



Pleading and Understanding Punitive-Damages Claims in Virginia

by Cory R. Ford

This article attempts to reduce confusion and provide tips when a punitive-damages claim butts up against Virginia’s relatively inconsistent pleading standard. Virginia currently has a somewhat-plaintiff-unfriendly system of separating meritorious from unwarranted punitive-damages. This is something that all lawyers need to be aware of, as the pleading standard tends to favor the defendant at the demurrer stage—allowing defendants sometimes to win before the plaintiff has even had an opportunity to conduct discovery. This is a logical, necessary, and inevitable result of having to plead fairly detailed facts even before formal discovery has commenced.

This paper neither attempts to suggest when punitive damages should be awarded nor what the proper standard should be. Instead, it encapsulates the current substantive law and pleading standards surrounding punitive-damages claims. And it makes some suggestions for lawyers—suggestions designed to help punitive damages survive their stricter pleading standard. The goal is to have such claims evaluated on their merits at a stage when evidence, rather than mere allegations, may be considered; or, alternatively, after evidence has been discovered and the necessary factual allegations can be pled.

First, what are punitive damages and when are they allowed? Punitive damages are designed to warn others and to punish the wrongdoer if he has acted wantonly,

oppressively, or with such malice as to evince a spirit of malice or criminal indifference to civil obligations. *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 686, 152 S.E.2d 271, 277 (1967). Thus, cases are widely in agreement—regardless of how the standard for granting punitive damages is actually worded in a particular case—that punitive damages accomplish two goals: (1) punishing the wrongdoer for a bad or reckless act, and (2) warning others as a disincentive from engaging in like behavior.

A more difficult—though theoretically consistent—issue is “what does acting wantonly, oppressively, or with such malice as to evince a spirit of malice or criminal indifference to civil obligations mean?”¹ There are three levels of negligence. The first level, “simple negligence,” involves the failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 486, 603 S.E.2d 916, 918 (2004) (internal citations omitted). The second level, “gross negligence,” is a degree of negligence showing indifference to another

Punitive-Damages Claims — cont’d on page 4

Table of Contents

Pleading and Understanding Punitive-Damages Claims in Virginia	1
by Cory R. Ford	
Letter from the Chair — <i>Speaking Legal</i>	2
by Jennifer Lee Parrish	
Is “Good Cause” for Venue Decisions Limited to Convenience Issues?	12
by Gary A. Bryant	
Supreme Court Defines Standing Requirement in Derivative Suits	16
by Kevin P. Oddo	
The New Millennium: Trends and Changes in Trial Practice	18
by William H. Ledbetter, Jr.	
Litigation Section Board of Governors	21
Recent Law Review Articles	22
by R. Lee Livingston	

Cory R. Ford, Esq., is an Associate with Barbara S. Williams, P.C.

Letter From The Chair • Speaking Legal

by Jennifer Lee Parrish

For some reason, it is often said that lawyers are hard to understand. We lawyers become so accustomed to the common language of our profession that we may at times forget that “other people” (those who do not practice law for a living) may hear what we say much in the same way that I hear an economist trying to explain the “science” of the stock market.

A job of a good lawyer is to be able to effectively communicate with his or her client in a manner the client understands, so that the client can make important client decisions. Clients like to ask, “Can I be sued for this?” Lawyers have to be able to explain that “yes, you can be sued for *anything*, but the question is whether there is a valid legal basis for a lawsuit?” Clients often do not understand the subtle differences between *anyone* being able to walk down to the courthouse and pay \$80.00 to file a lawsuit, as compared to whether that person’s lawsuit will survive past Demurrer, Plea, or Summary Judgment. Clients like to ask “will we win?” Lawyers have to explain, particularly when the case will be decided by a jury, that a jury can do almost anything. (Remember the old joke that the definition of a jury is “an assemblage of people gathered together to decide who hired the better lawyer.”) Although lawyers can explain what is a probable result—based upon experience, the law, the facts and the players in the case—lawyers cannot guarantee a particular outcome. Even though lawyers think they explain these issues, clients do not always hear the details of the explanation.

The inability of clients to understand “lawyer speak” is one reason why litigants often seem satisfied with dispute-resolution options other than trials. Statistics show (I would quote some statistics here, but 99% of all statistics are made up) that higher and higher percentages of cases are being resolved in mediation because trial results cannot be guaranteed, clients have no say in the outcome, and it is extremely expensive to take a case through a jury trial. Either one or all parties to litigation seem to achieve some satisfaction out of

receiving their “day in court” by explaining their situation and making their pleas of fairness to a mediator. Most importantly, however, is the fact that with mediation the client actually still has some control over what he or she is willing to offer or accept bringing the litigation to a conclusion.

Although many, including some past and current eminent members of the Litigation Section Board, believe that mediation is a good choice for all or most cases, lawyers have to be able to explain to their clients all of the issues surrounding the choice of mediation. Lawyers have to be able to explain, based upon the facts, the law, and the client, when mediation may not be the best solution for a particular case. The difficulty lies in both recognizing which are the cases that should be taken to trial, and in being able to explain the reasons to your client so that the client can make an educated and informed decision whether to proceed with the trial.

After a recent mediation, I heard it said that “you know it’s a good settlement when both sides are unhappy.” Aside from the typical relief felt by all parties that the litigation is over, neither party may be very happy with an agreed settlement. They often will wonder whether a judge or jury would have given them more money or made them pay less money.

On the other hand, after the verdict is rendered at the end of a trial, there is more often a clear winner. Instead of both parties being unhappy, often one party is extremely happy with the verdict, while the other party is extremely unhappy with the verdict. One could argue that while both parties are “satisfied” with the outcome of a mediation, often one party is ecstatic with the outcome of a jury verdict. Unfortunately, you can never know whether your client will be the ecstatic one.

These concepts are extremely difficult to explain to non-lawyers in a way that the non-lawyer, who is at all times extremely self-interested in the outcome of his or her claim or defense, can make the important and informed decision to proceed to trial; yet this is precisely what we must do.

Not only is it difficult for lawyers to explain in

Jennifer Lee Parrish, current Chair of the Litigation Section, is managing Partner at Parrish, Houck and Snead, PLC in Fredericksburg, Virginia.

English all of the factors for clients to consider when contemplating the decision to settle or mediate a case or take it to trial, we are also often *wrong* when we advise clients to go to trial, at least according to a recent study reported in the September issue of the *Journal of Empirical Legal Studies*.

The study, entitled “*Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*,”¹ analyzed 2,054 contested cases in California in which the parties conducted settlement negotiations, rejected settlement, and decided to proceed to trial or arbitration. The amounts offered and rejected in settlement negotiations were compared with the ultimate awards or verdicts received in the cases, revealing what the study called a high “error rate” in the decision to go to trial. If the trial outcome was worse for a particular party than what had been demanded or offered in settlement negotiations, the decision to go to trial was considered by the study to be economically ineffective, and therefore in error.

The authors concluded that plaintiffs’ decisions to go to trial were in error 61.2 percent of the time, while defendants’ decisions to go to trial were in error 24.3 percent of the time. Interestingly, the study also separately compared the error rates in cases where the parties were represented by “attorney-mediators who meet state-mandated mediator training requirements and have been selected to serve on their local court’s panel of mediators.”² The attorney-mediator data revealed that attorneys who have experience and training in dispute resolution had a lower error rate. The cases where an attorney-mediator represented the parties showed a reduced error rate (48.5 percent compared to 61.2 percent for those representing the plaintiff, and 21.5 percent compared to 24.3 percent for those representing the defendant).

Based upon this data, at least in California, the answer to the question of whether it would have been better for the parties if the case had not gone to trial is “yes” in a clear majority of cases for plaintiffs and one-quarter of the cases for defendants. Unfortunately, despite these findings, settlements are often still unat-

tainable in cases that even the lawyers believe should be settled. A client’s demands will necessarily play a significant role in whether or a not a settlement can actually be achieved. Explaining the alternatives and corresponding rationale to the client in an effective way is essential to success. The difficult job of the lawyer, therefore, is not only being able to explain to his or her client the options for resolving a case in language the client can fully comprehend, but also getting it right when making the recommendation on whether or not to proceed to trial. While hindsight is always 20/20, utilizing the proper skills and training pertinent to our role is imperative. If nothing else, perhaps this study teaches us that we could all benefit our clients if we continue our own education and training on the mediation of disputes. Maybe one day in the future it will be said that the language of lawyers and clients is the same. ☒

¹ Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, The Wharton School, University of Pennsylvania, published in *Journal of Empirical Legal Studies*, September 2008.

² *Id.* at page 2 of study.

Punitive-Damages Claims *cont'd from page 1*

and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness. *Id.* at 487, 603 S.E.2d at 918. The third level of negligent conduct is “willful and wanton negligence.” This conduct is defined as “acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.” *Id.* at 487, 603 S.E.2d at 919. *Accord, Wilby v. Gostel*, 265 Va. 437, 445-46, 578 S.E.2d 796 (2003).

So far so good. Virginia’s standard for granting punitive damages is not really the tricky part, though the cases that will merit a punitive-damages instruction are few and far between. What is a more difficult balancing act is having a punitive damages claim survive an attack by demurrer, despite Virginia’s notice-pleading standard. Virginia Supreme Court Rule 3:18(b) provides that “[a]n allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence.” As long as the pleading fairly puts the defendant on notice of the claim, the particulars of the theory of negligence need not be pled.

So, naturally, one would think that as long as a claim for punitive damages were pled, the claim would survive demurrer. In fact, this is a necessary, but not sufficient, step in order for a complaint containing a punitive damages claim to survive demurrer.² As far as the facts supporting a claim for punitive damages, since they are based on willful and wanton *negligence*, they need only be pled generally, correct? Isn’t that what the *Cowan* case says, that willful and wanton

behavior is the third of three levels of *negligence*? And if it’s negligence, Virginia Supreme Court Rule 3:18(b) says it only needs to be generally alleged, right? One could simply allege willful and wanton negligence, and then throw in a claim for punitive damages based on that willful and wanton negligence, correct? So one would think. But this sort of thinking will frequently result in a successful demurrer.

The truth is that the case law on the evolution of punitive damages is confusing. The *Mendez* case, whether intentionally or not, changed the pleading standard in Virginia for punitive-damages claims.³

The *Mendez* case, whether intentionally or not, changed the pleading standard in Virginia for punitive-damages claims.

The real problem for Virginia attorneys is that the *Mendez* case arose in an entirely new procedural posture from the cases that it cited, yet it applied language used in those prior cases.

For a long time, it was sufficient if the facts showed or tended to show (drawing all reasonable inferences from the facts alleged in favor of the plaintiff) that the defendant was aware from the circumstances that he was engaging in conduct that would probably result in injury to someone, and then either (1) acted consciously in disregard of another person’s rights or (2) acted with reckless indifference to the consequences of his or her own risky behavior. In other words (and there can be many formulations of this rule) there was either a *conscious* decision to engage in behavior that was a known risk to others, or the defendant

remained *willfully blind* to his behavior, which was obviously a risk to others. In either case, there is some sort of behavior that is inherently risky—something much riskier than ordinary negligence—and an actor who either consciously engages in that behavior or simply turns a blind eye to it and acts indifferently to the risk he poses to others.

The real problem for Virginia attorneys is that the *Mendez* case arose in an entirely new procedural posture from the cases that it cited, yet it applied language used in those prior cases. To illustrate, a brief recital of a few of the hallmark cases is needed to show their

procedural differences from the *Mendez* case.

In *Booth v. Robertson*, 236 Va. 269, 374 S.E.2d 1 (1988), an intoxicated defendant drove the wrong way down a highway. Despite narrowly missing a tractor-trailer—which had to swerve to miss the defendant and blared its air horn as the defendant passed on his left side—the defendant continued to drive the wrong way down the highway and had a head-on collision with the plaintiff. The *Booth* Court found that the defendant's elevated blood alcohol concentration was sufficient evidence of his conscious disregard for the rights of others without having to reach the issue in the absence of intoxication. Notably, however, the defendant in *Booth* did not have a collision prior to the accident with the plaintiff, but was put on notice (in this case, by the tractor-trailer driver) of the recklessness of his driving prior to his accident.

The procedural posture of the *Booth* case was an appeal from a successful motion to strike on the issue of punitive damages. For the present paper, the important thing was that the evidence supporting that claim had actually been heard in court. The claim was evaluated on its merits and struck as a matter of law. In other words, the claim had not been dispensed with on the allegations alone.

In *Huffman v. Love*, 245 Va. 311, 427 S.E.2d 357 (1993), an intoxicated defendant caused an accident shortly before getting into a second accident with the plaintiff.⁴ 245 Va. at 312-13, 245 Va. at 357. In addition to finding that the defendant's greatly elevated blood-alcohol level tended to show a conscious disregard for the consequences of his actions, the Supreme Court stated that “[f]urther, at the time of this accident, he [the defendant] knew that his driving ability was impaired because he had just collided with another vehicle. Ignoring this fact, he continued to drive.” *Id.* at 314.⁵ The Court in *Huffman* contrasted the case with *Hack v. Nester*, where the defendant did *not* have an accident just prior to hitting the plaintiff:

We also reject Love's argument that *Hack v. Nester*, 241 Va. 499, 404 S.E.2d 42 (1991), compels a different result. The facts presented in *Hack* are distinguishable from those presented

here. Unlike Love, defendant Hack had not collided with another vehicle immediately prior to the accident in question. In addition, there was no evidence that Hack was exceeding the speed limit when he collided with Nester's vehicle.

Id. at 315, 427 S.E.2d at 360.

In short, the Supreme Court of Virginia found that one critically important factor in its determination of willful and wanton behavior was whether the defendant had notice of the consequences of his driving behavior. If a defendant knows, through an incident or near miss, that his actions constitute an unreasonable risk to others, yet continues in the face of that now-known risk, his actions show a conscious disregard for the consequences of his actions.

But, again, what is important for our purposes is the procedural posture in which the case arose. In *Huffman*, the Supreme Court was reviewing a pretrial ruling where the trial court had entertained a proffer of evidence that the plaintiff would put on during trial, after the defendant had admitted negligence. The defendant, in turn, was asking the court to limit the plaintiff's proof to the issue of compensatory damages alone, and was thus contending that the evidence did not arise to willful and wanton conduct. Once again, therefore, the trial court's determination was *not* on the allegations alone, but rather upon the evidence of the case, proffered to the court and produced after discovery. See *Huffman*, 245 Va. at 313, 427 S.E.2d at 359.

Skip ahead a few years. In *Alfonso v. Robinson*, 257 Va. 540, 514 S.E.2d 615 (1999), the Court found that it was appropriate for the jury to be instructed on the issue of punitive damages in a case where the defendant disregarded known dangers.⁶ The defendant's truck broke down on the highway while it was still dark, and despite his knowledge of the dangerous condition this presented and his training to set out warning flares or reflective triangles, he failed to do so. The Court found it particularly compelling that the defendant was a professional truck driver, and stated that “[d]espite this training and knowledge, Alfonso *consciously elected* to leave the disabled truck in a travel

Punitive-Damages Claims — cont'd on page 6

Punitive-Damages Claims *cont'd from page 5*

lane of an interstate highway without placing any warning devices behind it.” Such evidence that a defendant had *prior knowledge or notice* that his actions or omissions would likely cause injury to others is a significant factor in considering issues of willful and wanton negligence.” *Id.* at 548, 514 S.E.2d at 619.

In other words, it was not the defendant’s mere status as a driving professional that the Court found so compelling, but rather the knowledge specific to this type of hazard that his professional status imparted to him. Based on his training of how this omission could be inherently dangerous, the defendant in *Alfonso* continued to act in conscious disregard for the safety of others. This time the warnings came from the defendant’s training and professional knowledge rather than on any “near misses” or warnings from other drivers, as in the *Booth* case. But as in *Booth* and *Huffman*—both drunk-driving cases—the Supreme Court found the facts sufficient to merit a punitive-damages instruction.

Once again, however, the procedural posture of the *Alfonso* decision is a critically important factor. After a trial the defendant moved to strike the plaintiff’s evidence on the willful and wanton negligence count. The trial court denied the motion, the issue went to the jury, and a large verdict was granted in favor of the plaintiff, to which the defendant appealed. The decision of whether or not to strike the punitive damages claim was again based on the evidence, this time evidence adduced at trial rather than via proffer before trial.

As a brief aside from our procedure discussion, to help shine light on Virginia’s substantive standard for what constitutes conduct amounting to “conscious disregard,” the *Alfonso* Court cited two other decisions in which the defendant’s conduct did not arise to a conscious disregard for the rights of others: *Harris v. Harman*, 253 Va. 336, 486 S.E.2d 99, (1997), and *Clohessy v. Weiler*, 250 Va. 249, 462 S.E.2d 94 (1995).

In *Harris*, defendant Harris tailgated the plaintiff, Harman, at high speeds over a considerable distance. Harman, who was familiar with the road he was on, checked his rear-view mirror, and by the time his eyes

came back to the road it was too late to stop his truck from going off of an approaching sharp curve and embankment. Harris likewise followed Harman off the road and down the embankment at the same point, but the two vehicles never made contact. The Court noted the following:

In this case, Harris’ tailgating did not present Harman with immediate peril. While the record is not precise, it does

establish that Harman was aware of Harris’ tailgating for four to five miles before the two vehicles approached the curve and that Harman’s speed was consistent throughout that four to five mile stretch. Harman was familiar with the road, knew he was approaching the curve, and knew he had to slow down to negotiate it. Harman was not put in sudden peril by Harris’ tailgating, but he had been aware of, and had reacted to, the situation for a period of time. During that time, Harman, by his own admission, drove at an excessive speed and failed to keep a proper lookout. Accordingly, Harman was contributorially [sic] negligent as a matter of law, and the trial court erred in submitting that issue to the jury.

Harris, 253 Va. at 340, 486 S.E.2d at 101.

In addition to the Court’s finding of contributory negligence on the part of the plaintiff, there was no prior warning to the defendant that his conduct would cause the *type* of accident that occurred. Had the defendant’s driving behavior instead resulted in a rear-end collision, causing the plaintiff to go over the embankment, the Court may have had a much more difficult decision to make—given Harmon’s own participation. But there was simply no evidence of a warning, whether by near miss, the plaintiff braking,

... the Court appears to be applying a three prong test, based on the facts of each case, to determine whether a defendant’s conduct shows a conscious disregard for the safety of others...

or another driver, that the defendant's driving behavior would result in the type of accident that occurred, particularly because that accident was equally the fault of the plaintiff. For our purposes, suffice it to say that the *Harris* case went to the jury and was appealed (in relevant part) on the basis that it was error for the trial court to refuse to instruct the jury on willful and wanton negligence. Once again, that decision was based upon evidence adduced at trial, not mere allegations.

Likewise, in *Clobessy*, a 16-year-old defendant drove with a fogged up windshield and without her headlights on, having failed to turn them on again after a brief stop. The defendant claimed that her view was unobstructed, yet she was unable to see the plaintiff walking with her husband in the road. A group of boys was also walking on the road, but further along than the plaintiff, and therefore the defendant had not yet passed the group of boys when she struck the plaintiff.

The defendant appealed the trial court's decision to allow the issue of punitive damages based on willful and wanton negligence to go to the jury. The plaintiff contended that because the defendant was driving in a residential neighborhood following a football game, she knew or should have known there would be pedestrians present. The Court found the following:

[T]he plaintiff testified that there was no one else walking on the roadway but the boys ahead of the Weilers. Thus, we find no factual predicate in the record to support the plaintiffs contention that the defendant "knew pedestrians were walking" in the residential area, particularly pedestrians walking on the wrong side of the street with their backs toward approaching traffic in violation of Code §46.2-928. Hence, the evidence in this case does not support a finding that the defendant had prior knowledge

of *specific conditions* that would likely cause injury to others.

Clobessy, 250 Va. at 253 (emphasis added).

The Court found it particularly compelling that the defendant had no previous knowledge based on her driving experience that night that her driving was hazardous, and thus she could not have consciously continued to drive in a hazardous manner despite that knowledge. Without a doubt—although not articulated in the same facile manner as in *Clobessy*—the Court in *Harris* similarly found that there lacked a factual predicate showing that the defendant in that case had prior knowledge of the specific conditions that would likely cause injury to others, namely, the approaching curve and the contributory negligence of the plaintiff.⁷

Stated more succinctly, the Court appears to be applying a three prong test, based on the facts of each case, to determine whether a defendant's conduct shows a conscious disregard for the safety of others:

1) Did the defendant have prior knowledge of specific dangerous conditions that would likely cause injury to others?⁸

2) If the defendant had prior knowledge of specific dangerous conditions that would likely cause injury to others, did he *consciously disregard* that knowledge and continue engaging in the specific dangerous conditions that would likely cause injury to others?⁹ Another way of saying this is, upon realizing his conduct was somehow highly dangerous, did the defendant correct his behavior, or continue despite his awareness?

3) Was the injury the natural and probable result of the specific conditions of which the defendant was aware, and yet continued doing despite his or her knowledge of the probable consequences?¹⁰

... it is significant that in none of these milestone cases did the Supreme Court make a determination on demurrer. All of the cases cited above were decided not on allegations alone, but rather on evidence (whether proffered or adduced at trial). The Mendez case changed all of that.

Punitive-Damages Claims *cont'd from page 7*

Returning to the important issue of the procedural posture of these cases, it is significant that in *none* of these milestone cases did the Supreme Court make a determination on demurrer. All of the cases cited above were decided not on allegations alone, but rather on evidence (whether proffered or adduced at trial). The *Mendez* case changed all of that. Here is the quote that should give a Virginia lawyer pause about including a punitive damages claim based on general allegations of recklessness via willful and wanton conduct:

A claim for punitive damages at common law in a personal injury action must be supported by factual allegations sufficient to establish that the defendant's conduct was willful or wanton. *Huffman v. Love*, 245 Va. 311, 314, 427 S.E.2d 357, 359-60, (1993); *Booth v. Robertson*, 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988); *see Alfonso v. Robinson*, 257 Va. 540, 546-47, 514 S.E.2d 615, 619 (1999).

Woods v. Mendez, 265 Va. 68, 76, 574 S.E.2d 263, 268 (2003) (emphasis added).

Let's stop right there. Notice that the language has clearly now shifted from the *evidence* to the *allegations*, with no mention of Virginia Supreme Court Rule 3:18. Furthermore, as demonstrated above, none of the cases cited by the *Mendez* Court were decided on demurrer, and none of those cases were decided on the allegations alone. They were all decided after the close of discovery and on the evidence put on at trial or proffered as to what would be put on at trial.

In fairness, the *Mendez* Court acknowledges that

"[e]ach case raising an issue concerning the sufficiency of a claim of willful and wanton negligence must be evaluated on its own facts." *Mendez*, 265 Va. at 77, 574 S.E.2d at 268. Additionally, it appears to be the first of these major punitive damage cases that dealt with a trial court having sustained a demurrer, and so

... the *Mendez* case ... carved out what amounts to a pleading exception for punitive damages cases. Without ever mentioning that willful and wanton conduct was one of the three levels of negligence (see the *Cowan* case, *supra*), and without ever mentioning how punitive damages claims relate to Virginia Supreme Court Rule 3:18(b) (Virginia's notice pleading rule) the Supreme Court has concluded that punitive damages claims must include factual allegations sufficient to establish that the defendant's conduct was willful or wanton.

the appeal was based on that decision rather than the sufficiency of the evidence at trial. But *because* it was an appeal of an order sustaining demurrer, the very reason for which the *Mendez* cited to *Huffman*, *Booth* and *Alfonso* is clearly unsupported, as those cases had nothing to do with mere allegations, but rather evidence. In other words, those cases do not contradict the *Mendez* Court's decision that a claim for punitive damages must be supported by factual allegations sufficient to establish that the defendant's conduct was willful or wanton. Yet those cases also do not support that decision, as they are (materially) procedurally different. *See Booth*, 236 Va. at 273, 374 S.E.2d at 3¹¹; *Alfonso*, 257 Va. at 546-47, 514 S.E.2d at 619¹²; and *Huffman*, 245 Va. at 311, 427 S.E.2d at 359.¹³ Thus, the *Mendez* holding appears to be new precedent.

The real problem, then, is that a cursory reading of *Mendez* could lead one to believe that there was nothing new in it—

that it was a mere continuation of past precedent that the *evidence* must show that a defendant had prior knowledge or notice of specific conditions, or of actions or omissions that would likely cause injury to other individuals. Certainly the *Mendez* case does indeed stand for that proposition. Yet *in addition* the Court subtly—but unequivocally—carved out what

amounts to a pleading exception for punitive damages cases. Without ever mentioning that willful and wanton conduct was one of the three levels of negligence (see the *Cowan* case, *supra*), and without ever mentioning how punitive damages claims relate to Virginia Supreme Court Rule 3:18(b) (Virginia's notice pleading rule) the Supreme Court has concluded that punitive damages claims must include factual allegations sufficient to establish that the defendant's conduct was willful or wanton.

This holding has serious consequences, and the author is going to offer just a couple tips, most of which are certainly not brilliant or ground-breaking but are instead intended at simply surviving demurrer. First, the drafter of a complaint including a punitive-damages claim should never be shy to make a motion to amend. As there already is a policy of allowing liberal amendment, found in Virginia Supreme Court Rule 1:8, this policy should be exceptionally liberal regarding punitive-damages claims. This is because usually little or no factual discovery has been done—or even could have been done—at the time of the filing of the complaint, and many of the facts supporting the allegations necessary to support a claim for punitive damages will only reveal themselves later in discovery.¹⁴

Given that allegations of negligence may be pled generally, given that Virginia already has a policy of liberal amendment, and given that punitive damages have stricter pleading requirements, it is especially appropriate to allow amendment in punitive-damages cases where the facts supporting those claims have become available through discovery. Such a policy of liberal amendment actually will prevent unwarranted claims, as the drafting attorney may wait with confidence until facts are unearthed that support the claim, and then ask to amend.

Second, the attorney representing the plaintiff must put the defendant on notice that he is alleging some sort of reckless behavior in cases where this is present. The reason for this is that frequently a complaint is either filed just before the statute of limitations runs, or alternatively—if a claim for punitive damages is not initially pled—by the time facts are

divulged that would support such a claim the statute has run, and thus the new claim would be time-barred. Fortunately, however, we have a remedy for this. Virginia Code Section 8.0 1-6.1 allows relation back of certain claims. It provides that an amendment changing or adding a claim relates back to the date of the original pleading if:

- (i) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, and
- (ii) the amending party was reasonably diligent in asserting the amended claim or defense, and
- (iii) parties opposing the amendment will not be substantially prejudiced in litigating on the merits as a result of the timing of the amendment.

Although the statute by its wording only requires that the claim being related back to the original pleading *arise out of* the conduct, transaction, or occurrence, the better practice is to allege some sort of recklessness, at least where you believe it is warranted and facts may be uncovered later supporting a claim for punitive damages.¹⁵ This is because under the third requirement the defendant may be able to claim substantial prejudice if they are hit with an unexpected punitive-damages claim. By alleging reckless behavior to the extent possible in good faith, the defendant is from the inception of litigation put on notice that he must be prepared to defend himself with regard to that allegation. The punitive damages claim, once added, does not prejudice him in his defense. It only quantifies damages being sought for bad behavior that the defendant has been on notice of since the inception of the lawsuit.

This may be unnecessary, since the same facts that the defendant normally would rely on to rebut allegations of negligence would substantially, if not entirely, overlap with the facts that he would use to defend against allegations of recklessness, and therefore the defense would not normally be prejudiced.¹⁶ But the defendant will likely claim there is prejudice, and to be

Punitive-Damages Claims — cont'd on page 10

Punitive-Damages Claims *cont'd from page 9*

fair, sometimes there is legitimate prejudice created by the addition of punitive damages—particularly if there was no previous indication of any sort of reckless behavior. Therefore the best policy is to allege what you can, in good faith, from the inception of litigation in order to put the defendant on notice of all of the bad or negligent behavior that he is being sued for. If this is done properly there should be little reason that the addition of a punitive damages claim should not relate back to the date of the original pleading, regardless of whether the statute of limitations has run, so long as the plaintiff has been reasonably diligent in asserting the claim once facts are unearthed that tend to support it. ☒

¹ Actual malice will be ignored in this paper, as it is usually easier in terms of pleading, because those types of cases will usually lend themselves to pleading adequate facts from the inception of the lawsuit. By way of example, “actual malice” normally includes intentional torts and other obviously bad behavior that is factually adequate (in terms of a punitive-damages claim based on that bad behavior) to survive most demurrers because there is evil or bad intent surrounding the defendant’s behavior. Because malice is always a jury issue, see *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S.E. 836 (1918), those cases with facts that lend themselves to pleading actual malice should rarely run into the problems at the demurrer stage, at least for the same reasons as the negligence cases discussed in this paper, where it is assumed that no actual malice exists.

² See *Harrell v. Woodson*, 233 Va. 117, 122, 353 S.E.2d 770, 772 (1987).

³ *Woods v. Mendez*, 265 Va. 68, 574 S.E.2d 263 (2003).

⁴ Huffman’s motion for judgment alleged that “the defendant, Love, operated his vehicle in a careless, wanton, reckless and negligent manner and with a reckless disregard for the welfare and rights of others, including the plaintiff; driving drunk; failing to keep a proper lookout, approaching a dangerous curve at nearly twice the posted speed, driving on the wrong side of the road, and failing to keep his vehicle under proper control.” *Huffman*, 245 Va. at 312-13, 427 S.E.2d at 359.

⁵ Compare this holding to the allegations contained in footnote 4, *supra*. Notice that Love’s notice of a dangerous condition — namely, that he had just had a prior collision — was not pled, or at least that part was not relied upon as being necessary for the Supreme Court to reach the decision they reached.

⁶ The allegations in *Alfonso v. Robinson* were as follows: “In [the plaintiff’s] amended motion for judgment, she alleged that

[the defendant] negligently failed to perform certain statutory duties placed on the driver of a disabled motor vehicle. In Count I, [the plaintiff] alleged that [the defendant] negligently failed to activate the truck’s flashing hazard lights and to use warning flares or reflective triangles as required by state and federal regulations. In Count II, [the plaintiff] alleged that [the defendant’s] actions constituted willful and wanton negligence and exhibited a total disregard for the safety of the traveling public. *Alfonso*, 257 Va. at 542, 514 S.E.2d at 616-17.

⁷ One must compare the negligent or reckless conduct alleged (tailgating in *Harris*) with the harm that resulted. For instance, in the *Harris* case, there was no rear-end collision, but rather the plaintiff’s vehicle left the roadway due to a lack of attention and excessive speeds on the part of the plaintiff, neither of which can be attributed to the defendant, despite his negligent behavior. Had the defendant in *Harris* rear-ended the plaintiff after repeated tailgating and having had the plaintiff apply the brakes a few times over a considerable distance, the trial court may have submitted the question of punitive damages to the jury, given the Court’s analysis in *Clohesy*, because in that event the specific, dangerous condition that would likely cause injury to others (tailgating) was exactly what the defendant was doing, and kept on doing despite his knowledge of the danger of it, and the harm that would have resulted in that scenario was the natural and probable result of the highly dangerous behavior, namely, a rear-end collision.

⁸ In *Alfonso*, the prior knowledge of the specific condition was based on the professional training, education, and experience of the defendant. In *Booth* and *Huffman*, prior knowledge was based on “near misses” that put the defendants on notice prior to their collisions. Although it appears from the case law that specific warnings are necessary, nothing in the decisions cited precludes common sense from imputing prior knowledge, where a reasonable person would have been or should have been aware of great danger, and proceeding in the face of that danger was so unreasonable as to amount to recklessness. See Prosser and Keeton On Torts, 5th ed., Ch. 5 p. 214 (1984.) An opportunity to correct his behavior based on that knowledge, therefore, appears to also be an unspoken requirement before a defendant could be found liable for willful and wanton conduct arising out of consciously disregarding a known danger.

⁹ In *Clohesy*, the first people the defendant came into contact with were the ones she ran into, and therefore she did not consciously disregard a known specific condition likely to cause injury to others, namely, pedestrians walking in the street. Had she passed the group of boys that were present before hitting the plaintiff, the second prong of the suggested test may well have been satisfied.

¹⁰ See footnote 7, *supra*, for a discussion of why the defendant in *Harris* did not meet this criterion.

¹¹ “Negligence which is so willful or wanton as to *evinced* a conscious disregard for the rights of others, as well as malicious conduct, will support an award of punitive damages in a personal injury case.” (emphasis added).

¹² “We conclude that the *cumulative evidence* of Alfonso’s knowledge and conduct raised a question of willful and wanton negligence for the jury’s determination.” (emphasis added).

¹³ “In order to support an award of punitive damages in a personal injury case, the *evidence* must establish that the defendant’s conduct was so willful or wanton as to show a conscious disregard for the rights of others.” (emphasis added).

¹⁴ In addition, trial courts entertaining demurrers to punitive-damages claims should keep in mind that in all fairness to the plaintiff and his or her attorney, *Benitez v. Ford Motor Co.*, 639 S.E.2d 203, 639 S.E.2d 203 (2007), adds another layer of difficulty, namely, that it is often the case the plaintiff will not have solid factual support of a punitive damages claim until (for example) the deposition of a witness, as happened recently to this author. At the same time, the *Mendez* case requires fairly particular factual allegations in the complaint regarding punitive damages claims (as opposed to the “normal” negligence claims, which can be alleged generally). This essentially squeezes the lawyer through *Benitez* on one side and *Mendez* on the other when it comes to alleging punitive damage claims. Thus, liberal leave to amend in these instances would seem particularly appropriate.

¹⁵ That is to say, leave an express claim for punitive damages out, as that may not yet be factually supportable, but do include allegations, to the extent they are supported, of recklessness. For an interesting case on this subject, see *Smith v. Developers Diversified Realty Corp.*, 21 Cir. 993501 (2000). As is so often the case, the plaintiff’s attorney may simply not know what really happened on the day of the alleged incident, as facts may not be forthcoming without formal discovery. It is not, therefore, frivolous to allege that the defendant’s behavior was negligent, grossly negligent, and/or reckless. This is simply pleading in the alternative, which is frequently necessary before discovery has taken place and depositions have been taken.

¹⁶ This should not be surprising, since recklessness is just a heightened degree (the third level, so to speak) of negligence, so the underlying facts will often be entirely overlapping — it will more often be a question of whether the same facts that support negligence in the case will also support the additional legal requirements of recklessness (i.e., “conscious disregard”). Punitive-damages claims do not add new allegations of bad behavior on the part of the defendant, but instead only quantify the bad behavior already alleged into a claim for damages in the same way the traditional *ad damnum* quantifies damages that arise out of the negligent behavior alleged elsewhere in the complaint. Although the

facts supporting a punitive-damage claim may be put into a separate heading in the complaint along with the numeric demand associated with the punitive damages are, strictly speaking, a measure of damages, not factual allegations. This distinction can become important when attempting to relate allegations or claims back to the original complaint. ■

Is “Good Cause” for Venue Decisions Limited to Convenience Issues?

by Gary A. Bryant

Depending on your perspective, “forum shopping” is either an abuse or an art. It is no accident that more cases are filed in “plaintiff-friendly” venues than in other jurisdictions. Similarly, it is no accident that defense counsel often move to transfer when their clients are sued in these jurisdictions. As an example, few courts in the Commonwealth feel the effect of forum shopping more than the Circuit Court of the City of Portsmouth. Rightly or wrongly, a large portion of the plaintiffs’ bar sees Portsmouth as a jurisdiction in which multi-million dollar verdicts are the norm and defense verdicts the exception. If a case can be filed in Portsmouth, it will be, regardless of whether the case relates in any significant way to the forum. While the defense bar argues “forum shopping,” the plaintiffs’ bar responds that, as long as the venue rules designate Portsmouth as a permissible forum, it would be a disservice to the client to file anywhere else. If the defense hopes to secure transfer, it should argue that venue is inconvenient, and avoid the accusations of “forum shopping.”

Venue Rules

The venue provisions for actions brought in Virginia are contained in Virginia Code Sections 8.01-257 through 8.01-267. Section 8.01-261 provides for “preferred” venue in certain actions, while Section 8.01-262 sets forth “permissible” venues for all other cases. As a practical matter, the Code provides only “permissible” venue for most tort claims. Specifically, Section 8.01-262 sets forth a “permissible” venue where a defendant “regularly conducts substantial business activity.” For many corporate defendants operating in the Commonwealth, numerous circuit courts—and in some cases *all* circuit courts—will be a permissible venue.

Gary A. Bryant, Esq., is a partner at Willcox & Savage, P.C.

Regardless of whether a venue is preferred or permissible, transfer may be appropriate pursuant to Virginia Code Section 8.01-265 if the moving party can show “good cause” for the transfer. Section 8.01-265 states:

In addition to the provisions of Section 8.01-264 and notwithstanding the provisions of § 8.01-195.4, 8.01-260, 8.01-261 and 8.01-262, the court wherein an action is commenced may, upon motion by any defendant for good cause shown . . . (ii) transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses.

Where a defendant shows “good cause,” this section gives courts the discretion to nullify venue selections by transferring a case. Such discretion is necessary because the venue provisions of Virginia Code “may admit those who seek not simply justice but perhaps justice blended with some harassment.” *Norfolk & Western Railway Co. v. Williams*, 239 Va. 390, 392, 389 S.E.2d 714, 715 (1990). Harassment, of course, comes in all forms, a fact not lost on the General Assembly when it drafted Section 8.01-265, leaving the definition of “good cause” intentionally expansive. Under the statute, “[G]ood cause shall be deemed to include, *but not to be limited to*, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witness.” (Emphasis added).

Curiously, the venue-transfer statute imposes the same requirements for retaining an action for trial as for transferring a case. Specifically, Section 8.01-265 provides that “the court, on motion of any party and for good cause shown, may retain the action for trial.” At first glance, we might wonder why a party would ever move a court to retain an action. The Supreme Court’s decision in *Booth v. Brady*, 235 Va. 457, 369 S.E.2d 165 (1988), explains. In *Booth v. Brady*, the plaintiff, a resident of Virginia Beach, was injured in an accident occurring in Suffolk that involved a defendant who resided in Suffolk. The plaintiff chose to file suit in Norfolk and the defendant objected as Norfolk was neither a preferred nor a permissible venue. The trial court overruled the defendant’s objection noting that it would be “more convenient” to the plaintiff’s medical witness and his patients if the case were tried in Norfolk. The

Supreme Court reversed, holding that the trial court abused its discretion:

There was no showing that trial in Suffolk would result in “substantial inconvenience to the parties or the witnesses,” only that trial in Norfolk would be “more convenient” to the plaintiff’s medical witness and his patients. Hence, this Court holds that the ground assigned by the trial judge for retaining the action for trial in Norfolk did not constitute good cause under Code Section 8.01-265. And, because the absence of good cause appears as a matter of law, there was no basis for the exercise of discretion by the trial court.

235 Va. at 459, 369 S.E.2d at 166. The decision makes clear that a trial court cannot retain jurisdiction of a case filed in a venue listed in neither 8.01-261 nor 262 without articulating “good cause” for doing so—translated as “substantial inconvenience” resulting from trying the case in a permissible venue.

Virginia Code Section 8.01-267 sets forth the standard of reviewing any venue decision, and reads in pertinent part as follows:

Both the decision of the court transferring or refusing to transfer an action under 8.01-265 . . . shall be within the sound discretion of the trial judge. However, nothing herein shall affect the right to assign as error a court’s decision concerning venue.

Va. Code § 8.01-267.

Taken together, the venue rules and the Supreme Court decisions interpreting them provide that

(1) when a defendant objects to improper venue, the court must articulate “good cause” for retaining the case and

(2) when a defendant objects to proper venue and moves to transfer, the court must articulate “good cause” for granting the motion. Absent “good cause,” the venue-transfer decision is subject to reversal for an abuse of discretion.

Good Cause

Most cases addressing venue decisions—whether transferring or retaining—focus on the convenience to the parties, usually defined as how far the parties or their witnesses must travel to participate in the trial. But the plain language of the statute makes clear that

convenience to the parties is not the only consideration in determining “good cause” for transfer. The Code does not define “good cause” justifying either retention or a transfer except to note that good cause includes agreement of or avoiding inconvenience to the parties. The “but not limited to” language makes clear that other facts and circumstances may justify retention or transfer as well. So what is “good cause”?

Nexus

One often cited ground for transfer is that the underlying cause of action “has no practical nexus” to the chosen forum. But the Supreme Court has made clear that lack of a practical nexus alone will not justify transfer. In *Norfolk & Western Railway Co. v. Williams*, 239 Va. 390, 389 S.E.2d 714 (1990), the Supreme Court held that the City of Portsmouth will not be the litigation capital of Virginia simply because it is perceived as a plaintiff-friendly forum and that Virginia’s venue statutes allow flexibility in the choice of forum. Recognizing that the venue provisions often are misused and that venue choices frequently are “blended with some harassment,” the court held that a case should be transferred in circumstances in which the underlying cause of action has no “practical nexus” to the chosen forum *and* the moving party has otherwise shown “good cause” for transfer. *Id.* at 392, 389 S.E.2d at 717. Eliminating any doubt about whether the lack of a practical nexus standing alone justifies transfer, the Supreme Court reiterated in *Virginia Electric & Power Company v. Dungee*, 258 Va. 235, 520 S.E.2d 164 (1999), that the lack of a practical nexus *by itself* is not sufficient to establish the good cause necessary for transfer. *Id.* at 246.

Convenience

The *Williams* decision also provided some guidance on what amounts to “good cause”:

[T]o guard against abuse of the latitude afforded by the venue statutes, judges were vested with the discretion to change the location of the trial in favor of a location more convenient to the parties and witnesses, one free of any taint of prejudice, or on which would better serve the ends of justice.

239 Va. at 392, 389 S.E.2d 714. In essence, courts have the discretion to transfer venue to one “which

Venue Decisions — cont’d on page 14

Venue Decisions *cont'd from page 13*

would better serve the ends of justice.” While this standard language provides considerable flexibility in the good-cause analysis, most courts still look to convenience to find “good cause.”

In *Taylor v. Commonwealth*, 34 Va. Cir. 73 (City of Norfolk 1994), the Circuit Court for the City of Norfolk explored the venue statute in detail, noting confusion over the venue provisions. The plaintiff filed a tort claim against the Commonwealth in the city of Norfolk, where she resided. Under the Virginia Tort Claims Act, the city wherein the claimant resides is a preferred venue. But the Commonwealth moved to transfer to Greensville County where the tort occurred, another preferred venue, citing convenience as “good cause” justifying the transfer.

Before ruling, the court addressed “apparent inconsistencies in the statute and their accompanying reviser’s notes” rejecting the reviser’s conclusion that “if the venue is preferred and is properly laid under Section 8.01-261, the court may transfer the case only upon agreement of all the parties.” *Id.* at 75. The court interpreted the statute as prohibiting transfers from a preferred to a permissive venue only upon the agreement of parties, but leaving to the sound discretion of the court whether to transfer from one preferred venue to another upon a showing of good cause. The court ultimately concluded that the Commonwealth showed “that substantial inconvenience to the parties and witnesses [would] result if the action remain[ed] in the Circuit Court for the City of Norfolk.” *Id.* at 78.

The majority of other circuit courts considering the issue focuses on convenience to the parties when considering a motion to transfer as well. There are, however, a few exceptions. For example, in *Shaw v. Cook*, 13 Cir. LA31321 (City of Richmond 1996), the court concluded that delay in a trial is “good cause” for denying a motion to transfer. Other courts—relying on Section 8.01-264, which governs venue objections—have reached the same conclusion. See *Rector v. Approved Financial Corp.*, 48 Va. Cir. 329 (1999) (court concluding that the motion to transfer venue was untimely because the defendant waited seven months to notice a hearing on the motion).

Perhaps feeling the effects of a “plaintiff-friendly” venue, the Circuit Court for the City of Portsmouth broadened the notion of “convenience” in granting a motion to transfer venue. In *Jackson v. Hartig*, 274 Va. 219, 645 S.E.2d 303 (2007), a plaintiff filed a defama-

tion suit against the *Virginian Pilot* in Portsmouth notwithstanding that the suit had no connection to Portsmouth other than that the Newspaper was published there. To support its motion to transfer the case to Virginia Beach (or anywhere else but Portsmouth), the Newspaper cited a lack of practical nexus. But the Newspaper also needed to allege “good cause” to support the transfer. In light of the proximity of the various jurisdictions in Hampton Roads, any argument that the chosen forum was “inconvenient” was less than persuasive. Borrowing from the Supreme Court’s language in *Norfolk & Western Railway Co. v. Williams*, the Newspaper argued that the ends of justice would best be served if the Circuit Court in Virginia Beach resolved the defamation claims, which involved a former Virginia Beach public official who said that he was defamed by the Newspaper’s characterization his performance in office.

We will never know whether the Newspaper’s “good cause” argument was sufficient. The Portsmouth Circuit Court held that the “inconvenience” referenced in the Code was not limited to the parties, but that “good cause” included inconvenience to the court:

And we also throw in two other factors under the inconvenience aspect of it is are our jurors going to be inconvenienced in dealing with a matter that in reality is somebody else’s problem. And its going to take up a lot of valuable time that we have, because for whatever difference it makes, this is the busiest circuit court in the state. And we have plenty of work.

In essence, the trial court found good cause to transfer because it was inconvenient that Portsmouth jurors had to deal with someone else’s problem. The case was transferred to Norfolk and ultimately dismissed on a motion for summary judgment. As discussed below, while the plaintiff appealed the venue decision, the Supreme Court upheld the summary judgment ruling and, as a result, concluded that the venue issue was irrelevant.

Only one circuit court decision has addressed a venue-transfer motion grounded in “good cause” that amounts to neither delay nor inconvenience. In *Kollman v. Jordan*, 60 Va. Cir. 293 (City of Chesterfield 2002), the defendant argued that venue should be transferred because of “the lack of practical nexus between [the] action and plaintiff’s chosen forum” and that “the plaintiff’s position suggests a taint or abuse of

the venue provisions.” *Id.* at 294-95. The trial court properly noted that a lack of practical nexus, standing alone, is insufficient to justify transfer. Exploring the defendant’s contention that the plaintiff’s choice of venue amounted to harassment, the court again chose “convenience” as the yardstick:

In the case at bar, Chesterfield County is adjacent to Colonial Heights. The Colonial Heights Circuit Court building and the Chesterfield County Circuit Court are only 12 miles apart. This distance imposes no “substantial inconvenience to the parties or the witnesses.” Nor does it suggest a desire on the plaintiff’s part to harass or inconvenience defendant.

Id. at 295 (citations omitted).

Even the Portsmouth Circuit Court in *Jackson v. Hartig*—the court that ignored the convenience of the parties—based its ruling on convenience to the court. In short, while the venue statute clearly provides that “good cause” supporting a transfer includes something other than inconvenience to the parties, no court in Virginia has found “good cause” to mean anything other than inconvenience or delay.

Venue Is Not Jurisdictional

Anyone who has taken Virginia civil procedure knows that venue is not jurisdictional. Venue issues only come up when a party objects. Unlike jurisdiction, where a court lacks the authority to render a decision, a case filed in the wrong venue can be heard and decided as long as there is no objection.

The distinction between venue and jurisdiction is particularly important when challenging a court’s decision to transfer a case. The decision is subject to challenge *only* if the case is tried. Moreover, if the circuit court improperly transfers a case which ultimately is dismissed either on demurrer or motion for summary judgment, any error in transferring the case is harmless. In *Jackson v. Hartig*, the Norfolk Circuit Court dismissed the plaintiff’s claim on a motion for summary judgment after it was transferred from Portsmouth. On appeal, the plaintiff challenged both the dismissal, and the original transfer of venue on the grounds that anything that occurred after the improper transfer, including the ultimate summary judgment dismissal, was void. After affirming the summary judgment decision, the Supreme Court rejected the venue argument, noting that venue is concerned only with the “appropriate

place of trial,” not the viability of a cause of action. 274 Va. at 232.

The Supreme Court’s decision makes clear that, when factual issues are irrelevant, so is venue. If a plaintiff fails to state a cause of action as a matter of law, then it does not matter which court decides the case. Since a circuit court summary judgment decision is reviewed *de novo*, any resolution of the issue on appeal will not depend on the perspective of the trial judge.

Conclusion

While the Code may suggest that “good cause” is not limited to issues of convenience, any party hoping to persuade a judge either to transfer or retain a case would be well served by raising convenience as an important issue. Parties may argue that a particular venue is or is not convenient for the parties or the witnesses. They can argue that a venue is not convenient because it will result in a delay of the trial. They may even argue that a venue is not convenient to the court. But the better argument is that the venue is not convenient because the court is overloaded, and delay is likely. If venue is permissible in a particular jurisdiction, there is no case law suggesting that a defendant can secure transfer simply by arguing that the choice of a plaintiff-friendly venue amounts to “harassment.” ☒

Supreme Court Defines Standing Requirement in Derivative Suits

by Kevin P. Oddo

A derivative suit is one brought by a shareholder, member or partner of an entity on behalf of the entity to obtain relief for the entity against a third party. It is often utilized by a minority shareholder, member, or partner to compel the entity to assert a breach of fiduciary duty claim against the controlling shareholder, member or partner.

To have standing to maintain a derivative suit, however, a shareholder must “fairly and adequately represent the interests of the corporation in enforcing the rights of the corporation.” Va. Code § 13.1-672.1. The Virginia Limited Liability Company Act and the Virginia Uniform Partnership Act have nearly identical requirements. See Va. Code § 13.1-1042, and Va. Code § 50-73.62. Yet how, exactly, is a court to determine whether a plaintiff “fairly and adequately” represents the interests of the entity?

Until *Jennings v. Kay Jennings Family Limited Partnership*, 275 Va. 594, 659 S.E.2d 283 (2008), there was no answer to this question from the Supreme Court of Virginia. In *Jennings*, the Court held that economic antagonisms between the plaintiff and the limited partnership he sought to represent in the derivative suit meant that the plaintiff could not fairly and adequately represent the partnership. Therefore, the plaintiff lacked standing to prosecute the derivative suit.

Background

The case arose out of a family business dispute. The Jennings Family Limited Partnership (“Partnership”) was the lessee of certain real estate in Springfield, Virginia. In 1985, the Partnership subleased the real estate to Springfield Toyota, Inc. (“Dealership”), a car

dealership owned by the Jennings family. In 1994, the Dealership was reorganized, and Michael Jennings became its sole stockholder. Meanwhile, Michael’s four siblings became the general partners of the Partnership, and Michael and his siblings were the limited partners. Also in 1994, the Partnership and the Dealership entered into a new 15-year lease with options to extend the lease term.

In 2003, Louis Jennings—one of the general and limited partners—advised Toyota that the lease between the Dealership and the Partnership was not valid. Louis also engaged in other conduct that allegedly constituted a breach of his fiduciary duty to the Partnership as well as interference with the dealership’s business.

In 2004, Michael and representatives of Toyota met with the general partners to discuss an expansion of the Dealership. To finance the improvements, Michael wanted the Partnership to subordinate the lease to the construction loan. The general partners refused. Michael then offered to buy his siblings’ interests in the Partnership so that he could control the Partnership and control the land. One of his siblings sold her interest to Michael, but the others refused.

Proceedings Before Circuit Court

In 2005, Michael filed a derivative suit under Va. Code § 50-73.62 against the Partnership and Louis. While the case was pending, a limited liability company owned and operated by Michael and his wife purchased the real estate that the Partnership leased. They notified the Partnership that the monthly rent would quadruple. The Partnership contested the increase, and the matter was arbitrated.

Michael then filed an amended complaint. The Partnership demurred, arguing that Michael lacked standing to maintain a derivative suit because he did not “fairly and adequately represent the interests” of the limited partners and the Partnership.

The trial court sustained the demurrer. It found that because Michael had adverse economic interests to those of the Partnership, had arbitrated against the Partnership, and was pursuing remedies that the other partners did not support, he did not “fairly and adequately” represent the interests of the limited partners and the Partnership.

The Supreme Court’s Decision

On appeal, the Supreme Court affirmed. In analyzing the case, it looked to case law interpreting the deriv-

Kevin P. Oddo, Esq., is a Partner in the Roanoke office of LeClairRyan, a Professional Corporation.

ative-suit requirements of Rule 23.1 of the Federal Rules of Civil Procedure—and, in particular, *Davis v. Comed, Inc.*, 619 F.2d 588 (6th Cir. 1980). In *Davis*, the Sixth Circuit had held that, in determining whether a shareholder fairly and adequately represented the company, a court should take into account “outside entanglements” that make it likely that the plaintiff would disregard the interests of the other class members. Among the specific factors that it identified were: (1) economic antagonisms between the representative and the members of the class; (2) the remedy sought by the plaintiff in the derivative action; (3) indications that the named plaintiff is not the driving force behind the litigation; (4) plaintiff’s unfamiliarity with the litigation; (5) other litigation pending between the plaintiff and the defendants; (6) the relative magnitude of plaintiff’s personal interests as compared to his interests in the derivative action itself; (7) plaintiff’s vindictiveness toward the defendants; and (8) the degree of support plaintiff is receiving from the shareholders he purports to represent. *Id.* at 593-94.

The Supreme Court agreed that the *Davis* factors were “relevant” but stated that they “are not exclusive and must be considered in the totality of the circumstances found in each case.” 275 Va. at 602, 659 S.E.2d at 288. Applying these factors and the totality of the circumstances, the Court agreed with the trial court that Michael did not fairly and adequately represent the interests of the limited partners and the Partnership. First, it recited the facts showing that Michael had economic interests antagonistic to those of the Partnership which could influence his judgment in the management of the litigation in a manner adverse to the interests of the Partnership or the limited partners. Specifically, as a principal in the limited liability company that owned the real estate, Michael had an economic interest in securing as much rental income as possible from the Partnership under the lease. As president of the dealership, Michael had an economic interest in maintaining the dealership’s lease with the Partnership and in paying as little rent as possible to the Partnership under that lease. Michael also wanted to subordinate the Partnership’s lease to obtain a construction loan, and had expressed a desire to “control the Partnership and the land.” These facts constituted sufficient evidence to

support the trial court’s finding of economic antagonism between Michael and the Partnership. *Id.* at 603, 659 S.E.2d at 289.

The Court rejected Michael’s contention that the adverse economic interests must relate to the claim asserted in the derivative suit. Michael argued that the derivative claims involved Louis’ actions that allegedly harmed the Partnership, and claimed that on this issue there was no economic antagonism between the parties. The Court held, however, that *any* antagonistic economic interests could have an impact on Michael’s ability to maintain the litigation in the best interests of the Partnership and the limited partners. Michael’s “outside entanglements” with the limited partners therefore were properly considered. *Id.*

The Court also found sufficient evidence of other litigation between the parties. Michael had raised the Partnership’s rent on the property and threatened to sue the Partnership for back rent. These acts, which clearly were adverse to the Partnership, resulted in an arbitration proceeding between the Partnership and Michael’s limited liability company. *Id.* at 604, 659 S.E.2d at 289. This too rendered Michael an inadequate representative.

Finally, the Court found evidence that the other partners did not support the derivative suit. Michael did not dispute this finding, instead arguing that a lack of support from the other partners is the “very essence of a derivative claim.” *Id.* at 605, 659 S.E.2d at 290. While the Court seemed to acknowledge this, especially where there are only a limited number of potential partners to bring a derivative suit, it refused to elevate this factor above the other factors and the entire set of circumstances surrounding the case. *Id.*

Jennings teaches that courts will take a broad, common sense approach to the issue of standing in derivative suits. Michael had a long history of contentiousness and adversity with his siblings on business matters. This history called into question Michael’s ability to represent his siblings in litigation that supposedly was for their benefit, especially where the siblings did not want him to pursue the claims on their behalf. In defending derivative suits, therefore, counsel will want to explore all aspects of the relationship between the plaintiff and those he seeks to represent for any evidence of conflict among them. ☒

**In defending derivative suits,
therefore, counsel will want to
explore all aspects of the
relationship between the plaintiff
and those he seeks to represent
for any evidence of conflict
among them.**

View from the Bench

The New Millennium: Trends and Changes in Trial Practice

by *The Honorable William H. Ledbetter, Jr. (Ret'd)*

Trial lawyers engage in the most grueling specialty in the practice of law. Their work is routinely challenging and stressful. Historically, they have consoled themselves with the fact that the rules, procedures and protocols that govern their work have been relatively static—relative, that is, to the torrent of change that has buffeted other legal specialties.

The first years of the new millennium have altered this landscape. During the period, trial lawyers have been introduced to considerable change. The appellate courts and the legislature have been unusually busy in the field of trial practice and procedure. Further, some notable trends have emerged.

Trial lawyers should stay abreast of these developments so they can “keep up”; and just as important, so they can foresee future shifts and rearrangements that may necessitate adjustments in their practice. To that end, this article examines some of the more significant trends and changes occurring in the first years of the new millennium.

Pro Se Litigants

Self-representation has always been commonplace in district courts. In a sense, those courts were designed for that sort of litigation. Recently, *pro se* litigants have begun appearing more frequently in circuit courts, where pleadings are more formal and the disputes are more complex. The evidence is anecdotal—there are no official statistics—but any judge in the Commonwealth can confirm the trend.

Over the period, through conferences and workshops, trial judges have been alerted to the challenges

The Honorable William H. Ledbetter, Jr., is retired Judge of the Fifteenth Judicial Circuit of Virginia.

posed by *pro se* litigation and how to deal with them. So, too, trial lawyers are affected by this trend. See Snukals and Sturtevant, *Pro Se Litigation*, 42 *U. of Rich. L. Rev.* 93 (2007).

Approaches to pleadings, discovery, and even trial techniques vary from the norm when a trial lawyer faces an unrepresented (a.k.a. “self-represented”) litigant. In these cases, a trial lawyer cannot forge ahead without creating a special strategy to achieve the result sought while not appearing to be overbearing or imperious to the court or jury.

Merger of Law and Equity Pleadings

In 2006, Virginia joined most other court systems in eliminating distinctions between law and equity pleadings. Forms of equitable relief are not affected. See Bryson, *Merger of Common Law and Equity Pleadings*, 41 *U of Rich. L. Rev.* 77(2006). It is doubtful that there is any instance in which the merger of law and equity pleadings has affected the outcome of a case.

Dropping Lawsuits

At common law, a plaintiff could drop and recommence a lawsuit as many times as he pleased, as long as the period of limitations had not expired. Virginia’s nonsuit statute, Code Section 8.01-380 (amended three times in the 2000’s), creates balance by reducing to one the number of times a plaintiff can stop and restart litigation, while allowing time for refileing a dropped case. Second and subsequent nonsuits may only be taken in limited circumstances.

It is these second and subsequent—so-called “discretionary”—nonsuits that have brought the topic back into the limelight in the last few years.

In *Janvier v. Arminio*, 272 Va. 353, 634 S.E.2d 754 (2006), the Supreme Court extended the no-notice rationale of *Waterman v. Haiverson*, 261 Va. 203, 540 S.E.2d 867 (2001), to second and subsequent nonsuits, at least where there has been no service on the defendant and in the absence of fraud.

The General Assembly re-entered the arena in 2007. It amended the nonsuit statute to require notice when the plaintiff seeks an additional nonsuit, thereby overturning *Janvier*. The amendment also provides that the court must be advised of any earlier nonsuit, and the order granting the additional nonsuit must contain that information.

These changes in the manner by which lawsuits can

be dropped and re-instituted make the process more equitable without being burdensome to either party.

Pleadings and the Use of Sanctions

Virginia adopted a sanctions statute—Code Section 8.01-271.1, patterned after Federal Rule of Civil Procedure 11—more than 20 years ago. The initial spate of appellate court decisions applying the statute seemed to reflect a go-slow, even lenient, attitude in the application of the statute.

In the mid-2000's, however, things changed. The Supreme Court sanctioned an attorney for abusive assertions in a motion for rehearing filed in that Court. The Court found that the motion was filed for an improper purpose which was to “ridicule and deride” the justices for their earlier decision in the case. *Taboada v. Daly Seven, Inc.*, 272 Va. 211, 636 S.E.2d 889 (2006). The following year, the Supreme Court addressed abusive language in trial-court pleadings, upholding sanctions against attorneys who filed a motion for recusal that contained unusually intemperate language in inaccurately accusing the trial judge of bias and unethical behavior. *Williams & Connelly v. PETA*, 273 Va. 498, 643 S.E.2d 136 (2007).

The prize for most-talked-about sanctions case in the new millennium goes to *Ford Motor Company v. Benitez*, 273 Va. 242, 639 S.E.2d 203 (2007). That case—like the two discussed above—addressed pleadings, but it involved unfounded allegations related to the substance of the case rather than derisive language directed to the court. In *Benitez*, the Supreme Court said that a pleading must have a basis in fact and law as required by the sanctions statute *at the time the pleading is filed*, so a party cannot make allegations based on information that might come to light later in the litigation.

This case has been analyzed repeatedly in conferences, seminars, and workshops and will be a topic of discussion at the VSB's winter meeting in Puerto Rico. (See also this writer's article, *The Impact of Benitez*, in this publication's Summer 2007 issue.) Surely, sequels to *Benitez* are in the wings.

If claims and defenses cannot be asserted until validating information is known, what happens when such information is obtained during discovery and counsel seeks to amend the pleading? The other party is not prepared to meet the new claim or defense, and objects to the amendment. Rule 1:8 provides that amendments should be liberally granted. The Court in *Benitez* suggested that a motion to amend the pleading is the correct path to take in such situations. But what if a trial

date has been set and witnesses have been summoned? This scenario soon will play out all across Virginia, causing consternation among trial judges seeking to do “the right thing” by following *Benitez* and Rule 1:8 but also mindful of the inconveniences of a continuance and the court's crowded docket.

Collateral Source Rule

Through the 1990's, the hot topic in trial courts was the admissibility of “written-off” medical bills in personal-injury cases. The circuit courts were hopelessly divided. Untold pages of briefs, articles, and trial court opinions analyzed the issue in a variety of ways.

In 2000, the matter was put to rest in *Acuar v. Letorneau*, 260 Va. 180, 531 S.E.2d 316 (2000), with the Supreme Court applying the age-old collateral source rule to “write-offs.” The Court held that plaintiffs are entitled to recover the amounts of their medical bills without reductions for benefits received from collateral sources, which it defined to include “write-offs”.

Medical Malpractice

Several notable changes occurred in the field of medical malpractice in the new millennium.

Of particular note, medical malpractice review panels became a thing of the past. Established in response to a perceived medical-malpractice crisis—and frequently utilized most of the 1990's—lawyers and health care providers apparently have now decided that the review panel does not accomplish a worthwhile purpose. Thus, the panels have gone the way of Nehru jackets and Chesapeake Bay oysters.

Today most medical-malpractice claims are mediated rather than litigated, taking a large number of these complex and time-consuming cases out of the courtrooms. More on this below.

Another change occurred when, in 2006, the General Assembly enacted Code Section 8.01-20.1 to require a plaintiff in a medical malpractice case to certify at the time of service that he has obtained an expert who opines that the defendant deviated from the applicable standard of care. (The requirement does not apply to the rare case—e.g., *Coston v. Bio-Medical Applications*, 2008 Va. LEXIS 7, 654 S.E.2d 560 (2008)—where the act of alleged malpractice lies within the range of the jury's common knowledge and experience.)

The General Assembly also enacted Code Section 8.01-581.20:1, which bars expressions of sympathy by a health care provider when offered at trial as an admis-

Trends and Changes in Trial Practice — cont'd on page 20

Trends and Changes in Trial Practice *cont'd from page 19*

sion of liability.

The statutory cap maxed out at \$2 million this year. Without modifying legislation, this is the total amount recoverable, including punitive damages, for a medical malpractice injury.

Changes in the “standard of care” statute, Code Section 8.01-581.20, now clearly require that a standard-of-care expert witness demonstrate knowledge of the standards of the defendant’s specialty and have a clinical practice in that field or a related field within a year of the alleged malpractice. (If the expert is licensed in Virginia, he is granted a presumption of knowledge of the statewide standard of care.)

Expert Opinions

Expert-opinion testimony has become essential in a growing number of cases to assist the jury in understanding the disputed issue. In addition to elevating the cost and expanding the length of trial, this development has put considerable strain on trial lawyers in the discovery and preparation phases of litigation, as well as at trial itself.

The major decision in this area is *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007), where the Supreme Court addressed the discretion that trial courts have in excluding expert opinion at trial which had not been adequately disclosed in discovery under Rule 4:1(b)(4)(A)(i).

“*Crane* motions” are popping up across the Commonwealth, testing the amount of informational detail that trial judges may require in a party’s disclosure of the “substance” of the expert’s expected testimony and a “summary” of the grounds for the expert’s opinion.

Another significant case involving expert opinions, *Bitar v. Rahman*, 272 Va. 130, 630 S.E.2d 319 (2006), rejected an attorney’s trial tactic of allowing an expert to complete his testimony (and leave the courthouse) before moving to strike the testimony based on questionable qualifications or reliability.

Alternatives to Litigation

Notwithstanding all these recent changes, and their aggregate impact on trial lawyers, none of them compares with the extraordinary shift in the way Virginians resolve civil disputes.

In the first year of the millennium 105,372 civil cases were commenced in the Commonwealth. By 2007, that number had diminished to 103,472.

Similarly, in 2000, juries decided 1,514 civil disputes; last year, just 666 cases were tried to juries.

Why is this? Are the citizens of Virginia having fewer injuries or becoming less litigious? Of course not. Rather, most civil disputes are mediated now, not litigated. According to the best available statistics, the balance tipped in 2005—the first year in which more civil disputes were mediated than decided by juries. The trend continues unabated.

In 2003, a court-sponsored judicial settlement program was established. Through last year more than 2000 referrals have been made to the program through the Supreme Court.

Perhaps more significantly, private groups of certified mediators are expanding and thriving throughout the Commonwealth to meet the escalating demand for these “alternative dispute resolutions.”

This transformation in the way disputes are resolved imposes new demands on trial lawyers. Not only must they stay abreast of developments in the field of trial practice and procedure, they must learn and utilize the methods and mechanisms of the rapidly-evolving and increasingly popular mediation process. ☒

Virginia State Bar Litigation Section 2008 - 2009 Board of Governors

Officers:

Jennifer Lee Parrish, Esq., *Chair*
Parrish, Houck & Snead, PLC
Post Office Box 7166
Fredericksburg, VA 22405

Gregory Joseph Haley, Esq.,
Vice Chair
Gentry, Locke, Rakes & Moore
10 Franklin Road, SE
P.O. Box 40013
Roanoke, VA 24022-0013

Robert Leonard Garnier, Esq.,
Secretary
109 Rowell Court
Falls Church, VA 22046

R. Lee Livingston, Esq.,
Immediate Past Chair
Tremblay & Smith, L.L.P.
105-109 East High Street
Post Office Box 1585
Charlottesville, VA 22902

Newsletter Editor:

Joseph Michael Rainsbury, Esq.
LeClairRyan, A Professional Corporation
1800 Wachovia Tower, Drawer 1200
Roanoke, VA 24006

Board of Governors Members:

Thomas Grasty Bell, Jr., Esq.
Timberlake Smith Thomas Moses
P.O. Box 108
Staunton, VA 24402-1018

Gary Alvin Bryant, Esq.
Willcox & Savage, P.C.
1800 Bank of America Center
One Commercial Place
Norfolk, VA 23510-219

Sandra T. Chinn-Gilstrap, Esq.
Danville Regional Law Center
520 Piney Forest Road
Danville, VA 24540

Maya Miriam Eckstein, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Scott Carlton Ford, Esq.
McCandlish Holton, PC
P.O. Box 796
Richmond, VA 23218

William Ethan Glover, Esq.
P.O. Box 207
Fredericksburg, VA 22404-0207

Sharon Smith Goodwyn, Esq.
Hunton & Williams
Post Office Box 3889
Norfolk, VA 23514-3889

Timothy Edward Kirtner, Esq.
Gilmer Sadler Ingram et al.
65 East Main Street
P.O. Box 878
Pulaski, VA 24301-0878

Kevin Philip Oddo, Esq.
LeClairRyan, A Professional Corporation
1800 Wachovia Tower, Drawer 1200
Roanoke, VA 24006

Barbara S. Williams, Esq.
101 Loudon Street, SW
Leesburg, VA 20175

Mary Catherine Zinsner, Esq.
Troutman Sanders LLP
1660 International Drive, Suite 600
McLean, VA 22102-3805

Ex-Officio Judicial Members:

Hon. Rodham Tulloss Delk, Jr., Esq.
Suffolk Circuit Court
Post Office Box 1814
Suffolk, VA 23439-1814

Hon. Elizabeth Bermingham Lacy
Supreme Court of Virginia
P.O. Box 1315
Richmond, VA 23218

Hon. Michael Francis Urbanski
United States District Court
Western District of Virginia
Post Office Box 38
Roanoke, VA 24002

Committee Chairs & Liaisons:

Nathan J. Douglas Veldhuis, Esq.,
Chair, Litigation YLC
Tremblay & Smith, L.L.P.
105-109 East High Street
Charlottesville, VA 22902-1585

Ann Kiley Crenshaw, Esq.
Computer Task Force Liaison
Kaufman & Canoles
A Professional Corporation
2101 Parks Avenue, Suite 700
Virginia Beach, VA 23451

Lawrence Steven Emmert, Esq.
Chair, Appellate Practice Subcommittee
Sykes, Bourdon, Ahern & Levy, P.C.
Pembroke Office Park, 5th Floor
281 Independence Boulevard
Virginia Beach, VA 23462-2989

Homer C. Eliades, Esq.
VSB Senior Lawyers Conference Liaison
405 North 6th Avenue
Post Office Box 967
Hopewell, VA 23860-0967

Mrs. Patricia Sliger, *Liaison*
Virginia State Bar, Suite 1500
707 East Main Street
Richmond, VA 23219-2800

Recent Law Review Articles

*R. Lee Livingston*¹

CONTRACTS

Pargendler, Mariana. *Modes of gap filing: good faith and fiduciary duties reconsidered.* 82 Tul. L. Rev. 1315-1354 (2008).

Yoder, Bryce. *Note. Now reasonable is "reasonable"? The search for a satisfactory approach to employment handbooks.* 57 Duke L.J. 1517-1555 (2008).

EMPLOYMENT PRACTICE

Grubman, Scott R. *Note. Think twice before you type: blogging your way to unemployment.* 42 Ga. L. Rev. 615-647 (2008).

Keller, Elisabeth A. and Judith B. Tracy. *Hidden in plain sight: achieving more just results in hostile work environment sexual harassment cases by re-examining Supreme Court precedent.* 15 Duke J. Gender L. & Pol'y 247-274 (2008).

Roesler, Beth Anne. *Student article. Judicially muzzling the voices of public sector employees. (Garcetti v. Ceballos, 547 U.S. 410, 2006.)* 53 S.D. L. Rev. 397-424 (2008).

Rubinstein, Kevin. *Note. Internal whistleblowing and Sarbanes-Oxley section 806: balancing the interests of employee and employer.* 52 N.Y.L. Sch. L. Rev. 637-657 (2007/08).

EVIDENCE

Beyler, Keith H. *Expert testimony disclosure under Federal Rule 26: a proposed amendment.* 41 J. Marshall L. Rev. 117-159 (2007).

Bocchino, Anthony and David Sonenshein. *Rule 804(b)(6)—the illegitimate child of the failed liaison between the hearsay rule and Confrontation Clause.* 73 Mo. L. Rev. 41-81 (2008).

Boucher, Alvin O. *Implied waiver of physician and psychotherapist-patient privilege in North Dakota medical malpractice and personal injury litigation.* 83 N.D. L.Rev. 855-885 (2007).

Downing, Kristy Joi. *The implications of In re Seagate—redefining willful infringement and waiver of attorney work product.* 12 Intell. Prop. L. Bull. 19-34 (2007).

Hall, Katrina. *Comment. Should a trial judge be permitted to independently Google an expert witness to determine credibility? (Kourkounakis v. Della Russo, 167 F. App'x 255, cert denied, 2006 U.S. LEXIS 5913, 2006.)* 112 Penn St. L. Rev. 885-905 (2008).

Reed, Leslie. *Comment. Is a free appropriate public education really free? How the denial of expert witness fees will adversely impact children with autism.* 45 San Diego L. Rev. 251-303 (2008).

INSURANCE LAW

Ham, Shane. *Arizona case note. Assignability of professional negligence claims against insurance agents. (Webb v. Gittlen, 174 P.3d 275, 2008.)* 50 Ariz. L. Rev. 647-656 (2008).

Liggett, Bradley D. *Comment. Contra applicantem or contra proferentem application: the need for clarification of the doctrine of contra proferentem in the context of insured-created ambiguities in insurance applications.* 2008 BYU L. Rev. 211-225.

MEDICAL JURISPRUDENCE

Behrens, Scott A. *Note. Call in Houdini: the time has come to be released from the geographic strait-jacket known as the locality rule.* 56 Drake L. Rev. 753-790 (2008).

George, Jennifer L. *Note. The United States Supreme Court failed to follow over thirty years of precedent by replacing individualized medical judgment with congressional findings. (Gonzales v. Carhart, 127 S. Ct. 1610, 2007.)* 41 Creighton L. Rev. 219-275 (2008).

PRACTICE AND PROCEEDURE

Coleman, Brooke D. *The Celotex initial burden standard and an opportunity to “revivify” Rule 56.* 32 S. Ill. U. L.J. 295-344 (2008).

Conley, Benjamin J. *Note. Will the real real party in interest please stand up?: applying the capacity to sue rule in diversity cases.* 65 Wash. & Lee L. Rev. 675-710 (2008).

DeBono, Jessica. *Comment. Preventing and reducing costs and burdens associated with e-discovery: the 2006 amendments to the Federal Rules of Civil Procedure.* 59 Mercer L. Rev. 963-990 (2008).

Derr, Emily J. *Note. Striking a better public-private balance in forum non conveniens.* 93 Cornell L. Rev. 819-848 (2008).

Justman, Jeffrey P. *Note. Capturing the ghost: expanding Federal Rule of Civil Procedure 11 to solve procedural concerns with ghostwriting.* 92 Minn L. Rev. 1246-1288 (2008).

Martin, Susan Lorde. *Litigation financing: another subprime industry that has a place in the United States market.* 53 Vill. L. Rev. 83-116 (2008).

PRODUCTS LIABILITY

O’Connell, Jeffrey and Patricia Born. *The cost and other advantages of an early offers reform for personal injury claims against business, including for product liability.* 2008 Colum. Bus. L. Rev. 423-528.

Schwartz, Victor E. and Christopher E. Appel. *Effective communication of warnings in the workplace: avoiding injuries in working with industrial materials.* 73 Mo. L. Rev. 1-39 (2008).

Vandall, Frank J. *The criminalization of products liability: an invitation to political abuse, preemption, and non-enforcement.* 57 Cath. U. L. Rev. 341-375 (2008).

TORTS

Coleman, Phyllis. *Scuba diving buddies: rights, obligations, and liabilities.* 20 U.S.F. Mar. L.J. 75-101 (2007-08).

Falk, Richard O. and John S. Gray. *Alchemy in the courtroom? The transmutation of public nuisance litigation.* 2007 Mich. St. L. Rev. 941-1016.

Fraker, Russell. *Note. Reformulating outrage: a critical analysis of the problematic tort of IIED.* 61 Vand. L. Rev. 983-1026 (2008).

Goldberg, John C. P. *Monsanto Lecture. Ten half-truths about tort law.* 42 Val. U. L. Rev. 1221-1276 (2008).

Gray, John S. and Richard O. Faulk. *“Negligence in the air?” Should “alternative liability” theories apply in lead paint litigation?* 25 Pace Env’tl. L. Rev. 147-209 (2008).

Hosie, Spencer. *Patent trolls and the new tort reform: a practitioner’s perspective.* 4 I/S75-87 (2008).

Little, William B. L. *“It is much easier to find fault with others, than to be faultless ourselves”:* contributory negligence as a bar to a claim for breach of the implied warranty of merchantability. 30 Campbell L. Rev. 81-116 (2007).

Nockleby, John T. *How to manufacture a crisis: evaluating empirical claims behind “tort reform”.* 86 Or. L. Rev. 533-598 (2007).

Richmond, Douglas R. *The lawyer’s litigation privilege.* 31 Am. J. Trial Advoc. 281-328 (2007).

Scordato, Marin Roger. *Understanding the absence of a duty to reasonably rescue in American tort law.* 82 Tul. L. Rev. 1447-1503 (2008).

Zirkel, Perry A. and John H. Clark. *School negligence case law trends.* 32 S. Ill. U. L.J. 345-363 (2008).

¹ Lee Livingston is a partner with Tremblay & Smith in Charlottesville.

Litigation News is published by the
Virginia State Bar Litigation Section.

Newsletter Editor

Joseph Michael Rainsbury, Esq.

*Statements or expressions of opinion
or comments appearing herein are
those of the editors, authors and
contributors and not necessarily those
of the Virginia State Bar or its
Litigation Section.*

Publish Your Work

Litigation News welcomes the submission of litigation-oriented articles. If you have researched or argued an interesting point of Virginia law, or have practice tips to share, consider condensing them into an article for **Litigation News**. The contact for submission of these articles is:

Joseph Michael Rainsbury, Esq.
LeClairRyan, A Professional Corporation
1800 Wachovia Tower
Drawer 1200
Roanoke, Virginia 24006
(Main) (540) 510-3000
(Direct) (540) 510-3055
(Fax) (540) 510-3050
joseph.rainsbury@leclairryan.com



Virginia State Bar
Eighth & Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800



PRST STD
U.S. POSTAGE
PAID
PERMIT NO. 709
RICHMOND