Changing the Rules: Recently Implemented and Recently Proposed Amendments to the Federal Rules of Civil Procedure

by Kristan B. Burch

For civil practitioners in federal court, two sets of amendments to the Federal Rules of Civil Procedure—one set now in effect, the other proposed—merit attention. First, Rules 37 and 45 were amended effective December 1, 2013. Second, the Advisory Committee on Federal Rules of Civil Procedure (“Advisory Committee”) issued a Report to the Standing Committee on Rules of Practice and Procedure (“Report”) on May 8, 2013, recommending for publication for comment amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. The public comment period on the preliminary draft of proposed amendments set forth in the Report closes on February 15, 2014.1

I. Amendments Effective December 1, 2013

In April 2013, the Supreme Court of the United States adopted proposed amendments to Rules 37 and 45. Those amendments, which became effective on December 1, 2013, relate to subpoenas. Pursuant to the new Rule 45(a)(2) and (b)(2), a subpoena “must issue from the court where the action is pending,” and a subpoena “may be served at any place within the United States.” This means that lawyers no longer will have to issue subpoenas duces tecum from the court for the district where the production is to be made.

The amendment to Rule 45(c) also includes a new section, entitled “Place of Compliance.” Under the new Rule 45(c)(1), a subpoena for trial, hearing, or deposition can command a person to attend “within 100 miles of where the person resides, is employed, or regularly transacts business in person.” If the person receiving the subpoena is a party or a party’s officer, that person can be commanded by subpoena to attend a trial, hearing, or deposition “within the state where the person resides, is employed, or regularly transacts business in person.” Under the new Rule 45(c)(2), a subpoena may require production of documents, electronically stored information, or tangible things at a place “within 100 miles of where the person resides, is employed, or regularly transacts business in person.”

The notice provisions in Rule 45 have moved from (b)(1) to (a)(4), and they now require “a notice

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The litigation section is, as many of you know, the largest section of the VSB. Our section is quite active, and we are proud of the accomplishments made since June.

The appellate committee, chaired by Monica Monday, put on a successful seminar in Fredericksburg titled “Winning Your Appeal: The Keys to Effective Appellate Representation.” The speakers were Court of Appeals Judge Stephen McCullough and Senior Assistant Attorney General Alice Armstrong. Monica took the opportunity to discuss what our section does, particularly the newsletter, and informed the audience that the focus of the Appellate Committee was on the appellate handbook. I thank Monica for her work and for spreading the word about our section.

As I write this message from the Chair, two of our past Chairs—Gary Bryant and Robert Garnier—are putting on a CLE presentation at the VSB’s mid-year meeting in Paris. Lucky Gary and Robert! We are also ramping up for the judging of the Law Essay writing contest for high school students. Anyone that wants information about that program can contact us.

Kevin Martingayle, the VSB President-elect, wants to put on the Best Annual Meeting at Virginia Beach this June. Kevin and the BAM committee have worked hard figuring out how to organize the meeting in a new venue since the Cavalier Hotel will be under renovation. The Litigation Section was honored to be chosen by the BAM committee to put on a showcase CLE at the annual meeting. We teamed up with two other sections, the Criminal Law Section and the Corporate Counsel Section, to organize the seminar entitled, “21st Century Digital Evidence.” Ever wondered how in the world you could get that cell phone call into evidence? Or an email? Attend the session and you should learn something—from both the civil side and the criminal side.

The annual meeting at Virginia Beach is a lot of fun and I am always surprised that more of our members don’t come and attend. There are plenty of family friendly activities at the Beach, lots of good free goodies at the exhibit hall, and CLE to boot! I encourage all of you to try and go this year—I don’t think you will be disappointed.

Again, I am proud of the work that we do as a Section and I encourage you to contact me should you wish to get more involved as a member. ♦

Barbara S. Williams is the 2013-14 chair of the Litigation Section and practices in Leesburg and Winchester.
and a copy of the subpoena” to be served on each party before a subpoena commanding the production of documents, electronically stored information, or tangible things or the inspection of premises is served on the person to whom it is directed.

The Rule 45 amendments also added two new sections at (f) and (g). Under Rule 45(f), a court where compliance is required that did not issue a subpoena “may transfer” a motion under Rule 45 to the issuing court “if the person subject to the subpoena consents or if the court finds exceptional circumstances.” If such a transfer takes place, an attorney who was authorized to practice in the court where the motion was made may file papers and appear on the motion “as an officer of the issuing court.” In order to enforce an order, the issuing court may transfer the order to the court where the motion was made. Rule 45(g) adds contempt provisions. Either the court for the district where compliance is required or the issuing court (if a motion is transferred) “may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or any order related to it.” The amendments changed Rule 37(b)—which governs discovery sanctions—to conform to Rule 45’s new rules regarding the transfer of subpoena-related motions and contempt orders.

II. Proposed Amendments Open for Comment through February 15, 2014

A. Duke Conference Proposed Revisions

In May 2010, a conference was held at the Duke Law School in which participants “urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.”

Many of the proposed rule amendments set forth in the May 8, 2013 Report were developed in response to “the central themes that emerged” from the Duke Conference. The proposed rule changes fall into three categories: (1) case management, (2) proportionality in discovery, and (3) cooperation. Certain of the proposed amendments in each category are summarized below.

1. Case-Management Proposals

The case-management proposals “reflect a perception that the early stages of litigation often take far too long” and that the “longer it takes to litigate an action, the more it costs.” Proposed changes include the following:

Rule 4(m). The proposed rule shortens the time to serve a summons and complaint from 120 days to 60 days.

Rule 16(b)(3) and Rule 26(f). The proposed rules call for scheduling orders and discovery plans to provide for the preservation of electronically stored information and to include agreements reached under Rule 502 of the Federal Rules of Evidence. In addition, proposed Rule 16(b)(3) includes a new section (v), which permits scheduling orders to “direct that before moving for an order relating to discovery the movant must request a conference with the court.”

Rule 26(d)(1). The proposed rule permits early Rule 34 requests for production of documents to be issued. Such requests can be issued more “than 21 days after the summons and complaint are served on a party” and will be considered served “at the first Rule 26(f) conference.”
2. Proportionality: Discovery Proposals

These proposed changes are aimed at “proportionality in using procedural tools, most particularly discovery.” They include the following:

**Rule 26(b).** The proposed rules add a requirement of proportionality to Rule 26(b). This can be seen in the proposed changes to Rule 26(b)(2)(C)(iii), which are designed to place limits on discovery proportional to the needs of the case. In addition, proposed Rule 26(b)(1) seeks to delete the last three sentences of this section (including the “for good cause” sentence) and replace them with: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

**Rule 26(c).** The proposed rule adds to (c)(1)(B) “an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery.”

**Rules 30, 31, 33, and 36.** The proposed rule changes: (1) reduce the presumptive limit on the number of depositions from 10 to 5, (2) reduce the presumptive duration of a deposition from 1 day of 7 hours to 1 day of 6 hours, (3) reduce the presumptive number of Rule 33 interrogatories from 25 to 15, and (4) set a limit on Rule 36 requests for admission at 25 requests unless otherwise stipulated or ordered by the court.

**Rules 34 and 37.** Proposed Rule 34(b)(2)(B) requires that the grounds for objecting to a request be stated “with specificity.” Proposed Rule 34(b)(2)(C) requires that an objection state “whether any responsive materials are being withheld on the basis of that objection.” Changes also are proposed to Rule 34(b)(2)(B) to address the timing for when a party choosing to produce copies—instead of permitting inspection—must produce the copies, and proposed Rule 37(a)(3)(B)(iv) is amended to add authority for an order compelling production by a party who “fails to produce documents.”

3. Cooperation

Participants at the Duke Conference “regularly pointed to the costs imposed by hyperadversary behavior and wished for some rule that would enhance cooperation.” The proposed change is to Rule 1 to add “and employed by the court and the parties” in an effort to “emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of each action, so the parties share the responsibility to employ the rules in the same way.”

B. Other Proposed Revisions Included in the Report

The Advisory Committee’s report also proposes changes to Rules 37 and 84.

**Rule 37.** The Report describes the proposed amendments to 37(e) as providing guidance “for a court by recognizing that a party that adopts reasonable and proportionate preservation measures should not be subject to sanctions.” In addition, unless there are exceptional circumstances in which a party’s actions “irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions may be imposed only on a finding that the party acted willfully or in bad faith.”

**Rule 84.** As presently written, Rule 84 states
that the forms in the Appendix “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” The Advisory Committee recommends elimination of Rule 84 and the related forms in the Appendix (except for Forms 5 and 6).²²

C. Comment Period for Proposed Amendments

Comments on the proposed amendments can be submitted to the Advisory Committee electronically or by mail.²³ The Advisory Committee will review all timely comments submitted by February 15, 2014. All timely comments will be made part of the official record and will be available to the public. In addition, members of the public who want to present testimony can appear at public hearings. The one remaining public hearing is scheduled for February 7, 2014 in Dallas, Texas. Those wishing to testify at the hearing should notify the Advisory Committee at least thirty (30) days in advance of the scheduled hearing.

After the period for public comment closes, the Advisory Committee will determine whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure. The proposed amendments would become effective on December 1, 2015, if they are approved—with or without revision—by the Advisory Committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court of the United States, assuming that Congress does not act to defer, modify, or reject them. ✷

(ENDNOTES)

2. Id. at 1.
3. Id.
4. Id. at 4.
5. Id.
6. Id. at 7.
7. Id. at 8.
8. Id.
9. Id. at 1.
10. Id. at 9.
11. Id. at 10.
12. Id. at 10-12, 20.
13. Id. at 12.
15. Id. at 26.
16. Id.
17. Id. at 26, 28.
18. Id. at 16.
19. Id. at 17.
20. Id. at 35.
21. Id. at 35.
22. Id. at 61.
Litigating Civil Cases in General District Court

by Timothy E. Kirtner

Virginia civil litigators traditionally have spent very little time in the general district courts unless they had an active collections practice or represented owners of rental properties. But the repeal of the removal statute and recent increases to the jurisdictional limits in general district court are contributing to an increase in the frequency with which civil litigators—particularly those handling personal-injury claims—find themselves in Virginia’s general district courts. As more litigation migrates to the general district courts, familiarity with the rules and statutes governing practice in the general district courts is necessary to allow litigators to properly advise clients of the advantages and disadvantages of litigation in those courts and to successfully navigate general-district-court litigation when representing clients in that venue.

Changes to Removal and Jurisdictional Amounts

The increase in popularity of the general district courts as venues for personal-injury litigation began with the repeal of the removal statute in 2007. Before that repeal, cases within the general district court’s concurrent jurisdiction could be removed to circuit court, without hearing, upon filing of a grounds of substantial defense and payment of a minimal fee. In the experience of this author, defense lawyers rarely allowed cases within the district court’s concurrent jurisdiction with the circuit court to remain in general district court. Plaintiffs’ lawyers were reluctant to file cases in the general district court, anticipating that the cases would be removed anyway.

The General Assembly also has expanded the jurisdiction of the general district courts in recent years, increasing the jurisdictional limit from $15,000.00 to $25,000.00 in 2010. Code § 16.1-77(1). General district courts now have exclusive original jurisdiction over claims for money or specific personal property with a value not exceeding $4500, exclusive of interest and any attorneys’ fees contracted for in the instrument sued upon. Id. And they have concurrent jurisdiction with the circuit courts on claims greater than $4500 but not exceeding $25,000, again exclusive of interest and any attorneys’ fees contracted for in the instrument sued upon.1 Id.

These statutory changes, combined with the rising cost of trying cases in circuit court—and perhaps an aversion to jury trials—increase the likelihood that civil litigators will spend more of their “in court” time in the general district court.

Nuts and Bolts of General District Court Practice

Actions for money damages may be instituted in the general district court by filing a “warrant in debt” or a complaint.2 Most general district court cases are instituted by the filing of a warrant in debt, a fill-in-the-blank-form available online.3 A clerk-issued warrant in debt contains a return (hearing) date on which the defendant must appear either (1) to try the case or (2) to state whether they dispute the claim and, if so, set the matter for trial on a later date. The warrant in debt contains spaces where the plaintiff can indicate whether the case is to be tried on the return date or whether that return date is to be used for the purpose of setting a later date for trial.

Actions initiated in general district court by complaint are subject to pleading requirements similar to those prevailing in circuit court.4 The pleading “must state the facts on which the plaintiff relies” and is considered sufficient “if it clearly informs the defendant or defendants of the true nature of the claim asserted.” The pleading is also required to notify the defendant of the date on which the motion is to be made. The defendant is not required to file an answer or equivalent responsive pleading regardless of whether the action is instituted by filing of a warrant in debt or complaint. Appearance on the original return or motion date is sufficient to dispute the claim in its entirety.

Discovery in general-district-court cases is limited.

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There are no provisions for serving interrogatories, requesting the production of documents, or taking depositions—though subpoenas duces tecum may be issued. The principal discovery mechanisms are the bill of particulars and the grounds of defense. As with the warrant in debt, there are district court forms available for these.

Motions for bills of particulars or grounds of defense are directed to the general district court judge, who must order the filing of the pleadings before any party is under an obligation to do so. General district court judges may also order the filing of these pleadings sua sponte.

The bill of particulars should describe, with specificity, the legal basis of the claims being made, set out the facts supporting those claims, and identify any documents supporting the claim. A party who fails to fully describe the basis for his claim—or to identify facts and documents supporting his claim—risks having evidence excluded by the general district court judge. Similarly, the grounds of defense should describe the legal basis for disputing the claim, set out important facts supporting the denial, and identify any important documents supporting the defenses. Failing to file a bill of particulars or grounds of defense within the time ordered by the general district judge is grounds for awarding summary judgment against the noncompliant party.

Litigating Personal Injury Cases in General District Court

There are many reasons why filing personal-injury cases in general district court is an attractive alternative to circuit-court litigation. One of the most significant of those considerations is the ability to present medical evidence inexpensively. By statute, the district court judge must admit copies of medical reports where certain prerequisites have been met. First, the party intending to introduce the report must provide a copy of it—and written notice of his intention to present the report at trial—to the opposing party ten days in advance of trial. When provided to the opposing party, the report must have attached to it a sworn statement of the treating healthcare provider verifying that “(i) the person named therein was treated or examined by such healthcare provider; (ii) the information contained in the report is true and accurate and fully descriptive as to the nature and extent of the injury; and (iii) that any statement of cost is true and accurate.” The statute also allows records of hospital or other medical facilities (as distinguished from other healthcare providers) to be authenticated by attaching a “sworn statement of a custodian thereof that the same is a true and accurate copy of the record of such hospital or other medical facility.” These methods for admitting medical records remain available in the circuit court where a case is appealed after a trial in the general district court.

General district courts also allow cases to be heard more quickly and more cheaply than in the circuit court. Most general district courts will have available dates within 60 days of the initial filing of the warrant in debt and some will have availability within as few as 30 days. Because of the limitations on discovery, statutory shortcuts for presenting medical evidence, absence of a jury, and a shorter litigation process, the cost of preparing and trying a case in general district court is significantly less than in circuit court.

Even if a case is appealed from the general district court, the decision in general district court may provide a platform for a negotiated settlement before trial in the circuit court. A trial in general district court thus can serve as an inexpensive non-binding arbitration for the parties. In a case where liability is hotly contested, a non-prevailing party’s view of its case may be moderated by the inability to persuade a general district court judge of its theory of the case.
cases where value is the only issue, the general district judge’s valuation may help to bring both parties into a reasonable settlement posture.

The Right of Appeal

There is an appeal of right to the circuit court from judgments of the general district court. The appeal is heard de novo in the circuit court. An appeal bond is required in an amount sufficient to satisfy the judgment appealed from and must be approved by the judge. Bonds in an amount two times the amount of the judgment are typical in this author’s experience. There is an important exception to the appeal-bond requirement in automobile-accident cases. Where the defendant against whom judgment has been granted presents proof of a liability-insurance policy with limits equal to or greater than the amount of the judgment, no appeal bond is required.

Conclusion

As the costs of litigation in circuit court continue to spiral out of control, litigation in general district court—in appropriate cases—becomes an increasingly attractive alternative. Virginia’s general district courts provide a venue for efficient and streamlined litigation of cases.

(ENDNOTES)

1. Section 16.1-77 contains exceptions to the $25,000.00 jurisdictional amount for certain types of actions (i.e. distress warrants, liquidated damages for violations of vehicle weight limits and bond forfeitures). There are also provisions granting the district court jurisdiction over actions for unlawful detainer, attachment, interpleader and several statutory actions. This article focuses on the procedures relating to the litigation of claims for money damages in the general district courts.
2. Rule 7B:4 of the Rules of Supreme Court of Virginia.
3. VA Form DC-412.
4. There appears to be some conflict between Rule 7B:4 and Virginia Code Section 16.1-81, which describes pleading requirements for a suit instituted by “motion for judgment” in the general district court. Rule 7B:4 was amended in 2006 to replace “motion for judgment” with “complaint”. However, no such amendment has been made to Section 16.1-81.
6. Form DC-441 (bill of particulars), and Form DC-442 (grounds of defense).
7. Rule 7B:2.
8. Id.
10. Id.
11. Virginia Code § 16.1-88.2
12. Provisions of § 16.1-88.2 apply to “a civil suit tried in a general district court or appealed to the Circuit Court by any Defendant to recover damages for personal injuries . . . .” (emphasis added).
14. Id.
Defamation

Case: Cashion v. Smith (10/31/2013)
Author: Mims
Lower Ct.: Apgar, Jonathan M. (City of Roanoke)
Disposition: Aff’d in Part, Rev’d in Part

Facts: Following a patient’s death, a trauma surgeon criticized an anesthesiologist’s performance in front of third parties, saying: “He could have made it with better resuscitation”; “This was a very poor effort”; “You didn’t really try”; “You gave up on him”; “You determined from the beginning that he wasn’t going to make it and purposefully didn’t resuscitate him”; and “You just euthanized my patient.”

The anesthesiologist sued the surgeon and his employer for defamation. Defendants claimed that the statements were non-actionable opinion and “rhetorical hyperbole.” In ruling on the defendants’ demurrers and pleas in bar, the trial court held that the non-euthanasia statements were expressions of opinion. But it overruled the demurrers and pleas in bar as to the euthanasia statements. The anesthesiologist endorsed the order “WE ASK FOR THIS” notwithstanding the fact that several of the rulings were adverse to him.

After discovery, the defendants moved for summary judgment on the euthanasia statements, arguing that they were qualifiedly privileged. The anesthesiologist opposed this motion, arguing that the surgeon’s statements were not made in good faith. The trial court granted the defendants’ motion, finding that there was insufficient evidence of common-law malice to overcome the qualified privilege. Accordingly, it dismissed the complaint.

Analysis: On appeal, the SCOV affirmed in part and reversed in part.

First, it held that the anesthesiologist did not waive his arguments as to the non-euthanasia statements by endorsing the order “WE ASK FOR THIS.” The arguments were properly raised elsewhere and the wording of the endorsement did not constitute a waiver under Code § 8.01-384. By using the language in question, the anesthesiologist simply asked the court to “enter an order memorializing its ruling.” He did not thereby assent to portions of the ruling adverse to him.

Second, the SCOV held that two of the non-euthanasia statements—the ones stating that the patient “could have made it with better resuscitation” and that “[y]ou determined from the beginning that he wasn’t going to make it and purposefully didn’t resuscitate him”—were actionable as defamation. They insinuated that: (1) the anesthesiologist’s actions caused the patient’s death, and (2) the anesthesiologist purposefully withheld treatment, causing the patient’s death. These were provably true or false statements. The second statement was tantamount to an accusation of euthanasia. The statements “[t]his was a very poor effort,” “[y]ou didn’t really try,” and “[y]ou gave up on him,” however, were non-actionable “because they are subjective and wholly depend on [the surgeon’s] viewpoint.”

Third, the SCOV agreed with the trial court that the qualified privilege attached to the surgeon’s remarks, but held that the trial court erred in finding that plaintiff could not overcome it. The trial court had ruled that the qualified privilege could be overcome only by a showing of personal spite or ill will. The SCOV rejected this analysis, noting that qualified privilege could be overcome by a showing of any one of the following factors: (1) the statements were false and made with reckless disregard for the truth; (2) the statements were communicated to third parties with no interest in the matter; (3) the statements were motivated by spite or ill will; (4) the statements included strong or violent language disproportionate to the occasion; or (5) the statements were not made in good faith. Although a showing of personal spite and ill will is sufficient to overcome the privilege, it is not necessary. Whether plaintiff satisfied one or more of those factors was a factual question for the jury.

Finally, the SCOV rejected the surgeon’s cross-appeal, which claimed that the euthanasia statements were mere rhetorical hyperbole. It held that a listener reasonably could have believed that the anesthesiologist committed the conduct attributed to him—namely, euthanizing the patient or contributing to his death by providing deficient care.

Key Holding(s):

• By endorsing an order “WE ASK FOR THIS,” a party does not necessarily waive objections to adverse findings in the order.

• Statements that are provably true or false are not statements of opinion for defamation purposes.

• For defamation purposes, a qualified privilege can be overcome by a showing of ANY ONE of the following factors: (1) the statements were false and made with reckless disregard for the truth; (2) the statements were communicated to third parties with no interest in the matter; (3) the statements were motivated by spite or ill will; (4) the statements included strong or violent language disproportionate to the occasion; or
(5) the statements were not made in good faith.

• Although a showing of personal spite and ill will is sufficient to overcome a qualified privilege, it is not necessary.

• For defamation purposes, a statement is not “rhetorical hyperbole” where a reasonable person could believe that the plaintiff engaged in the described conduct.

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**Intentional Torts**

**Case:** Commonwealth v. Peterson (10/31/2013)  
**Author:** Powell  
**Lower Ct.:** Alexander, William N., II (Judge Designate)  
(Montgomery County)  
**Disposition:** Reversed

**Facts:** At 7:30 a.m. on the morning April 16, 2007, two gunshot victims were found in a dormitory at Virginia Tech, in what police believed to be a domestic shooting by the female victim’s boyfriend.

The university president was notified shortly thereafter and, at 8:30 a.m., a policy group convened to discuss the response. A campus-wide e-mail blast about the shooting went out about 9:26 a.m.

The police found the boyfriend at around 9:45 a.m. While speaking with him, police heard that there were active shots in Norris Hall. A second e-mail blast went out at 9:50, stating that a gunman was loose on campus. The two plaintiffs’ decedents were among those killed in Norris Hall.

The administrators filed wrongful-death suits, claiming that a special relationship existed between Virginia Tech and decedents, that Virginia Tech had a duty to warn them of third-party criminal acts, and that its failure to do so led to their deaths.

The Commonwealth objected to jury instructions that stated that: (1) there was a special relationship between the university and the decedents, (2) that this imposed a duty on the university to maintain a safe campus, and (3) that if the jury found that the university reasonably could have foreseen injury caused to students by a third party but failed to warn them of it, then the university could be held liable. The trial court overruled those objections and the jury returned a plaintiffs’ verdict.

The Commonwealth moved to set aside the verdict on the grounds that the evidence was insufficient to establish that the university had a duty to warn others from criminal acts of third parties does not arise absent unusual circumstances—such as a special relationship. The SCOV agreed, however, that a special relationship existed in the case before it. But that did not end the inquiry. The plaintiffs also had to show that the harm was foreseeable.

The SCOV observed that the degree of foreseeability depended on the nature of the special relationship. In certain special relationships (e.g., common-carrier/passenger, innkeeper/guest, and employer/employee) there is a duty to warn where there is a known or reasonably foreseeable danger of third-party acts. Other special relationships (e.g., owner/invitee and landlord/tenant) give rise to a less-demanding duty, requiring a warning only where there was an imminent probability of injury from a third party criminal act.

The SCOV held that under either of these standards, the evidence was insufficient to establish that the university had a duty to warn. The university knew only that there had been a shooting, did not know the identity of the shooter, believed that the shooting was domestic in origin, and believed that the shooter had fled the area and posed no danger to others. Accordingly, it was not reasonably foreseeable that students in Norris Hall would fall victim to violent crime.

**Key Holding(s):**

- A university owed no duty to warn its students of the potential for third-party criminal acts where it knew only that there had been a shooting, did not know the identity of the shooter, believed that the shooting was domestic in origin, and believed that the shooter had fled the area and posed no danger to others.

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**Real Property**

**Case:** Old Dominion Boat Club v. Alexandria City Council (10/31/2013)  
**Author:** Goodwyn  
**Lower Ct.:** McGrath, John J., Jr. (City of Alexandria)  
**Disposition:** Reversed

**Facts:** A deed of partition vested a property owner with an easement over an existing alley. Prolonged public use led to the implied dedication and acceptance of that alley as public property and vested fee simple in the locality.

The locality allowed one of the abutting owners to erect a structure in the alley, to which the property owner objected, claiming that it interfered with its easement. The trial court rejected this argument, ruling that the implied dedication and implied acceptance extinguished the prior easement.
Analysis: On appeal, the SCOV reversed. It held that the easement survived the implied dedication and acceptance and that the dominant property could still enforce it even after the alley became a public way.

The SCOV reasoned that the implied dedication would have extinguished the easement only if the public use was inconsistent with it. But it noted that the long public use of the alley was consistent with—and did not interfere with—the property owner’s rights under the easement. So the implied dedication did not extinguish the easement.

The SCOV rejected the argument that the public dedication extinguished the easement because the easement no longer was necessary. Although long use as a public alley fulfilled the easement’s purpose, it did not extinguish that purpose. The dominant property owners still had a purpose for traversing the easement—i.e., accessing the public main streets and the river.

Key Holding(s):

• The fact that property has been implicitly dedicated for use as a public way does not necessarily extinguish pre-existing easements over that property.

• The cessation of an easement’s purpose extinguishes it.

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Employment

Case: Assurance Data, Inc. v. Malyevac (9/12/2013)

Author: Kinser

Lower Ct.: Smith, Robert J. (Fairfax County)

Disposition: Reversed

Facts: A provider of computer products and services sued a former employee, claiming that he violated non-compete, non-solicitation, non-disclosure, and return-of-confidential-information contract provisions. The employee demurred, claiming that the non-compete and non-solicitation provisions were overbroad. The employer opposed the demurrer, contending that it should be given the opportunity to show why the provisions were reasonable in the circumstances. The trial court, however, sustained the demurrer, ruling “as a matter of law the provision is unenforceable.”

Analysis: On appeal, the SCOV reversed. It recited the elements for evaluating whether a restraint on competition is enforceable. It then noted that enforceability cannot be determined in a “factual vacuum,” but instead must be evaluated with respect to “the particular circumstances of the case.” Thus, the trial court erred when it refused to allow the employ-
“confidential relationship” such that the defendants’ self-dealing transactions were presumptively the result of undue influence.

Second, it found that the decedent’s exclusive and extensive reliance upon defendants to manage her affairs sufficed to establish a confidential relationship. This was so even though the defendants did not need to exercise any power of attorney in the particular transactions at issue.

Key Holding(s):

- Undue influence can be found where there is either: (1) a confidential relationship, or (2) weakness of mind combined with inadequacy of consideration.

- For undue-influence purposes, a party to a joint bank account whose entire funds have been contributed by another account holder stands in a confidential relationship vis-à-vis the contributor of the funds.

- For undue-influence purposes, a confidential relationship arises where the impaired party exclusively and extensively relies upon the defendant to manage his or her affairs.

Real Property

Case: Clifton v. Wilkinson (9/12/2013)

Author: Russell

Lower Ct.: Freeman, Isaac St. C. (Washington County)

Disposition: Reversed

Facts: The state condemned part of a parcel during the construction of I-81. This split the parcel in two and landlocked one of the remaining pieces. Over the following 45 years, a neighbor permitted the owner to access the landlocked parcel by using an unpaved lane over the neighbor’s property. After the owner rebuffed the neighbor’s attempt to purchase the landlocked piece of land, however, the neighbor blocked the unpaved lane. The owner sued the neighbor, asserting an easement by necessity.

The trial court found that the owner satisfied the requirements for an easement by necessity, noting that: (1) there was once common ownership of the dominant and servient parcels, (2) the easement was reasonably necessary to the enjoyment of the land, and (3) there was no other means of access to the landlocked parcel. Accordingly, it enjoined the neighbor from blocking the lane.

Analysis: On appeal, the SCOV reversed. It noted that an easement by necessity arises only when the grantor of the dominant tract conveys it to another without providing any right of access to it. It does not arise when the former unity of title is severed by the grantor without impairing a right of access.

Although the plaintiff’s and defendant’s parcels were once commonly owned, the severance of the parcels is not what landlocked the dominant tract. It was the later condemnation that landlocked it. The owner was compensated for the loss of value occasioned by this. And the condemnation did not create any rights across lands that, by that point, were owned by others.

Key Holding(s):

- An easement by necessity arises only where it is the severance of the unity of title between dominant and servient parcels that landlocks the dominant parcel. It does not arise where the putative dominant parcel is landlocked by a later condemnation proceeding.

Land Use

Case: Nejati v. Stageberg (9/12/2013)

Author: Mims

Lower Ct.: Willis, Gordon F. (City of Fredericksburg)

Disposition: Reversed

Facts: A parcel was a single lot, though the locality’s tax map showed it as comprising two separate tax parcels. The owner had a survey prepared that divided the property into two lots along the lines of the tax map. But this survey was never submitted to or approved by the locality. The developer then conveyed the two lots to two separate purchasers.

The owner of one lot sued the owner of the other, claiming that the fact that the subdivision had not been approved meant that there was only one lot and, thus, that the two owners were tenants in common. The trial court agreed, allocating their percentage ownership based on the amount the owners paid the original owner.

Analysis: On appeal, the SCOV reversed. It held that the deed sufficiently described the particular portions of the lot being conveyed, and so the parties held “in severalty” rather than as tenants in common.

It was true that the original owner’s failure to comply with Code § 15.2-2254 and the local subdivision ordinance restricted the purchasers’ ability to use the conveyed parcels. But this did not bar the conveyance.

Key Holding(s):

- A landowner’s failure to obtain approval of a subdivision does not prevent the conveyance of the improperly subdivided lots, though it may limit those lots’ subsequent use.
Land Use
Case: PKO Ventures, LLC v. Norfolk Redevelopment and Housing Authority (9/12/2013)
Author: Millette
Lower Ct.: Sherman, Louis A. (City of Norfolk)
Disposition: Reversed

Facts: In 1998, the City of Norfolk approved a redevelopment project ("Project") for a nine-and-a-half-block area east of Old Dominion University. In 2007, the General Assembly enacted Code § 1-219.1, which said that property within a redevelopment area could be condemned only if it was blighted at the time of the filing of the condemnation petition. But there was an exception for redevelopment projects—like the Norfolk Project—adopted before 2007. For those projects, this statute did “not affect the ability of [the Project] to acquire property” until July 1, 2010.

In April 2010, the Project sought to condemn a lot (the “Property”) within the Project area. At the time, however, the Property was not blighted. After trial in 2012, the Project acquired title for the jury-determined price of $550,000.

The trial court held that the fact that the Project had instituted condemnation proceedings before July 1, 2010 meant that the exception applied and, thus, the Project could condemn the property even though the property was unblighted. This was so even though the Project did not actually acquire the property until long after July 1, 2010.

Analysis: On appeal, the SCOV reversed. It held that, for purposes of the delayed-implementation exception for preexisting redevelopment projects, the acquisition had to be completed by July 1, 2010. It was not sufficient merely to have filed a petition for condemnation by that date.

In reaching this conclusion, the SCOV noted that a separate delaying provision in the statute—not applicable to the facts of the case—was worded differently, applying to acquisitions “instituted” (i.e., filed) before a particular date. The SCOV reasoned that this showed that the General Assembly knew how to base the deadline on filing when it wished to do so. The fact that it did not do so in the provision at issue meant that the deadline was based on the completion of acquisition, not the filing of the condemnation petition.

The SCOV also rejected the Project’s argument that the operation of the deadline to a pending condemnation proceeding deprived it of vested rights. The SCOV noted that the Project’s rights in the Property were only prospective when the July 1, 2010 deadline expired.

Finally, the SCOV rejected the Project’s argument based on Code § 1-239. That section prohibits an act of the General Assembly from impairing a pre-existing “right accrued” or a “claim arising.” It noted that after the 2007 enactment, the Project was not impaired in its right to acquire the property. It was barred only because it failed to complete the acquisition by after July 1, 2010 deadline, when blight became a requirement for condemning the property. Likewise, the Project’s legal claims arose only when the Project commenced condemnation proceedings in April 2010, which was long after the 2007 enactment of the statute.

Key Holding(s):
- The 2007 Act exempting application of Code § 1-219.1 to acquisition of properties by pre-existing redevelopment projects before July 1, 2010, applied only where the acquisition in question was completed by July 1, 2010.

Civil Procedure
Case: Raley v. Haider (9/12/2013)
Author: Goodwyn
Lower Ct.: Brodie, Jan L. (Fairfax County)
Disposition: Aff’d in Part, Rev’d in Part

Facts: A doctor sued his former practice for unpaid earnings. The doctor also sued the doctor who owned the practice, claiming that the owner unlawfully distributed funds to himself in violation of Code § 13.1-1035 (which restricts distributions of insolvent LLCs). The trial court dismissed the doctor’s claim against the owner, holding that a § 13.1-1035 claim could be asserted only by the LLC or one of its members (which the plaintiff doctor was not). The doctor prevailed on his claim against the LLC, but was unable to collect on it.

The doctor then filed: (1) a garnishment proceeding against the owner, claiming that he violated Code § 13.1-1035, and (2) a complaint against the owner and two entities to which the doctor claimed the owner improperly transferred the medical practice’s assets. In count one of the latter complaint, the doctor sought—as judgment creditor—to stand in the shoes of the practice to bring the Code § 13.1-1035 claim.

The trial court sustained the defendants’ demurrers to all counts against all defendants, ruling that they were barred by res judicata because of the earlier dismissal of the plaintiff’s § 13.1-1035 claim against the owner.

Analysis: On appeal, the SCOV affirmed in part and reversed in part.

The doctor first claimed that the original dismissal should have been without prejudice, as it was based on lack of standing. The SCOV held that the doctor had waived this argument under Rule 5:25 by not asserting it below.

Nevertheless, the SCOV ruled that the claims were not barred by res judicata because the parties were not the same and there was no privity.

The SCOV held that in the garnishment and judgment-creditor claims against the defendant owner, the plaintiff doctor was
standing in the shoes of the practice, not suing in his own right. So the parties were not the same as in the original action. To the extent the remaining claims were brought in the plaintiff’s own right against the owner, however, those claims were barred.

As for the claims against the transferees, those were not barred because the transferees were distinct legal entities from the defendants in the first action, i.e., the practice and the defendant owner. Nor were they in privity with them, as they did not have anything at stake in the first action—a judgment could not affect them—and their interests were not represented.

Key Holding(s):

- For res judicata purposes, a litigant in an underlying action is a different person when—in a garnishment or other proceeding—he sues as judgment creditor to enforce the judgment debtor’s rights against a third party.

- For res judicata purposes, a corporate entity is distinct from the person who owns it.

- For res judicata purposes, two persons are in privity only where that their interests are so identical that participation in litigation by one is tantamount to representation of the other’s legal rights.

Arbitration

Case: Schuiling v. Harris (9/12/2013)

Author: Mims

Lower Ct.: Alden, Leslie M. (Fairfax County)

Disposition: Reversed

Facts: The defendant hired the plaintiff as a live-in house cleaner. The plaintiff signed an arbitration agreement in which the parties agreed that all disputes would be heard “exclusively” by the “National Arbitration Forum” (“NAF”), an entity that no longer exists. The contract contained a severability clause.

When defendant moved to compel arbitration, the plaintiff contended that the arbitration agreement was unenforceable because, she claimed, the designated arbitrator was an integral part of the agreement. The trial court agreed and refused to compel arbitration.

Analysis: On interlocutory appeal, the SCOVA reversed. First, it held that the severability clause, which authorized severance of “any part of any provision,” supported the position that the designation of NAF as arbitrator was severable. Second, it held that a determination that the selection of arbitrator was not severable would defeat the entire purpose of the agreement. Third, it held that the parties were presumed to know that Code § 8.01-581.03 directs a circuit court to appoint an arbitrator where the agreement fails to do so, or where the selected arbitrator is unable to act. Fourth, it held that there was nothing in the agreement that suggested that the parties thought NAF’s availability was problematic and that the agreement would terminate if NAF was unable to serve as arbitrator.

Key Holding(s):

- A provision in an arbitration agreement that requires disputes to be heard “exclusively” by a particular arbitrator is severable where: (1) the selected arbitrator is unavailable, and (2) the arbitration agreement contains a severability clause.
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