



## Using the First Amendment as a Defense to Non-Defamation State Law Torts

*Brett A. Spain*

### INTRODUCTION

In the movie *The People vs. Larry Flynt*, the story of Larry Flynt’s notorious rise as the publisher of *Hustler Magazine* and an unlikely First Amendment hero unfolds as the film bounces between the magazine’s creation and a series of legal battles pitting the Christian right against the outspoken pornographer. Although probably overlooked by many viewers, Flynt’s legal victories are not only interesting, but also serve as a practical example of how to avoid liability in certain non-defamation cases – rely on the First Amendment.

The movie ends with Flynt’s triumph over Jerry Falwell in the United States Supreme Court in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (“*Hustler*”). Falwell sued Flynt over an ad parody which, without going into the details, discussed Falwell’s “first time,” and made reference to alcohol, an outhouse, and his mother. The good reverend was not amused and sued Flynt, in Virginia, on state law causes of action for libel, invasion of privacy, and intentional infliction of emotional distress.<sup>1</sup>

At trial, the court struck the invasion of privacy claim, and the jury returned a verdict for Flynt on the libel claim finding that no reasonable person could believe the parody stated actual facts about Falwell. On the intentional infliction of emotional distress claim, the

jury awarded Falwell \$100,000 in compensatory damages and \$100,000 in punitive damages.<sup>2</sup> The Fourth Circuit affirmed the verdict, but the Supreme Court reversed, on First Amendment grounds, holding that a public figure like Falwell cannot recover emotional distress damages based on speech without meeting the heightened standard of proving “actual malice” under defamation law.<sup>3</sup> Accordingly, because the jury found in favor of Flynt on the libel claim, the intentional infliction claim was also dismissed.

The *Hustler* decision is but one example of how defendants have relied upon the First Amendment to avoid liability in non-defamation state tort cases. Many people, lawyers included, often forget that the First Amendment protects not only speech, but also the right to petition the government, freedom of religion, and freedom of association. Virginia’s corresponding provisions in Article I, Sections 12 and 16 of the Virginia Constitution offer similar protections.

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## Letter From The Chair

## Zoning Finds Religion

Samuel W. Meekins, Jr.

In response to what Congress saw as local government's hostility toward acts of religious exercise, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") was enacted by Congress and signed into law by President Clinton in 2000. The statutory scheme can be found at 42 U.S.C. 2000cc, *et seq.* Congress' prior attempt to insert itself into local zoning decisions affecting religious exercise was titled the Religious Freedom Restoration Act of 1993 ("RFRA"). That Act, however, was declared unconstitutional by the Supreme Court of the United States in *City of Boerne v. Flourez, Archbishop of San Antonio, et al.*, 521 U.S. 507 (1997). The decision was authored by Justice Kennedy as part of a six justice majority. Justice O'Connor dissented as did, to greater and lesser degrees, Justices Breyer and Souter. The Supreme Court felt RFRA was not in furtherance of existing free exercise jurisprudence.

While a full exposition of the Act, nicknamed (phonetically) R-LUPA, is beyond the scope of this comment, Section (a) of the Act makes it illegal for any government to impose or implement a land use regulation that imposes a substantial burden on the religious exercise of any person, assembly or institution unless the government can demonstrate that it has a compelling interest in imposing such a burden and that it is using the least restrictive means available to accomplish that compelling interest. The Act defines religious exercise as any exercise of religion, including the use, building or conversion of real property for religious exercise. Substantial case law has already been developed in the various federal circuits interpreting RLUIPA as it applies to local government's application of zoning laws, often conditional use permits, to prevent, among other things, the construction or rehabilitation of churches in municipal zones.

The federal nexus for the legislation is found in 2000cc(a)(2) titled "The Scope of Application." The statute lays forth three perceived grounds for federal intervention into a local venue's decisions which are (A) The receipt of federal financial assistance for the program that imposed the substantial burden; (B) The imposition of the burden affects interstate commerce; and, (C) The burden is imposed in a land use system under which the government makes individualized assessments of proposed uses for property. Putting

that into English, we know that section (C) would seem to apply in every instance in which a church is required to obtain a conditional use permit to operate within a specific zone of a city. The conditional use permit procedures usually provide for the governing body, based upon recommendations and public input to make an individualized assessment as to whether or not the use permit should be granted. Under those circumstances, RLUIPA would be implicated and the question would then arise as to whether the denial of the use permit to the person or institution would impose a substantial burden on their religious exercise. If it does, the government would have to produce evidence of compelling governmental interest and least restrictive means in order to avoid the RLUIPA implications.

Equally interesting under the Act is the interface with the free exercise clause of the First Amendment. There is case law saying that a government may impose some burdens upon religion as long as it arises from laws of general applicability. *E.g., Employment Div. v. Smith*, 494 U.S. 872 (1990). Under traditional First Amendment jurisprudence, the substantial burden on the free exercise of religion is held to be imposed only when a person is required to forego a tenant of their religious belief. *See Shubert v. Verner*, 374 U.S. 398 (1963). Under RLUIPA, however, it is specifically stated that "religious exercise" includes any exercise of religion "whether or not compelled by or central to a system of religious belief" and specifically applies to the "use, building or conversion of real property for the purpose of religious exercise." 42 U.S.C. '2000cc-5(7)(A) and (B). Hence, RLUIPA provides that a person's religious exercise could be substantially burdened merely by the government's preventing their use of real property even if no specific religious tenant of the person would be affected by the denial of that use.

The question yet to be answered will be how RLUIPA will be interpreted by a Supreme Court which is becoming increasingly hostile to the expansion of federal power at the expense of state's rights? When the Supreme Court's make-up is changed by the departure of two justices who are being replaced by two justices that are favorites of the religious right the landscape will be set. Can the new Court actually strike down a law that makes it easier for churches to establish their places of worship in locales that Congress has declared to be hostile to such religious practices? We will see. ☒

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# Your Courtroom Notebook

Vicki H. Devine

What? You say you don't have a courtroom notebook? Here's your opportunity to start one. You know, taking that first step is sometimes the hardest. Well, I'm here to help you with that first step. After a few paragraphs of introduction, you will find what can become the beginning of your very own notebook — one that you take to court with you every time you try a case.

Of course, when you try a case, you bring case-appropriate citations and law with you. Most of us, however, have been in a situation where you have made an objection at trial that is of the "everybody knows" type and either the judge is not as sure of the law as you are or he or she wants the precise authority. Often, the first words out of the judge's mouth (after the other side responds) will be, "What is your authority for that proposition, Ms. Esquire?" You find yourself (unless you have every evidence and other trial-related rule, with its citation, memorized) stumbling and fumbling to come up with a helpful (to both you and the judge) legal reference to support your position. Your courtroom notebook will help to alleviate your stumbling and fumbling. Plus, the court will thank you for being prepared. And your client will, too.

So, other than for preserving your dignity in court, what good is this notebook? **SO THAT YOU CAN PROPERLY PRESERVE YOUR POSITION ON THE RECORD FOR APPEAL.** We all know how important that is. Remember, when you are making an objection or when you are advocating a motion, you should set forth on the record all grounds for your position and ask the trial court for a ruling as to all grounds. The appellate court will be examining the record to see that you gave the trial court a chance to make an informed ruling. If your objection at trial was bland and generic, do not look for relief on appeal based upon more specific and elaborate grounds that were not presented to the trial court. For a chilling reminder of what the Supreme Court of Virginia considers to be the proper way to preserve your grounds for appeal, please read *Rose v. Jacques*, 268 Va. 137 (2004), wherein the Court declined to rule on six out of ten assignments of error because they had not been adequately preserved.

So, here is your starter set of citations. Add a copy of each case/rule just in case the court asks for it. Once you begin your

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notebook, you'll always be thinking of cases to add and as you develop the notebook, your preparedness will develop right along with it and soon you may become one of those geniuses that can recite cases and statutes with ease.

1. Deposition signature - can waive if witness and parties all agree - Rule 4:5(e).

Useful when the witness is "all over the place" in the deposition and you anticipate impeaching him/her with deposition testimony. Witness is less likely to be able successfully to rehabilitate his/her testimony when you point out the signature attesting to the accuracy of the transcript.

2. Use of deposition at trial. Rule 4:7

- Can be used to impeach the witness. Sub-paragraph (a)(1).
- Deposition of a *party* can be used for any purpose. Sub-paragraph (a)(3).
- If part of a deposition is offered by a party, adverse party may require him to introduce any other part which ought in fairness be considered with the part introduced and any party may introduce any other parts. Sub-paragraph (a)(5).

2. No reference to insurance in tort case - *Forsberg v. Harris*, 238 Va. 442 (1989); *Simmons v. Boyd*, 199 Va. 806 (1958).

- Grounds for a mistrial - casual vs. repeated/intentional
- But you can use it to show the possibility that a witness is biased through employment or other connection. *Lombard v. Rohrbaugh*, 262 Va. 484 (2001)

3. Mention of Police Accident/Crash Report - grounds for mistrial. Code § 46.2-278-279, *Davis v. Colgin*, 219 Va. 5 (1978); *Acuar v. Letourneau*, 260 Va. 180 (2000).

- Statements and notes made may be testified to by officer without referral to a "police report" or "official report."
- Applicable in federal courts as well as state courts - *Krizak v. Brooks*, 320 F.2d 37 (4th Cir. 1963)

4. Bias of witness - bias of witness is not a collateral matter

- *Norfolk & Western Railway Company v. Sonney* 236 Va. 482 (1988). (See also *Lombard v. Rohrbaugh*, *supra*.)
- Plaintiff was allowed to cross examine the doctor who had initially examined and treated the plaintiff at the request of the railroad, about the number of employees he had examined and treated for the rail-

Your Courtroom Notebook — cont'd on page 10

## First Amendment *cont'd from page 1*

This article focuses on the first three rights mentioned above and explores how defendants have successfully avoided state tort liability in Virginia and elsewhere on First Amendment grounds. The utility of these defenses, of course, depends on the type of claim and the jurisdiction. In some instances the protection is limited by nature, while in other instances the protection has been limited by courts. In the right case, however, the First Amendment can be an invaluable means of disposing of otherwise valid claims.

### FREEDOM OF SPEECH

#### Application of *Hustler* Generally

The *Hustler* decision laid the foundation for raising freedom of speech as a defense to non-defamation state tort causes of action. Although courts have limited its application somewhat, the core aspect of the holding remains intact – a party cannot make an “end run” around defamation law by seeking defamation-like damages for defamation-like conduct under other state causes of action. Courts have uniformly adopted that rule in cases alleging infliction of emotional distress, the exact claim considered in *Hustler*.<sup>4</sup> In addition, many courts have reached the same conclusion in addressing a variety of business and other torts, including tortious interference, conspiracy, unfair trade practices, trespass, and unjust enrichment.<sup>5</sup>

In some cases, courts have found that plaintiffs are using non-defamation tort theories as a thinly veiled attempt to avoid the heightened burden imposed by the First Amendment. In other cases, courts have determined that a plaintiff cannot prove a specific element of the tort. For example, under state laws that require proof of an “improper purpose” to assert a tortious interference claim, courts have held that exercising a First Amendment right to speak is not sufficient.

As a result, the issue in these cases often boils down to whether the plaintiff is, in fact, attempting to avoid defamation principles. The United States Supreme Court acknowledged this distinction in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and held that *Hustler* does not prevent a plaintiff from asserting non-defamation tort claims under “generally applicable” state law (*i.e.*, law that does not single out the press), at least where the plaintiff is seeking non-reputational damages. The plaintiff in *Cohen* sued against a media organization alleging that the defendant had breached a promise to keep his name confidential. Distinguishing *Hustler*, the Court stated, “Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of \$50,000 for a breach of a promise that caused him to lose his job

and lowered his earning capacity. Thus, this is not a case like *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state law tort of intentional infliction of emotional distress.”<sup>6</sup>

*Cohen* has been criticized sharply,<sup>7</sup> but it remains the law and has created an additional layer of analysis. Courts applying *Hustler* and *Cohen* generally analyze a plaintiff’s claims to determine whether he or she is seeking “reputational” or “non-reputational” damages. Where the plaintiff is asking for reputational damages, courts regularly dismiss tort claims after determining that the plaintiff cannot prove a defamation claim.<sup>8</sup>

#### Application of *Hustler* by the Supreme Court of Virginia and the Fourth Circuit

The success of this argument in Virginia and the Fourth Circuit has been mixed. The Fourth Circuit (applying non-Virginia state law) has adhered to the principles set forth in *Hustler*. The Supreme Court of Virginia has addressed the issue only in the context of

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tortious interference claims. Although the court has acknowledged *Hustler* and its acceptance in other jurisdictions, it has rejected the wholesale application of First Amendment principles to these claims.

The first case in this series is *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985), a case that predates *Hustler*. The plaintiff in *Chaves* was an architect whose contract with the City of Fredericksburg was canceled after a competing architect wrote a letter to members of the City Council questioning the plaintiff's experience and fees. The plaintiff sued the competitor for defamation and tortious interference with contract rights and was awarded both compensatory and punitive damages at trial. Although the trial court set the verdict aside on both counts, the supreme court reinstated the compensatory damages award on the plaintiff's tortious interference claim.<sup>9</sup>

One of the issues on appeal was whether the defendant's actions were protected by the First Amendment, an argument that the supreme court rejected, stating:

We are unpersuaded by Johnson's freedom-of-speech argument. By logical extension, it would apply to any verbal conduct, however tortious, and would completely destroy the right of action universally recognized. . . . The tort complained of here is an intentional wrong to the property rights of another, accomplished by words, not defamatory in themselves, but employed in pursuance of a scheme designed wrongfully to enrich the speaker at the expense of the victim. The law provides a remedy in such cases, and the constitutional guarantees of free speech afford no more protection to the speaker than they do to any other tortfeasor who employs words to commit a criminal or a civil wrong.

*Id.* at 121-22.

Twelve years later, the Supreme Court of Virginia addressed a similar argument in *Maximus, Inc. v. Lockheed Information Management Systems Co.*, 254 Va. 408, 493 S.E.2d 375 (1997), *later appeal*, 259 Va. 92, 524 S.E.2d 420 (2000) ("*Maximus*"). The plaintiff in *Maximus* sued a competitor who filed a bid protest and succeeded in having the Virginia Department of

Social Services cancel a notice of intent to award a contract to the plaintiff. The defendant alleged in its protest that the review board had undisclosed conflicts of interest.<sup>10</sup> In ruling on the plaintiff's tortious interference claim, the lower court determined that the bid protest was protected by a "qualified privilege," a defamation principle usually requiring a showing of "malice" to succeed. The Supreme Court of Virginia, however, reversed that decision and rejected the application of defamation principles generally to tortious interference claims. While the court recognized that certain affirmative defenses (some closely analogous to a qualified privilege) apply, the court held that proving malice was not an element of the claim.<sup>11</sup> The court did not discuss the *Hustler* decision in reaching that conclusion.

Whatever ambiguity existed by the court's failure to discuss *Hustler* was largely resolved for tortious interference claims in *American Online, Inc. v. Nam Tai Electronics, Inc.*, 264 Va. 583, 571 S.E.2d 128 (2002). In that case, AOL sought to quash a subpoena issued by a California court seeking the identity of an anonymous e-mail user who allegedly defamed the plaintiff and interfered with the plaintiff's business.<sup>12</sup> AOL argued that the lower court improperly applied principles of comity in enforcing the subpoena. Among other things, AOL argued that California law regarding unfair business practices was not comparable to Virginia law based upon the *Hustler* decision, which AOL contended called into question the Virginia Supreme Court's decision in *Chaves*.<sup>13</sup>

In affirming the lower court's decision, the Virginia Supreme Court again rejected the notion that the *Hustler* rationale governed tortious interference claims, despite acknowledging that many other courts have reached that very conclusion:

Unquestionably, since the *Hustler Magazine* decision, some courts have sustained challenges to tort litigation on the ground that the plaintiff was seeking to "avoid the protection afforded by the Constitution . . . merely by the use of creative pleading." However, in *Maximus, Inc. v. Lockheed Information Management Systems Co.*, 254 Va. 408, 412, 493 S.E.2d 375, 377 (1997), a decision rendered after

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## First Amendment *cont'd from page 5*

*Hustler Magazine*, we acknowledged “the similarity . . . [of] the defamation law construct to business torts” noted in *Chaves*, but declined to extend First Amendment protections to a tortious interference with a contract expectancy cause of action.

*Id.* at 595 (citation omitted).

The comments made by the Virginia Supreme Court in *AOL* are somewhat astonishing. Essentially, the court acknowledged *Hustler* and then ignored it, determining that its later decision in *Maximus* somehow controlled. From the outside, it appears the court got caught up with the notion that applying *Hustler* would be tantamount to adding malice as an element of a tortious interference claim. The *Hustler* decision, however, does not go that far. All the Supreme Court held is that, when the cause of action is based on protected speech, a plaintiff cannot avoid the strictures of the First Amendment through creative pleading.

The impact of these decisions in other areas is unclear. While the Virginia Supreme Court has not given *Hustler* a broad application, the court’s holding is limited to ruling that malice is not an element of a tortious interference claim. The court did not categorically reject all First Amendment principles and, in fact, indirectly supported a defense based on providing truthful information – an affirmative defense recognized by the Restatement (Second) of Torts and acknowledged in both *Chaves* and *Maximus*.<sup>14</sup>

In contrast to the Virginia Supreme Court’s treatment of the *Hustler* decision, the Fourth Circuit applied its rationale in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4<sup>th</sup> Cir. 1999), to bar a plaintiff from recovering “reputational” or “publication” damages for non-defamation torts when the plaintiff

could not satisfy First Amendment requirements. Food Lion filed suit against ABC for a story aired on *PrimeTime Live* detailing allegedly unwholesome food handling practices by Food Lion employees. ABC had obtained videotape footage from inside Food Lion stores by having two of its reporters apply for jobs as meat handlers. The reporters misrepresented their names, education, and work experience on the applications and were employed for a brief period of time during which they secretly videotaped co-workers.<sup>15</sup>

Recognizing the difficulty in proving the falsity of the report, Food Lion sued ABC and its employees under a variety of tortious newsgathering theories such as fraud, trespass, breach of fiduciary duties, and unfair trade practices. Food Lion’s compensatory damages claim included a small amount of administrative expenses (*e.g.*, employee training expenses), as well as significant alleged “publication” damages based upon loss of goodwill and lost sales.<sup>16</sup> Food Lion relied on *Cohen* and argued that it suffered economic damages, not merely reputational damages, thereby

distinguishing its claims from *Hustler*. The Fourth Circuit, however, disagreed stating, “Food Lion attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims, while holding to the normal state law proof standards for these torts. This is precluded by *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). . . . Food Lion, in seeking compensation for matters such as loss of good will and lost sales, is claiming reputational damages from publication, which the *Cowles* Court distinguished by placing them in the same category as the emotional distress damages sought by Falwell in *Hustler*.”<sup>17</sup>

### Summary

These cases highlight two important points in making a defense based upon freedom of speech. First, success will depend upon the jurisdiction and nature of

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the claims involved. One need look no further than Virginia to see how different courts can apply *Hustler*. Second, the outcome of these cases often depends upon how the claims are framed and pled by the parties. A litigant familiar with this line of cases will claim “economic” damages, not reputational damages, and will argue that its claims are based upon generally applicable state law. A litigant unfamiliar with these cases may soon find himself or herself either proving a defamation claim or out of court altogether.

## RIGHT TO PETITION THE GOVERNMENT

Another important right guaranteed by the First Amendment is the right to petition the government. This right permits citizens to lobby the government freely in support of or against governmental action. It also permits citizens to bring lawsuits to exercise other rights. As with freedom of speech, the Supreme Court of the United States has acknowledged these rights and has held that individuals or corporations cannot be sued in certain circumstances for exercising their right to petition the government. In a series of cases that has become known as the *Noerr-Pennington* doctrine, the Supreme Court applied that rationale to bar antitrust claims based upon petitioning activity. Other courts,<sup>18</sup> including the Supreme Court of Virginia and the Fourth Circuit, have extended that doctrine with certain limitations to bar state law tort claims as well.

In *Titan America, LLC v. Riverton Investment Corp.*, 264 Va. 292, 569 S.E.2d 57 (2002), for example, the Supreme Court of Virginia extended the *Noerr-Pennington* doctrine to state law causes of action for tortious interference and conspiracy. The plaintiff in *Titan America* sought to acquire land for a warehousing and distribution site. A competing company (Riverton) attempted to block the acquisition by filing lawsuits alleging violations of the Freedom of Information Act and contesting land use permits before the zoning commissioner, the board of zoning appeals, and the circuit court. After several years, Titan acquired land at an alternate site and brought suit against Riverton and its affiliates.<sup>19</sup>

The circuit court dismissed Titan’s claims and that decision was affirmed on appeal. The Supreme Court of Virginia noted that the, “*Noerr-Pennington* doctrine arises from rights afforded by the First Amendment to the United States Constitution and

does not limit protection of those rights to causes of action involving antitrust matters.”<sup>20</sup> The Court determined that Titan’s claims were based on “actions seeking to enforce or challenge governmental decisions through the use of the courts and, thus, fall squarely within the constitutional protections recognized by the *Noerr-Pennington* doctrine.”<sup>21</sup>

The Fourth Circuit likewise has extended the doctrine to state law claims. That extension proved critical in *Igen International, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4<sup>th</sup> Cir. 2003). In *Igen*, a dispute arose between two companies over their agreement to facilitate the development, manufacturing and marketing of medical diagnostic products based on certain patented technology. At trial, the jury found in favor of the plaintiff on several claims and awarded \$105.4 million in compensatory damages and \$400 million in punitive damages. Approximately \$5 million of the compensatory damages and all of the punitive damages were based upon a claim of unfair competition arising from the defendant pursuing patent infringement litigation against the plaintiff after purchasing the patent from the original owner.<sup>22</sup>

On appeal, the Fourth Circuit reversed the award on the unfair competition claim relying on the *Noerr-Pennington* doctrine, noting that, “although originally developed in the antitrust context, the doctrine has now universally been applied to business torts.”<sup>23</sup> Based upon the facts presented at trial, the Fourth Circuit found that the plaintiff had failed to satisfy its burden of proving that the defendants’ First Amendment activity was a sham.<sup>24</sup>

The Fourth Circuit reached a similar conclusion in *A Fisherman’s Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183 (4<sup>th</sup> Cir. 2002). In *Fisherman’s Best*, the plaintiff successfully bid to operate a new maritime center for the City of Charleston. As part of its operation, however, the plaintiff proposed to serve vessels engaged in longline fishing, a practice bitterly opposed by recreational and sports fisherman.<sup>25</sup>

Numerous groups protested the plaintiff’s selection and asked for the plaintiff’s removal. One of these parties was the Recreational Fishing Alliance (“RFA”), a national non-profit organization whose stated purpose is rebuilding and preserving fisheries in the United States. The RFA was instrumental in convincing the

# Is the Tort of Negligent Supervision Alive and Well in Virginia?

Roger T. Creager

Although some courts have held that under Virginia law there is no cause of action for negligent supervision,<sup>1</sup> the Virginia Supreme Court has never broadly and generally rejected liability for negligent supervision. To the contrary, more than one Virginia Supreme Court decision contains language supporting the view that the tort of negligent supervision may yet be recognized in Virginia, and two Virginia Circuit Courts have been willing to recognize the tort under certain circumstances.<sup>2</sup>

The federal courts and Virginia Circuit Courts rejecting claims for negligent supervision have not provided any extensive analysis or discussion of liability for negligent supervision. Instead, they summarily rely upon a 1988 decision of the Virginia Supreme Court which they view as completely dispositive of the issue. The decision which federal courts and Virginia circuit courts have cited as support for the proposition that there is no cause of action in Virginia for negligent supervision is the decision of the Virginia Supreme Court in *Chesapeake and Potomac Telephone v. Dowdy*.<sup>3</sup> The *Dowdy* decision, however, actually involved very unusual facts and the holding was stated in limited terms. In *Dowdy*, the Supreme Court held that the trial court erred in submitting the unusual claim involved in that case to the jury. The plaintiff in *Dowdy* claimed he suffered from "spastic colitis," also known as "irritated bowel syndrome." The plaintiff was employed by the defendant telephone company. He alleged that the manner in which his superiors with the company supervised him aggravated his condition. The employee's claim implicated the fundamental policy concerns addressed by Virginia law restrictions on recovery for emotional distress and by the tactile tort rule, as well as Virginia law regarding

employment-at-will and restrictions on liability for wrongful discharge. The trial court nevertheless submitted the claim to the jury.

On appeal, the Virginia Supreme Court reversed and held that this extremely unusual claim should not have been presented to the jury. The *Dowdy* case thus held that an employee had no claim against his own employer on the basis of a theory that the employer negligently supervised him and thereby caused him, the employee, to suffer emotional distress and associated physical harm. The case was an obvious attempt to circumvent the Virginia rule against recovery for emotional distress in the absence of physical contact and harm. The case was likewise a clear attempt to do an end-run around the required elements of the separate tort of intentional infliction of emotional distress. The Virginia Supreme Court held:

[P]laintiff contends recovery should be allowed because "it was established that the defendants were on full notice that the stress and pressure that they were applying to the plaintiff were directly and adversely affecting his physical condition," and a jury should be permitted to conclude "this to be unreasonable conduct on the part of the employer." We disagree.<sup>4</sup>

The *Dowdy* case did not involve the issue of whether a defendant can be held liable **to a third person** for physical and emotional injury directly caused as a result of the defendant placing and keeping another person in a position where he foreseeably poses a danger to others. Moreover, the Court in *Dowdy* announced its holding in language which was limited to the unusual circumstances presented. The Court did not reject liability *to third persons* for negligent supervision generally, but merely ruled that "there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here."<sup>5</sup>

Nothing in *Dowdy* suggests that negligent supervision is not actionable in contexts different than the highly unusual situation involved in *Dowdy*. To the contrary, recent decisions of the Virginia Supreme Court make clear that *Dowdy* did not foreclose such a possibility. Later in 1988, the Supreme Court observed:

In this opinion, we decide only whether the allegations of negligent hiring, as set forth in Count I of the amended motion for judgment, state a cause of action in Virginia. This is so because appellant failed to submit any authority either on

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brief or in oral argument concerning **negligent supervision** and failure to warn as alleged in Counts II and III of the amended motion for judgment. Consequently, those issues have been abandoned.<sup>6</sup>

Clearly, this is not the type of statement the Court would have made if it felt it had previously rejected liability for negligent supervision under all circumstances.

Even more telling, in deciding the amount of coverage available under an insurance policy, the Supreme Court observed in 1995 that “within the factual content of the claimants’ motions for judgment against West American’s insureds, an occurrence could be deemed as any one of the following: the insureds’ negligent hiring of Vette [the defendants’ employee], or the insureds’ negligent supervision of Vette, or the insureds’ negligent retention of Vette[.]”<sup>7</sup>

Most recently, in the *Stottlemyer* case in 2004 the Virginia Supreme Court again declined to address the issue of liability for negligent supervision, since the jury found there was no underlying negligence by the alleged primary wrongdoer.<sup>8</sup> Again, if the Court had believed that its earlier decisions completely foreclosed liability for negligent supervision or negligent credentialing, it could and presumably would have readily said so.

Liability for negligent supervision is merely another type of liability for negligence. As the Virginia Supreme Court has said:

“\* \* \* (W)henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or the property of the other, a duty arises to use ordinary care and skill to avoid such injury.”<sup>9</sup>

This is the broad, over-arching principle of negligence under Virginia law. Liability for negligent supervision is merely another form of negligence liability and it arises under well-established general principles of negligence law. The duty of reasonable care is a duty which the Virginia Supreme Court of Virginia has said is “owed to mankind generally.”<sup>10</sup>

The recognition of this general duty of reasonable care has already led the Virginia Supreme Court to recog-

nize liability for negligent hiring and negligent retention. As the Court has stated, the cause of action for negligent hiring “is based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer’s conduct if the employer is negligent in the hiring of an improper person in work involving an unreasonable risk of harm to others.”<sup>11</sup> Liability for negligent hiring is based upon an employer’s failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.<sup>12</sup>

Similarly, the independent tort of negligent retention is recognized in Virginia.<sup>13</sup> Liability for negligent supervision is simply another logical application of general negligence principles to yet another context where a failure to use reasonable care foreseeably creates a danger of harm to others. Arguably, the tort of negligent supervision should be recognized in appropriate factual settings.

Moreover, the fact that the primary wrongdoer was not an employee of the entity defendant should not preclude liability for negligent supervision. The analogous tort of negligent hiring “enables a plaintiff to recover in circumstances when respondeat superior’s ‘scope of employment’ limitation protects employers from liability.”<sup>14</sup> Liability derives not so much from the employment relationship, but from the placement of a person in circumstances which the defendant knows or should know will pose a danger to others if reasonable care is not exercised in selecting, retaining, and supervising the person.<sup>15</sup>

Moreover, Virginia’s traditional common law duty to hire a fit worker has never been limited to employees, but rather has been extended to negligence in connection with other persons who are not employees. Well-established Virginia law holds that one who hires an independent contractor escapes responsibility for the contractor’s torts only where he “was guilty of no negligence in selecting its contractor.”<sup>16</sup> This rule was applied by the Virginia Supreme Court in 1988 in *Philip Morris Inc. v. Emerson*.<sup>17</sup> In that case, plaintiffs sought damages for injuries from exposure to pentaborane, a toxic chemical. Among other claims, the plaintiffs sought recovery against Philip Morris on the basis that it was negligent in selecting a contractor to handle pentaborane. In its opinion, the Supreme Court sustained plaintiff’s theory of liability against Philip Morris and

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## Your Courtroom Notebook

*cont'd from page 3*

road. The defendant, however, was not allowed to elicit the same type of information about the number of patients the plaintiff's treating doctor saw that were also clients of the plaintiff's attorney. Supreme Court found this to be reversible error.

5. Cross-examination/lawyer testifying - *Rakes v. Fulcher*, 210 Va. 542 (1970)

- Not error for trial court to refuse to allow counsel to ask questions which would have amounted to testimony by counsel who had not withdrawn from the case. (Questions such as: "Do you recall telling me that...? Why did you tell me ...?") This could have resulted in giving the jury the impression that the facts assumed by the questions actually existed.

6. Expert testimony - *McMunn v. Tatum*, 237 Va. 558 (1989)

No hearsay evidence during direct examination of expert

- Court should not allow expert to testify on direct examination that other experts share his/her opinion. I.e., no hearsay opinions on direct examination. On cross-examination, however, Code § 8.01-401.1 does not prohibit expert from providing the basis for his opinion, no matter if it is hearsay.

7. Introduction of Medical bills - no expert needed in certain circumstances.

- Code § 8.01-413.01 - Presumption of authenticity and reasonableness if copies have been furnished to opposing party or his attorney at least 21 days prior to trial.

- *McMunn v. Tatum*, 237 Va. 558 (1989). Plaintiff may offer medical bills through his/her testimony if he/she lays a foundation showing (1) that the bills are regular on their face and (2) they appear to relate to treatment, the nature and details of which the plaintiff has explained.

(1) If defendant challenges the **authenticity** of the bills, they will be insufficient in themselves to create a jury issue.

(2) If the defendant challenges only their **quantitative reasonableness**, a jury issue is created on that question.

(3) If defendant questions the **medical necessity or causal relationship** between the bills and his actions and rep-

resents to the court that the defense will offer evidence on those issues, the bills will be insufficient in themselves to create a jury issue, and expert foundation testimony will be a prerequisite to their admission.

While your initial inclination may be to read this case as requiring a defense expert to refute the causal connection/necessity, not all judges may agree with you.

7. Reputation for truth and veracity - *Gamache v. Allen*, 268 Va. 222 (2004)

- If your client has been impeached, you can put on evidence of his reputation for truth and veracity in the community.
- In impeaching a witness' reputation for truth and veracity, such evidence must be confined to the general reputation of the impeached witness for truth and veracity and may not include the commission of specific acts of untruthfulness or other bad conduct, even though these have bearing on veracity.

8. Treatises/scientific authorities

A. On cross exam

*Hopkins v. Gramowski* - 198 Va. 389 (1956)

It is **proper** for cross-examining counsel to "test the knowledge and accuracy" of the IME doctor by reading to him pertinent extracts from the article and asking him whether he agreed or disagreed with what had been read.

It is **improper** to allow the entire treatise into evidence and for the plaintiff's attorney to then read from the treatise again during his closing argument to the jury.

In this manner, counsel got before the jury the dissertation of the author on injuries to the neck when that physician was not before the court, had not been sworn and was not subject to cross examination.

B. On direct exam

Code § 8.01-401.1 - Expert can rely on treatise/authority and read from it, but must disclose to opposing side 30 days prior to trial unless otherwise ordered by the court.

C. Treatise/writing itself is not allowed to be introduced into evidence either by case law or statute.

9. Remedial Measures - Code § 8.01-418.1; *NationsBanc v. Holcombe*, 248 Va. 445 (1994)

- Evidence of repairs made after the accident are not admissible to prove negligence. Evidence of subsequent measures taken can be admissible when offered

for another purpose, including, but not limited to, proof of ownership, control, feasibility of precautionary measures if controverted, or for impeachment.

10. Verdicts - *Bowers v. Sprouse*, 254 Va. 428 (1997); *Richardson v. Braxton-Bailey*, 257 Va. 61 (1999); *Walker v. Mason*, 257 Va. 65 (1999); *Rice v. Charles*, 260 Va. 157 (2000).

Personal Injury

*Bowers v. Sprouse*, 254 Va. 428 (1997) - In personal injury action, jury awarded verdict for exact amount of plaintiff's medical special damages. That is inadequate as matter of law. Verdict indicates that jury found plaintiff was injured and had incurred special damages, but failed to compensate for any other items of damages such as pain and suffering, or inconvenience. (Vigorous dissent by Justice Lacy.)

*Richardson v. Braxton-Bailey*, 257 Va. 61 (1999) - Justice Lacy wrote for the Court. Verdict in an amount less than or approximating a portion of special damage does not justify conclusion that jury failed to consider other damage elements such as pain, suffering and inconvenience.

The quality of the evidence is dispositive, not a comparison between the amount of the verdict and the special damages claimed.

*Walker v. Mason/Williams v. Simmons & Walker v. Creasey* - 257 Va. 65 (1999)(decided the same day as *Richard v. Braxton-Bailey*) Justice Lacy wrote one opinion covering the three cases:

*Walker v. Mason*

Specials	\$4,431.00
Verdict	230.00 (ER bill)
Trial Court additur — Judgment for Plaintiff for \$7,730.00	
Supreme Court - reversed & verdict reinstated	

*Williams v. Simmons*

Specials	\$1,386.00
Verdict	560.00 (lost wage claim)
Trial Court - additur — Judgement for Plaintiff for \$2,500.00	
Supreme Court reversed and verdict reinstated	

*Walker v. Creasey*

Specials	\$2,614.00
Verdict	2,700.00
Trial Court additur — Judgement for Plaintiff for \$5,000.00	
Supreme Court reversed and Judgment reinstated.	

BOTTOM LINE: When the verdict is not in the exact amount of all the special damages claimed, Bowers is not applicable and the trial court must review the evidence under traditional principles relating to the adequacy of jury verdicts.

The bright line rule from Bowers is limited to those factual situations in which the jury verdict is identical to the full amount of the special damages. The rationale underlying the rule does not extend to an award which deviates from the amount of all the special damages claimed, even if the amount of the verdict corresponds to an identifiable portion of the special damages.

Wrongful Death

*Rice v. Charles*, 260 Va. 157 (2000) - Jury returned verdict for the precise amount of funeral expenses, with no award for sorrow, mental anguish and loss of solace. Verdict was inadequate as a matter of law.

11. Jury Selection - *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005)

12. Massie v. Firmstone - 134 Va. 450 (1922)

- “No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends upon facts within his own knowledge and as to which he has testified.

- Strictly construed.

- Applies to testimony of **litigants'** statements of facts within his/her own knowledge and inferences therefrom.

Does not apply to:

- estimates of fact, e.g., speed or distance
- statements of opinion
- matters outside the realm of the party's knowledge
- statements that are not clear and unequivocal

I should point out that this was a multi-day trial with complex medical issues (mild traumatic brain injury). Counsel on appeal was not the same firm as trial counsel and because of the amount of the verdict (\$7.5 million), no stone was left unturned on appeal. ☒



## Negligent Supervision *cont'd from page 9*

affirmed the traditional "rule of liability for negligent hiring of an incompetent independent contractor."<sup>18</sup>

There is no indication in the *Philip Morris* decision that the Supreme Court intended its holding to be limited to the facts of that case. To the contrary, in finding Philip Morris liable, the Supreme Court relied on precedent dealing with medical care. At the trial court level, Philip Morris had been found liable for both hiring and retaining the contractor at issue. The Supreme Court held that the duty to hire a fit contractor continued thereafter, including a duty to continue to retain only a fit contractor. In making this ruling, the Supreme Court relied upon an earlier holding that a hospital had a duty to select and retain as employees nurses who were reasonably fit and trained for their duties.<sup>19</sup> All of these authorities are consistent with the conclusion that Virginia law recognizes liability in connection with negligent selection, retention, and supervision of another person whom the defendant places or keeps in a position where he will foreseeably pose a danger to others if the defendant does not exercise reasonable care in his selection, retention, and supervision.

Indeed, any bright-line distinction between negligent selection and retention, which clearly are actionable under Virginia law, and negligent supervision, on the other hand, would be difficult to reconcile with the fact that the theories of negligent retention and negligent supervision are clearly distinct. A Fairfax County Circuit Court judge whose decision rejected liability for negligent supervision nevertheless recognized that the line between negligent retention and negligent supervision is blurry. In 1998 the Fairfax County Circuit Court said:

If, under the negligent retention tort, an employer has a duty to act upon notice of an employee's incompetency or unfitness, then theoretically that employer would have to respond to complaints that come to its attention because of day-to-day failures of an employee. **Thus, the distinction between retention and supervision becomes blurred.**<sup>20</sup>

An employer who has negligently failed to properly supervise an employee is also an employer who has negligently retained an employee who, without supervision, poses an unreasonable risk of harm to others.

Liability for negligent selection, retention, and supervision are merely variations of the over-arching theme

of liability for negligence, i.e., a failure to use reasonable care under circumstances where that failure foreseeably poses a danger of injury to others. "Negligent supervision is a variant of the common law tort of negligence."<sup>21</sup>

Logic suggests that whether liability exists for negligent supervision should depend upon the circumstances involved. Thus, it would be unwise to arrive at a blanket conclusion that such liability is foreclosed in all circumstances. As the trial court observed in *Stottlemeyer*, "[o]utside of the Commonwealth of Virginia, approximately twenty-five to thirty states have recognized some form of negligent credentialing/supervision cause of action against a hospital in a medical malpractice case."<sup>22</sup> The trial court further observed:

Many of these jurisdictions also blend "negligent credentialing" and some form of "negligent supervision" into one cause of action. *See, e.g., Fridena v. Evans*, 127 Ariz. 516, 622 P.2d 463 (1980); *Oehler v. Humana, Inc.*, 105 Nev. 348, 775 P.2d 1271 (1989)). As noted by the Supreme Court of Oklahoma, there has been no state which completely rejected the corporate liability or negligence theories in hospital cases. *See Strubhart v. Perry Memorial Hosp.*, 1995 Okla. 10, 38, 903 P.2d 263, 276 (1995).<sup>23</sup>

The approach of the trial court in *Stottlemeyer* is well-reasoned. The court said that the key issue was whether a duty was owed under the circumstances. The court concluded that in the context of doctors providing services at a hospital, the circumstances were such that it was foreseeable that harm would result if the hospital did not insure that reasonable credentialing requirements were met. Thus, the trial court held that the hospital could be held liable for negligent credentialing.<sup>24</sup>

The same type of thoughtful analysis should be applied to the issue of negligent supervision. Certainly, there are at least some factual circumstances where liability for negligent supervision should be recognized. For example, employers, who already have a duty to use reasonable care in the selection and retention of their employees, should also have a duty to use reasonable care in supervising them so as to prevent foreseeable injuries to third persons. [As previously noted, liability for injuries to the employee himself as a result of negligent supervision of the employee is foreclosed due to the special policy considerations involved, as set forth in *Dowdy*.] It would be illogical to conclude that an employer, who under Virginia law must

use reasonable care in selecting and retaining an employee, owes no duty to the public with respect to supervision of the employee. Indeed, liability for negligent retention (which is already recognized in Virginia) and liability for negligent supervision are essentially variations of the same theme. As previously noted, an employer who has negligently supervised an employee has also arguably negligently retained the employee under such circumstances (i.e., retained an employee who is unreasonably dangerous in the absence of sufficient monitoring and supervision). In either event, harm from a lack of reasonable care is foreseeable, and liability should be imposed.

Additionally, there are circumstances outside of the traditional employer/employee context where liability for negligent selection, negligent retention, and negligent supervision should be imposed. As noted above, Virginia law already supports liability for negligent selection of independent contractors. It would seem illogical to conclude that in all circumstances the duty owed with respect to an independent contractor is always at an end at the moment of hiring, and no liability may be imposed for any negligence thereafter. Such a rule would produce the unsound result that there could be no liability even if the party hiring the negligent contractor subsequently learns of or is on notice of facts showing that the contractor is unfit or the work is being conducted in a dangerous manner. Moreover, in some contexts, the party using the independent contractor may already owe a continuing duty of monitoring and supervision under existing laws and regulations, and liability for negligent supervision should be recognized in these contexts.

For example, the Federal Motor Carrier Safety Regulations impose extensive duties upon motor carriers with respect to the hiring, monitoring, supervising, training, assigning, and dispatching of commercial motor vehicle drivers, irrespective of whether the drivers are employees of the motor carrier or independent contractors.<sup>25</sup> In such circumstances, the motor carrier already owes a duty to monitor and supervise drivers, regardless of whether they are employees or independent contractors. This duty, and liability for its breach, is imposed because of the danger to the public.<sup>26</sup>

A similar situation is presented where a hospital provides health care services through doctors the hospital has selected and who must continue to meet the credentialing requirements imposed by the hospital. In this context, the practical realities are such that the hospital in effect already owes a duty of care under existing laws and regulations,<sup>27</sup> and it would be anomalous to refuse to impose lia-

bility where the hospital knows or should know that a doctor is unfit or is acting (or failing to act) in a manner likely to cause harm to others.

The wisest course, therefore, is the one arguably already adopted by the Virginia Supreme Court – determination of whether liability can be imposed for failure to use reasonable care to supervise another should depend upon the particular circumstances. In the particular and special circumstances presented in *Dowdy*, the Court declined to recognize such liability. No subsequent decision of the Virginia Supreme Court has ever rejected negligent supervision liability in other circumstances, and existing case law provides support for the conclusion that the Court would recognize such liability in a proper case.

A question can be raised regarding whether evidence supporting a claim for negligent hiring, retention, or supervision should be admitted in a case where the defendant has already admitted respondeat superior liability for any negligence of the primary wrongdoer that is proved. A Virginia federal court addressed this issue in the case of *Fairshter v. American National Red Cross*,<sup>28</sup> where the defendants admitted that they would be liable under respondeat superior principles for injury caused by any negligence of a phlebotomist in the manner in which blood was drawn. The court noted:

Defendants argued that since they have admitted vicarious liability pursuant to the doctrine of *respondeat superior*, they cannot also be held liable for the tort of negligent hiring. . . . Defendants continue by arguing that once an employer has admitted *respondeat superior* it is unnecessary and highly prejudicial for the court to also consider whether the employer is liable under the theory of negligent hiring.<sup>29</sup>

The court observed that even though a majority of courts have held that an admission of respondeat superior responsibility precludes other claims of corporate responsibility, some other courts have allowed the claims to go to the jury. The court discussed and ruled upon this issue as follows:

However, a minority of jurisdictions have held that “an admission of liability does not preclude an action for both *respondeat superior* and negligent entrustment, training, hiring, retention, or supervision.” *Poplin v. Bestway Express*, 286 F. Supp. 2d 1316, 1319 (M.D. Ala.2003). These

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## Negligent Supervision *cont'd from page 13*

jurisdictions view negligent hiring as a tort distinct from *respondeat superior* and do not allow an agency claim to preclude a separate tort claim. *Marquis v. State Farm Fire and Casualty Co.*, 265 Kan. 317, 961 P.2d 1213, 1225 (1998).

The Supreme Court of Virginia has held that “negligent hiring is distinct from tort liability predicated upon the doctrine of *respondeat superior*.” *Interim Personnel of Cent. Va., Inc. v. Messer*, 263 Va. 435, 559 S.E.2d 704, 707 (2002) (citing *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391, 394 (1988)). These holdings tend to categorize Virginia as a jurisdiction favoring the minority rule. This assertion is further supported by the fact that according to published opinions a Virginia court has never dismissed a claim of negligent hiring because of preclusion by a *respondeat superior* claim. In fact, Virginia courts have allowed both of these claims to go forward in the same action. See *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922) (allowing theories of *respondeat superior* and negligent training [actually the case involved *respondeat superior* and negligent retention] to go to a jury verdict); See also *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 539 S.E.2d 426 (2000) (discussing trial court’s entry of summary judgment on claims of liability under *respondeat superior* and claims of negligence under negligent hiring and retention). Clearly, Virginia law follows the minority rule, which allows claims of *respondeat superior* and claims of negligent hiring to proceed in the same action. Therefore, this evidence [of negligent hiring] was properly admitted at trial.<sup>30</sup>

Moreover, the court held that evidence of negligent training and negligent supervision was properly admitted because it was relevant. The court reasoned that this evidence “tended to make the assertion that Ms. Bey’s [the phlebotomist’s] negligent actions caused Ms. Fairshter’s [the plaintiff’s] injuries more probable than it would be without the evidence.”<sup>31</sup>

Another issue that can be raised is what purpose might be served by continuing to pursue a negligent hiring,

retention, or supervision claim if *respondeat superior* liability may eventually be established.<sup>32</sup> The answer to this is four-fold. First, as *Fairshter* noted, Virginia courts have allowed multiple claims of corporate or entity responsibility to go forward, without requiring a threshold showing of the plaintiff’s purpose in pursuing multiple theories. A plaintiff has the right to proceed to trial and verdict on any and all available claims for relief, and no reported Virginia Supreme Court decision to the contrary has been located.

Second, an assumption that no purpose would be served by inclusion of a negligent supervision claim is erroneous. For example, in many cases an important purpose would be served by proceeding on the additional claim of corporate or entity responsibility for negligent entrustment, hiring, retention, or supervision. This additional claim may have the effect of doubling the available insurance coverage under decisions of the Virginia Supreme Court holding that insurance policies provided coverage in the full policy amount with respect to a negligence claim against a permissive user of a vehicle, and also provided additional coverage in the full policy amount with respect to a claim against the named insured for negligent entrustment.<sup>33</sup>

Third, in many cases a negligent supervision claim may be appropriate even though *respondeat superior* liability is not admitted, may eventually not be proved, and perhaps may not even be pleaded. The discussions of motor carrier liability and hospital liability above provide example of such situations. There is no question that a negligent supervision claim may be an important and necessary claim in these situations.

Fourth, and perhaps most importantly, a sound determination of the issue of whether a duty of supervision is owed and a claim for negligent supervision is stated should depend upon the particular facts pleaded and proved, and not on whether the claim will or will not eventually “add” something to the case. Indeed, in many if not most cases the ultimate impact of the claim on the case is difficult if not impossible to discern at the pleading stage. The claim is either adequately pleaded or not. Determination of this issue cannot logically depend upon the ultimate utility or impact of the claim, a matter which cannot be known with certainty at the demurrer stage and which is legally irrelevant to the sufficiency of the pleading. ■



<sup>1</sup> See *Spencer v. General Elec. Co.*, 894 F.2d 651, 657 (4th Cir. 1990) (holding that an employer was not liable for negligent supervision under Virginia law for

allegedly negligently failing to prevent an employee from intentionally sexually harassing another employee), *overruled on other grounds by Farrar v. Hobby*, 506 U.S. 103 (1992); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114 (W.D. Va. 1996) (same); *Thompson v. Town of Front Royal*, 117 F. Supp. 2d 522 (W.D. Va. 2000); *Johnson v. Enterprise Leasing Co.*, 1999 U.S. App. LEXIS 15752 (4th Cir. 1999); *Dawkins v. Richmond Community Hospital*, 13 Cir. LU2341, 30 Va. Cir. 377 (City of Richmond 1993) (plaintiff enrolled in a substance abuse program at a hospital could not state a claim for negligent supervision against the hospital for negligent supervision of a counselor, allegedly enabling the counselor improperly to enter into a sexual relationship with plaintiff); *Permison v. Vastera, Inc.*, 20 Cir. L23096, 51 Va. Cir. 409 (Loudon County 2000); *Courtney v. Ross Stores, Inc.*, 19 Cir. L162716, 45 Va. Cir. 429 (Fairfax County 1998); *Berry v. Scott and Stringfellow*, 4 Cir. L973589, 45 Va. Cir. 240 (City of Norfolk 1998). See also *Dixon v. Denny's, Inc.*, 957 F. Supp. 792, 797 (E.D. Va. 1996) (“The Court concludes that a claim for negligent retention is not actionable under Virginia law. The Virginia Supreme Court has refused to impose on employers a duty which would extend beyond the initial decision to hire”). But see *Fairshter v. American National Red Cross*, 322 F. Supp. 2d 646, 650 (E.D. Va. 2004) (holding that the trial court properly admitted evidence of negligent hiring, training and supervision).

<sup>2</sup> See *Johnson-Kendrick v. Sears, Roebuck & Co.*, 4 Cir. L95942, 39 Va. Cir. 314 (City of Norfolk 1996); *Mangum v. Providence Hall Assocs.*, 19 Cir. L131955, 1995 Va. Cir. LEXIS 1418 (Fairfax County 1995)).

<sup>3</sup> 235 Va. 55, 365 S.E.2d 751 (1988).

<sup>4</sup> *Chesapeake and Potomac Telephone v. Dowdy*, 235 Va. at 60, 365 S.E.2d at 754.

<sup>5</sup> *Dowdy*, 235 Va. at 61, 365 S.E.2d at 753 (emphasis added).

<sup>6</sup> *J. . . v. Victory Tabernacle Baptist Church*, 236 Va. 206, 208, 372 S.E.2d 391, 393 (1988) (emphasis added).

<sup>7</sup> *S.F. (Jane Doe) v. West American Ins. Co.*, 250 Va. 461, 465, 463 S.E.2d 450, 452 (1995) (emphasis added).

<sup>8</sup> *Stottlemeyer v. Ghramm*, 268 Va. 7, 13-14, 597 S.E.2d 191, 194 (2004) (“We need not consider whether plaintiff had causes of action against Winchester Medical Center for negligent supervision or negligent credentialing because the jury found that Dr. Ghramm was not negligent and, therefore, those issues are moot.”)

<sup>9</sup> *Marketing Cooperative v. Garber*, 205 Va. 757, 761, 139 S.E.2d 793, 796 (1965) (quoting *Standard Oil Company v. Wakefield*, 102 Va. 824, 832, 47 S.E. 830, 832 (1904)).

<sup>10</sup> *Overstreet v. Security Storage Co.*, 148 Va. 306, 317, 138 S.E. 552, 555 (1927) (“The security company owed him only the duty it owed to mankind generally — that is, not to do any act which a person of ordinary prudence could reasonably apprehend, as a natural and probable consequence thereof, would subject him to peril”).

<sup>11</sup> *Southeast Apartments Mgmt. v. Jackman*, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999).

<sup>12</sup> See *id.*; *Interim Personnel v. Messer*, 263 Va. 435, 440, 559 S.E.2d 704, 707 (2002).

<sup>13</sup> See *Southeast Apartments Mgmt., Inc. v. Jackman*, 257 Va. at 260, 513 S.E.2d at 397; *Philip Morris Inc. v. Emerson*, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988) (recognizing tort of negligent retention).

<sup>14</sup> *Interim Personnel v. Messer*, 263 Va. at 441, 559 S.E.2d at 707.

<sup>15</sup> The trial court in *Stottlemeyer* concluded that Virginia law recognized liability for negligent credentialing of doctors who were “independent contractors” at a hospital. In reaching this conclusion, the trial court noted that the Virginia Supreme Court has recently indicated a willingness to be more flexible in its approach to liability for independent contractors. The trial court noted that the Supreme Court of Virginia in *McDonald v. Hampton Training School of Nurses*, 254 Va. 79, 486 S.E.2d 299 (1997), indicated that it believed changes in the health care industry and in society in general “have brought into serious question the common law distinction between ‘employees’ and ‘independent contractors’ and when an entity may be liable for acts of what would have been considered independent contractors at common law.” *Stottlemeyer v. Ghramm*, 26 Cir. L91L181, 60 Va. Cir. 474, 481 (City of Winchester 2001), *aff’d on other grounds*, 268 Va. 7, 597 S.E.2d 191 (2004).

<sup>16</sup> *Davis Bakery v. Dozier*, 139 Va. 628, 634, 124 S.E. 411, 413 (1924).

<sup>17</sup> 235 Va. 380, 368 S.E.2d 268 (1988).

<sup>18</sup> *Id.* at 399, 368 S.E.2d at 278.

<sup>19</sup> *Id.* (citing *Norfolk Protestant Hospital v. Plunkett*, 162 Va. 151, 155-56, 173 S.E. 263 (1934)). See also *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 26, 45 S.E. 740, 741 (1903) (holding that “it was the duty of the [mining] company [which furnished a doctor for its workers] to exercise reasonable care... (i)n the selection of a surgeon”).

<sup>20</sup> *Courtney v. Ross Stores, Inc.*, 19 Cir. L162716, 45 Va. Cir. at 432 (emphasis added).

<sup>21</sup> *G.E.T. ex rel. T.T. v. Barron*, 4 S.W.2d 622, 624 (Mo. App. 1999).

<sup>22</sup> *Stottlemeyer v. Ghramm*, 26 Cir. L91L181, 60 Va. Cir. at 477 (trial court’s opinion) (citing extensive authorities).

<sup>23</sup> *Stottlemeyer v. Ghramm*, 26 Cir. L91L181, 60 Va. Cir. at 478 (trial court’s opinion).

<sup>24</sup> The trial court reasoned:

The Court views the basic issue of this case to be the question of duty. Does a hospital owe a duty to the patients who use its facility to use reasonable care in credentialing the physicians who enjoy staff privileges at the hospital? The question of whether such a duty is owed is generally grounded on the concept of foreseeability. See, e.g., *Carter v. Jefferson Memorial Hosp. Corp.*, 9 Va. Cir. 489 (1982) (“the underlying concept is foreseeability, that it was reasonably foreseeable that the hospital may cause harm or present unreasonable danger to its patients by its failure to exercise reasonable care”). It is clearly foreseeable that if a hospital opens its facilities to demonstrably incompetent professionals, including independent contractors, that injury to patients will occur. Although the physician may be an independent contractor, the hospital cannot knowingly or negligently permit one lacking the minimal professional credentials to use its facilities to provide services which pose such an inherent danger of injury.

Therefore, it is not surprising that all hospitals have a process for credentialing physicians, and they are required to do so in order to obtain and retain their accreditation. Common sense would indicate that a hospital, like virtually any business, would and should examine the baseline capability of both its employees and the independent contractors who regularly use its facilities to insure at least minimal professional qualifications. This is most certainly true in today’s medical environment.

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# Training the Appellate Advocate

*L. Steven Emmert*

This is the way Judge Bob Humphreys of the Court of Appeals tells the story: The panel considering that morning's arguments was certain it had to do something, but what to do? The lawyer's performance had been abysmal; his brief was hopelessly unclear and inadequate; his client had essentially been betrayed. The panel had to do something about this latest example of a pattern of shoddy practice before the court.

Then one member of the panel had an idea – Why don't we sanction the lawyer, by requiring him to attend an appellate CLE presentation? That should get a clear message across to him, AND improve the level of performance we see, in at least one practitioner. They quickly agreed to this approach, and an appropriate order soon issued; the lawyer was directed to attend one CLE program in appellate practice within the ensuing six months, and to send a certificate of compliance to the court.

A few days later, the court got a letter from the unfortunate lawyer. He acknowledged the panel's directive, and wasn't complaining about how he was treated. The problem, he pointed out, was that there were no CLE's available on appellate practice, leaving him powerless to comply with the court's order.

\* \* \* \* \*

Let's assume for the moment that you are that unfortunate lawyer, and you received this somber order in this morning's mail. After you regain your composure, you begin to sort out what you have to do. How would you comply with the court's directive? Where would you look for a program? The problem is that the supply of appellate CLE's, driven as it is by a relatively low demand, is not all that plentiful. Let's consider the usual courses of action for someone looking to improve his or her appellate skills, even without a directive to do so.

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If you're like most Virginia lawyers, the first place you'd go to find a supply of programs is Virginia CLE, a non-profit organization that sponsors scores (perhaps hundreds; I haven't tried to count) of excellent seminars each year. But a search of that fine organization's web site comes up empty when you type in the key word "appellate," and using "appeal" instead gets you references to a handful of seminars that obviously aren't about appellate practice.

Virginia CLE does, in fact, offer a fine CLE program on appellate advocacy. But demand is low enough that they only offer it every other year; the last one was offered in the spring of 2004. So if that's your source of education, you're going to go hungry for a while.

On a statewide level, there are very few programs offering training in appellate advocacy, and they're not easy to find. The VTLA and VADA offer fine training programs, but even the most comprehensive of those generally include little more than a short section on appellate advocacy. You may have more luck with your local bar association. For example, the Bar Association of the City of Richmond, which does an excellent job of sponsoring CLE programs on a variety of topics, occasionally offers appellate programs with an illustrious faculty. The Virginia Beach Bar Association offers programs at its periodic membership meetings, although that association's ventures into the field of appellate advocacy are rare. Finding detailed presentations will be difficult; the longest of these programs usually do not exceed two hours, and we must acknowledge that there is only so much that one can learn in that time.

How about the national stage? The ABA, for a time, sponsored a magnificent program called the Appellate Advocacy Institute, which met in Washington, DC. It was a two- or three-day program with a staff that was just crawling with appellate jurists and specialists. The keynote speaker was some fellow named Rehnquist, who seemed to know a thing or two about appellate practice. The student-faculty ratio was mid-single digits. (You will have discerned by now that I was fortunate enough to have attended the Institute a few years ago.) But a search of the ABA's web site for the Institute comes up dry. I don't know whether they will ever again offer this wonderful program, but it wouldn't help you

if this morning's mail really had included the dreaded sanction order.

\* \* \* \* \*

The stakes are such that learning appellate advocacy is no longer an option, or a luxury, for the trial lawyer who plans to venture into an appellate court. (The danger of dabbling in an area of practice with which one is not familiar should be obvious, and is beyond the scope of this essay.) In order to appreciate the gravity of the situation, you should know about a couple of informal practices that are used in the state appellate courts. Neither is widely publicized, but they are both there, like Want and Ignorance beneath the robes of the Ghost of Christmas Present, and you are subject to them as soon as you sign your name at the end of a petition for appeal.

In the Supreme Court of Virginia, they have a three-strikes rule. You won't find it in the Rules of Court, or on the court's web site. If you want to know about it, you have to ask. But the truth is that if a lawyer accumulates three dismissals for procedural defaults – missed deadlines are the best example – the court will notify the Virginia State Bar. This procedure is not the equivalent of a formal complaint, and the VSB may do no more than keep the information in your permanent file. But the court will take this step, and once the VSB has it, well, . . . let's just say that the range of consequences is unpleasant to contemplate. Sanctions fade, but one's bar record is forever.

The Court of Appeals of Virginia – remember Judge Humphreys' panel? – has a similar practice, but it's a one-strike rule. Yes, you read that right; the court refers each and every procedural dismissal to the VSB, to handle as the Bar sees fit. This is the best example of a no-tolerance policy you'll find in the appellate context.

\* \* \* \* \*

So the stakes are high, and the opportunities for training are few. What can be done about it? Unless the trial bar wants to leave the appellate courts to the appellate specialists (and there are a couple of big reasons why that won't happen), there will have to be an expansion of the availability of appellate training opportunities

within the Commonwealth. It isn't a problem getting the faculty; there are many outstanding appellate lawyers across Virginia who are willing to give their time and talent, and I have never heard of an appellate judge who declined to offer insight to lawyers. The problem is at the other end of the supply-demand balance. Trial lawyers generally do not understand that appellate advocacy is a very different animal from what they're accustomed to in trial courts, and do not see the need to get training in it. Or they may perceive that they only handle about one appeal every two or three years, so it's not worth their time to attend a program devoted to such a small portion of their practice.

In the short run, one way to address (I won't say *solve*) the problem is to better publicize the few CLE's that are currently offered, and to encourage trial lawyers to attend. Second, you can contact Virginia CLE and ask it to make its appellate seminar an annual event. This is a very good program, and should be attended by anyone who plans to appear in an appellate court. If enough of us ask, they should listen. Finally, in my role as the chair of the Appellate Practice Subcommittee, my first priority is to increase the availability of appellate training programs. I intend to prepare a series of programs, one dealing with each aspect of the appellate process, with an eye toward presenting each such program across Virginia. I hope to do this in conjunction with the judges and justices on the three appellate courts that sit in the Commonwealth. I am confident we will get their cooperation. The question is whether we'll get yours. ☒

# View From the Bench

*The Honorable J. Martin Bass*

## The Case for Civility

Like many people, I began this year as I do most, resolving to be more organized, exercise more, the usual kind of repentant promises one makes after holiday excesses. In fact, I found myself in January, rummaging through the drawer of unread articles I had collected with the best of intentions, and I came across a piece in an old American Bar Journal about professionalism and the practice of law in Charleston, South Carolina. I had kept it for a number of reasons, primarily because one of my closest friends practices there, and in reading it, I came across the remarks of a trial lawyer that spoke effectively and practically to the very issue of professionalism in the context of relationships with other lawyers and the Courts.

The attorney being interviewed recalled the words of a now-retired judge who used to say that he would sign any order a lawyer brought to him, but that if he – the judge—ever got in trouble for putting his name to something, he would never accommodate that lawyer again. Such an attitude seemed “impossibly quaint” to the attorney reminiscing about the judge, but the lawyer observed that this kind of “honor system” approach had worked for a long time in his community. He also said that it is the responsibility and the challenge of practicing lawyers to help new lawyers understand the importance of relationships over legal maneuvering. He noted that some judges in his area would refuse to hear a motion until assurances were given that the lawyers had talked about the issues and attempted to reach an agreement, seeing this not only as a way of encouraging reasonable compromise, but a sense of fair play as well. He concluded with thoughts we all have, but frequently forget: *when you start out in law practice, you have a reservoir of good will, but you can use it up quickly by being rude or too demanding when it will not disadvantage your client to provide accommodations or courtesies.*

## A Dinosaur Speaks

The challenge in making the case for civility among lawyers is readily apparent to one who has lived a

life in the law for almost thirty years. Along with the gray hair and the expanding waistline has come the overwhelming sense of change in direction since my departure from law school. What I thought a life in the law would be has been redefined again and again. And frankly not all the changes have been ones I relish. What I saw when I began my practice is remarkably different from what I see today, but it doesn't have to be; it doesn't have to be if lawyers are willing to consider that what they may have learned in law school about how to stay out of trouble, how to keep a license is the protocol of legal ethics; while professionalism, on the other hand, is about how we live our lives in the law.

The movement among bar associations throughout the country to instill in each new bar generation a renewed sense of professionalism has had its critics. Some have argued that too much emphasis is placed on altruism without a corresponding grasp of how economic self-interest affects lawyer decision-making. And a young woman who participated in the Virginia State Bar's Professionalism course a couple of years ago when I was on the faculty, looked me straight in the face and asked, “Why do all of you talk about the legal profession as if it were some deity, rather than the business it really is?” The only thing she did not say that morning was that I represented a dinosaur's point of view.

To the critics of the Bar's professionalism initiatives, I would say, economic self-interest and business principles are not unwanted or irrelevant in today's legal profession, but they represent only part of the equation. If self-interest and a focus directed only toward the bottom line are all that being a lawyer means to you, then you have adopted, in former Chief Justice Harry Carrico's words, “the morals and ethics of the market place” only, and you have failed to understand the whole concept of lawyering as a profession. The part that completes the definition of a life well lived in the law is the concept of relationships. And to the young lawyer who challenged me I would say, if I can leave as large a footprint and still command the interest and curiosity as have those prehistoric creatures, after my life in the law is over, I will be happy to have been thought of by her, or by lawyers generally, as a dinosaur.

The essence of professionalism is for me quite simple; it is doing those things, taking those steps that reflect integrity — doing and saying that which is right even if it means withdrawing from representation, or avoiding an argument in Court that might advance my

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cause at the expense of disclosing a precedent against me.

### Leading By Example

As a member of the Virginia judiciary, professionalism is for me also all about leadership by example: treating lawyers and litigants with respect, civility and courtesy, and requiring, even demanding, the same conduct of those who come before the Court representing themselves or those represented by counsel.

Judges do not become imbued with omniscience when they put on a robe; they, like the lawyers who come before them, have to earn respect each day. And those who remember that very simple principle, who practice it with each ruling on objections, with each decision delivered, they are the true professionals. Just as judges have the right to expect appropriate behavior in the courtroom, they have an equal obligation to behave appropriately, with dignity, restraint and civility.

In the preamble to Principles of Professional Courtesy, published by the Virginia State Bar Board of Governors in 1988, we find the words: *Civility and manners, no less than a deep-rooted respect for the law are the mark of an enlightened and effective system of justice. Courtesy then, emanating from all quarters, extending in all directions, becomes an indispensable ingredient in the orderly administration of the courts.*

As a judge, the key focus of that statement of principle is that courtesy and civility- from the bar to the bench, from the bench to the bar, from lawyer to lawyer, from lawyer to litigant, from the bench to litigant - -when emanating from all directions, contribute to the orderly administration of the courts and one might well add, only then is there the orderly administration of justice.

I am reminded of the judge for whom I substituted in the General District Court many years ago; on his bench was a small, laminated plastic sign with the letters KYBMS. Over the course of several months, with each substitute assignment, I tried to decipher the code, without success; finally, on the street corner one day, I asked him, what do those mysterious initials mean? His reply: the most important lesson a judge can learn – *Keep your big mouth shut.* He might also have said, what I have learned since: Refrain from unnecessary lecturing, pontificating or preaching. Avoid temper tantrums. Do your job appropriately and speak with words everyone can understand.

Today my colleague across the hall, more technologically astute than I, has a screen saver on his computer

that reads, *You are employed by the persons who enter your courtroom.* So, the message I deliver about the expectations others should have of you as a professional, and the expectations you should have of yourselves, apply to those who put on a robe each morning as well.

### Attention and Awareness, Attitude, Accountability

For ten years as a judge in the juvenile court, I addressed newly licensed drivers, teenagers eager to grab hold of that piece of plastic and much less eager to hear me talk about the responsibility of driving a car. For those who grew up in Virginia, you will recall that you had to go to Court to get your driver's license. Virginia is perhaps the last state in the country to hold on to this tradition, but then again those who grew up here also know that habits and customs die hard in the Old Dominion. I struggled regularly to find something fresh, relevant, even clever to say to these kids who really only cared about getting out of the court room and onto the roads. A friend of mine in Fredericksburg, said to me, "oh that's easy, just tell them to do what's right instead of what they think they can get away with." In making the case for civility, I will suggest, albeit in a different context, some of the same things I told hundreds of teenagers over the years.

First, receiving, and holding on to the license of a professional is about attention and awareness.

Second, it's about attitude.

And finally, it's about accountability.

You cannot develop a successful practice or sustain a worthy reputation as a lawyer without being aware of the legal culture in which you operate and paying attention to the examples of professional and unprofessional conduct you encounter every day. Public confidence in our profession rests on individual shoulders. And client confidence in you as a lawyer rests on the attention you pay to communicating honestly with the client about how you will handle his or her particular problem, the attention you pay to your working relationships with other lawyers and with the judges who try your cases, and the courtesy you show the support staff, and the Clerks of the Courts you enter. The relationships you develop within that legal culture and the attention you pay to them are critical; indeed the clients you represent will be supported by, or at the mercy of, your relationships with others.

Cultivate those relationships by being fair, open and reliable. Stand up to those who would take advantage of you without lowering yourself to their level. Avoid

*View from the Bench — cont'd on page 20*

## View from the Bench *cont'd from page 19*

using correspondence to opposing counsel with a copy to the judge – it rarely does anything but create the possibility of setting up an improper *ex parte* communication and it all too often sets an otherwise avoidable tone that is contentious and inappropriate. Don't personalize the litigants' conflict by name calling, or condescending remarks directed at opposing counsel in the courtroom – the conflict belongs to the litigants.

The adversary system does not require you to be adverse to the system. A true professional has a duty to maintain the integrity of the system, to enhance it and to leave it better than when he or she entered it.

As a young lawyer, I received a call at home one night from opposing counsel in a divorce case; his client, furious at something my client had done, had ruined the attorney's dinner that evening, so apparently the lawyer felt it only right to ruin mine. He railed on at me about my nefarious client and called me names I had not heard—or used—in the worst battles in high school and when he stopped to take a breath, I very calmly said two things: first of all, you and I don't need to behave like our clients have behaved toward each other, and second, only one person is allowed to scream at me, and she's standing here next to me preparing dinner. He calmed down; he laughed about the latest problem that had developed between our clients and he promised to call me at the office in the morning. We went on to work out the case appropriately, narrowing the issues and leaving the unsettled ones for the Court to sort out. To this day, I never had another problem with that attorney.

Consider also the encounter I had with a lawyer who placed an Order in front of me my very first week on the bench. When I looked at it and said, "what gives you the idea that this court has jurisdiction to enter this Order?", he grinned at me, and said, "it never hurts to try." Well, I disagree; it does hurt to try—that way. To this day, when that attorney walks into my court room I have to weigh everything he says, read every line of his pleadings, examine his exhibits with a level of scrutiny unnecessary for those lawyers who do what's right, rather than what they think they can get away with. Perhaps things are not so different and every bit as quaint in Virginia as in Charleston, South Carolina, when it comes to evaluating trustworthiness.

Thus, your attitude as a lawyer is critical to the development of your reputation and to letting others see

the best you have to offer as a professional. If you choose to be surly to a judge who has just overruled your objection; if you continue to argue your point after having lost it with the court, if your idea of politeness is to say "with all due respect, your honor" your client is at the mercy of your attitude. How many lawyers really think a judge is flattered with the prefatory remark, accompanied by a slow intake of breath, "with all due respect, your Honor"? I tend to hear it as an immediate signal that he has no respect for my decision at all. And being human under that robe, I am apt to share my reflections of that lawyer with others who do my job. Do lawyers really think judges don't talk to each other? Do lawyers think when we eat lunch we only talk about the law? We may talk about lawyers. And we all know those lawyers who are reliable, whose arguments can be trusted, whose representations regarding stages of discovery or settlement or whose estimates of time to try a case are honest and real. We may, and do, talk about lawyers and about their attitudes.

Finally, being a professional is about your sense of accountability. When you stand before a judge and blame your secretary, or the court Clerk for your error, you take on all the impressive authority of a nine year old caught red-handed at mischief. When you fault opposing counsel for your own lack of preparedness, when you fault another judge for requiring your presence when you have overbooked your schedule, you shatter your own reputation and you forfeit credibility in that hearing. Done often enough, you develop a reputation for whining, and you have no credibility.

As many lawyers have done, I began my career as a judge's law clerk. Though some of my friends viewed clerkships as a deferral of the real world decision-making process, I saw it as an extension of the learning process and to this day I consider it as valuable, if not more so, than any of my classroom experiences in law school. I clerked for a man who had been chief justice of a state Supreme Court for eighteen years at that point and who went on to serve in that position for many more. I learned invaluable lessons from him about law, about people, about loyalty, and about humility. The man was a consummate professional and he was a pragmatist. To this day I remember his deep southern drawl as he said to me, "Keep your own house. Pay attention to details. Don't ask for favors; ask for guidance. Don't blame someone else for your mistakes; apologize and don't repeat your errors. Pay attention to boundaries and always remember, an attorney is one who speaks for another; a lawyer is one who is learned in

the law. You will be an attorney many times in your career, but you should always be a lawyer as well.”

Attention and awareness. Attitude. Accountability. A life in the law is, and can be, a life well lived. How you define and sustain the relationships you develop as a lawyer will define your character as a lawyer. Someone once said character is what you are about when no one is looking. What you are about at your core is what makes you a professional, or one who is unworthy of that distinction. Professionalism is all about doing what you know to be right, not what you think you can get away with. You will meet lawyers who will say anything, file anything, do anything to advance his or her particular agenda at the time. You will encounter lawyers who have forgotten that you were on the receiving end of their treachery and think they can get away with it again. Avoid them if you can and all they purport to stand for – because they stand for little, if anything. Resolve to do what’s right; accept nothing less. Define yourself for your client, for your community, and for yourself as a professional. Every lawyer reading these words knows exactly what I mean. But if it takes the large footprint, the curiously old-fashioned voice of a dinosaur to remind you, then I’ll accept that challenge.

Lawyers have to earn the respect of people — ordinary people, ordinary judges, other ordinary lawyers every single day. They do that by doing what’s right; they do that by being courteous, civil, responsive, prepared and thorough — by being a professional.

*Adapted from remarks made to newly licensed lawyers at sessions of the Virginia State Bar’s Professionalism Course and to students in the Law Schools of the Commonwealth at sessions of the Virginia State Bar’s Professionalism for Law Students Course* ☒

## Negligent Supervision *cont’d from page 15*

ment where many patients have no practical option in choosing surgeons, anesthesiologists, pulmonologists, nurses, etc. who will provide service. It would seem only logical and commonsensical that a patient being wheeled on a gurney into an operating room and looking up at four to eight heavily masked professionals standing in front of millions of dollars of high-tech medical equipment would normally assume that someone has made an effort to ensure that these people meet minimal professional standards. See, e.g., *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957); *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St. 3d 435, 628 N.E.2d 46 (Ohio 1994).

*Stottlemeyer v. Ghramm*, 26 Cir. L91L181, 60 Va. Cir. at 479 (trial court’s opinion).

<sup>25</sup> See Title 49, *Code of Federal Regulations*, Parts 40, 382, 383, 387, 390-397, 399 (2005).

<sup>26</sup> See, e.g., *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974); *Hodges v. Johnson*, 52 F. Supp. 488 (W.D. Va. 1943) (holder of certificate to operate commercial motor vehicles is responsible for operation of vehicles, even where vehicles are operated by independent contractors of certificate holder).

<sup>27</sup> See *Stottlemeyer v. Ghramm*, 26 Cir. L91L181, 60 Va. Cir. at 479 (trial court’s opinion) (“Therefore, it is not surprising that all hospitals have a process for credentialing physicians, and they are required to do so in order to obtain and retain their accreditation”).

<sup>28</sup> *Fairshter v. American National Red Cross*, 322 F. Supp. 2d 646 (E.D. Va. 2004).

<sup>29</sup> *Id.* at 653.

<sup>30</sup> *Id.* at 653-654.

<sup>31</sup> *Id.* at 654.

<sup>32</sup> The fact that a negligent supervision claim can sometimes seem to be surplusage may help explain why the issue of liability for negligent supervision seems to have been given scant attention by some courts that have summarily rejected the claim, and may also have resulted in minimal development, briefing, and litigation of the claim.

<sup>33</sup> See *Haislip v. Southern Heritage Insurance Co.*, 254 Va. 265, 492 S.E.2d 135 (1997); *Johnson v. Windsor Insurance Company*, 268 Va. 196, 597 S.E.2d 31 (2004).



## First Amendment *cont'd from page 7*

City of Charleston to reconsider its grant to the plaintiff. Subsequently, the plaintiff filed suit against RFA and a competitor alleging conspiracy, antitrust violations, tortious interference, and defamation. The lower court granted summary judgment to the RFA on all claims, and the Fourth Circuit affirmed.<sup>26</sup>

With respect to the antitrust claims, the court found that the RFA's actions were protected under the *Noerr-Pennington* doctrine as legitimate First Amendment activities.<sup>27</sup> Although not specifically relying on the *Noerr-Pennington* doctrine, the court reached a similar conclusion on the state law claims finding that the RFA was not acting with an improper purpose, but rather was exercising its First Amendment rights. The Fourth Circuit stated, "RFA's purpose was to exercise its First Amendment rights to petition the local government not to allow longliners at the Maritime Center and if it were found that RFA intentionally interfered with AFB's corporate opportunity, plaintiffs did not establish that it was for an improper purpose."<sup>28</sup>

Given the broad scope of the right involved, courts have protected petitioning activity in a variety of contexts, including arbitration proceedings before quasi-public entities,<sup>29</sup> pre-litigation allegations of patent infringement,<sup>30</sup> and petitions to administrative agencies.<sup>31</sup> The protection is not unlimited, though, as courts have created certain exceptions, the most notable being the sham litigation exception.

Although not all courts have done so, the Supreme Court also limited the application of the *Noerr-Pennington* doctrine in the context of competitive bidding where the government acts in a proprietary capacity. In *Lockheed Information Management Systems Co. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000), a continuation of the *Maximus* case after remand, the jury returned a verdict in favor of the plaintiff on its claims of tortious interference with contract expectancy and business conspiracy.

On appeal, the defendant raised a number of

arguments, including that its bid protest was protected under the *Noerr-Pennington* doctrine. The Supreme Court of Virginia, however, rejected that argument. Although the court noted that other jurisdictions had applied the doctrine to business torts, the court found it inapplicable in a competitive bidding context under a "commercial activities exception." The court concluded, "[t]he *Noerr-Pennington* doctrine was developed as a protection for entities petitioning the government in relation to legislative or policy making matters. The doctrine was not intended to shield false, misleading, or otherwise improper conduct by bidders for government contracts, particularly when

the government body is acting as a private commercial entity."<sup>32</sup>

**While the First Amendment does not provide a defense in all non-defamation cases, when properly invoked, the First Amendment can result in a summary disposition of otherwise valid claims.**

## FREEDOM OF RELIGION

Unlike the broad application of arguments based upon freedom of speech or the right to petition the government, a defense based upon freedom of religion is more limited. For those who represent religious organizations on a regular basis, this line of cases is well-known. For everyone else, it is worth mentioning because courts have severely restricted the ability of secular courts to adjudicate ecclesiastical disputes. If a lawyer finds himself representing a religious body, a familiarity with these cases is essential. The same applies to a lawyer who is considering a suit against a religious body. Even when a potential client has a seemingly bulletproof case, an attorney may discover that the court lacks subject matter jurisdiction to resolve the dispute.

As with the rights discussed above, the Supreme Court of the United States laid the foundation for challenging the jurisdiction of secular courts (or the justiciability of these claims). Courts throughout the country, including the Supreme Court of Virginia and the Fourth Circuit, have extended the principles enunciated in those cases to a wide variety of tort claims. While there are certain disputes that can be resolved in secular courts (*e.g.*, disputes over church property), courts have

refused to inject themselves where the outcome necessarily requires the court to involve itself in matters of church faith or doctrine.

In *Cha v. Korean Presbyterian Church*, 262 Va. 604, 553 S.E.2d 511 (2001), for example, the Supreme Court of Virginia affirmed the dismissal of claims for wrongful termination, tortious interference with contract, and defamation, all on freedom of religion grounds. The plaintiff in *Cha* was an educational pastor for the Korean Presbyterian Church. He alleged that a controversy arose within the church, questioning whether certain members of the church leadership had misused funds. After the plaintiff participated in a meeting of members seeking disclosure of the church's financial records, the plaintiff claimed that certain elders told him that his future employment was in jeopardy if he did not stop advocating full disclosure. Thereafter, during a meeting of the church's deacons, several defendants accused the plaintiff of borrowing a significant amount of money from the congregation and not repaying that money. The elders committee terminated the plaintiff's employment after he refused to resign.<sup>33</sup>

The plaintiff then filed suit against members of the church leadership and the church itself claiming that he was wrongfully terminated, that certain individual defendants tortiously interfered with his contract with the church, and that certain defendants defamed him. The circuit court determined that it did not have subject matter jurisdiction to interfere in a church dispute and dismissed the matter.<sup>34</sup> That decision was affirmed on appeal.

With respect to the tortious interference count, the Supreme Court held that resolution of the claim would require the court to involve itself in church governance and related matters in violation of the First Amendment of the United States Constitution and Article 1, Section 16 of the Virginia Constitution.<sup>35</sup> The Court stated that, "[w]ithout question, had the circuit court exercised subject matter jurisdiction of the plaintiff's motion for judgment, the court would have become entangled in issues regarding the church's governance as well as matters of faith and doctrine. And, as we have already held, ecclesiastical decisions regarding the appointment and removal of pastors are generally beyond the jurisdiction of secular courts. Neither the federal Free Exercise Clause nor Article I, § 16 of

the Constitution of Virginia permits a circuit court to decide whether the plaintiff had a valid contractual relationship or business expectancy to serve as a pastor of the Korean Presbyterian Church."<sup>36</sup>

The Fourth Circuit reached a similar conclusion in a lawsuit brought by an ordained minister whose employment was terminated based upon the financial condition of the program over which he was the executive director. See *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4<sup>th</sup> Cir. 1997). After reviewing the historical foundation for declining subject matter jurisdiction over ecclesiastical disputes, the Fourth Circuit determined that a decision as to how and whether a religious entity must use its funds implicates First Amendment protections and constitutes an ecclesiastical dispute that could not be litigated in a secular court.<sup>37</sup>

The most recent application of these principles in a non-defamation case<sup>38</sup> in Virginia occurred in *Denny v. Prince*, 68 Va. Cir. 339 (Portsmouth 2005). In a lengthy and well-reasoned opinion, Judge Davis dismissed a tortious interference claim brought by a pastor against his former church. The opinion contains an extensive analysis of prior decisions in this area, including the leading United States Supreme Court cases, the relevant Virginia and Fourth Circuit cases, and similar lawsuits in other jurisdictions. The opinion also analyzes the various circumstances and exceptions that permit a secular court to resolve cases involving religious organizations. It is a must-read for any lawyer defending a religious body or considering a suit against such an entity.

## CONCLUSION

The *Denny* case serves as a useful reminder for practitioners even where freedom of religion is not an issue. The defendants in that case originally filed a demurrer and motion to dismiss that did not address the court's jurisdiction. At the hearing on those pleadings, the court raised this issue *sua sponte*, and the rest was history. The defendants filed a special plea in bar, and the plaintiff soon found himself without a tribunal to hear his claim. This lesson should not be overlooked. While the First Amendment does not provide a defense in all non-defamation cases, when properly invoked, the First Amendment can result in a summary disposition

*Using the First Amendment — cont'd on page 18*

## First Amendment *cont'd from page 17*

of otherwise valid claims. ❏



<sup>1</sup> *Id.* at 47-48.

<sup>2</sup> *Id.* at 48-49.

<sup>3</sup> *Id.* at 56.

<sup>4</sup> See, e.g., *Colon v. Town of West Hartford*, No. Civ. 3:00CV168, 2001 WL 45464, at \*\*6-7 (D. Conn. Jan. 5, 2001); *Cowras v. Hard Copy*, 56 F. Supp. 2d 207, 209-10 (D. Conn. 1999); *Dudrick v. Dolcefino*, No. 14-96-01181-CV, 1998 WL 856236, at \*\*14-15 (Tex. App. Dec. 10, 1998); see also *Smith v. Dameron*, 12 Va. Cir. 105, 109-10 (Stafford County 1987) (pre-*Hustler* decision reaching the same conclusion).

<sup>5</sup> *Boladian v. UMG Recordings, Inc.*, 123 Fed. Appx. 165, 169 (6<sup>th</sup> Cir. 2005) ("Because plaintiffs have failed to show that their defamation claim against defendants was viable, their derivative claim of unjust enrichment against Meijer also fails. A party may not skirt the requirements of defamation law by pleading another, related cause of action"); *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 856-58 (10<sup>th</sup> Cir. 1999) (affirming dismissal of tortious interference claims based on speech that would not sustain a defamation claim).

<sup>6</sup> *Id.* at 671.

<sup>7</sup> See, e.g., Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 Ga. L. Rev. 1087 (2001); Jacqueline A. Egr, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages Resulting from Newsgathering Torts*, 49 U. Kan. L. Rev. 693 (April 2001).

<sup>8</sup> See, e.g., *Veilleux v. National Broad. Co.*, 206 F.3d 92, 127-29 (1<sup>st</sup> Cir. 2000); *Steele v. Isikoff*, 130 F. Supp. 2d 23, 28-29 (D.D.C. 2000) (dismissing damages under a variety of theories to the extent the plaintiff claimed reputational damages); *Brock v. Viacom Int'l, Inc.*, No. Civ.A. 1:04-CV-1029C, 2005 WL 3273767 (N.D. Ga. Feb. 28, 2005) (dismissing plaintiffs' claims of fraud, breach of contract, and promissory estoppel on defamation grounds where the plaintiffs alleged only reputational harm); *Hornberger v. American Broad. Cos.*, 799 A.2d 566, 595-98 (N.J. Super. Ct. App. Div. 2002); *Crawl v. Cox Enters.*, No. Civ.A. 00VS002088F, 2001 WL 849222 (Ga. State Ct. Mar. 13, 2001).

<sup>9</sup> *Id.* at 114-17.

<sup>10</sup> *Id.* at 410.

<sup>11</sup> *Id.* at 411-414.

<sup>12</sup> *Id.* at 587-88.

<sup>13</sup> *Id.* at 594.

<sup>14</sup> Both of these cases note the affirmative defenses adopted by the Restatement, one of which is the provision of truthful information (Section 772). See *Chaves*, 230 Va. at 121; *Maximus*, 254 Va. at 415; see also Robert L. Tucker, "And the Truth Shall Make You Free": Truth as a First Amendment Defense in Tortious Interference with Contract Cases, 24 Hastings Const. L.Q. 709 (1997).

<sup>15</sup> *Id.* at 510-11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 522-23; see also *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1133 n.19 (E.D. Va.) ("To be sure, Zeran is not the first plaintiff to attempt to avoid the strictures of defamation law by disguising a defamation claim as another tort. Courts uniformly reject such attempts"), *aff'd*, 129 F.3d 327 (4<sup>th</sup> Cir. 1997).

<sup>18</sup> See, e.g., *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-29 (3<sup>d</sup> Cir. 1999); *South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 50-51 (8<sup>th</sup>

Cir. 1989); *Arthrocare Corp. v. Smith & Nephew, Inc.*, No. Civ. 01-504-SLR, 2004 WL 896002, at \*3 (D. Del. Mar. 10, 2004) ("Although originally developed in the antitrust context, courts have applied this doctrine universally to business torts"), *reconsideration denied*, 315 F. Supp. 2d 615 (D. Del. 2004); see generally Ann K. Wooster, Annotation, *Application of Noerr-Pennington Doctrine by State Courts*, 94 A.L.R. 5<sup>th</sup> 455 (2005).

<sup>19</sup> *Id.* at 296-300.

<sup>20</sup> *Id.* at 301.

<sup>21</sup> *Id.* at 302.

<sup>22</sup> *Id.* at 307-08.

<sup>23</sup> *Id.* at 310.

<sup>24</sup> *Id.* at 311-13.

<sup>25</sup> *Id.* at 187.

<sup>26</sup> *Id.* at 187-89.

<sup>27</sup> *Id.* at 189-90.

<sup>28</sup> *Id.* at 196.

<sup>29</sup> See e.g., *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 391-94 (E.D. Va. 2002) (dismissing tortious interference and abuse of process claims based upon infringement proceedings brought by a registered trademark owner in the WIPO, finding that "it is a quasi-public organization that is an integral part of the United Nations system of organizations, with a mandate to administer intellectual property matters").

<sup>30</sup> See, e.g., *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1375-77 (Fed. Cir. 2004) (relying upon federal patent law and the First Amendment and holding that "state laws that impose tort liability for patentholder's good faith conduct in communications asserting infringement of its patent and warning about potential litigation" are preempted by federal patent law and will be protected unless objectively baseless); *Melea Ltd. v. Quality Models Ltd.*, 345 F. Supp. 2d 743, 756-58 (E.D. Mich. 2004), *appeal dismissed*, 139 Fed. Appx. 260 (Fed. Cir. 2005).

<sup>31</sup> See, e.g., *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-29 (3<sup>d</sup> Cir. 1999) (applying the *Noerr-Pennington* doctrine to state law claims for malicious prosecution, tortious interference with contract, tortious interference with a prospective economic advantage, and unfair competition where the defendant, an American distributor of ibuprofen, filed a petition with the Department of Commerce and the United States International Trade Commission requesting imposition of anti-dumping and countervailing duties on imports of bulk ibuprofen from the plaintiff, an Indian company).

<sup>32</sup> *Id.* at 105.

<sup>33</sup> *Id.* at 608-10.

<sup>34</sup> *Id.* at 607-08.

<sup>35</sup> *Id.* at 613-14.

<sup>36</sup> *Id.* at 613.

<sup>37</sup> *Id.* at 331-32; see also *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (table), 1998 WL 904528 (4<sup>th</sup> Cir. 1998) (dismissing discrimination and breach of contract claims for lack of subject matter jurisdiction); *Jacobs v. Mallard Creek Presbyterian Church, Inc.*, 214 F. Supp. 2d 552 (W.D.N.C. 2002) (dismissing for lack of subject matter jurisdiction).

<sup>38</sup> While this article deals with non-defamation cases, defendants have relied on freedom of religion in defamation cases as well with mixed results (depending upon whether the court necessarily would have to involve itself in ecclesiastical issues). See, e.g., *Cha*, 262 Va. at 614-15 (dismissing defamation claim); *Bowie v. Murphy*.



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