ he testified that he did not release the patient until after he first consulted with a specialist in nephrology, described the patient's current condition, and confirmed with the specialist that "it was safe to discharge [the patient] from the hospital."⁴² Dr. Graffeo testified that he

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Arresting Officers *cont'd from page 13*

sought and obtained this consulting opinion from Dr. Keith Zaitoun because he was a specialist in nephrology, and because Zaitoun had done a work-up on the patient during a five-day hospital stay a week earlier and therefore “knew the patient better.”⁴³ Again, the plaintiff’s hearsay objection was overruled by the trial judge.

Both cases followed a remarkably similar pattern. In both cases, the plaintiff objected on hearsay grounds to the defendant’s testimony about the consulting opinion he obtained from the specialist. In both cases, the defendant argued that his testimony was not offered for its truth but to explain why he later made the decisions for which he was on trial, and the trial judge overruled the objection. And in both cases, despite the law that evidentiary rulings are supposed to be reviewed only for abuse of discretion, the Supreme Court of Virginia reversed and concluded that the testimony should have been excluded as hearsay.

In both *Wright* and *Chandler*, the court made the mistake of placing almost exclusive reliance on a line of earlier cases in which it had held that a nonparty expert medical witness should not be allowed to testify that he has spoken with others who agreed with his opinion.⁴⁴ Those cases made good sense; when a *non-party* expert witness says that others agree with him, such testimony has absolutely no relevance unless it is taken as evidence of the truth of what the others said, which makes it classic hearsay. The same would also be true if a malpractice defendant testified to conversations he had with other doctors after the date of his alleged negligence.

But that is a far cry from what happened in *Wright* and *Chandler*, where the *defendant* in a medical malpractice case testified about the opinions he requested and obtained from specialists who had actually seen the same patient, as a way of demonstrating the extent of his care in obtaining appropriate consultations *during* his treatment of the plaintiff, which is typically a central issue in malpractice litigation.⁴⁵ If the evidence is offered for that limited purpose with an appropriate limiting instruction, its relevance does not depend on whether it is true or false, and so no hearsay danger is presented, as the trial judges correctly realized in both of those cases. When the witness on the stand is a *nonparty* medical expert, by contrast, obviously no similar claim can be made that the evidence is “offered for the mere purpose of

explaining or throwing light on the *conduct* of the person to whom it was made,”⁴⁶ since the lawsuit does not involve *his* conduct at all.

This is why the Supreme Court was mistaken to conclude in *Chandler* that there could be “no other reason for introducing Dr. Zaitoun’s opinion than to bolster Dr. Graffeo’s testimony to prove that he had complied with the appropriate standard of care.”⁴⁷

On the contrary, the obvious “*other* reason” was to show, not that this patient’s condition permitted his safe discharge from the hospital (his later death pretty much proved otherwise), but that the defendant *reasonably believed* it did at the time, based on his consultation with a specialist who knew the patient better. Virginia law allows a medical malpractice defendant to testify to the “factual issues in the case, including what actions he took and *his reasons* for taking those actions,” and such “factual testimony,” even if it includes the doctor’s understanding of what “many surgeons do,” is “materially different from standard of care testimony.”⁴⁸

In attempting to explain why it could not trust a jury to obey the standard limiting instruction in a case like *Wright*, the Supreme Court reasoned:

Is it proper for a witness to testify to what others told him out of court, where that otherwise inadmissible testimony is offered solely for the purpose of explaining or throwing light on the conduct of the witness?

It all depends on who the witness is.

While [the urologist’s] statements would be some evidence of Dr. Kaye’s state of mind (why he proceeded in Wright’s procedure as he did), that would be true, to some degree, of almost *any* hearsay statement offered by its proponent.⁴⁹

In other words, the court reasoned, if we let doctors testify to what others told them in the operating room on the grounds that it is only offered to explain their subsequent conduct, that “exception” to the hearsay rule would quickly swallow the rule, since almost every bit of hearsay could be admitted on that rationale. This is perfect nonsense. Most inadmissible hearsay could *never* be logically offered on such a theory, either because it was heard by the witness after the event in question, or else because it was heard by a nonparty witness whose conduct is therefore not relevant at the trial. That would most obviously include, come to think of it, *all* of the inadmissible hearsay collected by police officers in criminal cases! Perhaps it should be no surprise that this obvious point was misunderstood by the same court that has evidently perceived no logical limits on the ability of a police officer to do what Dr. Kaye was trying to do.

These two holdings are unfortunate and deeply troubling, and seem to reflect a grave naivety about the nature of medical malpractice litigation. Doctors routinely make life-and-death decisions based in large part on reports that they receive about the patient from specialists, lab technicians, nurses, radiologists, and a host of others, as well as the expertise they have acquired over a lifetime of conversations and conferences with other doctors going all the way back to their classes in medical school. All of these sources of guidance are classic hearsay if admitted for their truth, but they are routinely admitted in malpractice litigation, often without objection, even if only to permit the jury to decide whether the defendant made every reasonable effort to gather all pertinent sources of data and insight, and whether he made the right choices in light of the information and knowledge ultimately available to him. If the reasoning of *Wright* and *Chandler* is to be taken seriously and carried to its logical conclusion, there is no principled reason why *all* of these extrajudicial sources of insight would not also be inadmissible hearsay, a result which would have a profound impact on malpractice litigation as we know it.⁵⁰

Those who share my deep concern over these two cases might take some consolation in the knowledge that the court's dubious holdings may well be attributable to its confusion over the facts of those cases. In *Wright v. Kaye*, for example, the court mistakenly stated that the allegedly inadmissible hearsay proffered by the defendant involved "an intraoperative consultation he undertook *by telephone*" with a urologist,⁵¹ when in fact the specialist was actually summoned into the operating room and observed the site of the incision before recommending the proper course to close the affected area.⁵² This embarrassing mistake suggests that the court was probably unaware that the urologist had actually seen the patient at all. Likewise, the court's opinion in *Chandler* makes no mention of the fact that the specialist called by the defendant for a second opinion had actually seen the same patient one week earlier and allegedly knew the patient better than the defendant did. It is quite possible that the court mistakenly thought that both cases involved second opinions obtained over the phone from specialists who never saw the patient, which arguably might reduce their precedential significance a great deal -- although it must be conceded that nothing in either opinion clearly suggests that these mistakes about the facts played any role in the court's rulings. Only time will tell whether the court will limit those rulings to cases where the defendant obtained a second opinion from someone who never saw the patient, even though (perhaps unbeknownst to the court) *neither* of those cases actually involved such a situation. This sad chapter in Virginia legal history vividly confirms the wisdom of the rule that evidentiary rulings are supposed to be reviewed only for abuse of

discretion by the trial judge, who usually understands the facts and background of the case better than a busy appeals court ever could.

Conclusion

We summarize by considering a fundamental and frequently recurring question of evidence law, as well as its incredible answer here in Virginia.

Q. Is it proper for a witness to testify to what others told him out of court, where that otherwise inadmissible testimony is offered solely for the purpose of explaining or throwing light on the conduct of the witness?

A. It all depends on who the witness is. If the witness is not even a party but is a police officer in a criminal case trying to explain why he arrested and charged the defendant with the same crime the jury is trying to resolve, the answer is evidently always "yes" -- even though such unfairly prejudicial details are irrelevant to the jury, which has no need to learn whether (much less why) the accused was ever placed under arrest, and even though the United States Constitution forbids the jury from attaching *any* weight to the fact of his arrest in deciding his guilt or innocence. Moreover, this is true even if the testifying police officer is merely narrating *multiple* hearsay about what he heard from another police agent who allegedly heard it from an alleged witness to the crime.⁵³

On the other hand, if the witness is the defendant in a medical malpractice action trying to explain precisely why he took the actions that constituted his alleged malpractice, and why he reasonably believed that those decisions were correct in light of the information available to him, the answer is evidently always "no" -- even though that information goes directly to the ultimate issue in the litigation, and even if the witness is attempting to show the extent of his care in seeking out the opinions of appropriate specialists who also saw the patient with their own eyes.⁵⁴

Both lines of cases are about as wrong as one could imagine. But to think that they came from the same court is simply mind-boggling. It is hard enough to believe that they were written by judges from the same *planet*. ☒



¹ Purely as a matter of semantics, there are two different ways to describe what happens when a trial judge excludes a statement (or when an appeals court reverses a judgment) because the court fears that the jury is likely to disregard a limiting instruction that the statement may not be considered for its truth. A purist would insist that the evidence, by definition, *cannot* be hearsay if the proponent tells the judge, and the judge tells the jury, that it is not offered for its truth; the exclusion of such evidence must be based on a balancing of its potential for unfair prejudice against its probative value. *United States v. Evans*, 216 F.3d 80, 87 (D.C. Cir. 2000); CHRISTOPHER MUELLER & LAIRD

Arresting Officers *cont'd from page 15*

KIRKPATRICK, EVIDENCE §§ 8.12 and 8.18 (3d ed. 2003). The Supreme Court of Virginia, however, claims that a statement is *hearsay*, and excluded by the *hearsay* rule, even if the trial judge says it is not admitted for its truth, as long as it carries an unacceptable risk of being misused by the jurors for its truth, or where it appears that the offering party's real motive for offering the evidence was his hope that the jury would do so. See sources cited *infra* notes 8, 35, and 39. For the sake of simplicity, this article will adopt the somewhat unconventional terminology employed by the Supreme Court of Virginia.

2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 249 (5th ed. 1999).

3 *Id.* (emphasis added).

4 *Id.* That reference work correctly advises that instead of giving the details of the complaints received from others, the testifying officer should merely explain that he arrived at the scene or took certain actions "upon information received," or words to that effect," which "should be sufficient" to protect the prosecution from any unfair prejudice or jury confusion. *Id.*

5 Such matters usually become relevant only if the accused chooses to make them relevant by advancing the suggestion that he was the victim of "overly aggressive or unjustified enforcement efforts." MUELLER & KIRKPATRICK, *supra* note 1, § 8.18. But even then, the "cure" of allowing the officers to explain their conduct is "often worse than the disease" if it discloses to the jury "the opinions of outsiders that defendants engaged in criminal acts," so it is often wise for the court to exclude such evidence as unfairly prejudicial "if the defense does not raise or exploit the issue in some way." *Id.* For an excellent discussion of this issue, see *United States v. Evans*, 216 F.3d 80, 85-90 (D.C. Cir. 2000).

6 *E.g.*, *United States v. Williams*, 358 F.3d 956 (D.C. Cir. 2004); *United States v. Meserve*, 271 F.3d 314, 319-20, 330 (1st Cir. 2001); *United States v. Becker*, 230 F.3d 1224, 1228-29 (10th Cir. 2000); *United States v. Evans*, 216 F.3d 80, 85-90 (D.C. Cir. 2000); *United States v. Cass*, 127 F.3d 1218, 1222-24 (10th Cir. 1997); *United States v. Sallins*, 993 F.2d 344 (3d Cir. 1993); *United States v. Brown*, 767 F.2d 1078, 1083-84 (4th Cir. 1985); *United States v. Hernandez*, 750 F.2d 1256, 1256-59 (5th Cir. 1985).

7 *E.g.*, *Conley v. State*, 620 So.2d 180, 182-83 (Fla. 1993); *Craig v. State*, 630 N.E.2d 207 (Ind. 1994); *State v. Doughty*, 359 N.W.2d 439 (Iowa 1984); *Gordon v. Commonwealth*, 916 S.W.2d 176 (Ky. 1995); *Commonwealth v. Rosario*, 721 N.E.2d 903 (Mass. 1999); *State v. Williams*, 525 N.W.2d 538, 544-45 (Minn. 1994); *State v. Braxter*, 568 A.2d 311 (R.I. 1990); *Schaffer v. State*, 777 S.W.2d 111 (Tex.Cr.App. 1989).

8 197 Va. 264, 88 S.E.2d 919 (1955).

9 *Id.* at 267, 88 S.E.2d at 921.

10 201 Va. 724, 113 S.E.2d 667 (1960).

11 *Id.* at 725, 113 S.E.2d at 668.

12 *Id.* at 729, 113 S.E.2d at 670.

13 Under Virginia law, a defendant charged with crimes of violence against an arresting officer may try to reduce the grade of the offense by proving that he was being arrested illegally, but the burden of raising that issue and proving the illegality of the arrest is on the defendant, not the prosecution, *Clinton v. Commonwealth*, 161 Va. 1084, 1089, 172 S.E.2d 272, 274 (1934), and the defendant in *Fuller* did not even testify, much less offer any evidence either that he was resisting an illegal arrest or that he was threatened with any conduct that would justify the use of deadly force. See *Banner v. Commonwealth*, 204 Va. 640, 647, 133 S.E.2d 305, 310 (1963) ("An illegal arrest of itself would not give the defendant the right to shoot or take the officer's life"). So there is no way the prosecution should have been allowed to prove the legality of the arrest in that case to rebut a defense that had never been raised. In any event, that charitable explanation of the holding in *Fuller* would be especially tenuous today, since "the overall trend in a majority of states has been toward abrogation of the common law right to use reasonable force to resist an unlawful arrest." *Commonwealth v. Hill*, 264 Va. 541, 548 n. 2, 570 S.E.2d 805, 809 n.2 (2002) (noting without deciding whether Virginia should join that trend).

14 248 Va. 460, 477, 450 S.E.2d 379, 390 (1994).

15 *Id.* (emphasis added). The Court said it was quoting its opinion in *Upchurch v. Commonwealth*, 220 Va. 408, 258 S.E.2d 506 (1979), but the passage it quoted from *Upchurch* was actually a quotation from the holding in *Fuller*.

16 In *Weeks*, the Supreme Court reasoned that the incriminating statement by the defendant's passenger "was offered to explain [the police officer's] action in arresting defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper." 248 Va. at 477, 450 S.E.2d at 390. This completely overlooks the obvious fact that the precise *time* when the accused was placed under arrest was completely irrelevant to the jury. The jurors never even should have been told such things, much less given an explanation for them.

17 *Taylor v. Kentucky*, 436 U.S. 478, 487, 98 S.Ct. 1930, 1936 (1978) (explaining the

reasons for the need to give criminal jurors an instruction on the presumption of innocence). Many readers with the supposed "benefit" of extensive criminal trial experience will certainly think I do not know what I am talking about because they have seen countless police officers testify at trial about their decision to place the accused under arrest. I am well aware of that common practice, which is entirely because of the unfortunate prevalence of incompetent defense lawyers who have not read *Taylor v. Kentucky* and do not understand that they should be objecting to such prejudicial and irrelevant information, perhaps because they too have seen it happen so often. And so the tragic cycle continues.

18 See *supra* note 9.

19 In a case like *Weeks* where two potential suspects were present at a crime, an extrajudicial statement made by one of them to the police and implicating the other is so inherently suspect and devastating that it cannot be admitted at their joint trial, not even if it is admitted with a "limiting instruction" that the jury may not consider it for its truth against the one who did not make the statement, because of the intolerable risk that the jury will be unable to heed such an instruction. *Bruton v. United States*, 391 U.S. 123 (1968). That is true even in a case, such as *Weeks*, where the extrajudicial statement is admitted alongside an alleged confession by the defendant himself. *Cruz v. New York*, 481 U.S. 186 (1987). Logically, that conclusion is not altered merely because the accused is on trial by himself, at least not in a case like *Weeks* where the evidence was neither relevant nor admissible for any proper purpose to rebut some defense raised by the accused at trial. *Tennessee v. Street*, 471 U.S. 409, 417 (1985) (Brennan, J., concurring). These points were all plainly settled long before *Weeks* was decided.

20 *State v. Brack*, 2001 WL 92089 (Ohio App. 2001).

21 *State v. Brokaw*, 183 Conn. 29, 31 n.2, 438 A.2d 815, 816 n.2 (1980).

22 *State v. Wragg*, 61 Conn.App. 394, 397, 764 A.2d 216, 219 (Conn.App. 2001).

23 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004).

24 *Id.* at 399-400, 592 S.E.2d at 378-79.

25 Although I have tried without success to obtain the record on appeal in that case, I say with complete confidence that the defendant did not suggest otherwise, because in light of its ruling the Court of Appeals surely would have said so if he had. Even if I am wrong about this, not one word of the court's opinion suggests that its ruling was based in any way on anything done by the defense at trial, so *Fisher* can surely be cited as binding precedent even in a case where the accused makes no suggestion of any suspicious or improper misconduct by the police.

26 *Id.* at 405, 592 S.E.2d at 381-82.

27 *Id.* at 406, 592 S.E.2d at 382.

28 197 Va. 264, 88 S.E.2d 919 (1955).

29 *Id.* at 267, 88 S.E.2d at 921.

30 358 F.3d 956, 963-64 (D.C. Cir. 2004).

31 *Fisher*, 42 Va. App. at 406, 592 S.E.2d at 382 (emphasis added).

32 MCCORMICK ON EVIDENCE, *supra* note 2, § 249. ACCORD MUELLER & KIRKPATRICK, *supra* note 1, § 8.18 ("In an astonishing variety of cases, it is important to prove what a person actually knew or understood, what information was provided to her (warning or notice), or what pressures she felt from the urgings or blandishments of others. In such settings, evidence of oral out-of-court statements that she heard, or written statements that she read or had a chance to read, is routinely admitted.")

33 *Riner v. Commonwealth*, 268 Va. 296, 317, 601 S.E.2d 555, 567 (2004).

34 *Fuller v. Commonwealth*, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960).

35 267 Va. 510, 593 S.E.2d 307 (2004).

36 *Id.* at 529, 593 S.E.2d at 317.

37 Deposition of Dr. Kaye, at 11-12 and 16-19.

38 *Wright*, 267 Va. at 529, 593 S.E.2d at 317.

39 268 Va. 673, 604 S.E.2d 1 (2004).

40 *Id.* at 677, 604 S.E.2d at 2. The diagnosis was at least partially correct, because the patient died several days later from a ruptured thoracoabdominal aortic aneurysm. *Id.* at 676, 604 S.E.2d at 2.

41 *Id.* at 681, 604 S.E.2d at 5.

42 *Id.* at 682, 604 S.E.2d at 5.

43 This quote appears on page 840 of the trial transcript in the *Chandler* case. Dr. Graffeo further stated that this was "a patient who [Dr. Zaitoun] had completed his work-up on," *id.* at 838, and that Dr. Zaitoun "had the knowledge of [the patient's] five-day hospitalization at Maryview." *Id.* at 840.

44 See *CSX Transportation v. Casale*, 247 Va. 180, 182-83, 441 S.E.2d 212, 214 (1994); *Todd v. Williams*, 242 Va. 178, 181, 409 S.E.2d 450, 452 (1991); *McMunn v. Tatum*, 237 Va. 558, 566, 379 S.E.2d 908, 912 (1989).

45 *Bracey v. Sullivan*, ___ So.2d ___, 2005 WL 89478, at *5 (Miss. Ct. App. Jan. 18, 2005) (affirming summary judgment for malpractice defendant based, among other things, on the presentation of affidavits from expert witnesses to establish "that the appro-

appropriate consultations were made throughout [the patient's] treatment at the hospital").

⁴⁶ Fuller v. Commonwealth, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960) (emphasis added).

⁴⁷ Chandler, 268 Va. at 682, 604 S.E.2d at 5.

⁴⁸ Smith v. Irving, 268 Va. 496, 502, 604 S.E.2d 62, 65 (2004) (emphasis added). Believe it or not, this case was decided the *same day* the court decided *Chandler*, and also on the same day that the court reiterated, in the course of affirming the conviction and death sentence of a criminal defendant, that "[t]he hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made." Winston v. Commonwealth, 268 Va. 564, 591-92, 604 S.E.2d 21, 36 (2004) (quoting *Weeks* and ruling that a police officer could testify to incriminating statements made to him by a crime victim solely for the purpose of explaining why the officer took certain photos of the accused). Needless to say, the three opinions were written by three different justices – it could not have been otherwise – but, incredibly, all three cases were unanimous on the points for which I have cited them. It appears that the members of the court may be too busy to read these things very closely.

⁴⁹ Wright v. Kaye, 267 Va. 510, 530, 593 S.E.2d 307, 318 (2004) (emphasis added).

⁵⁰ Under Virginia law, "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay," VIRGINIA CODE § 8.01-401.1, but that hearsay exception obviously does not apply to the vast wealth of insight a medical doctor collects from decades of oral conversations and conferences with colleagues.

⁵¹ Wright v. Kaye, 267 Va. 510, 517, 593 S.E.2d 307, 310 (2004) (emphasis added).

⁵² My experience and intuitions told me that this had to be a mistake; no surgeon in any operating room would ever call a urologist on the telephone and ask "if I try to describe where I have made the incision, would you tell me if I am too close to the bladder?" I obtained the record on appeal and confirmed this unsurprising fact for myself. The allegedly inadmissible testimony consisted of what the urologist saw "while he was there," and his response when he was asked for his recommendation "given what you see here." Deposition of Dr. Kaye at 16-19. There is nothing in the record about any telephone conversation. It is a good bet that this mistake was made by a young law clerk who did not understand the meaning of the operative note which stated that the urologist "was called for intraoperative consultation."

⁵³ This is exactly what happened in both *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994), and *Fisher v. Commonwealth*, 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004).

⁵⁴ This is exactly what happened in both *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), and *Chandler v. Graffeo*.



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Virginia Supreme Court Holds That Depository Bank Is Not Liable for Embezzlement by Corporation's Employee

Thomas C. Junker and Rebecca E. Kuehn

The Virginia Supreme Court, in an unanimous Opinion authored by former Chief Justice Harry L. Carrico, ruled that Section § 3-406 of the revised UCC (Va. Code § 8.3A-406) does not create a basis for a claim of negligence against a depository bank that allegedly negligently paid a series of checks bearing forged drawer's signatures. The Virginia Supreme Court is the first senior appellate court to decide this issue.

Halifax v. Wachovia Bank, N.A., 268 Va. 641 (2004), involves the second unsuccessful appeal by Halifax in its attempt to recovery over \$15.4 million embezzled by Halifax's comptroller, Mary Adams. Ms. Adams used the facsimile signature stamp of Halifax's President to draw over 300 checks to herself, her companies, or to cash during a three and one-half year period. Ms. Adams deposited and cashed those checks at her bank, Central Fidelity (later Wachovia). Halifax did not discover the embezzlement until early 1999.

Halifax sued its own bank, First Union, for paying checks "not properly payable" because they contained forged drawer's signatures. First Union obtained summary judgment against Halifax, on the grounds that Halifax's claims were barred under 4-406(f) of the UCC because Halifax had failed to report the forged checks within one year after it received the cancelled checks or the statements reflecting those checks. On appeal, the Virginia Supreme Court affirmed the trial court's decision, rejecting Halifax's argument that the one-year bar of 4-406(f) did not apply if the bank was alleged to have acted in bad faith. *Halifax Corporation v. First Union National Bank*, 262 Va. 91 (2001).

Halifax then pursued its claims against Wachovia Bank, as the depository bank, alleging that it was liable to Halifax, under UCC Section 3-406, for negligently paying the checks, for conversion under UCC § 3-420, and for "aiding and abetting a breach of fiduciary duty". Halifax's claims were

premised on its allegations that Wachovia had ignored multiple "red flags" or other warning signs that the checks were part of an ongoing embezzlement, including the fact that the checks were in large amounts and many times more than what Wachovia knew was Adams' usual salary. Halifax argued that the "comparative negligence" provision in UCC § 3-406 somehow created a "duty of care" on the part of Wachovia, the depository bank, to conduct such an independent investigation under these facts, and that Section 3-406 therefore gave Halifax a basis for an affirmative claim.

Wachovia obtained summary judgment on all of Halifax's claims, arguing that the Virginia legislature had not created a cause of action against a depository bank under Section 3-406, and that Section 3A-420 similarly precluded a claim of conversion. The trial court also dismissed Halifax's claim for "aiding and abetting a breach of fiduciary duty," finding that even if Virginia were to recognize such a claim, Halifax had not alleged either that Wachovia had actual knowledge that the embezzlement was occurring or that Wachovia intentionally participated in the embezzlement.

In its unanimous Opinion of November 5, 2004, the Virginia Supreme Court affirmed the trial court on the grounds advanced by Wachovia. In holding that there was no affirmative claim created by Section 3-406, the Court refused to follow other lower state court decisions in New Jersey, Maryland, and Louisiana that had relied on a statement by Professors White and Summers in their treatise on the UCC, where they opined that Section 3-406 "must be interpreted" so as to provide for a claim of statutory negligence. The Court stated that the views of White and Summers in this regard, "were not compatible with Virginia law."

Equally significant, the Virginia Supreme Court clarified that a claim for "aiding and abetting a breach of fiduciary duty" would lie only where the Defendant had not only actual knowledge of the embezzlement by a fiduciary, but also participated in the embezzlement with "mens rea."

The case has significant implications for depository banking. If the Court had ruled otherwise, depository banks would have been faced with the prospect of having to determine, among other things, what circumstances would be sufficiently "suspicious" as to warrant some independent investigation, and to determine exactly how such "investigation" would be conducted, concerning checks written by companies or individuals that were not the bank's customers. The Virginia Bankers Association submitted an amicus brief in support of Wachovia's position.

First Union National Bank and Wachovia Bank, N.A. were represented by Grady C. Frank, Jr., Thomas C. Junker and Rebecca E. Kuehn of LeClair Ryan at the trial court and on appeal. ☒

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