

Gray v. Rhoads: Doing Indirectly What You Can't Do Directly

by John C. West and Megan C. Rahman

In a recent decision, the Supreme Court of Virginia held that, in the context of a personal injury or wrongful death action, *Virginia Code* § 8.01-404 does not preclude the introduction of a law enforcement officer's prior written statement as a party admission in a plaintiff's case-in-chief. The Court's decision in *Gray v. Rhoads, et al.*, 268 Va. 81, 597 S.E.2d 93 (2004), thus opens the door for future plaintiffs to use as substantive evidence statements about the subject matter of the litigation given by officers to detectives conducting homicide or internal affairs investigations. This article analyzes the Court's decision in *Gray*, its impact on internal police investigations and the importance of these initial statements in subsequent civil litigation.

In practice, the interviews that take place during homicide or internal affairs investigations are often hastily done, resulting in vague or confusing statements from an



officer. Many times, the officer's version of an event, provided in a question-and-answer format with a detective, is incomplete. Because the officer is not given the opportunity to review his or her statement, inaccuracies are not identified and corrected. Other times, the questioner fails to follow up on the officer's answers with more detailed questions, relying instead on an officer's open-ended stream-of-consciousness account to provide a reliable version of events. Plaintiffs are now able to use these vague and confusing statements against an officer in their case-in-chief as substantive evidence.

The Court's decision in *Gray* eviscerated the protection that *Virginia Code* § 8.01-404 provided to statements made by officers during the course of police and internal affairs investigations. Section 8.01-404 prohibits the use of some prior witness statements to contradict a witness at trial in a personal injury or wrongful death action. This section provides:

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject matter of the civil action, without such writing being

shown to him This section is subject to the qualification, that in an action to recover for a personal injury or death by wrongful act or neglect, *no ex parte affidavit or statement in writing other than a deposition, after due notice, of a witness* and no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect complained of, *shall be used to contradict him as a witness in the case.*¹

The appeal in *Gray* arose from the fatal shooting of Frederick Gray by an officer employed by the Albemarle County Police Department.² Responding to early-morning “911” calls concerning a disturbance at the apartment where Gray and his girlfriend resided, four officers arrived at the apartment to find Gray near or coming out of the bathroom and a woman who appeared to have blood on her clothing.³ The four officers—Amos Chiarappa, David Wallace, Sharn Perry and Phillip Giles—all testified about what they observed and did when they entered the apartment.⁴ The Court relied on this testimony.

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According to Wallace, the apartment appeared as if an assault had occurred, with blood drops on various clothing items, property and on floor and walls of the apartment.⁵ Upon entering the apartment, one of the officers ordered Gray to “get down” on the floor.⁶ Although Gray initially complied with the request, a struggle ensued when Wallace began to handcuff Gray.⁷ Chiaparra attempted to restrain Gray by hitting him between the shoulder blades and on the forehead with a baton.⁸

Chiaparra testified that after seeing the condition of his fellow officers involved in the struggle with Gray—Giles sliding down the wall and Wallace being thrown out the door by Gray—and after Gray turned to attack him, Chiaparra drew his weapon and fired three shots.⁹ Gray fell face down in the doorway of the apartment, and a subsequent autopsy revealed that the cause of death was “two gunshot wounds to the chest causing injury to both lungs and the heart.”¹⁰

Abraham Gray Jr., administrator of the estate of Gray, filed an amended motion for judgment against the officers, in addition to the captain and the chief of the police department of Albemarle County. He asserted claims for assault and battery, false arrest and imprisonment, gross negligence resulting in the wrongful death of Gray, grossly negligent retention and grossly negligent hiring.

During plaintiff’s opening statement at trial, defendants objected to the use of certain prior statements made by the officers.¹¹ These statements were made during interviews of the officers after the shooting.¹² Albemarle County police detectives conducted the first interviews

soon after the shooting.¹³ The second set of interviews, by an Albemarle County Police Department lieutenant, was made a month later.¹⁴ The tapes of the interviews were subsequently transcribed and produced to the plaintiff by the defendants during discovery.¹⁵

Defendants’ objection to plaintiff’s use of the statements was based on a § 8.01-404 prohibition of the use of certain types of prior witness statements to contradict a

witness in a case for personal injury or wrongful death.¹⁶ The circuit court sustained the objection and ruled that the plaintiff could not use the statements for either impeachment purposes or as substantive evidence of what the officers had said in the interviews.¹⁷ At the close of the evidence, the jury returned a verdict in favor of Chiaparra on the assault and battery and gross negligence claims.¹⁸ The Court granted an appeal to decide whether the circuit court’s decision to disallow the use of the officers’ statements for any purpose was proper.

According to the Court, the dispositive question presented in the appeal was whether *Code* § 8.01-404 precludes the introduction of a witness’s prior written statement as a party admission in a plaintiff’s case-in-chief.¹⁹ Defendants argued that by allowing the officers’ statements into evidence as party admissions, the provisions and intent of § 8.01-404 would be emasculated because the plaintiff intended to contradict the officers’ trial testimony.²⁰ The plaintiff, in contrast, argued that § 8.01-404 only addresses the use of prior written statements for impeachment purposes, and the circuit court improperly extended the reach of the statute by preventing the plaintiff from admitting the officers’ statements as party admissions in his case-in-chief to prove the events surrounding the shooting death of Gray.²¹

The Court, finding the terms of the statute to be clear and unambiguous as written, looked no further than the plain meaning of the statute’s words to discern its meaning.²² Agreeing with the plaintiff’s argument, the Court held that the plain terms of the statute limit the application of the prohibition to only those situations where a prior written statement is used to contradict a witness.²³ According to the Court, this was not the case in *Gray*. The plaintiff sought to introduce the transcripts of the officers’ statements as party admissions in the plaintiff’s case-in-chief. At that point in the trial, the officers would not have been testifying as witnesses nor would they have previously testified.²⁴ Thus, the Court concluded that the statements would not have been used to “con-

tradict” the officers because the officers would not yet have been, and might never have been, witnesses.

The dissent, written by Justice Roscoe B. Stephenson Jr., presents a compelling argument against the use of such statements. Justice Stephenson recognizes that the *sole* purpose of the plaintiff in introducing the statements was to contradict the officers’ anticipated testimony at trial. By allowing the plaintiff to use the statements as substantive evidence in its case-in-chief, according to Justice Stephenson, the plaintiff would effectively be able to circumvent § 8.01-404 by indirectly doing what the plaintiff could not.²⁵

The Court recognized that if the officers had already testified and, the statements had been offered as evidence thereafter, the statements would have been properly refused.²⁶ Notwithstanding that such statements constituted party admissions, their effect, in that circumstance, would have been to contradict the witnesses and § 8.01-404 would not have permitted their introduction. Thus, the admissibility of the statements depends on the timing of their introduction; that is, whether the witness or party who made the statement had already testified at the time the statement is introduced into evidence.

The practical effect of the Court’s decision is that statements given by officers to detectives in police and internal affairs investigations will now play an even greater role in civil litigation. Plaintiffs are now able to present to a jury the defendant officer’s version of an event before the officer ever takes the stand in his own defense. Thus, to the extent the officer’s statement varies from his anticipated testimony, a defense attorney will have no choice but to rehabilitate his or her client during direct examination in order to present the officer’s version of events without losing credibility in front of the trier of fact.

As a result of the Court’s decision in *Gray*, attorneys representing law enforcement officers and law enforcement agencies must pay even closer attention to the manner in which these interviews are con-

ducted and the resulting statements of the officers. The use of these statements as substantive evidence against an officer can be a powerful tool for a plaintiff. Because statements taken from officers within hours of an incident are inherently prob-

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lematic, attorneys must know how such statements are elicited. After a struggle with a suspect, which often results in bodily injury to both the officer and the suspect, an officer may be scared and running on pure adrenaline. Many officers experience tunnel vision following the incident and their memory may not be clear. The officer may think he or she knows what he or she did and why, but could actually have only a vague recall of what happened before the incident.

In many cases, more than one officer is involved. Often, an individual officer may not have full knowledge of all the facts. For instance, when more than one officer is involved in a struggle, it is quite unlikely that each officer will know everything that the other officers did while engaged with the suspect. The officer may recall that a particular action or response occurred, but not be sure who did what or in what sequence. Yet, when asked a question about the events during the interview, officers may guess or makes assumptions without qualifying their answers and admitting or recognizing that the answer is based on speculation.

Also important to keep in mind is that the investigation by the police department, which begins only hours after the incident occurs, can result in criminal charges against the officers involved. Thus, any statements given in the course of such an

investigation can be used against an officer at a criminal trial. Therefore, an officer might provide cursory responses or limit his cooperation in an attempt to cap the information available for criminal charges. On the other hand, during the internal

affairs investigation, which does not result in criminal charges, an officer can be compelled to cooperate, placing his job at risk if he refuses. Consequently, an officer’s statement to the internal affairs investigator could very well be different than his statement to the criminal investigator in the amount of detail and recall due to not only the position of the officer in giving his answers, but also to the passage of time between the two interviews. In either event, the statement can never be considered truly voluntary and this undoubtedly has some effect on the answers provided by the officer to the investigators.

In addition, the questioner is not conducting the interview with any thought that the end product will become critically important to the officer or the agency in a possible civil lawsuit. Questions might be left unanswered or not asked at all, justifications are not sought for the officer’s opinions, and general responses are left without clarification of important details. As such, local government attorneys and their outside counsel should scrutinize the procedures used by detectives in the police department and the internal affairs division. This will ensure that both the department and the officer are not left with an inaccurate and cursory statement that a plaintiff’s attorney will be able to effectively use against an officer at trial. One way to do this is to provide additional training for investigators in interviewing

techniques. Another option is to have legal counsel involved at the early stages of the investigation to make sure that the statements given provide a complete and accurate description of the events.

In light of the Court's recent holding in *Gray*, and for the other reasons discussed, the internal statements given by officers about an incident that will most likely be the subject of litigation are now even more important. Local government attorneys and their outside counsel should pay close attention to the internal investigations while they are ongoing to ensure that an officer's statement is accurate and complete and to limit the value of these statements to plaintiffs in subsequent civil litigations. 📄

Endnotes:

- 1 *Virginia Code* § 8.01-404 (emphasis added).
- 2 268 Va. at 84, 597 S.E.2d at 95 (emphasis added).
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 *Id.*

- 11 The circuit court had entered a pretrial order requiring, among other things, that the parties exchange a list of trial exhibits fifteen days before trial. Any objections to the exhibits were to be filed five days before trial, otherwise the objections would be deemed waived. The statements were included in both parties' exhibit lists, yet defendants did not file any objections as directed by the court. The court stated that the sole issue for appeal was "whether the circuit court erred in barring the plaintiff from using, for any purpose, the statements made by the officers after the shooting death of Gray when the defendants had failed to make a timely objection to their admissibility in accordance with the circuit court's pre-trial order." However, in light of the actual grounds for the decision, the Court concluded that it was not necessary to decide whether the circuit court abused its discretion by failing to enforce the terms of its pre-trial order regarding objections to the admissibility of exhibits. *Id.* at 86, 90 n.6, 597 S.E.2d at 96, 99 n.6.
- 12 *Id.* at 85, 597 S.E.2d at 96.
- 13 Petition for Appeal at p. 12.
- 14 *Id.* at 85, 597 S.E.2d at 96.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*
- 18 The circuit court, in ruling on various motions, dismissed the other claims and defendants, except the negligent retention claim against the captain and the chief of police. The court severed that claim from the others and decided that it would proceed to trial only if the plaintiff prevailed against Chiarappa. None of those rulings were pertinent to the appeal. *Id.* at 86 fn.4, 597 S.E.2d at 96 fn.4.
- 19 *Id.* at 88, 597 S.E.2d at 97.
- 20 *Id.*
- 21 *Id.* at 88, 597 S.E.2d at 98.
- 22 *Id.* at 86, 597 S.E.2d at 96.

- 23 *Id.*
- 24 *Id.*
- 25 *Id.* at 91, 597 S.E.2d at 99.
- 26 *Id.*



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