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E-Discovery and Electronically Stored Information: Know Your Rules

by Michael A. Beverly

Electronically stored information (ESI) plays an important role in the daily life of virtually every practicing lawyer. It may be communicating by e-mail, reviewing and sending documents electronically, or even posting or following updates on Twitter or Facebook. Similarly, ESI typically plays a role in the lives of the clients we represent and, as a result, it will almost certainly play a role in any dispute that the client hires an attorney to resolve. Accordingly, it is important for attorneys to understand how federal and state courts are dealing with the challenges presented by the increasing role of ESI in today's legal disputes.

Discovery disputes over ESI—and associated sanctions motions—occur in all types of cases. Nationwide, approximately three out of four discovery orders issued in federal court require e-mail to be produced.[1] Courts at all levels are are confronting the use and abuse of electronically stored information and electronic discovery.[2] And the problem is on the rise. In 2009 alone there were more e-discovery sanction cases in federal court than in all years prior to 2005 combined.[3] On the federal level, ESI discovery disputes arise most commonly in employment cases (17%), contract disputes (16%), intellectual property disputes (15.5%), tort cases (11%), civil rights cases (8.5%), and bankruptcy (3%).[4]

One challenge is that there is no one-size-fits-all approach to handling electronic discovery because reasonable people can reach differing conclusions based on the details and exigencies of each case.[5] Because individual lawyers may use different processes in different cases, there are probably more ways of gathering, processing, and producing electronically stored information than there are lawyers. Accordingly, in recent years the federal courts and the Supreme Court of Virginia have amended their rules to adjust to this ever-evolving aspect of our society and its role in legal disputes.

Michael A. Beverly is an Associate City Attorney at the Virginia Beach City Attorney's Office.

FEDERAL AND STATE RULES

The Federal and State Rule Amendments Regarding ESI Are Broadly Written to Include Current and Future Forms of ESI.

In 2006, the Federal Rules of Civil Procedure

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Letter From the Chair • Robert Leonard Garnier

Another year has now come and gone for the Litigation Section. As we close our fiscal year and start anew for 2011-12, I am reminded of many recent accomplishments of the Section, including CLE presentations, appellate symposia, and progress on publications. And we have picked another winner in our annual Law In Society essay competition—I am pleased to congratulate Thomas Park Beaver, of Western Branch High School in Chesapeake, Virginia, for his 2011 winning essay, "Liberty and Sensitivity: The First Amendment in the Post-9/11 World." I encourage you to read Thomas' essay at http://www.vsb.org/site/public/2011-winning-essay.

As I end my term as Chair of the Board of Governors of our section, I am pleased to know that the Litigation Section will be led by an excellent panel of trial attorneys. Our Chair position for next year has wisely been entrusted to Scott Ford of McCandlish Holton, PC, in Richmond. Scott is an accomplished litigator who has received considerable favorable recognition from his peers. He has already devoted substantial time and effort to the Virginia State Bar. I look forward to his leadership and I know that our Litigation Section is in good hands with Scott at the helm. Assisting Scott, Gary Bryant, the head of the litigation section of Willcox Savage in Norfolk, will assume the position of Vice Chair. Gary has worked many hours this year to produce an outstanding CLE workshop on expert witnesses on behalf of our Section at the VSB Annual Meeting. Your new Secretary for 2011-12 will be attorney Barbara Williams (with offices in Leesburg and Winchester), recently honored as one of Virginia's Most Influential Women. Tim Kirtner, practicing at Gilmer, Sadler, Ingram, Sutherland & Hutton in Pulaski, is slated to take on the duties of Treasurer.

Robert L. Garnier was the 2010-2011 Chair of the Litigation Section's Board of Governors and practices in Falls Church.

While our Section will be guided by great leaders next year, please be reminded that the Litigation Section is *your* Section, and these officers and the full Board of Governors encourage you to consider how you, too, might help to advance our goal "to provide a forum for the discussion of matters affecting the way in which litigation is conducted in the Commonwealth of Virginia, to sponsor projects and programs of educational value or special interest and relevance to the members of the Section; and to promote efforts aimed at improving the efficient, affordable, ethical and just resolution of societal disputes." If you have ideas that you believe may further that end or otherwise better our service to the Section, I invite you to contact the Board of Governors (see our webpage for member information) to share your thoughts and help us improve the Section.

With my last letter, I want to leave you with a final thought—"Who controls your butter?" It is always important to know the answer to that question as you practice law; indeed, as you go through life. Although I have heard or seen the following anecdote related several different ways and from different sources—including as told by Hardball's Chris Matthews—the story essentially goes as follows: Former basketball star and U.S. Senator Bill Bradley attended a fundraising dinner one evening. As a waiter filled water glasses and distributed bread and butter at his table, putting one pat of butter on each of the plates, Bradley stopped the

waiter to demand more butter because one pat was not enough. The waiter replied to Bradley, "I'm sorry, just one serving of butter for each guest." Unsatisfied and arguing for more, Bradley reportedly responded, "I don't think you know who I am. I'm Bill Bradley, I was an All-American basketball player at Princeton, and an Olympic medalist. I was a Rhodes Scholar and studied at Oxford. I returned to the U.S. to play for the NBA Knicks for 10 years, winning the world championship twice. I was then elected as a U.S. Senator, and later even ran for President of the United States. I would like some more butter." Unwavering, the waiter responded, "I don't think you know who I am." "No, I don't. Who are you?" Bradley retorted. "I," the waiter responded, "am the guy who is in charge of the butter. One pat per person." And the waiter walked off to another table.

As we make decisions throughout our career and encounter and work with others, no matter how important we might think we are, or even how important or "right" our clients might be, we should remain mindful of "who controls the butter." Sure, in some instances, we or our clients might indeed control the butter. But often times, others naturally have control over the means to our ends, and we might be well-served by a reality check that strips away our pride or sense of self-importance, and humbly acknowledge the impact of others on our practice and, indeed, our broader daily lives. Whether working with a client, communicating with a judge, negotiating with opponents, dealing with court clerks, speaking to court reporters, receiving from delivery persons, etc., we must learn and practice to appreciate the role such others play in our efforts as advocates and professionals. In fact, in the end, we should remember that how we treat others not only reflects significantly upon our values and character, but may well shape the fruit of our labors. Yes, even as litigators diligently advancing with zeal the interests of our clients, let us not forget the wisdom and importance of the "Golden Rule" and of treating all with whom our practices bring us into contact with fairness and respect.

In closing, it has been an honor to serve as Chair of this Section and I am grateful for the opportunity to have done so, and I look forward to continuing to working with the Board of Governors as I serve out my remaining term. ▣

E-Discovery and Electronically Stored Information *cont'd from page 1*

were amended to explicitly address ESI and its role in today's legal landscape. Rule 34(a)(1)(A) provides that electronically stored information "including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations-stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form" may be requested in discovery.

Similar changes to the Rules of the Supreme Court of Virginia became effective July 1, 2009. Like the Federal Rules, the Virginia Rules broadly define the scope of electronically stored information. Rule 4:9 provides that ESI includes "writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by respondent into reasonably usable form."[6]

The broad definition of ESI contained in each set of rules makes clear the intent to cover not only existing forms of ESI but any future forms as well. For example, neither Twitter nor Facebook had achieved a significant level of prominence in society when the federal rules were amended in 2006. Since that time, however, both have become increasingly utilized—not only in popular culture but also as commercial tools for small businesses. Under the descriptions in both sets of rules, Twitter and Facebook updates would most likely fall within the scope of ESI. Because ESI is constantly evolving and taking on forms not previously envisioned, the practicing lawyer must ensure a working familiarity with new forms of ESI as they develop and become a part of our society.[7]

Because ESI is constantly evolving and taking on forms not previously envisioned, the practicing lawyer must ensure a working familiarity with new forms of ESI as they develop and become a part of our society.

Attention to the Rules can lessen the opportunity for discovery abuses.

Discovery of ESI or "e-discovery" by its very nature, lends itself to abuse of the discovery process. In the digital age, it is much easier to amass and deliver large volumes of useless or non-responsive information, thereby obscuring the information most useful to the requesting party. A working knowledge of the rules can help an attorney avoid such abuse.

For example, current Federal Rule of Civil Procedure 34(b)(1)(C) and Virginia Rule 4:9(b)(i) both allow the requesting party to specify the form or forms in which electronically stored information is to be produced.[8] These rules enable the requesting party to obtain information in a form that makes the best use of the resources available to it. Before the changes to the rules, a party producing ESI merely had to "produce them as they are kept in the usual courses of business."[9] So if a party requested a significant, but manageable, number of e-mails and the e-mails were regularly printed out and maintained in paper copy, the responding party need only to produce the paper copies of the e-mails. This was so, even if the producing party had electronically-stored copies maintained at an off-site facility. Under the current Virginia Rule 4:9 and Federal Rule 34(b), however, a party can specifically request the electronic version of the e-mails. This may greatly assist the requesting attorney's analysis

of the data contained therein. In addition, certain digital forms of ESI (e.g., Word files) may be more easily searched than others (e.g., TIFFs). By allowing a party to specify the format in which it would like to receive ESI, the new e-discovery rules ensure that ESI is produced in a format that is most suitable for their use.

The rules can work the other way, too. In smaller cases, the rules allow a party to request ESI to be printed out. Depending on the requesting attorney's available technology and personal preferences, paper production may be more conducive for review.

There are, however, limits to the extent to which the requesting party can require the producing party to massage the ESI. While the rules give the requesting party the ability to designate the format in which the ESI is to be produced, the rules also protect the producing party by providing that "a party need not produce the same electronically stored information in more than one form."[10]

Both the Virginia and Federal Rules allow a party to produce ESI as a business record in answers to interrogatories "where the answer may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records."[11] This addition to both the Federal Rules and the Virginia Rules is a logical evolution of the earlier versions of the rules.

Preservation of ESI

In addition to considering the role of ESI during the course of litigation, attorneys must recognize the importance of ESI in anticipation of litigation. Under federal law "the duty to preserve material evidence [including ESI] arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[12] In *Samsung v. Rambus, Inc.*, Judge Payne of the United States District Court for the Eastern District of Virginia, Richmond Division stated "[i]t is difficult to imagine conduct that is more worthy of being considered litigation misconduct or more worthy of sanction than spoliation of evidence in anticipation of litigation because that conduct frustrates, sometimes completely, the search for the truth."[13] Even further, "[i]f the party does not own or control the evidence, the party still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence."[14]

While no corresponding duty has yet been explicitly articulated by the Supreme Court of Virginia,[15] the Court of Appeals of Virginia has recognized such a duty. It affirmed the use of a spoliation—or missing evidence—adverse inference, stating "[a]spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."[16]

The requirements of preserving and producing ESI undoubtedly impose substantial burdens on a large entity. Consistent with other forms of discovery, once in litigation, a responding party may object to producing electronically stored information in the requested format pursuant to Federal Rule 34(b)(2)(D) and Virginia Rule 4:9(b)(iii) when it is not reasonably accessible because it is unduly burdensome or expensive to produce or not reasonably calculated to lead to the discovery of admissible evidence. [17]

Yet a party's identification of sources of ESI as not reasonably accessible or unduly burdensome or expensive does not relieve the party of its common

law or statutory duties to preserve evidence prior to or during litigation.[18] On a motion to compel, the objecting party has the burden to show that the information is not reasonably accessible because of undue burden or cost.[19] This change reflects a standard first set forth in *Zubulake v. UBS*, 217 F.R.D. 309 (S.D.N.Y. 2003), and provides a test that can be applied by the court to determine how, if at all, costs should be shared by the parties in the production of ESI. Nonetheless, even if such a showing is made the Court may still order discovery from such sources if the requesting party shows good cause—though the court may specify conditions for discovery.[20] The outcome of such discovery motions is, of course, not known at the time the duty of preservation arises, so the rules provide no practical relief to the scope of a client's duty to preserve all potentially discoverable ESI.

SANCTIONS

Recent cases underscore the importance of preserving and disclosing ESI. They show that losing a costly discovery battle may make transform a victory on the merits into a hollow win. In *Keithley v. The Homestore.com, Inc.*,[21] for example, the district court upheld a magistrate judge's $283,000 sanction against a party for failing to produce ESI. This, even though the court granted summary judgment in favor of that party.

One of the most publicized recent e-discovery sanctions decision was in *Qualcomm Inc. v. Broadcom Corp*,[22] a Southern District of California case decided in January 2008. In that case the magistrate judge awarded $8.5 million in attorney's fees and costs against Qualcomm for e-discovery misconduct. The Qualcomm decision arose out of counsel's failure to disclose approximately 46,000 incriminating emails. Though the district court overturned the award, the damage to the attorneys was already done. Indeed, upon reconsideration the magistrate judge found that the attorneys were still culpable for the massive discovery failures in the case. It just found that—in light of additional evidence—the attorneys' conduct was not in bad faith. In overturning the sanctions, the court noted that "this massive discovery failure resulted from significant mistakes, oversights, and miscommunication on the part of both outside counsel and Qualcomm."[23]

More recently, in *Victor Stanley, Inc. v. Creative Pipe, Inc.*,[24] the United States District Court for the District of Maryland imposed some of the most extreme sanctions to date for misconduct involving ESI. Victor Stanley, Inc.—a manufacturer of bike racks, outdoor furniture, and other furnishings—sued its competitor Creative Pipe, Inc. (CPI) for alleged copyright and patent violations and unfair competition. Just after the lawsuit was filed, computer forensics determined that: 353 e-mails were deleted from CPI's president's laptop; an email was sent from the CPI president to a contact outside the country instructing him to destroy various emails and attachments related to VSI drawings; the CPI president attempted to delete over 5,000 files; the CPI president deleted relevant ESI after VSI identified it and requested it in discovery; on the eve of a discovery hearing the CPI president deleted over 9,000 files from his work computer; four days prior to VSI's scheduled imaging of CPI's president's computer he deleted almost 4,000 additional files; more than 62,000 files were copied from CPI's president's work computer and never produced; and over 9,000 files were deleted from CPI's president's computer after the court issued a preservation order. Due to the egregiousness of the e-discovery misconduct the court not only awarded a default judgment and attorney's fees and costs but also took the extraordinary step of imposing

a sanction for civil contempt of imprisonment not to exceed two years, unless and until the CPI president paid the plaintiff's attorney's fees and costs. The trial court indicated that it even considered forwarding the case to the U.S. Attorney's office for prosecution as a criminal sanction for the discovery misconduct.

In *VFI Assoc.'s LLC, et al. v. Lobo Machinery Corp., et al.*,[25] a case closer to home, the Western District of Virginia demonstrated that e-discovery misconduct will be treated seriously and will not be tolerated by the court. The plaintiffs were investors in a wood-products business. They sued one of their suppliers, alleging that it sold the equipment to them at inflated prices and paid kickbacks to the plaintiff's former business manager. The Court found that the defendants "(1) knowingly refused to produce the so-called 'source documents,' supporting the transactions contained in their books and records, after being ordered to do so; and (2) knowingly altered data ordered to be produced from the electronic accounting software used in the business (the so-called Platinum Accounting Software) in an effort to hide relevant evidence."[26]

The Court found that, although the defendant's actions were in bad faith, default judgment against the defendant was too severe. Instead, the court sanctioned the defendants by precluding the defendants from offering any defense, evidence, or argument as to the true cost of the supplies, the amount of any markup, and whether any upgrades were made to the supplies that would have justified the price or value of the supplies. While the sanctions in *VFI* fell short of a default judgment, the practical effect of the sanction was nearly the same.

Not much time has passed since the recent changes to the Virginia Rules addressing ESI. So there has been little guidance yet from the Supreme Court of Virginia on how it will deal with ESI and sanctions related to preservation, production or destruction of ESI. Nonetheless, case law from other jurisdictions suggests that significant sanctions are possible. Prudence dictates that litigators take a cautious and conservative approach to ESI preservation and production.

Although the Virginia and Federal rules regarding ESI are similar, there is an important difference. The Federal Rules contain an explicit "safe harbor" that protects against sanctions for ESI lost during the ordinary operation of a computer system: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[27] Although a similar provision was proposed as an amendment to the Virginia Rules, it was never adopted by the Supreme Court.

ISSUES UNIQUE TO FEDERAL LITIGATION

A unique aspect of litigating in federal court is Federal Rule 26(a)'s initial-disclosure requirement.[28] These initial disclosures require an attorney to be aware of potential ESI issues in the case. Federal Rule 26(a)(1)(A)(ii) mandates that attorneys "provide to other parties…a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession."[29]

Depending on the case, this could be a daunting task. Initial disclosures force attorneys to emphasize to their clients the importance of establishing an effective litigation-hold policy and their potential e-discovery obligations. An effective litigation-hold policy can help take the sting out of producing accurate and relevant Rule 26 initial disclosures, and responding to later requests for ESI.

Another unique aspect of federal litigation is the

initial pretrial conference.[30] During this conference, parties must—as part of developing a discovery plan—relate their "views and proposals on…any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Under Rule 37(f), the failure to participate in the development of a discovery plan is sanctionable: "[i]f a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure."[31] So when litigating in federal court it is imperative for attorneys always to be cognizant of the role of ESI—even before discovery begins.

Clearly, ESI is an ever changing part of our lives and our client's lives. As such, it is important to always remember to follow the guidelines set forth by the federal courts and the Supreme Court of Virginia to aid in the discovery and production of ESI.

ENDNOTES:

1 The Concise Guide to E-Discovery, January 2010, Osterman Research, Inc.

2 *See e.g.* United States District Court, Western District of Virginia, *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers By Electronic Means*, April 2011 (updated April 27, 2011)

3 *Sanctions for E-Discovery Violations By the Numbers*, Duke L. Journal, Vol. 60:789, 794 (2010)

4 *Id.* at 798.

5 *Judges guide to Cost Effective E-Discovery*, Ver. 1.0, ii, Kershaw, Anne, and Howie, Joe (2010 eDiscovery Institute).

6 Virginia Supreme Court Rule 4:9.

7 *See VFI Assoc.'s LLC, et al. v. Lobo Machinery Corp., et al.*, 2010 U.S. Dist. LEXIS 120971, Case No. 1:08CV00014 (November 15, 2010). (discussed *infra* note xxxiii)(the ESI at issue consisted of electronic data specifically contained in accounting software that arguably may not fall within the description set forth in Rule 34).

8 Fed. R. Civ. P. 34(b)(1)(C); Virginia Supreme Court Rule 4:9(b)(i)

9 Fed. R. Civ. P. 4:9(b) (repealed 2006).

10 *DE Techs., Inc. v. Dell, Inc.*, 2007 U.S. Dist. LEXIS 2769 .

11 Virginia Supreme Court Rule 4:8(f); *see also* Fed. R. Civ. P. 33(d).

12 *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008).

13 *Samsung v. Rambus, Inc.*, 439 F.Supp.2d 524, 535 (2006).

14 *Stallings v. Bill-Jax, Inc.*, 243 F.R.D. 248, 251 (E.D.Va. 2007); *Evans v. Medtronic, Inc.*, 2005 U.S. Dist. LEXIS 38405 at *39 (W.D. Va. 2005).

15 *Benitez v. Ford Motor Co.*, 69 Va. Cir. 323 (Nov. 23 2005).

16 *Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 581, 580 S.E.2d 467, 475 (2003); *Gagelonia v. Commonwealth*, 52 Va. App. 99, 116-17, 661 S.E.2d 502, 511 (2008)(citing *Wolfe*).

17 Fed. R. Civ. P. 34(b)(2)(D); Virginia Supreme Court Rule 4:9(b)(iii).

18 Fed. R. Civ. P. 26 (comment on 2006 Amendment).

19 *Id.*

20 *Id.*

21 629 F.Supp.2d 972 (N.D.Cal. 2008).

22 No. 05 Civ. 1958, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

23 *Qualcomm, Inc. v. Broadcom Corp.*, 2010 U.S. Dist. LEXIS 33889, *9 Case No. 05cv1958-B (S.D.Cal. April 2, 2010).

24 269 F.R.D. 497, 2010 U.S.Dist. Lexis 93644 (D. Maryland Sep. 9, 2010).

25 2010 U.S. Dist. LEXIS 120971, Case No. 1:08CV00014 (November 15, 2010).

26 *Id.* at *2

27 Fed. R. Civ. P. 37(e).

28 Fed. R. Civ. P. 26.

29 *Id.*

30 *Id.; But cf.* Virginia Supreme Court Rule 4:13 ("The court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:…(9) provisions for disclosure or discovery of electronically stored information).

31 Fed. R. Civ. P. 37(f). ✳

Relief from Default: Procedure and Substance after the 2006 Rule Changes

by Timothy Edmond Kirtner

There are certain subjects no one likes to talk about. For litigators, this includes the rules surrounding default judgments—whether representing the defendant in default or the plaintiff who stands to potentially benefit from a default. Uncertainty about the ultimate disposition of the inevitable motion for relief from default vexes plaintiff's counsel and defendant's counsel alike. For the attorney representing the party in default, fearful of the consequences for the client if relief is not granted, anxiety over whether a trial judge will relieve their client from default can cause sleepless nights. For the attorney representing the plaintiff, the questions are perhaps more subtle, but no less unsettling. That attorney, too, is forced to speculate about how the trial judge would rule on a motion for default judgment. When defense counsel calls and requests leave to file a late answer, the desire to preserve long-cultivated professional relationships collides with ethical duties of zealous representation.

Ultimately, the advice that attorneys on both sides will give to their respective clients turns on their calculation of how the trial judge will exercise his or her considerable discretion. The 2006 revisions to Part 3 of the Rules of Practice and Procedure, and the manner in which those rules have been interpreted by the Supreme Court of Virginia and circuit courts since the rules' revision will inform both sides.

Tim Kirtner is a partner at Gilmer, Sadler, Ingram, Sutherland & Hutton in Pulaski.

Rules Prior to 2006

Before January 1, 2006, two rules spoke to the issue of default in a civil action. Rule 3:5 provided that a defendant who failed to file responsive pleadings within 21 days of service was in default. Rule 3:17 set forth the consequences of being in default, which included waivers of various sorts: of trial by jury, of objections to admissibility of evidence, and of notice of further proceedings. But neither Rule 3:5 nor 3:17, in turn, intimated that the trial court had discretion to relieve parties in default. So motions for relief were typically premised upon Rule 1:9, titled "Discretion of Court." This rule expressly provided that "[t]he time allowed for filing pleadings may be extended by the court in its discretion and such extension may be granted although the time fixed already has expired . . ."[1] Based upon Rule 1:9, trial courts granted motions for leave to file late responsive pleadings, with the trial courts exercising their discretion depending upon the facts of each particular case and relying upon a body of common law to guide their factual inquiries and ultimate decisions.

Before 2006, the seminal case providing the framework under which most Virginia courts analyzed motions for relief from default was *Emrich v. Emrich*.[2] In *Emrich*, the Court of Appeals held that the "existence or absence of good cause for the delay, together with other compelling circumstances, control the determination" whether to grant a motion for relief. The *Emrich* court also held that those compelling circumstances included but were not limited to "lack of prejudice to the opposing party, the good faith of the moving party, the promptness of the moving party in responding to the opposing party's decision to progress with cause [and] the existence of a

meritorious claim . . ."[3] The *Emrich* court, however, declined to set out any bright-line tests, noting that it was "impossible to lay down a rule which will be binding in all cases."[4]

The 2006 Rule Changes

The post-2006 Rules provide substantially more detail as to the process by which the courts should consider motions for relief from default, if not necessarily more detail as to the substantive matters a circuit court should consider in exercising its discretion. Rule 1:9 remains in place as it existed prior to 2006. Rule 3:8, which now details the defendant's obligation to file a timely response to a complaint, does not expressly provide that the failure to do so constitutes default. All matters pertaining to default are now embodied in Rule 3:19.

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Rule 3:19(a) states that a defendant failing to file a timely responsive pleading as prescribed in Rule 3:8 is in default and the rule goes on to list the consequences of that default.[5] In contrast to the former Rule 3:17, new rule 3:19 provides separate processes for relief from default and relief from a default judgment. Sub-paragraph (b) addresses those circumstances where the defendant is in default by virtue of having failed to file a timely responsive pleading, but where no default judgment has been entered by the court. Under those circumstances, Rule 3:19(b) specifically gives the court authority to grant leave for filing of a late responsive pleading where the defendant demonstrates "good cause." It also allows the court to place certain conditions on the granting of relief, such as reimbursement to the plaintiff of any costs or fees incurred "solely as a result of the delay in the filing of responsive pleading . . . ."

Rule 3:19(d) addresses those situations in which default judgment has already been granted. 3:19(d)(1) details the process by which, and circumstances under which, the court may grant relief within 21 days of the date of entry of the default judgment. The court is to consider "the extent and causes of the defendant's delay in tendering a responsive pleading, whether service of process and actual notice of the claim were timely provided to the defendant, and the effect of the delay upon the plaintiff." Again, the court is granted discretion to condition relief upon reimbursement of costs and fees specifically associated with the delay.

Finally, Rule 3:19(b)(2) makes clear that the rule does not give the trial court authority to grant relief more than 21 days after the entry of judgment except as otherwise specifically provided by statute.

Application in the Circuit Courts

Even after the enactment of Rule 3:19, Virginia's circuit courts have continued to rely heavily upon Rule 1:9 and upon the *Emrich* court's analysis as they consider motions for relief from default. Since January 1, 2006, four reported circuit court opinions have been issued in cases where defendants found themselves at some stage of default. *See Fletcher v. Inova Health Care Services*, 71 Va. Cir. 331 (2006); *Ellis v. Danville Regional Medical Center*, 75 Va. Cir. 301 (2008); *Sanders v. Shuttle America*, 75 Va. Cir. 378 (2008); *Nauman v. Samuels*, 73Va. Cir. 411 (2007). Three of those decisions—*Fletcher*, *Nauman*, and *Sanders*[6]—allude to and rely upon the trial court's broad discretion granted under Rule 1:9.

Each of those three granted relief from default.

In *Fletcher* the circuit court acknowledged that Rule 1:9 did not explicitly contain a good-cause provision.[7] But it held that "good cause is certainly a factor in deciding whether to exercise the court's discretion . . . ." Although the showing of good cause in that particular case was "slight", the court granted relief from default. It noted the lack of any evidence of bad faith and concluded that the ends of justice were better served by granting relief from default.

The *Nauman* court, too, viewed the presence or absence of good cause as a "necessary component of the Court's analysis." In light of the inadvertence of defense counsel in that case, the court found that the good-cause factor did not weigh in defendant's favor. But weighing the good-cause factor against (1) the lack of prejudice to the plaintiff, (2) the lack of bad faith on the part of the defendant, (3) the prompt response of defense counsel to the discovery of the oversight, and (4) the existence of a meritorious defense, the court concluded that relief from default was appropriate.[8]

Finally, in *Ellis*—the only reported circuit-court case refusing to grant relief from default—the court cited Emrich for the proposition that "inadvertence or failure to exercise due diligence under the circumstances in responding to legal process does not constitute a reasonable or legal excuse for failure to comply with filing requirements."[9] Apparently concluding that the defendant's actions in that case fell into the category of inadvertence or lack of due diligence, the court held that the defendant had not demonstrated "a reasonable or legal excuse" for their default and denied the request for relief from default.

The Supreme Court recently issued its first opinion interpreting the good cause provision of Rule 3:19(b)

The Supreme Court's Application of New Rules

The Supreme Court recently issued its first opinion interpreting the good cause provision of Rule 3:19(b), *AME Financial Corporation v. Kiritsis*.[10] In that case the defendant was AME Financial—a mortgage lender incorporated in Georgia. It was sued in the Circuit Court of Chesterfield County by the Kiritsises, mortgage borrowers. The plaintiffs alleged breach of contract, fraud, and conspiracy in violation of the Virginia Consumer Protection Act. The Kiritsises alleged that after they executed mortgage-loan documents and closed their loan transaction, a lawyer for AME contacted them and demanded they sign a revised note with terms different from the one they executed at closing. After the Kiritsises refused to sign the note—and without notice to the Kiritsises—a vice president for AME signed the new note as *attorney-in-fact* for the Kiritsises. No such power of attorney had been granted. AME then assigned the loan to GreenPoint Financial who was also named as a defendant in the suit.

AME was served through its Virginia registered agent on May 24, 2006. Approximately one week later, in a conversation with the Kiritsises' attorney, an AME vice president was told that AME would need a Virginia licensed attorney to file responsive pleadings to the suit. Ignoring that instruction, the AME vice president proceeded to file and sign an answer on behalf of AME on June 14, 2006. The Kiritsises responded by filing a motion to strike the answer and a motion for default judgment. They accompanied these motions with a notice that a hearing would be held on the two motions on July 21, 2006. AME did not appear at the hearing, the Circuit Court granted the motion to strike AME's

answer, it found AME in default and—based upon that default—it held that AME was deemed to have admitted the allegations in the complaint. The court retained the case on the docket as to AME solely for the purpose of ascertaining damages.

AME hired Virginia counsel the same day it learned of the default order. On July 31, 2006, counsel filed a motion for leave to file late responsive pleadings. AME also filed a motion for relief from default. The circuit court denied both motions. AME sought reconsideration, which the circuit court also denied. After another judge was assigned to the case, AME filed yet another motion for relief from default, which the new presiding judge likewise denied.

Although AME was prohibited from presenting evidence on liability issues at trial, GreenPoint—AME's assignee, who had filed a timely answer—was allowed to present AME's defenses, as well as its own. After determining that the Kiritisises were not obligated on the second note, the Court proceeded to the issue of damages. At this point, AME was allowed to present evidence. The Circuit Court awarded the Kiritsises attorney's fees and court costs on their fraud counts as well as punitive damages against AME. AME appealed and argued that the trial court abused its discretion by denying AME's motion for relief and by granting default judgment against AME.

On appeal, the Supreme Court of Virginia affirmed. First, it considered whether AME had demonstrated "good cause" such that the trial judge should have exercised his discretion to grant relief from default. The Supreme Court began its analysis by noting that it had not previously been asked to interpret "good cause" under Rule 3:19(d). The Court observed, however, that before Rule 3:19(d) certain factors had been considered by Virginia courts to support the exercise of discretion to grant relief from default. Those factors included, but were not limited to, lack of prejudice to the opposing party, the good faith of the moving party, the promptness of the moving party in responding to the opposing parties' decision to progress with the cause, the existence of a meritorious claim or substantial defense, the existence of legitimate extenuating circumstances, and justified belief that the suit had been abandoned or would be allowed to remain dormant on the docket.

Critical to the Court's analysis were certain facts. First, AME was placed on notice by plaintiff's counsel that Virginia law required responsive pleadings signed by Virginia counsel. This notice came eight days after service and thirteen days before the deadline for filing a proper and timely answer. Second, the motion to strike, received by AME on June 22, put AME on notice of the alleged deficiencies in its pleading. Finally, in the ensuing month AME made no effort to retain counsel and failed to appear at the July 21 hearing. The *AME* Court emphasized that the decision "as to whether good cause has been shown so as to allow additional time to file responsive pleadings clearly 'rests within the sound judicial discretion of the trial court, it being impossible to lay down a rule which will be binding in all cases.'" [11] The Court highlighted the fact that Rule 3:19(b) indicated that the trial court "may"—as opposed to "shall"—grant leave upon a finding of good cause. It thus interpreted the rule to say that even if good cause is shown, the trial court still has discretion as to whether to grant or refuse the defendant's motion for leave to file late responsive pleadings.

Conclusion

Although Rule 3:19 now provides a clear process by which the trial courts should consider motions for relief from default, *AME* affirms that trial courts

retain broad discretion whether to grant relief from default. While the circuit courts continue to grapple with the definition of good cause and the proper weight to be afforded the good-cause factor, the Supreme Court has held that even a showing of good cause does not guarantee relief from default. Indeed, the *AME* decision may be viewed as making it even more difficult to reverse a trial court's decision to deny relief from default since the *AME* court has concluded that a trial court may deny a motion for relief even after good cause has been shown. Otherwise, the substantive law governing the granting or denial of relief from default remains largely the same. In both the Circuit Courts and the Supreme Court the *Emrich* holding continues to provide the framework for the fact-driven analysis of whether relief should be granted. ▣

(Endnotes)

1 Rule 1:9, Rules of the Supreme Court of Virginia

2 *Emrich v. Emrich*, 9 Va. App. 288, 387 S.E.2d 274 (1989)

3 *Id.* at 276.

4 *Id.* (*quoting Eagle Lodge v. Hofmyer, 193 Va. 864, 870, 981 72 S.E.2d 195, 198 (1952)*)

5 A defendant at this stage of default waives notice of further proceedings, including depositions, and also waives the right to trial by jury.

6 The *Sanders* court, applying the cost provisions of Rule 3:19(b), conditioned the relief upon the defendant's payment of attorney's fees and court costs.

7 *Fletcher*, 71 Va. Cir. at 332. The *Fletcher* Court made no reference to the good cause provision in Rule 3:19(b).

8 *Nauman* 73 Va. Cir. at 416.

9 *Ellis* 75 Va. Cir. at 303 quoting *Emrich*, 9 Va. App. 288, 292, 787 S.E.2d 274, 276.

10 *AME Financial Corporation v. Kiritsis*, 281 Va. 384, 707 S.E.2d 820 (2011).

11 *Id.* at 281 Va 393, quoting *Eagle Lodge*. ▣

Ten Questions for a Circuit Court Judge

by Rodham T. Delk, Jr.

In October 2010, Circuit Court Judge Rodham T. Delk, Jr., and United States Magistrate Judge B. Waugh Crigler presented a litigation-skills talk at a conference sponsored by the Local Government Attorneys Association. Before the presentation, the conference committee prepared a list of ten questions and asked that Judge Delk and Judge Crigler work those issues into their presentation.

The comments below are Judge Delk's notes addressing the ten questions that he prepared before the presentation. We have lightly edited Judge Delk's responses to eliminate the discussion specific to litigation issues involving local government law.

1. Many judges have limited familiarity with the legal issues involved in some types of litigation. How can an attorney most effectively present the issues in a bench trial or motions argument?

A written brief with specifically identified issues and relevant case and code citations provides an opportunity for preparation for the arguments to a judge in a motions hearing. Remember that a judge no more weighs the law "by the pound" than by the evidence. Just a very few on-point cases or statutory citations may be sufficient.

In addition, a well-prepared, concise trial memorandum forces pre-trial preparation on the key issues of fact and law. That kind of focused pre-trial preparation usually will narrow the issues at trial (obviating the need to throw the kitchen sink at the judge and see what sticks) and leads to a much more efficient presentation of the evidence.

Judges look forward to these documents and, particularly where a non-jury trial is concerned, they greatly assist the trial judge in deciding the case, either from the bench or after post-trial consideration.

2. What is a judge looking for in a motions argument?

Concise identification of the pertinent issues, and concise fact-based argument based upon relevant and on-point case and statutory law.

3. What can a lawyer do to help the Court get ready? Notebooks with exhibits? Copies of the key cases? Copies of the statutes? What kinds of briefs are most helpful to the Court?

All of the above, but with full copies of the *key* cases only. If the case is briefed post-trial, then see the answer to Question 1, above.

4. What specific cross-examination techniques are most effective?

Cross-examination's Golden Rule always applies: if you don't know the answer, don't ask the question. Control the witness. Ask focused and leading questions only—and, to the extent possible—those that call for no more than a "yes" or "no" answer. In doing so, the cross-examiner forces specific answers (which he knows from discovery) to questions of his specific choice (which he also knows from discovery). Open-ended questions relinquish control of the witness and perhaps the case.

5. How can an attorney with only occasional litigation experience maximize his or her cross-examination skills?

Judge Delk is Circuit Court Judge in Virginia's Fifth Judicial Circuit.

Take time to observe selected motion hearings and trials conducted by truly skilled trial lawyers. Where the motion hearing or trial involves unevenly-matched lawyers, one can also learn what not to do. Productive observation of trials, however, should be conducted intentionally and critically for the best and worst of trial practice, and not merely for entertainment value (such as waiting for the "gotcha" moment).

Remember that the Perry Mason "gotcha" moment rarely, if ever, occurs in the real world of litigation. Accordingly, the way cross-examination can make a case is by good use of the specific cross-examination answers in closing argument. I have observed really competent trial lawyers literally build an entire closing argument on the specific cross-examination answers elicited at trial together with the specific interrogatory answers from discovery.

6. What are the most frequent mistakes you see lawyers make in motions practice? In conducting a cross-examination?

Motions practice: lack of preparation and organization. Briefing the motions forces both preparation and organization, not only for the motion hearing, but also for the trial.

Cross-examination: see above. The use of non-leading questions in cross-examination can enable a skillful, well-prepared witness to devastate the opposing side of the case because the cross-examiner ceded control of the witness and the case.

7. What are the things you see lawyers do in motions practice that are most effective?

Concise briefs on clearly identified issues with concise facts and directly supportive case law, and clear and cogent arguments.

8. How can a lawyer bring a good faith discovery dispute before the Court without looking stupid?

Demonstrate to the Court the good-faith efforts made by the moving party to resolve discovery issues before the hearing. Discovery disputes are the bane of judges, in that, from the judicial perspective, not much is usually accomplished in narrowing the issues of a case, addressing trial issues, or bringing the case to a pre-trial resolution. In other words, from the judge's standpoint, there is not much up-side to the process. That is why I personally do not generally limit discovery. I find that most discovery disputes involving recalcitrant lawyers and/or clients generally waste valuable judicial and lawyer time. I probably order production/disclosure of responses in well-over 95% of the disputes. Why waste everyone's time and money over the other 5% ?

9. What insight can you give the group on how the judicial decision-making process works? How do you decide close legal and fact questions? What do you read in the briefs? What do you check? How many cases do judges read?

I begin with the applicable case and statutory rules of law, which frame the issues. I then look to the relevant facts and how they fit in the legal framework. Most of this can be gleaned from the briefs and arguments. I then consider the arguments in the briefs and as presented at the hearing. Most questions of law and fact are probably close calls, or they wouldn't be before the judge. The rest is more judicial art than judicial science. I read the briefs and all cited cases that appear to be significant. I am not interested in "string citations." I only need one

good case or statute on point, factually and/or legally.

Where the issues arise in a pre-trial mode, most judges probably are reluctant to terminate or "short-circuit" litigation in the pre-trial stage except where the issues can clearly be resolved. Close cases are far more likely than not to go to trial, after which many of the same pre-trial motions may be renewed. The Virginia Supreme Court is clearly on record favoring trials on the merits. Whether reversed or not on appeal, the case will likely not have to be re-tried.

10. Suggestions on effectively presenting expert testimony.

As a general observation, I find most experts (medical-malpractice witnesses excepted) to be under-prepared for either direct or cross-examination. The experts may simply have little experience in trial testimony. As a result, they fail to present direct testimony in a logical and compelling manner, and thereby become fodder for a good cross-examiner. The usual reason is that the expert is simply under-prepared by counsel.

While general questions to the expert on direct testimony may seem logical and pertinent to counsel, the expert must be intensively prepared on his responses in order to produce logical and compelling direct testimony. The expert should be thoroughly familiar with her discovery responses. Remember that opposing counsel might very well use portions of discovery responses on cross-examination at trial. The inevitable damage done on cross-examination can be greatly minimized by thorough preparation of the expert for direct examination.

Where trial exhibits are utilized, take preparation time to assure that exhibits are tightly-focused. They should clearly buttress testimony, rather than confuse it. Furthermore, good exhibits can help the expert to focus her testimony. One well-prepared trial exhibit will carry more weight in the jury room than numerous mediocre ones.

Recent Civil Cases from the Supreme Court of Virginia

JUNE SESSION 2011

Contract

Case: *Cappo Mgt. V, Inc. v. Britt, 100797 (6/9/2011)*

Author: Lemons

Lower Ct.: City of Newport News (Pugh, David F.)

Disposition: Affirmed

Facts: Customer purchased new car from dealer. The sales contract required the customer to obtain financing. The customer's bank, however, withdrew financing. So the dealer repossessed the vehicle. It did so without first notifying the purchaser.

The purchaser sued the dealer, claiming that the dealer's failure to give notice of its intent to repossess violated the notice provisions of Article 9 of the UCC, Va. Code §§ 8.9A-611 through -614. The dealer defended on the ground it was not a secured creditor because the contract never became effective. It claimed that the whole bargain was conditioned on the buyer's obtaining financing, which never occurred.

The trial court disagreed, held that the contract was governed by Article 9, and found that the dealer violated Article 9 by not providing notice of its intent to repossess the vehicle.

Ruling: On appeal, the SCOV affirmed. The SCOV acknowledged that the parties' bailment agreement said that the car was the dealer's property unless and until the buyer obtained financing. But the SCOV noted that all the other contract documents treated the purchaser as the owner of the car even before obtaining financing. Thus, the SCOV held that the financing requirement was a "condition subsequent."

Turning to the text of the UCC, the SCOV held: (1) that the dealer acquired a "security interest" in the car under the terms of the parties' agreement, (2) that the buyer was a "debtor" for purposes of Code 8.9A-625(c), as she had assumed an obligation to pay monthly installments for her car, and (3) that the buyer had an interest in the collateral as a debtor. Although there was no "default," the parties had agreed to authorize repossession in other circumstances, including failure to obtain financing.

Because the buyer retained an interest in the vehicle, the SCOV held that that the UCC required the dealer to notify the buyer 10 days before it repossessed the vehicle.

Key Holding(s):

- An automobile dealer who intends to repossess a vehicle because of the purchaser's failure to comply with a condition subsequent must give the purchaser 10 days notice of its intent to repossess.

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Case summaries are prepared by Joseph Rainsbury, Editor of Litigation News. Mr. Rainsbury is a partner in the Roanoke office of LeClairRyan.

Insurance

Case: *Dabney v. Augusta Mutual Ins. Co., 100841 (6/9/2011)*

Author: Millette

Lower Ct.: City of Roanoke (Peatross, Paul M.)

Disposition: Aff'd in Part, Rev'd in Part

Facts: This was an insurance-coverage case in which a series of mishaps prevented prompt notification of the claim. The injury occurred in 2002 when the victim was attacked by two pit bulls. The victim later discovered that the dogs belonged to a person who had since died. The decedent's personal representative was notified of the attack but was unaware that the decedent had an insurance policy that would cover it. The personal representative first learned of the policy when making a claim for a subsequent house fire.

When sued for the dog attack in 2004, the personal representative sent written notice to the insurer. But the insurer had since moved—though without informing the insured of the new address. Finally, a friend of the victim got in touch with the insurer in 2005 and attempted to resolve the dispute. The insurer denied coverage based on the insured's failure to timely notify it of the claim.

The decedent's estate assigned its rights to the victim. The victim then sought a declaratory judgment that the insurer had a duty to defend and indemnify the decedent's estate against the victim's claims. The complaint, later amended, alleged that the insurer was notified of the claim in 2004, yet failed to timely assert a policy defense.

The insurer moved for summary judgment, arguing that the personal representative breached the terms of the policy by not giving it prompt written notice of the claim. The victim countered that this was a factual question for the jury and that the insurer had waived its right to rely on this defense by not asserting it promptly after it received notice in 2004, as required by Code § 38.2-2226. The Circuit Court denied the insurer's motion.

At trial, the insurer moved to strike at the close of the plaintiff's evidence. It argued that: (1) the insured's 2004 notification, which occurred 254 days after service of the victim's personal-injury claim, was not given "as soon as [is] practical," and (2) the plaintiff's claim that the insurer had waived this defense failed because the evidence showed that the insurer was actually notified in 2005—not 2004, as was alleged in the amended complaint.

The Circuit Court took the first part of the motion under advisement, deferring a ruling on whether the insured provided notice "as soon as practical." But it granted the second part of the insurer's motion, ruling that the plaintiff's argument that the insurer had waived its right to assert a policy defense could only succeed if the plaintiff showed that the insurer received notice in 2004, as alleged in the amended complaint.

At the close of evidence, the jury was instructed to make a factual finding whether the insurer received the 2004 letter. The jury found that it did not. Accordingly, the Circuit Court held, as a matter of law, that (1) the insured's notification of the insurer was untimely,

and (2) there was no factual basis for the insured's assertion that the insurer did not promptly assert the policy defense.

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

As to the § 38.2-2226 argument, the SCOV held that plaintiff was bound by its allegation that the insurer first received notice in 2004. Because the jury found that the insurer had not, in fact, been notified in 2004, the argument that the insurer had not promptly raised a policy defense failed as a matter of law. Accordingly, the SCOV affirmed the trial court's ruling, stating that "[t]he circuit court's decision properly limited Dabney to relief based on the allegations in her amended complaint."

On the issue whether the insured provided notice of the occurrence "as soon as is practical," however, the SCOV reversed. It stated that this issue ordinarily presents a question of fact for the jury. "Given the extenuating circumstances"—e.g., the delay in identifying the dogs' owners, the death of the dogs' owner, the personal administrator's delay in learning about the policy, and the change in the insurer's address—the question whether the insured had given timely notice was one for the jury, not the court, to decide.

Key Holding(s):

- Whether an insured has notified an insurer of his claim "as soon as is practical," as required under the policy, generally presents a question for the factfinder.

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Civil Procedure

Case: *Davis v. County of Fairfax, 100632* (*6/9/2011*)

Author: Lemons

Lower Ct.: Court of Appeals (Court of Appeals)

Disposition: Reversed

Facts: County filed a petition in General District Court ("GDC") to declare pet owner to be unfit under Code § 3.1-796.115(A) (now codified at § 3.2-6569). The GDC declared pet owner to be unfit, and she appealed for a de novo proceeding in Circuit Court ("CC"). Before trial in CC, the county nonsuited the claim.

The county filed a new petition in GDC, which the GDC dismissed for lack of jurisdiction. The county appealed that ruling to CC. The CC conducted a bench trial on the merits and entered an order declaring the pet owner to be unfit, and ordering the pet owner to pay the costs of boarding her animals during the pendency of the action.

The pet owner appealed the disposition to the Court of Appeals ("COA"), which has jurisdiction over such appeals. The COA affirmed, holding that when a party nonsuits a de novo appeal of a GDC case, the legal effect is to nullify the entire suit as if it had never existed in either court. Thus, it held, the CC had jurisdiction over the appeal of the renewed GDC case.

Ruling: On appeal, the SCOV reversed.

It observed that, under 8.01-380, a nonsuited action must be filed in the court in which the nonsuit was taken, unless that court lacks jurisdiction. Once a CC acquires appellate jurisdiction over an appeal of right from GDC, it does not lose that juridiction by the granting a nonsuit.

Thus, in the case before it, the CC did not lose jurisdiction by granting the nonsuit and the county was required to re-file in CC, not GDC. The re-filed action in GDC was a nullity, and the GDC properly dismissed it for lack of jurisdiction. Moreover, the CC did not have jurisdiction to decide the refiled case on the merits after the county appealed from the GDC's dismissal for lack of jurisdiction. Thus, the CC erred in entertaining the merits of the action.

Key Holding(s):

- A circuit court retains jurisdiction over a de novo appeal from general district court even after that appeal is nonsuited. Thus, the nonsuited action can—and must—be re-filed in circuit court.

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Civil Procedure

Case: *Kocher v. Campbell, 100399* (*6/9/2011*)

Author: Russell

Lower Ct.: Spotsylvania County (Brown, J. Howe (Judge Designate))

Disposition: Reversed

Facts: Plaintiff was injured in an April 2004 motor-vehicle collision. In October 2005, before bringing suit, plaintiff filed for bankruptcy. He did not list his personal-injury cause of action in his schedule of assets, and obtained a standard discharge in January 2006.

In February 2006, the plaintiff filed a personal-injury complaint. He nonsuited this action before serving process. When he refiled, the defendant moved for summary judgment—asserting that the plaintiff lacked standing. The plaintiff nonsuited this suit as well.

With plaintiff's concurrence, the bankruptcy Trustee reopened the bankruptcy in February 2008 and plaintiff filed amended schedules—this time listing his personal-injury cause of action as an asset, but claiming that it was exempt property. The bankruptcy court entered an order in May 2009 declaring that the plaintiff had properly exempted the claim.

Meanwhile, in May 2008, the plaintiff had refiled his personal injury action. The defendant moved for summary judgment, asserting lack of standing and the statute of limitations. The Circuit Court denied this motion in December 2009 and certified the matter for interlocutory appeal pursuant to Code 8.01-670.1.

Ruling: The SCOV reversed. It held that, upon filing for bankruptcy, the plaintiff's personal-injury cause of action could be asserted only by the trustee. This lasted unless and until the claim was restored to the plaintiff by the bankruptcy court.

The SCOV held that the plaintiff's personal-injury cause of action was only restored to him when the bankruptcy court entered an order exempting the cause of action from the estate. Until that time, the cause of action was enforceable solely by the trustee.

As the cause of action was restored to the plaintiff only in May 2009, and all three of plaintiff's complaints had been filed before that date, the SCOV held that they had been initiated by a party without proper standing. At the times those complaints were filed, only the trustee could enforce the personal-injury claim. Because subsequently acquired standing does not retroactively cure a lack of standing at the time suit is filed, the plaintiff's suits were legal nullities that did not toll the running of the limitations period.

Key Holding(s):

- A party who has filed for bankruptcy does not have standing to assert a pre-petition personal-injury claim unless and until the claim is restored to him in the bankruptcy court—either by having the trustee abandon the claim or by having the bankruptcy court approve an exemption from the estate.
- The later acquisition of standing to pursue a claim does not retroactively confer standing.
- Any suit that is filed when a plaintiff lacks standing is a legal nullity that does not toll the running of the statute of limitations.

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Business Torts

Case: *Lewis-Gale Medical Center, LLC v. Alldredge, 100457 (6/9/2011)*

Author: Koontz

Lower Ct.: City of Roanoke (Apgar, Jonathan M.)

Disposition: Reversed

Facts: Defendant Hospital hired a physicians practice group to provide emergency-department staffing. The practice group, in turn, hired the plaintiff physician. Under the employment contract between the plaintiff and the practice group, either side could terminate for any reason, subject to a 90-day notice requirement.

Plaintiff met with nurses employed by the Hospital and helped them voice their grievances in a letter to the Hospital. When the Hospital learned of the plaintiff physician's participation in the letter, it pressured the practice group to take action against her. The practice group was concerned that the Hospital might terminate the practice group's contract. So it terminated the plaintiff's employment, giving her 90 days notice. The plaintiff failed to report to work after that, but the practice group paid her for an additional 90 days.

The plaintiff physician sued defendant Hospital for tortious interference with contract. The Hospital moved for summary judgment on the ground that plaintiff's contract with the practice group was an at-will employment contract and that plaintiff had not sufficiently established "improper methods" leading to her discharge. The trial court took the matter under advisement and the matter proceeded to trial.

At the close of plaintiff's evidence, the defense moved to strike—asserting, *inter alia*, that plaintiff had failed to establish that the Hospital had caused the termination of her contract though actions that were illegal, tortious, or otherwise improper. The trial court denied this motion, and the jury returned a verdict of $900,000.

Ruling: On appeal, the SCOV reversed.

It held that the plaintiff's contract was an at-will arrangement, even though it had a 90-day notice provision. Because the plaintiff had an at-will employment agreement with the practice group, she needed to show that the Hospital engaged in "improper methods" to procure her discharge.

The SCOV held that the plaintiff did not establish improper methods and so the trial court should have struck the plaintiff's evidence. Mere spite or ill-will is insufficient to constitute "improper methods." Furthermore, the mere fact that the Hospital exerted pressure on the practice group was not enough to constitute "improper methods."

The SCOV noted that the "inherent intimidation or duress" felt by the practice group due to its desire to continue its relationship with the Hospital was not not enough. Furthermore, the plaintiff presented no evidence of any "specfic threat or other action" by the Hospital that suggested that it would terminate its contract with the practice group if the practice group did not terminate the plaintiff's employment.

Although Virginia recognizes the tort of tortious interference with contract, "this does not mean that every contract relationship which is terminated or disrupted through the interference of a third party promoting its own interests will result in tort liability for that party." It is only where those actions fall so far outside the "rough-and-tumble world" of business as to constitute "improper methods" that there is a cause of action.

Key Holding(s):

- Pressuring an entity with whom one does business to discharge an at-will employee is not, standing alone, sufficient to establish the "improper methods" needed to support a claim for tortious interference with the employee's at-will employment.

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Real Property

Case: *Mulford v. Walnut Hill Farm Group, LLC, 100333 (6/9/2011)*

Author: Mims

Lower Ct.: Culpeper County (Brown, J. Howe, Jr.)

Disposition: Affirmed

Facts: A party purchased a parcel that it was told was "landlocked." A pre-purchase appraisal, too, revealed that the purchaser would need to acquire an easement. The purchaser, however, saw that the property contained an old plank road—no longer in use—that traversed the adjoining property and connected his parcel to a public road.

After the sale, the purchaser cleared and began using the roadway. The neighboring landowner, through whose property the plank road ran, objected to this use and claimed that the purchaser was trespassing. Purchaser sued the neighboring landowner, asserting that he had the right to access the public road using the old plank road. He asserted three theories: (1) the plank road was a public road, (2) the neigboring landowner was equitably estopped to deny the right of way, and (3) the purchaser was entitled to a prescriptive easement. Notably, he did not assert a theory of easement by implied grant from the original severance of the landlocked parcel.

The circuit court rejected these arguments and found that the purchaser did not have a right of way along the plank road.

Ruling: On appeal, the SCOV affirmed.

On the public-road issue, the SCOV noted that the purchaser failed to show that the government ever accepted a dedication of the road. Because it was a rural road, "formal acceptance by the public" was necessary. Although there was evidence of long-past public use of the road, there was no evidence of formal public acceptance of a dedication of the road. So the plank road was not a public road.

On the equitable estoppel issue, the SCOV held that the purchaser needed to establish that the neighboring landowner made a false rep-

resentation about the right of way and that the purchaser relied on this false representation. As there were no allegations of any such misrepresentation, however, the purchaser's theory failed as a matter of law.

On the prescriptive easement issue, the SCOV noted that the purchaser needed to show that his predecessors in title used the property. Although there was some evidence that the plank road had been used between 1937 and 1994, there was no evidence of who actually used it during this time. Accordingly, the purchaser could not show by clear and convincing evidence that his predecessors in interest had used the plank road.

Key Holding(s):

- A party who claims that a rural road is a public road bears the burden of showing formal public acceptance of the road.

- To establish a prescriptive easement, it is not sufficient merely to show that the area had been used for the requisite period. Rather, the proponent of the prescriptive easement must also show that it was used by his predecessors in interest.

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Condemnation

Case: *Taco Bell of America, Inc. v. Commonwealth Transportation Commissioner of Virginia, 092465* (*6/9/2011*)

Author: Lacy

Lower Ct.: Fairfax County (Roush, Jane Marum)

Disposition: Reversed

Facts: Land containing a Taco Bell restaurant was needed to upgrade a portion of a highway. The Commissioner filed a petition in condemnation under the eminent-domain statute. At trial, the Commissioner moved to exclude consideration of the nature and the value of 42 pieces of equipment used in the Taco Bell. He claimed that these items were not fixtures because they were not affixed to the property.

The evidence showed that: (1) though these items could physically be removed, they were integrally related to the business and (2) Taco Bell restaurants typically were sold with the furniture and fixtures in place.

The trial court, however, held that the items were personal property because they could easily have been removed from the property. Thus, it instructed the jury not to consider them when assessing the value of the taken property.

Ruling: The SCOV reversed. It noted that, in the condemnation context, the standard for whether an item is personal property or a fixture depends on a three-part test that considers: (1) annexation of the chattel to the realty, (2) adaptation of the item to the use being made of the realty, and (3) the intention of the item's owner to make it a permanent addition to the property. The second of these factors is entitled to great weight, so that "[i]f the chattel is essential to the purposes for which the building is used or occupied," it will be considered a fixture.

The circuit court, however, only considered whether the items were movable. Yet "whether an item can be removed from the realty is not the test for establishing whether it is a fixture." As there was evidence that the items (1) were used for the purpose of the restaurant, and (2) were intended to be made a permanent accession to the realty, there was sufficient evidence for the fixture issue to be submitted to the jury.

Key Holding(s):

- Whether an item is a fixture for condemnation purposes depends on: (1) annexation of the chattel to the realty, (2) adaptation of the item to the use being made of the realty, and (3) the intention of the item's owner to make it a permanent addition to the property.

- The mere fact that an item can easily be removed from realty does not establish that it is personal property for condemnation purposes.

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APRIL SESSION 2011

Medical Malpractice

Case: *Chalifoux v. Radiology Assocs. of Richmond, Inc., 100052* (*4/21/2011*)

Author: Koontz

Lower Ct.: City of Richmond (Jenkins, Clarence N., Jr.)

Disposition: Reversed

Facts: Patient sought treatment for headaches and other symptoms on right side of her face. Over the course of nearly three years, she had multiple office visits with her family doctor and with neurologists. Those doctors repeatedly requested radiology services from the defendant radiology practice. The radiology practice repeatly sent back reports finding no abormalities present.

On October 24, 2005, the practice sent back a report of an abnormality, which it said was visible in retrospect in the earlier studies. Plaintiff brought suit on October 12, 2007—within two years after the last study, but more than two years after the allegedly negligent studies.

Plaintiff claimed that the continuing treatment rule tolled the limitations period and so she could base her action on the earlier studies. The Circuit Court rejected that argument, reasoning that the radiology services were "episodic." And it sustained the radiology practice's plea of the statute of limitations.

Ruling: On appeal, the SCOV reversed. It noted that the continuous-treatment rule applies in medical-malpractice cases in which there has been a continuing course of examination and diagnosis.

The SCOV held that, under the facts of the case, the radiology services were a continuing course of examination and diagnosis.

For each scan, the radiologists reviewed the patient's history and, if necessary, consulted earlier scans—all of which were available in the practice's electronic file system. This care was for a particular, existing condition and was coordinated with the patient's family physician and her neurologist.

The SCOV distinguished the case before it, which involved a course of examination for a specific complaint, from cases involving routine screening exams.

Key Holding(s):

- The continuing treatment rule tolls the limitations period in

failure-to-diagnose claims against health care specialists that provide repeated diagnostic services in evaluating a patient complaining of a particular, existing, condition.

✦ ✦ ✦

Contract

Case: *Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominium, Inc., 100303 (4/21/2011)*

Author: Goodwyn

Lower Ct.: City of Alexandria (Dawkins, Nolan B.)

Disposition: Affirmed

Facts: Dispute between owners' association and management company. The contract between the owners' association and the management company could be terminated by the owners' association for cause upon 30 days notice. The owners' association terminated the contract because the management company had made serious tax errors, which resulted in the owners' association having to pay substantial tax penalties. The owners' association gave 30 days notice.

Notwithstanding this termination, the management company sent letters to unit owners directing them to continue to make payments to it. It also set up a bank account in the owners' association's name—but without the owners' association's permission—in which it deposited the funds from the unit owners and from which it paid itself fees.

The owners' association sued for breach of contract and conversion. The management company counterclaimed, contending that the owners' association improperly terminated the contract because (1) the contract referenced the owners' association's bylaws, and (2) the bylaws required a 3/4 vote in order to change the management company and there had been no such vote.

The trial court disagreed. It sustained the demurrer to the mangagement company's counterclaim, and excluded evidence regarding the absence of a vote to terminate the management contract.

The case went to trial. At the close of the owners' association's case—and once again at the end of trial—the management company moved to strike because (1) the estimated damages from the tax penalties was speculative, (2) the conversion count was improper because it arose from an alleged breach of contract, and (3) there was insufficient evidence to support a claim of punitive damages. The trial court denied these motions.

The trial court granted the owners' association's motion for summary judgment on the conversion claim, awarding it $91,125. The jury returned a $70,667 verdict on the contract claim and also awarded punitive damages of $275,000. The trial court denied the management company's post-trial motions—including for remittitur of the punitive damages—and entered judgment on the verdict.

Ruling: The SCOV affirmed.

It rejected the management company's claim that the owners' association's bylaws had been incorporated into the contract. The only mention of the bylaws in the parties' contract was in a section where the management company acknowledged its awareness of the bylaws. This did not ipso facto make the bylaws a part of the contract. Moreover, the general reference to the bylaws did not prevail over the specific portions of the contract that stated the manner in which the owners' association could terminate the contract.

The SCOV also rejected the management company's claim that there was no conversion tort independent of the contract. The contract already had been terminated when the management company converted the funds (i.e., when it improperly directed funds to the improperly established account out of which it improperly paid itself). Furthermore, it was proper for the trial court to grant summary judgment for the plaintiff owners' association on this claim because the facts surrounding the account were undisputed and the management company had no viable affirmative defense to the conversion claim.

On the contract-damages issue, the SCOV rejected the management company's *John Crane, Inc.* argument that the owners' association had not properly designated the testimony that its expert on tax damages would give. Although the owners' association did not itemize the amount of damages in its interrogatory response regarding experts, it did disclose that the witness would testify that the management company's errors resulted in underpayment of taxes leading to payment of interest and penalties. It was not an abuse of discretion for the trial court to find that the expert designation was sufficient.

The SCOV rejected the management company's argument that contract damages—including future tax penalties—were speculative. Although some of the penalties had not yet been assessed, the owners' association presented competent evidence about what the penalties likely would be. A plaintiff need not establish contract damages "with absolute certainty." It is sufficient if the evidence enables the jury to make an "intelligent and probable" estimate of the amount of damages.

On the punitive-damages issue, the SCOV held that there was sufficient evidence that the management company had consciously disregarded the rights of the owners' association. It pointed to evidence that the management company's employees had established a bank account by misrepresenting that they were officers of the owners' association, that the management company had held unit-owner assessments in these accounts and had paid themselves from it for a year, and that the company knew—from related litigation—that its interpretation of the management contract was untenable. Accordingly, the question whether the management company consciously disregarded the owners' association's rights was properly before the jury.

Finally, the SCOV held that the amount of punitive damages was appropriate. In reviewing the propriety of such awards, the court considers the "reasonableness between the damages sustained and the amount of the award and the measure of punishment required, whether the award will lead to a double recovery, the proportionality between the compensatory and punitive damages, and the ability of the defendant to pay." The SCOV found that the punitive damages in the case were not so excessive as to shock the conscience of the court. The $275,000 amount was "approximately two and a half times the compensatory award for conversion." The award was not influenced by passion, corruption, or prejudice. It did not provide a double recovery to the plaintiff. And although the management company argued that it was undergoing financial difficulties, it presented no evidence of this at trial.

Key Holding(s):

- Merely mentioning a separate agreement in a contract does not ipso facto incorporate the separate agreement's terms into the contract.

- A conversion claim that arises only after a contract has been terminated is independent from any contract claim the plaintiff also might have.

- A party seeking contract damages need not prove them to an "absolute certainty." It need only present sufficient evidence from which the jury can make an "intelligent and probable" estimate of damages.

✦ ✦ ✦

Condemnation

Case: *Dean v. Board of County Supervisors of Prince William County, 100048 (4/21/2011)*

Author: Lemons

Lower Ct.: Prince William County (Johnston, Craig D.)

Disposition: Affirmed

Facts: In a condemnation proceeding concerning a parcel used as gas station and transmission-repair shop, the condemnee sought to introduce evidence regarding a purported comparable sale. The purported comparable sale, however, was made by the locality in order to finish a planned road project.

The locality moved to exclude this evidence on the ground that the purported comparable sale was not "voluntary" and so could not be used in evaluating the worth of the condemned property. The Circuit Court excluded this evidence, and the jury returned a verdict signifantly less than the amount sought by the condemnee.

Ruling: On appeal, the SCOV affirmed.

As an initial matter, it noted that, in a condemnation proceeding, the amount a locality paid for similar land in the past generally is not admissible unless the offering party establishes that the sale was voluntary, free from compulsion.

The SCOV held that the condemnee failed to make this showing. It merely presented evidence that the seller in the comparable sale thought it was voluntary. The locality, for its part, presented evidence that, in the purported comparable sale, it paid far more than was stated in its original take certificate. Indeed, it paid this premium in order to avoid litigation with the owner. From the locality's perspective, the sale was not voluntary. The SCOV held that it was insufficient, as a matter of law, for a condemnee simply to show that one party to the allegedly comparable sale thought it was voluntary. Both sides of the transaction must view it as voluntary.

Key Holding(s):

- A condemnee seeking to introduce evidence of a comparable sale to the locality must show that *both* sides of the purportedly comparable transaction viewed it as voluntary and free from compulsion.

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Business Torts

Case: *Dunn, McCormack & McPherson v. Connolly, 100260 (4/21/2011)*

Author: Lemons

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

Disposition: Affirmed

Facts: Law firm that had an at-will contract for legal representation with redevelopment authority sued the chairman of the county's board of supervisors, asserting that he tortiously interfered with its contract.

The Amended Complaint alleged that the chairman's actions were outside the scope of his official authority, arose out of a personal clash with one of the law firm's partners, and were motivated by "spite, ill will, and malice."

The trial court sustained the chairman's demurrer to the Amended Complaint.

Ruling: On appeal, the SCOV affirmed. It noted that a party alleging tortious interference with an at-will contract must show "improper methods," i.e., actions that are "illegal, independently tortious, or violate" an established standard of trade or profession." Simply alleging spite, ill will, or malice was not enough: "We will not extend the scope of the tort to include actions solely motivated by spite, ill will, and malice."

Key Holding(s):

- Allegations of "spite, ill will, or malice" are insufficient to establish the "improper methods" that are necessary to support a claim of tortious interference with an at-will contractual relationship.

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Insurance

Case: *Farmers Insurance Exchange v. Enterprise Leasing Co., 100082 (4/21/2011)*

Author: Millette

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

Disposition: Affirmed

Facts: Car renter ("Renter") opted not to obtain supplemental liability protection from car-rental company. Renter was insured for the rental by his personal insurance company ("Insurer"), which covered temporary use of the automobile during repairs to his primary vehicle. In the rental contract, Renter agreed to indemnify car-rental company for any damages resulting from his use of the car.

Renter got into accident with third party—an accident for which he was at fault. Car-rental company, which was self-insured, paid for damages to third-party's car. Car-rental company then sought indemnification from Renter and his Insurer. Insurer filed Declaratory Judgment Action, citing the "other insurance" clause of the policy and claiming that the Renter's policy was secondary to the car-rental company's self-insurance. The Circuit Court rejected this argument and found that Insurer had to indemnify car-rental company.

Ruling: The SCOV affirmed. It noted that the plain language of the Renter's policy covered the use of temporary substitute vehicles, such as the rental car. The "other insurance" provision did not apply because self-insurance is not "insurance"—indeed, it is the opposite of insurance.

The SCOV said that, while its earlier decision in USAA Cas. Ins. v. Hertz established that rental companies have an obligation to provide insurance, the case did not resolve the question of priority between a rental company's self-insurance and a renter's personal insurance. The terms of the indemnity agreement should be applied according to their terms.

The SCOV added that its holding does not violate the "anti-subrogation rule," which prevents insurers from obtaining indemnification from a negligent insured. The rule does not apply to self-insurers.

Under self-insurance, there is neither an insurer nor an insured. So the self-insured car-rental company was not bound by the anti-subrogation rule and could seek indemnity from the renter.

Key Holding(s):

- "Other insurance" clauses in insurance contracts do not apply to entities that are self-insured.
- The "anti-subrogation rule" does not apply to entities that are self-insured.

✦ ✦ ✦

Insurance

Case: *GEICO v. United Services Automobile Association, 100332 (4/21/2011)*

Author: Mims

Lower Ct.: City of Hampton (West, Randolph T.)

Disposition: Reversed

Facts: Insurance case arising out of motor-vehicle accident. The car was owned by Mother, who had insurance for it. It was used principally by Daughter. Daughter routinely allowed third persons to use the vehicle, though generally only for short trips. At the time of the accident, it was driven by male Friend, who had stormed off after a fight with Daughter and had driven her car to another town. When Friend had not returned within 30 minutes, Daughter called police to report that the vehicle was stolen.

Mother was insured by a family automobile insurance plan issued by GEICO, which covered persons who were using the car with the insured's permission. Friend was also covered by a separate family automobile insurance plan issued by GEICO to Friend's mother. This plan covered situations in which Friend was driving another person's car with permission. The Victim of the accident had uninsured/underinsured motorist coverage through USAA.

GEICO denied claims under policies issued to Mother and to Friend's mother, claiming that Friend did not have permission at the time of the accident, and so was not insured under either policy. Victim filed personal-injury against Friend and against Victim's uninsured/underinsured motorist carrier, USAA.

GEICO filed a declaratory judgment action against USAA, seeking a declaration that it was not liable under either of the policies that it issued to Mother and to Friend's mother. After a trial the Circuit Court ruled that the Friend had permission to use the car and so GEICO had coverage obligations under both of its policies.

Ruling: On appeal, the SCOV reversed.

Friend's mother's policy covered motor-vehicle use that was "with permission, or reasonably believed to be with the permission, of the owner and is within the scope of the permission." GEICO conceded that Daughter had authority to give Friend permission, and that Daughter generally had allowed "anyone that wanted to use" the car to use it. But it argued, and the SCOV agreed, that Friend's use exceeded the scope of any such permission. Although there was ample evidence that Daughter routinely allowed friends to drive her car for small trips within Hampton, there was no evidence that Daughter "ever had permitted anyone to drive the car out of Hampton into surrounding localities." And there was affirmative evidence that, on this occasion, Daughter viewed Friend's use to be without permission (e.g., the fact that she called the police to report the vehicle stolen). So Friend's use exceeded the scope of permission and the accident was not covered by Friend's mother's policy.

For similar reasons, the claims under Mother's policy failed. Mother's policy covered use that was "with the permission of the named insured," provided that the use was "within the scope of such permission." The SCOV held that where an insured entrusts a car to another person for his "general use," the person entrusted with the vehicle may also permit another person to use the car. Virginia Code § 38.2-2204(A), also known as the omnibus clause, mandates coverage for this kind of "implied" permission. But to be covered, the use must be within the scope of that permission. The evidence showed that Friend was not operating the vehicle within the scope of Daughter's implied permission to use the vehicle. Accordingly, he was not covered under Mother's policy, either.

Key Holding(s):

- Under Virginia Code § 38.2-2204(A), when a named insured entrusts a vehicle to the general use of another, that person has the power to grant implied permission to third parties, but coverage resulting from this implied permission extends only to such operation of the vehicle as is within the scope of the implied permission.

✦ ✦ ✦

Civil Procedure

Case: *Gunter v. Martin, 100305 (4/21/2011)*

Author: Mims

Lower Ct.: City of Colonial Heights (Gill, Herbert C.)

Disposition: Reversed

Facts: Party who alleged that he was biological child of decedent sued the decedent's personal representative, the widow, claiming that he was an heir and beneficiary of the estate. The widow moved to dismiss on the grounds that the alleged biological child failed to file an affidavit of parenthood within one year of the decedent's death. The circuit court granted the motion and dismissed the action.

In a later suit, the purported biological child brought a partition action against the widow, in her personal capacity, claiming a share in the real estate owned by decedent at the time of his death. The widow filed a plea in bar of res judicata under pre-Rule 1:6 law. The trial court sustained the plea in bar because the two cases arose out of the same transaction or occurrence—viz., the paternity status of the decedent.

Ruling: On appeal, the SCOV reversed.

Before July 1, 2006, the effective date of Rule 1:6, a party asserting a plea of res judicata needed to establish identity of remedies, identity of causes of action, identity of parties, and identity of quality of the persons for or against whom the claim was made. The remedy sought in the first action (a declaration that the purported child was an heir) differed from the remedy sought in the second action (an allotment of the real estate). Accordingly, res judicata did not apply.

Key Holding(s):

- Under pre-Rule 1:6 res judicata law, a party needed to show that the remedy sought in the first and second suits was identical. Failure to do so was fatal to a claim of res judicata.

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Land Use

Case: *Jennings v. Board of Supervisors of Northumberland County, 100068 (4/21/2011)*

Author: Kinser

Lower Ct.: Northumberland County (Taliaferro, Harry T., III)

Disposition: Aff'd in Part, Rev'd in Part

Facts: Marina owner wanted to expand business to include additional mooring slips. County board of supervisors denied request for special-exception permit.

Marina owner challenged this denial in Circuit Court, arguing that (1) the Virginia Marine Resources Commission ("VMRC") has exclusive authority over the placement of piers beyond the mean low-water mark, and (2) the locality's special-exception permit ordinance lacks adequate standards to guide the governing body's decision whether to grant a special use permit, as it simply required the locality to apply general principles of land use.

The Circuit Court rejected this argument and awarded judgment for locality.

Ruling: The SCOV affirmed.

It rejected the argument that the VMRC had exclusive jurisdiction over bottom lands that were beyond the mean low-water mark. Code § 15.2-2280 gives localities the authority to zone the "territory under its jurisdiction." And under Code § 15.2-3105, the boundaries of localities bordering on the Chesapeake Bay extend to all structures that have been, or will be, erected on the waterfront. So marinas are within the territories of the counties whose land they abut. This applies even if the land on both sides of a tidal tributary lies in the same county.

Moreover, Code § 28.2-1203(A)(5) specifically contemplates that localities have concurrent jurisdiction with the VMRC to regulate the Chesapeake Bay bottomland.

Finally, the argument that the special-exception ordinance lacked appropriate guidance was considered, and rejected, in Bollinger v. Board of Supervisors. The wording of that ordinance was nearly identical to the wording of Northumberland County's ordinance in the present case.

Key Holding(s):

- Localities have concurrent jurisdiction with the Virginia Marine Resources Commission to regulate bottomlands in the Chesapeake Bay extending beyond the mean low-water mark.

- A special-exception permit ordinance that instructs the locality to apply general principles of land use when deciding special-exception applications is not void for lack of adequate standards.

✦ ✦ ✦

Malicious Prosecution

Case: *Lewis v. Kei, 100338 (4/21/2011)*

Author: Koontz

Lower Ct.: Prince George County (D'Alton, James F., Jr.)

Disposition: Aff'd in Part, Rev'd in Part

Facts: A ten-year-old boy approached general contractor's truck and asked for a ride home. A witness thought the contractor was abducting the child, yelled at the child to get out, and called 911 to report an attempted abduction. Police officer obtained an arrest warrant based only on the 911 call. He did not personally interview the parties. Local television picked up the story—allegedly from either the witness or the police officer.

The officer put up a notice on the county website declaring that an arrest had been made in an "abduction" case, identifying the contractor by name, and posting a picture of him. This was republished by a local television station and the story was picked up by local paper, which quoted the officer as saying "I think it's a good day since we got this guy in custody and hopefully everyone can rest a little bit easier."

Contractor was jailed for 41 days and denied bail twice. Eventually, the Assistant Commonwealth's Attorney spoke with child—who verified the contractor's account—and dismissed the charges by nolle prosequi.

Contractor brought action against officer for malicious prosecution, false imprisonment, and defamation. The officer demurred to the malicious-prosecution and false-imprisonment claims, asserting that the arrest was founded on probable cause. He also demurred to the defamation claim, contending that the statements attributed to the officer were either true, statements of opinion, or absolutely privileged. The Circuit Court sustained the demurrer and dismissed the claims against the officer.

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

The SCOV affirmed the trial court's ruling on the malicious-prosecution count. A party asserting such a claim must show that the defendant lacked probable cause, i.e., "knowledge of such a state of facts and circumtances as excite a belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected." The SCOV held that the officer's reliance on the call of a purported eyewitness to a 911 dispatcher was sufficient to give him probable cause to believe that the contractor had tried to abduct the child.

The SCOV affirmed the ruling on the false-imprisonment count for similar reasons. A claim for false imprisonment requires the plaintiff to allege that an arrest was unlawful. But an arrest is lawful if based on a warrant that is "regular and valid." Because there was probable cause, the warrant was validly issued and the arrest was therefore lawful.

The SCOV, however, reversed the trial court decision sustaining the demurrer to the defamation claim. It held that a party asserting a defamation claim must show that "defendant has published a false factual statement that concerns and harms the plaintiff or the plaintiff's reputation." And such a plaintiff must also show that the defendant either (1) "knew that the statement was false" or (2) if he believed the statement was true, either lacked a reasonable basis for such belief or acted negligently in failing to ascertain the true facts. In the second situation, the statement must be such as to make apparent the danger to the plaintiff's reputation.

The SCOV held that the complaint against the officer sufficiently alleged defamation. It asserted that the officer made false statements of fact on the county's website and that he had suggested that the plaintiff was guilty of attempted abduction. It further alleged that the officer made false statements to reporters about the incident. And it alleged that the officer acted recklessly in making these statements, that he lacked any good faith basis for them, and that he knew that

news organizations would republish them. These false accusations of a criminal act were sufficient to establish injury to the plaintiff's reputation.

Key Holding(s):

- A police officer has sufficient "probable cause" to defeat a claim of malicious prosecution where he institutes criminal action based on a purported eyewitness's call to a 911 dispatcher.

- For purposes of false-imprisonment claim, a police officer's arrest of an individual is not unlawful where it is based on a valid warrant supported by probable cause.

- A complaint adequately states a defamation claim against a police officer where it alleges that the officer falsely implicated the plaintiff in criminal activity, lacked any good-faith basis to believe the truth of the statements, and knew that his statements would be repeated by news organizations.

✦ ✦ ✦

Estates and Trusts

Case: *Riverside Healthcare Ass'n, Inc. v. Forbes, 100108 (4/21/2011)*

Author: Kinser

Lower Ct.: City of Newport News (Fisher, Timothy S.)

Disposition: Aff'd in Part, Rev'd in Part

Facts: The Grantor of an inter-vivos trust ("Trust") conveyed a seven-acre parcel to the Trust. The Trust prohibited the Trustee from selling the property except in a condemnation proceeding. The Trust directed that the Trustee distribute all "net income" to the Grantor during her lifetime. The Trust defined "net income" to include "all funds . . . generated from or by the [T]rust property and/or any proceeds from the [T]rust property" less funds paid by the Trust for certain expenses. Upon the Grantor's death, the Trust would dissolve and the principal would be distributed to Defendant.

The Commonwealth acquired part of the property in a condemnation proceeding. The Trustee, citing the Trust's definition of "net income," argued that the proceeds of the condemnation should go to the Grantor. Defendant, citing the Uniform Principal and Income Act ("UPIA") claimed that the proceeds were "principal," and should not be distributed to Grantor. The Trial Court ruled in favor of the Trustee, reasoning that the condemnation payments were "proceeds" from the property and that the UPIA did not apply here because the parties had defined income to encompass the proceeds from the property.

In a counterclaim, the Defendant sought an equitable accounting pursuant to 8.01-31. The Circuit Court sustained the Trustee's demurrer to this claim, reasoning that an accounting was unnecessary, as the Circuit Court already had ordered the Trustee to provide Defendant with a statement showing the condition of the Trust and the receipts and disbursements during the relevant period.

Ruling: On appeal, the SCOV affirmed the ruling regarding the allocation of condemnation proceeds to income, but reversed the decision sustaining the Trustee's demurrer to the equitable accounting counterclaim.

On the first issue, the SCOV acknowledged that the UPIA applies "except as otherwise expressly provided in . . . the terms of the trust." (citing Code 55-277.33). But it noted that Code 55-277.3 states that a fiduciary should allocate principal and income "in accordance with the terms of the trust . . . , even if there is a different provision in this chapter." Thus, the question boiled down to whether the trust's allocation of principal and income differed from what was in the UPIA.

The SCOV held that it did. Ascertaining the intent of the Grantor by looking to the ordinary meaning of the terms used in the trust, the SCOV held that "proceeds from the [T]rust property" encompassed the amount received for the property in a condemnation action. The Trust itself categorized condemnation actions as a form of "sale," and a standard meaning of "proceeds" is "money received from a sale." So under the plain terms of the trust, receipts from a condemnation action were to be allocated to income, not principal.

On the second issue, the SCOV held that it was error for the Circuit Court to sustain the Demurrer to the Counterclaim based on documents that it said had already been produced to Defendant. Those documents were not attached to the Counterclaim and the Trustee never craved oyer of them. So they were not properly before the Circuit Court and could not be the basis for a demurrer.

Key Holding(s):

- Where the express terms of a trust contradict the method for allocating principal and income in the UPIA, it is the terms of the trust that control.

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Consumer Rights

Case: *Ruby v. Cashnet, Inc., 100287 (4/21/2011)*

Author: Millette

Lower Ct.: Shenandoah County (Hupp, Dennis Lee)

Disposition: Reversed

Facts: Plaintiff entered into a total of 33 successive payday-loan arrangements with defendant over the course of two and a half years. Typically, the plaintiff would pay off an existing loan and immediately thereafter enter in a new loan for a similar amount.

Plaintiff contended that the lender's practice of making successive loans violated Va. Code § 6.2-1816(6)(i), which forbids a payday lender from "refinanc[ing], renew[ing], or extend[ing] any payday loan." The Defendant contended that this section does not apply when a lender makes a loan to a borrower immediately after the borrow repays a previous loan in full.

After a bench trial, the Circuit Court entered judgment for the lender, holding that this pattern of loan-pay-off-followed-by-new-loan did not constitute a refinancing, a renewal, or an extension of the loans.

Ruling: On appeal, the SCOV reversed.

It held that the ordinary meaning of "refinance" and "renew" encompasses the practice of exchanging an old contractual debt for a new one, typically repaying the old loan with money obtained from the new loan. The facts at trial showed that the "substance" of the transactions was that the proceeds from the new loans were being used to repay the previous loan. Thus, under the plain meaning of those terms, the successive loans were an illegal "refinancing" and "renewal" of the loan arrangements.

Key Holding(s):

- The practice of making successive loan arrangements con-

stitutes a "refinancing" and "renewal" of the loans where the substance of the transactions shows that the payoffs of the old loan were funded by the proceeds from the new loans.

- A payday lender violates Code 6.2-1816(6)(i) when it issues successive loans to a consumer where the payoffs of the old loans are, in substance, funded by the new loan obligations.

✦ ✦ ✦

Real Property

Case: *Scott v. Burwell's Bay Improvement Ass'n, 100149 (4/21/2011)*

Author: Koontz

Lower Ct.: Isle of Wight (Parker, Westbrook J.)

Disposition: Affirmed

Facts: Defendant owned land along James River. In 1925, plaintiffs' predecessor in interest obtained an order authorizing construction of wharf and pier at the site. These later were expanded to include a pavilion and attached piers. Plaintiffs acquired the pavilion and piers in 1989, to use as a family retreat. A hurricane destroyed the pavilion and piers in 2003.

Defendant obtained approval from the Virginia Marine Resources Commission ("VMRC") in 2006 to build a pier in the riparian area where the plaintiffs had previously had its pavilion and piers. Plaintiffs sought to enjoin contrstuction. The SCOV, in an earlier decision, held that the plaintiffs' predecessor had a personal, non-transferable license, and remanded for consideration of whether plaintiffs had obtained riparian rights through adverse possession or had obtained a prescriptive easement to use those rights.

The trial court found that plaintiffs had not acquired rights in either way, and entered judgment for Defendants.

Ruling: The SCOV affirmed.

A party asserting adverse possession of riparian rights must show—by clear and convincing evidence—actual, hostile, exclusive, and continuous possession for 15 years. And the use must be of sufficient notoriety as to put the true owner on actual or constructive notice of it. A party can establish a prescriptive easement to riparian rights by making a similar showing for a period of 20 years.

Although there was evidence that plaintiffs occupied the pavilion and piers continuously from 1989 to 2003—a period of 14 years—there was no evidence of any such use after 2003, when they were destroyed. Furthermore, after 2003, the plaintiffs neither excluded others from the area nor commenced efforts to reconstruct the destroyed structures. So the plaintiffs did not satisfy the requisite 15- and 20-year time periods.

The SCOV held that the plaintiffs could not "tack" on earlier periods of use because (1) there was no evidence that the prior owners of the pavilion had ever asserted an exclusive claim to the riparian rights at issue, and (2) the defendants presented evidence that the pavilion and piers were publicly used before plaintiffs' purchase of them.

Key Holding(s):

- A party asserting adverse possession of riparian rights must show actual, hostile, exclusive, and continuous possession for 15 years. A party asserting a prescriptive easement to such rights must make a similar showing for the period of 20 years.

- A party asserting adverse possession of—or a constructive easement to—riparian rights can "tack" on earlier uses only if it can show that its predecessors' uses were exclusive.

✦ ✦ ✦

Premises Liability

Case: *Volpe v. City of Lexington, 092583 (4/21/2011)*

Author: Mims

Lower Ct.: Rockbridge County (Irvine, Michael S.)

Disposition: Aff'd in Part, Rev'd in Part

Facts: Defendant City operated a riverside park that included a low-head dam. Low head dams create dangerous currents and "hydraulics" in high-water situations. These dangers are not apparent to common observation.

In the planning process for the park, the city was told of the dangers that a low-head dam could cause in high-water situations. The City did not, however, post prominent warnings about these dangerous conditions. Nor did it adopt any safety precautions vis-à-vis swimming in the river.

Plaintiff's decedent drowned in high-water conditions when he was swept over the dam by the current and caught in a hydraulic at the dam's base.

The Circuit Court held, as a matter of law, that the danger posed by the dam was open and obvious and so the City had not obligation to warn its invitees of the hazard. It also ruled that (1) the City did not act with gross negligence and (2) the City did not act with willful and wanton negligence.

Ruling: On appeal, the SCOV reversed the Circuit Court's determination that the dangers posed by a low-head dam were, as a matter of law, open and obvious. The SCOV distinguised earlier drowning cases because—unlike the conditions in those cases—a low-head dam poses dangers not ordinarily encountered in a body of water. A jury could reasonably differ on whether the hazards of a low-head dam were open and obvious.

The SCOV also reversed the gross-negligence ruling. It noted that gross negligence involves an "utter disregard of prudence amounting to complete neglect of the safety of another," and it held that—given the City's knowledge of the dangers posed by low-head dams in swollen river conditions - there was sufficient evidence from which a jury could find gross negligence.

The SCOV, however, affirmed the willfull-and-wanton negligence ruling, finding that there was no evidence that the City engaged in "a spirit of mischief, criminal indifference, or conscious disregard for the rights of others."

Key Holding(s):

- A low-head dam that creates hazards that are not ordinarily present in natural waterways is not, as a matter of law, an open and obvious hazard that relieves a landowner of its duty to warn invitees.

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Newsletter Editor:
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LeClairRyan, A Professional Corporation
1800 Wachovia Tower, Drawer 1200
Roanoke, VA 24006

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Norfolk, VA 23514

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

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

James Chandler Martin, Esq.
Martin and Martin Law Firm
410 Patton Street, Suite A
P.O. Box 514
Danville, VA 24543-0514

Kristine Lynette Harper Smith, Esq.
Edmunds & Williams, P.C.
P.O. Box 958
Lynchburg, VA 24505-0958

Mark Douglas Stiles, Esq.
City Attorney's Office
Building #1, Room 260
2401 Courthouse Drive
Virginia Beach, VA 23456-9004

Jeffrey Lance Stredler, Esq.
AMERIGROUP Corporation
SVP, Senior Litigation Counsel
4425 Corporation Lane
Virginia Beach, VA 23462

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P.O. Box 40013
Roanoke, VA 24022-0013

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

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

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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