The Expert of My Enemy Is My Expert: Conflicts of Interests Amongst Expert Witnesses

by Maya M. Eckstein and Paul Nyffeler

Every litigator knows that the right expert can be the difference between winning and losing. This makes good experts rare commodities. Over time, top experts develop specialties and work for one party after another in dozens of cases, a perfect recipe for developing conflicts of interest. As a result, it is critical for experts and the attorneys considering hiring them to conduct thorough conflicts checks to identify potential problems, such as an expert’s prior or even current engagement with an opposing party.

But what standards should experts apply when considering conflicts? Surprisingly, while attorneys are governed by strict ethical rules, conflicts-of-interest rules for experts are virtually nonexistent. In fact, the “Guidelines for Conduct for Experts Retained by Lawyers,” recently drafted by the American Bar Association’s Task Force on Expert Code of Ethics, were withdrawn from consideration by the ABA’s House of Delegates.1 Among other things, the proposed Guidelines included an unremarkable prohibition that precluded an expert from accepting an engagement, absent informed consent, “if the acceptance would create a conflict of interest, i.e. that the expert’s provision of services will be materially limited by the expert’s duties to other clients, the expert’s relationship to third parties, or the expert’s own interests.”2 Notably absent, though, from even this proposal is a prohibition on an expert accepting an engagement that could materially harm a current client’s interests.

So what standards apply? Virginia courts apply the same standards to expert testimony that they apply to any other testimony: “where the probable prejudice exceeds the probative value of the evidence, the evidence should be excluded.”3 In assessing whether relevant testimony is admissible, a court is “always balancing the probative value of the evidence against the disadvantages (delay, confusion, prejudice, surprise, etc.) which may attend its admission.”4 For example, a party has the right to challenge a witness’s credibility by cross-examining the witness with prior inconsistent statements.5

These standards, though, do not provide sub-

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Maya M. Eckstein is a partner at Hunton & Williams’s Richmond office. Paul Nyffeler is an associate there.
I recently sat down and read “By George!: Mr. Washington’s Guide to Civility Today,” a slim volume that reproduces 110 thoughts on etiquette that George Washington wrote out as a teenager more than 250 years ago. Many historians believe that the rules represent a compilation of existing materials and Washington’s thoughts.

According to a 1996 U.S. News/Bozell poll, 89% of Americans long for greater civility in public discourse. As trial lawyers called upon to assist the public in resolving disputes, we are in a unique position to improve civility in how we model behavior. President Lincoln once commented, “as a peace maker, the lawyer has a superior opportunity of being a good man.”

ABA President Stephen N. Zack recently commented that “as lawyers, we must still honor civility.” “Words matter. How we treat others matters. The way others treat us matters, not only for today, but for generations to come.”

Our professional reputations are built over a career based in large part how we have interacted with each other, the Bench, our clients, and the public.

In addressing newly admitted attorneys on November 1, 2004, Justice Peter T. Zarella of the Connecticut Supreme Court said:

The practice of law has historically been referred to as a noble profession. The increase of incivility and unprofessional behavior, however, has tainted the public’s view of lawyers, and so we must join forces to restore nobility to our profession through our civil treatment of, and respect for, everyone who has a role in the legal process, whether we are on the same side—or the opposing side—of a dispute. We must be adversaries without being enemies. We must return to a practice of taking the high road with fairness, courtesy and simple good manners. We must mend fences rather than trample them.

Many of Washington’s rules struck me as relevant to our work as lawyers and showing common decency and civility to others. They include the following:

1. Every action done in company ought to be with some sign of respect to those that are present.
6. Sleep not when others speak, sit not when others stand, speak not when you should hold your peace, walk not on when others stop.
14. Turn not your back to others, especially in speaking; jog not the table or desk on which another reads or writes; lean not upon anyone.
34. It is good manners to prefer them to whom we speak before ourselves, especially if they be above us, with whom in no sort we ought to begin.
35. Let your discourse with men of business be short and comprehensive.
40. Strive not with your superior in argument, but always submit your judgment to others with modesty.
41. Undertake not to teach your equal in the art himself professes; it savor of arrogancy.
42. Let your ceremonies in courtesy be proper to the dignity of his place with whom you converse, for it is absurd to act the same with
a clown and a prince.

45. Being to advise or reprehend any one, consider whether it ought to be in public or in private, and presently or at some other time; in what terms to do it; and in reproving show no signs of cholor but do it with all sweetness and mildness.

49. Use no reproachful language against any one; neither curse nor revile.

50. Be not hasty to believe flying reports to the disparagement of any.

56. Associate yourself with men of good quality if you esteem your own reputation; for ‘tis better to be alone than in bad company.

58. Let your conversation be without malice or envy, for ‘tis a sign of a tractable and commendable nature, and in all causes of passion permit reason to govern.

59. Never express anything unbecoming, nor act against the rules moral before your inferiors.

65. Speak not injurious words neither in jest nor earnest; scoff at none although they give occasion.

67. Detract not from others, neither be excessive in commanding.

69. If two contend together take not the part of either unconstrained, and be not obstinate in your own opinion. In things indifferent be of the major side.

73. Think before you speak, pronounce not imperfectly, nor bring out your words too hastily, but orderly and distinctly.

76. While you are talking, point not with your finger at him of whom you discourse, nor approach too near him to whom you talk, especially to his face.

85. In company of those of higher quality than yourself, speak not ‘til you are asked a question, then stand upright, put off your hat and answer in few words.

88. Be not tedious in discourse, make not many digressions, nor repeat often the same manner of discourse.

We should all be mindful of the rules penned by Washington over 250 years ago as we advocate for our clients in a way that we and the public will be proud. Further, we must remember that the conflicts we are retained to assist are between the clients and not the lawyers.
stantial guidance in the expert-conflict-of-interest scenario. This is particularly true in the situation in which an adverse party hires a client’s expert as its own, and even more so when the expert already has been retained by the client in a pending, separate, ongoing litigation. In other words, the expert would be testifying for a client in one case, but against the same client in concurrent litigation.

These situations raise thorny issues of confidentiality. Take, for example, the situation in which Client ABC hires Expert to testify in Case 1, which was filed by Opponent Bad Guy. Expert is then hired by ABC’s opponent (Opponent Shrewd Guy) in Case 2, to testify against ABC. Because the Expert may have been privy to ABC’s confidential information in Case 1, or even trial strategy or other attorney work product, Shrewd Guy potentially has obtained an unfair advantage, as Expert has information he would not have but for his retention by ABC in Case 1. Moreover, any action taken in Case 2 to either remove Expert or effectively cross-examine him by impeaching his credibility will harm ABC’s efforts in Case 1. Legitimate efforts to attack Expert in Case 2 would be ready ammunition for Bad Guy to use against ABC’s expert in Case 1. This predicament effectively eliminates ABC’s right to challenge Expert’s opinions and credibility in Case 2, for fear of harming ABC’s position in Case 1. To make matters worse, this situation undermines ABC’s trust in Expert, making it wonder in every meeting for Case 1 whether Expert is there to assist ABC’s interests in Case 1 or as Opponent Shrewd Guy’s agent in Case 2, obtaining unfettered access to ABC which no one else could obtain. A crafty adversary might even seek out an opponent’s expert to put it in just such an impossible situation.

Two options are available to parties faced with this scenario. First, courts across the country typically apply a traditional three-pronged test to the expert-conflict-of-interest analysis. Second, if an expert was working for a client in one litigation but against the client in another litigation, rules prohibiting *ex parte* contacts with opposing experts potentially can be used to sanction opposing counsel.

**Three-Pronged Analysis**

Courts across the country have applied a three-pronged test to such situations. Under the traditional analysis applied to expert-conflict situations, courts consider, first, whether it was “objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed” and, second, whether “any confidential or privileged information [was] disclosed by the first party to the expert.”6 Courts often also apply a third element: “the public interest in allowing or not allowing an expert to testify.”7

In analyzing the first prong—whether it is objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed—courts consider “whether the relationship was one of long standing and involved frequent contacts instead of a single interaction . . . whether the expert is to be called as a witness . . . whether alleged confidential communications were from expert to party or vice-versa, and whether the moving party funded or directed the formation of the opinion to be offered at trial.”8 Additional factors include entering into formal confidentiality agreements, exchange or discussion of work product, whether the expert was asked not to discuss the case with an adverse party, and whether the expert’s opinion was derived from or related to work conducted while working for the previous party.9 If the expert “met but once with counsel, was not retained, was not supplied with specific data relevant to the case, and was not
requested to perform any services,” the first prong cannot be met.10

Regarding the second prong—whether any confidential or privileged information was disclosed by the moving party to the expert—courts consider whether the expert and moving party discussed the moving party’s “strategies in the litigation, the kind of expert [the moving party] expected to retain, [the moving party’s] views of the strengths and weaknesses of each side, the role of each of the [moving party’s] witnesses to be hired, and anticipated defenses.”11 Purely technical information is not considered confidential information.12

Finally, in analyzing the third prong—the public interest—courts consider such issues as (1) whether any prejudice might occur if an expert is or is not disqualified,13 (2) the appearance of a conflict of interest,14 (3) the availability of a replacement expert and the burden associated with obtaining a new expert,15 (4) “ensuring parties have access to expert witnesses who possess specialized knowledge and allowing experts to pursue their professional calling,”16 and (5) prohibiting “unscrupulous attorneys and clients [from creating] an inexpensive relationship from potentially harmful experts solely to keep them from the opposing party.”17

Even if the three-pronged test is met, some exceptions have been made for experts concurrently serving for and against a party when the subjects of the case and their testimony are sufficiently unrelated.18

**Ex Parte Communications**

In Virginia courts, the only proper method for obtaining discovery of an expert witness is by interrogatory or deposition.19 Courts around the country have interpreted similar rules to implicitly prohibit any *ex parte* communications with an adverse party’s expert witness.20 In fact, courts have deemed such *ex parte* contacts an ethical violation under ABA Model Rule of Professional Conduct 3.4(c), which states that “a lawyer shall not knowingly disobey an obligation under the rules of a tribunal.”21 Even state bars have opined on the permissibility of *ex parte* contacts with adverse experts.22

Violation of this prohibition has resulted in severe sanctions. For example, a finding of *ex parte* communications can result in exclusion of a party’s expert witness.23 The United States Court of Appeals for the Ninth Circuit reversed a judgment because the appellee’s attorney engaged in an *ex parte* meeting with an adverse expert, the court remanded the case for retrial and sanctions.24 In California, a one-hour meeting discussing the hiring of an adverse expert resulted in disqualification of both the expert and the law firm.25 Thus, an attorney knowingly takes a risk of disqualification when engaging in *ex parte* communications with an adverse party’s testifying expert witness. No case has dealt with whether a party may speak to their expert serving as an opponent’s expert in another litigation without the opponent’s counsel present, but caution is warranted.

**Conclusion**

The potential for conflicts of interest for experts should be a concern for litigators and experts alike. Experts trade in their credibility and reputations, providing enormous incentive for self regulation. Yet the lack of national ethics standards for experts and reliance on experts to monitor themselves for potential conflicts of interest could expose attorneys and their clients to unforeseen risk. Additional research may be the difference between having a testifying expert and leaving your client without an expert—or even its chosen counsel. ✤

*Editor’s note:* The authors prepared this article before the Supreme Court of Virginia decided *Arnold v. Wallace*, ___ Va. ___, 725 S.E.2d 539 (2012). *Arnold* addresses some of the expert-witness conflict-of-interest issues that Ms. Eckstein raises in her article. A summary of the facts and holdings of *Arnold* appears at page 33 of this newsletter.
ENDNOTES

1. See American Bar Association, http://www.abanow.org/2012/01/2012mm300/ (withdrawing resolution to adopt Standards of Conduct For Experts Retained By Lawyers) (January 2012).

2. Id. § IV.


12. Id. (citing Nikkal Ind., 689 F. Supp. at 191-92).


18. See Bone Care Int’l LLC v. Pentech Pharma. Inc., 2009 U.S. Dist. LEXIS 7098, *4-5 (N.D. Ill. Feb 2, 2009) (three different experts testifying about different medicinal compositions for treating different disorders were allowed to testify adversely to client); Atlantic City Assoc. LLC v. Carter & Burgess Consultants, Inc., 2007 U.S. Dist. LEXIS 1185, *4 (D.N.J. Jan. 5, 2007) (two experts for one client were allowed to testify against their client in another litigation because subjects were unrelated and no confidential information was shared).


21. See Erickson, 87 F.3d at 301-02; see also, Va. R. Professional Conduct 3.4(d).


23. See Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1183 (5th Cir. 1996) (“[W]e are troubled that . . . counsel for the tug interests made several ex parte contacts with [the expert] and apparently employed him as their consultant . . .”); Campbell Indus., 619 F.2d at 26 (affirming denial of defendant’s request to call plaintiff’s expert as its own expert witness after revealing defense counsel’s ex parte contacts with the expert); Heyde v. Xtraman, 404 S.E. 2d at 611-12 (affirming exclusion of defendant’s testifying expert witness because witness was plaintiff’s non-testifying expert before defendant engaged in ex parte contacts with him).

24. Erickson, 87 F.3d at 304.

Practical Tips for Using Requests for Admissions

by Michael W. Robinson

Everyone has a default discovery plan: serve interrogatories and requests to produce documents, and then proceed to depositions. Perhaps as a result, requests for admissions are (1) under-utilized, and (2) frequently poorly utilized. But requests for admissions can be a very important and effective tool, and should not be relegated to an afterthought. So let me offer some primer points and perhaps a few tips and useful citations on effectively incorporating requests for admissions into discovery plans.

The rules governing requests for admissions are almost identical in state and federal court practice. Accordingly, federal court decisions addressing requests for admissions are deemed “informative but not necessarily binding” in the state court system.¹ In state court, of course, requests for admissions may play a far more strategic pretrial role because requests for admissions may be the only hope for a posture that allows summary judgment.²

Under Virginia Supreme Court Rule 4:11 and Federal Rule 36, a party may seek an admission of a statement or opinion of fact or the application of law to fact, or on the genuineness of any document. Depending on whether you are in state or federal court, the responding party has twenty-one or thirty days to respond, and the failure to respond to a request within that time results in the request being deemed admitted. Subject to proper objections, a responding party has a duty to admit so much of the request as good faith requires, to deny the request, or to “set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” A denial must fairly respond to the substance of the request, and if good faith requires that a party qualify its answer or deny only a part, the response shall specify which part is admitted and that which is qualified or denied. There is a duty of reasonable inquiry and a party may not claim lack of information as a response unless it certifies that it has taken reasonable steps to ascertain the information and that the information known or readily obtainable is insufficient to allow an admission or denial.³

In light of those requirements, requests would appear to be a powerful tool. But there are limits. And those limits reflect the primary purposes of requests for admissions. Thus, parties should not simply attempt to transform a Complaint into a series of requests for admissions.⁴ Nor should extensive requests for admissions be served in the “wild-eyed hope” that a party will simply fail to respond in a timely fashion.⁵ In fact, while requests are legitimately served to narrow issues, they should not be used to try to preemptively resolve disputed facts of the case in hopes of creating a fee-shifting mechanism, used to bootstrap deposition testimony into admissions conclusively determining facts, or used to burden a party with responding to one party’s version of events.⁶

So how should we use requests? If you are using requests solely to establish the foundation for admitting documents, the requests come naturally. But when expanding your use to address other facts, the landscape changes, and precision is the word of the day. Here are some suggestions:

1. Don’t approach requests for admissions like discovery.

In both the state and federal rules, the rules governing requests for admissions appear in the sections addressing discovery. But don’t approach requests like discovery; they serve a different purpose. Most courts view requests for admissions as serving two essential purposes: first, to narrow issues for trial...
or summary judgment; second, to facilitate the presentation of the matter at trial. In emphasizing these purposes, courts have gone so far as to say that requests for admissions are not discovery.\(^7\)

And courts have upheld or rejected the propriety of requests based on whether the requests further the two goals.\(^8\) So keep these two purposes in mind when drafting, responding to, and arguing the appropriateness of or the sufficiency of responses to requests for admissions.

2. **Draft with specificity and focus each request on a singular fact.**

Unlike interrogatories, requests for admissions should not seek detailed responses, or any additional factual information. Well-drafted requests should be able to be answered in one word: either “admitted” or “denied.” Draft with that goal in mind.

The drafter “bears the burden of setting forth in necessary, but succinct, detail, the facts, events or communications to which admission is sought.”\(^9\) Requests should be “drafted in such a manner that the response can be ascertained by a mere examination of the request and the corresponding answer.”\(^10\) The facts or events for which admission is sought should be set forth in separate requests; one fact per request. As one court explained, “each request for admission must be direct, simple, and ‘limited to singular relevant facts.’”\(^11\) While the Virginia Supreme Court has not given such detailed guidance, it has imposed a duty on the party requesting admissions to “phrase [the] requests with clarity and fairness.”\(^12\)

3. **Don’t rely on the responding party’s obligation to partially admit facts in drafting your requests.**

In light of the defendant’s duty to parcel any portions of a request that can be admitted, a drafter may be tempted to set forth broad requests. Resist that temptation. A party may properly object to vague or ambiguous requests, and need not parcel out for response portions of the request.\(^13\) Compound requests, or requests that include interdependent facts are particularly problematic. Notwithstanding the general duty to undertake in good faith to admit the portion of a request that is true, a single request that contains interdependent facts can be properly objected to, or denied in its entirety if one fact on which the request is premised is denied.\(^14\) Simply put, an attorney “drafts complex requests at his peril.”\(^15\)

4. **The right to seek requests based on the application of law to facts does not extend to legal conclusions.**

A frequent source of difficulty or confusion arises from the effort to attempt to obtain legal conclusions through requests. The rules permit requests based on “the application of law to fact.” But the rules do not permit requests to address questions of law.\(^16\)

Unfortunately, there is no bright line test to apply to this tension. Requests that simply seek ratification of the legal conclusions one party “attaches to the operative facts” are improper.\(^17\) Likewise, requests seeking an admission on “pure” questions of law—for example, that the statute of limitations for an action based on a written contract is five years – are improper.\(^18\) And requests seeking admissions as to the requirements of statutes or regulations have likewise been held improper.\(^19\)

In contrast, requests seeking admissions on an interpretation of a contract or on a party’s legal obligations under a contract are proper.\(^20\) And the manner in which statutes or regulations apply to specific, non-hypothetical facts also may be the subject of requests.\(^21\) So be aware that the closer your requests come to any legal conclusion, the
chances of a proper objection increases. Seeking an admission on a matter generally reserved to the court—such as whether a person is a public figure for purposes of a defamation claim—will draw an objection. There is a big difference between requesting an admission that an injury or breach of contract or breach of legal duty occurred on a particular day, and asking whether the cause of action accrued on a particular day.

5. Challenge objections or improper responses through a motion to determine the sufficiency of the response; but never expect the court to require a party to admit any fact.

The proper means to address an objection or response to a request for admission is a motion to determine the sufficiency of the response. There is no motion to compel responses to requests for admissions (although I have seen many argued, and probably argued a few as well). The provisions of Virginia Supreme Court Rule 4:12 and Federal Rule 37 regarding motions to compel do not apply to requests for admissions. If the court overrules an objection or determines that a response is insufficient, it may order a response or, in rare circumstances, deem the request admitted. Depend on the former; deemed admissions are rare and I am not aware of any reported cases where a court deemed a matter admitted on an initial determination of sufficiency.

Do not expect, however, to have the court order that a particular request be admitted, even in the face of overwhelming evidence of its truth. The court will not make pretrial determinations of whether a request should or should not be admitted; it will simply order a response. And “denied” is always a sufficient response. If a request is denied and that matter is proven at trial, the remedy is to seek an award of fees.

A few quick notes on common objections and responses are in order—though the topic merits an additional article. The objection that a matter is disputed and must be resolved at trial is an insufficient response. Likewise, a party who claims that it cannot respond due to lack of information must certify that it made reasonable inquiry into the matter—and courts will look for evidence of what steps were taken. The scope of the duty of reasonable inquiry may differ in various circumstances, it is not necessarily limited to what a party knows; it may include the duty to review documents, testimony, or to seek information from other parties.

Finally, in seeking admissions about the contents of and statements in documents, the objection or response that the “document speaks for itself” is seldom recognized. Indeed, one court has held that not only should requests to admit verbatim quotes be responded to without objection, a party can ask admissions by paraphrasing documents; “If, on the other hand, the request for admission paraphrases a document, it should be admitted if the paraphrase is accurate and denied if it is not.”

6. Leave of court is required to withdraw or amend admissions.

Admissions are conclusive for purposes of the pending action and a party has no right to amend an admission. A party must seek leave of court to amend or withdraw any admission, including admissions made by a failure to respond to properly served requests. If you have failed to respond to requests for admissions within the prescribed time, the proper motion for relief is a motion to withdraw the admissions (since by rule the requests are now deemed admitted).

Both the federal and state court rules set out a two prong test for determining whether a party should be permitted to amend or withdraw admissions. First, will the withdrawal or amendment promote the presentation of the merits of the action? Second, will allowing the withdrawal or amendment prejudice the party that obtained the admission? The Virginia rule expressly allocates the burden of each party. The party seeking to
withdraw admissions is required to show whether the withdrawal would promote the presentation of the matter on the merits. The party opposing the motion bears the burden to show prejudice. While the federal rule is silent on this burden, most federal courts have adopted a similar allocation of the burden of proof.\textsuperscript{31}

The first prong generally is met by showing that the admission removes an important and disputed aspect of the merits of the case from actual consideration. The Virginia Supreme Court has recognized that this prong is met “when upholding the admissions would practically eliminate any presentation of the merits of the case.”\textsuperscript{32} In essence, the withdrawal should serve to aid in the “ascertainment of the truth and the development of the merits.”\textsuperscript{33} The second prong—prejudice to the party that obtained the admission—does not consider at all the prejudice of now having to prove a previously admitted point. Rather, the prejudice must address the difficulty a party faces because of the withdrawal of the admission, \textit{i.e.,} “the sudden need to obtain evidence with respect to the questions previously answered by the admissions.”\textsuperscript{34}

Contrary to popular belief, there is no “excusable neglect” standard for addressing the failure to respond to admissions. A party must satisfy the two-prong test. Notably, some courts have held that the court should not even consider whether there was an excuse for failing to respond, and that denying leave because there was no good excuse for the failure to timely respond was an abuse of discretion.\textsuperscript{35} On the other hand, other courts have refused a request for leave to amend when no good reason for the failure was provided. Thus, treat any excuse for failing to respond as an unwritten third prong of what is essentially an “equitable” balancing test. If you have good reasons, use them to buttress your two-prong argument. If the reasons are tepid, concede and emphasize the two-prong test and the fact that it inherently results in a fair and equitable result regardless of the reasons for any initial failure.

\textbf{7. Costs are awarded for proving facts that should have been admitted; not for every fact that was the subject of a request.*}

If you are required to prove facts that were the subject of a request for admission, you may seek the costs incurred, including attorney fees, in proving those facts at trial. But as the Supreme Court of Virginia recently made clear, requests for admission are not a fee-shifting device, and a request intended merely as a basis to award fees to a prevailing party may be deemed an improper request.\textsuperscript{36} In state court, costs and fees will not be awarded if the request could be denied in good faith; \textit{i.e.,} the party had a reasonable belief that it might prevail on the point at trial.\textsuperscript{37} Similarly, in federal court, costs and fees will not be awarded if the request was held objectionable or “the party failing to admit had a reasonable ground to believe that it might prevail on the matter.”\textsuperscript{38}

Here again, the specificity of your requests—and the use of the requests to further the purposes of narrowing issues or aiding in the presentation at trial—can help. Broad requests over disputed facts likely will not lead to an award of costs. But specific, properly drafted requests set up the potential for successful fee awards. One federal court of appeals, for example, held that it was an abuse of discretion for a district court to decline to award fees and costs in a case involving the alleged improper disclosure of confidential information. Even though there was a legitimate dispute over whether a bank “used” certain confidential information and the bank could have reasonably believed that it could prevail on that matter, the request was limited to whether the bank “referred to” the information, which should have been admitted as undisputed.\textsuperscript{39}

\textbf{8. Use requests for admissions to assist in E-discovery.}

Finally, a few tips and reminders for using requests for admissions with electronic evidence. We all spend a lot of time gathering and reviewing E-discovery. Well-drafted requests for admissions
help to streamline the presentation of E-discovery. Likewise, if matters are not admitted, the cost for proving those facts can be significant if a third party IT specialist is required to lay foundations to establish the admissibility of E-documents or other evidence, e.g., the content or display of web-pages at particular times.

So consider using requests for admissions to address and confirm:

- The email address of key parties;
- The authenticity of email printouts;
- The fact that particular emails were (1) sent or (2) received by a party;
- The authenticity of website screen shots;
- The authenticity of postings in social media sites or tweets and blogs.

The use of requests for admissions need not be limited to merely questions of authenticity, however. Carefully drafted requests can address matters such as whether particular emails were deleted; whether drives were scrubbed; whether files were deleted, altered, or downloaded to portable storage devices; and whether particular programs were present on computers. Some of these requests may need to await a forensic examination. And, as a tactical matter, you may prefer to have an expert explain everything. But don’t overlook the possible impact of a streamlined approach on these issues as well, or the benefit of having a conclusive admission. ✩

*Editor’s Note: A summary of the Piney Meeting House Investments case, discussed in note 36 and accompanying text, appears at page 22 of this newsletter.

ENDNOTES

2. Virginia Supreme Court Rule 3:20 authorizes summary judgment based on the admissions in the proceedings. Summary judgment may be elusive, even when based on conclusive facts.
4. Perez v. Miami-Dade County, 297 F.3d 1255, 1258 (11th Cir. 2002). Piney Meeting House Investments, Inc. v Hart, ___ Va. ___, Record No. 111548 (June 7, 2012) (request seeking admission that party had no defenses to claims was an improper request under Rule 4:11 and could not be used as basis for award of attorney’s fees). See also
5. Shaheen, 265 Va. at 475 (quoting Perez, 297 F.3d at 1255).
10. Id.
15. Diederich, 132 F.R.D. at 621; see also Erie Ins. Exch., 236 Va. at 14 (requests tied to erroneous premise properly denied without need to make partial admissions).
I. Introduction.

The costs and risks associated with electronic discovery are significant concerns for businesses of all sizes. It is no secret that most companies create, distribute, receive, and store their information and critical data electronically. Depending upon the size and structure of an organization, electronically stored information (ESI) such as e-mail, instant messages, voicemail, faxes, spreadsheets, databases, calendars, presentations, website information, photos, and social-media platforms may be found in hundreds, if not thousands, of possible locations within an organization. As technology rapidly changes and transforms our society, the volume of ESI continues to grow at an explosive rate. For example, as you are reading this sentence right now, much of that information is migrating up into the cloud. In the Summer 2011 edition of Litigation News, Michael Beverly wrote a very informative article regarding the procedural rules applicable to electronic discovery and ESI. The following are some practical tips to help you advise your client through the electronic discovery process. Although no single approach to e-discovery is appropriate for every case, assisting your client with proper plan-
ning and execution will help effectuate a successful, efficient and cost-effective process.

II. Do Not Assume that Your Client Knows What to do With Respect to Electronic Discovery.

The rules, court decisions, and other legal authority governing e-discovery preservation and production vary depending upon jurisdiction. Outside counsel should always be diligent when advising their clients about the steps they need to take to comply with applicable e-discovery requirements. Whether you are communicating with in-house counsel or directly with other employees, do not assume that your client knows all of the current rules that apply to e-discovery in the particular jurisdiction where its case is pending.

Even before the filing of a lawsuit, you should counsel your existing corporate clients to help them prepare for the e-discovery process. For example, some clients may not know that events that trigger the duty to preserve—and, thus, the duty to implement a legal hold—may actually precede the receipt of a pleading. Examples may include the receipt of a demand letter, subpoena or a notice of a claim. A client may also not realize that the duty to preserve information also applies when it is a plaintiff in a lawsuit or when it is the subject of an audit or a government investigation. Clients need to be educated on these issues to avoid possible spoliation of evidence and the consequences that can result therefrom.

You should meet with those individuals who will play a key role in your client’s e-discovery process and work with them to implement a reliable and defensible process. In large companies, that will include not only in-house attorneys but also employees who work in information technology, compliance, data privacy, human resources, and records management. In smaller organizations, the audience may be quite different. The key is to thoroughly understand your client’s business operations, company culture, and the ways your client stores and maintains its records and information.

It is of critical importance that you inform your client of the consequences that can result from failing to comply with the duty to preserve relevant information. It has become all too common to read news articles and court opinions involving both intentional and inadvertent evidence spoliation and discovery sanctions. If the court in which a matter is pending has local rules regarding e-discovery or a pilot project governing e-discovery procedures, you need to make sure your client is aware of those requirements. For example, the United States Court of Appeals for the Seventh Circuit, the United States Court of Appeals for the Federal Circuit, and Federal Courts in New York, Maryland, Florida, Delaware and others have all implemented standards or standing orders governing e-discovery in certain cases. Federal and state courts throughout the country continue to adopt new standards, protocols, and model orders aimed specifically at e-discovery. Most of these programs and orders recognize the challenges inherent in e-discovery and emphasize the goals of reducing e-discovery costs and increasing communication and cooperation among trial counsel. Effective client communication and taking an active role in the e-discovery planning process will help diminish the likelihood that your client will be hit with monetary sanctions, an adverse-inference instruction, or other rulings detrimental to the merits of its case.

III. Know Your Client’s Records and Information Management System.

Most corporate information is created and stored electronically. Thus, in order for you to properly advise your client in connection with its e-discovery obligations, you need to understand where your client’s business records are stored, how its computer systems operate, how its records are maintained, and the costs associated with the collection and preservation of data from each source. While the concepts of e-discovery and litigation seem to go hand-in-hand, companies are becoming more aware that e-discovery is a small part of a larger picture—data and information governance. As the
volume of information grows within companies, many of them are devoting more resources to their records and information management programs. If you or someone in your firm is knowledgeable in this field, you should consider offering to provide guidance in this area, particularly if you are able to help the client integrate its e-discovery procedures into its larger information-management program. It is critical that these two areas work well together.

By having this knowledge, you will be able to help your client prepare for the document production request that will inevitably arrive at some unforeseen and inconvenient time in the future. As with many projects, preparation is key, and having a plan in place for preserving and producing records subject to a legal hold will help your client handle its e-discovery responsibilities more productively and efficiently.

IV. Advise Your Client What Steps Need to be Taken to Properly Preserve Information Subject to a Legal Hold and Help Your Client Improve its Legal-Hold Process.

Do not assume that your client knows what to preserve or how to properly preserve information that is subject to a legal hold. If you are aware of a situation that has arisen that requires the preservation of ESI, you should at a minimum offer to draft the legal-hold notice that your client will be distributing throughout its organization. If your client declines that offer, you should ask to review the legal hold before it is distributed to ensure that it will accomplish its intended purpose and will be defensible in court. You should also ask for a list of the custodians who will be receiving the hold, and remind your client that the list might need to be amended or supplemented as the case progresses. Since sanctions have been imposed on both clients and attorneys as a result of insufficient legal-hold notifications, you have a vested interest, as does your client, in making sure that relevant information is preserved and ultimately produced. You may want to consider adding a paragraph or two about preservation obligations and e-discovery in your engagement letter to your client.

You should take an active role in advising your client as to how to properly preserve information subject to a legal hold. You should interact not only with in-house counsel but also the IT personnel and other key employees who will be playing a role in this process. Your client needs to understand that relevant information needs to be preserved and may be discoverable regardless of how that information is generated or where that information is stored. Many employees may not have any experience with the legal system and may not understand that an e-mail can be a record subject to preservation if it is relevant to a lawsuit.

You should also address the subject of departing and former employees with your client. You may need to preserve information that was created or possessed by former employees for a particular matter, as well as current employees subject to a legal hold who leave the organization prior to the release of the hold. If a key custodian has left the organization, you should investigate how that person’s data was disposed of upon his or her departure, as you will need to know whether the records were destroyed, saved, or transferred to another employee. You should also make sure your client has procedures in place to ensure that records in the custody of departing employees subject to a legal hold are preserved after departure. Similarly, you should advise your client to have a process in place to monitor the repair or replacement of a relevant custodian’s computer or other device to ensure no relevant information is lost.

As you guide your clients through the legal-hold process, take note of ways that your client can improve not only its legal-hold process but also its entire e-discovery process, and help your client develop best practices for those processes. This covers everything from your client’s records and information-management program, its policies and procedures for e-mail usage and retention, new technologies, legal-hold audits and releases, and software solutions that help your client comply with
V. Be Cost Effective and Understand the Role of Technology.

The burdens and costs arising out of the preservation and production of ESI can be substantial. Just as you would give careful consideration to merits strategy at the outset of a case, you should also focus on e-discovery strategy and the technology that is currently available to reduce that expense at an early stage of the case.

Even with all of the technological advances, old fashioned cooperation among counsel is always an important key to handling e-discovery in an efficient manner. Almost all of the court opinions pertaining to e-discovery emphasize that cooperation and transparency play a very important role in the e-discovery process. The concept of proportionality has gained a great deal of momentum in the last few years in most jurisdictions. This concept, which derives from Rule 26 of the Federal Rules of Civil Procedure, Supreme Court of Virginia Rule 4(1)(b)(1), 4(1)(b)(7), and similar state rules, provides a mechanism whereby the value of information is weighed against the burden of finding and producing it. If the burden outweighs the value, it often does not need to be produced. Courts have recognized the importance of proportionality in e-discovery and although there appears to be a lack of uniform agreement among the courts regarding the application of proportionality to e-discovery issues, you need to be familiar with how the court hearing your client’s case will view and treat the concept of proportionality. Some courts have evidenced strong support for applying proportionality to preservation issues, while others have not been as receptive. Depending upon the nature of the case, this can amount to considerable additional discovery expense. You should use the meet-and-confer process to be creative and to work with opposing counsel to reduce the burden of e-discovery on all parties involved in the litigation. Both the court and your clients will appreciate your efforts.

One way to reduce the cost and burden of e-discovery is to develop targeted and iterative discovery protocols at the start of the case. You can also reduce the burden of e-discovery by knowing how to use search-and-review protocols that employ modern technology. This technology can be used not only to reduce expenses but also to protect privileged and sensitive business information. You can use e-discovery tools to reduce the burden and expense of privilege logs. For example, a number of e-discovery tools can create and prepare a detailed privilege log from a document’s metadata. But even with this technology, careful attention should be paid to ensure that privilege logs comply with applicable rules and present sufficient information to provide a basis for asserting the privilege. Courts are increasingly critical of improper privilege logs, and a waiver of the privilege can result if a log is deficient.

Along these same lines, you should consider advising your client with regard to its selection and use of e-discovery software and vendors. If you are using a vendor to assist with e-discovery, offer to help your client to negotiate favorable prices, particularly hosting and storage charges, as well as data-disposal or return fees. There are many e-discovery vendors with widely varying skill sets and technology. It is important for you to be familiar with the relative strengths of these vendors in order to provide sound guidance to your client.

There have been many innovations in the document-review process over the past few years. Although technological advances have helped cause the explosion in data creation and preservation, technology also can be used to help reign in some of the costs associated with e-discovery. You or someone on your legal team should be as knowl-
edgeable about that subject as you are with the underlying merits of the case, because a failure to be knowledgeable in that area can result in additional unnecessary expense and inconvenience to your client. If you are able to create savings for your client by negotiating with vendors or utilizing technology, make sure you tell your client about those efforts — they will be greatly appreciated.

Finally, if your client has insurance coverage, you should determine early in the case whether e-discovery costs fall within the scope of coverage. If there is coverage, you should communicate with the carrier at the start of the case to ensure that there are no surprises or disagreements when invoices are submitted for payment.

VI. Stay Apprised of New Developments in the Law.

As technology changes, so does the law. Many courts, attorneys, and clients have witnessed first-hand the continuing evolution of e-discovery as well as the complexities and costs related to the preservation and production of electronic records. Social-media platforms such as Facebook, LinkedIn and Twitter have exploded in popularity with both individuals and businesses. The rapid growth of cloud computing has given birth to a whole new array of e-discovery and other legal issues. Depending upon the subject matter of any given case, your comprehensive understanding of these technological developments may be crucial in advising your clients in e-discovery matters. For example, with cloud computing, issues such as data security, data privacy, data location, metadata, data access, production costs, and disaster recovery all may at some point in time play a role in your e-discovery efforts.

Earlier this year, Magistrate Judge Andrew Peck of the United States District Court for the Southern District of New York issued what has been described as the first judicial opinion approving the use of predictive coding.³ In his opinion, Judge Peck noted “[w]hat the Bar should take away from this Opinion is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.”⁴ For the reasons Judge Peck notes in his opinion, it is important for counsel to understand how these developments in the law impact the cases you are handling for your clients.

Clients pay a great deal of attention to e-discovery costs, so you should also stay apprised of any legal authority that provides for the recovery of e-discovery costs arising out of litigation. In accordance with Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920, a prevailing party in civil litigation may pursue the recovery of certain costs from the non-prevailing party, although there appears to be a split of authority as to whether such costs are covered by the aforementioned code section.⁵ If you are representing a client in a litigation matter, you need to advise your client at the outset of the case about the potential for recovering (or paying) e-discovery costs so that your client is not made aware of this issue for the first time at the conclusion of the case.

VII. Conclusion.

The cost, time, labor, and potential sanctions associated with e-discovery can present significant challenges for your clients, but careful planning and thoughtful guidance can limit the inconvenience, risk, and expense to them. Your ability to educate and advise your client, and to manage the process properly and efficiently, will matter a great deal to your client. It is critical that attorneys be knowledgeable when it comes to their client’s records and information-management systems, as well the law applicable to each case. In representing your corporate clients, you should always be thinking about ways to help them improve their records and information-management programs and their legal-hold processes, assist them with selecting reputable e-discovery service providers to assist as appropriate with e-discovery solutions, and continually seek cost-effective approaches to e-discovery. Not only will this result in a satisfied client, but it will also
provide you with numerous opportunities to develop new business and relationships with your existing client base.

ENDNOTES

1. Pippins v. KPMG, LLP, 2011 WL 4701849 (S.D.N.Y. 2011) (defendant’s motion for protective order to limit the scope of its preservation obligations denied and defendant required to spend, according to its own estimates, in excess of $1,000,000 to preserve computer hard drives).


3. Predictive coding generally refers to the process of using a “seed set” of documents known to be responsive to identify documents similar to them in content. Several e-discovery vendors claim to provide this technology, but their efficacy varies widely.


Make it Simple! Preparing an Argument for Trial Court

By Leslie L. Lilley
Judge, Second Judicial Circuit

Simple means “plain, basic, or uncomplicated in form, nature, or design; without much decoration or ornamentation.”1 Leonardo Da Vinci liked simple. He proclaimed that “simplicity is the ultimate sophistication.” In a modern context, Steve Jobs, adopted Da Vinci’s quote in marketing Apple products, and added, “[i]t takes a lot of hard work . . . to make something simple, to truly understand the underlying challenges and come up with elegant solutions.”2 Apple’s chief designer, Jonathan Ive, amplified the mantra in explaining, “[simplicity] involves digging through the depth of the complexity.”3

Simple is hard, but simple is effective. While it is impossible to know what sways a judge,4 a concise, well-organized, and well-supported oral argument—one that digs through the depth of the complexity and resolves into a simple deductive conclusion—is the most effective tool of the trial lawyer. Sounds good, but how do you prepare and make effective use of this tool before a trial judge?

Analyze and know your forum. Know the courtroom set-up and decide how best to present your argument in that forum. You must decide where to stand, where to display demonstrative exhibits, what technology to use and how to use it. If you are visiting an unfamiliar courthouse, talk to the bailiff and the clerk to understand “how things are done.” To use an old political axiom, know the shape of the table.

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2. Apple’s chief designer, Jonathan Ive, amplified the mantra in explaining, “[simplicity] involves digging through the depth of the complexity.”
3. Simple is hard, but simple is effective. While it is impossible to know what sways a judge, a concise, well-organized, and well-supported oral argument—one that digs through the depth of the complexity and resolves into a simple deductive conclusion—is the most effective tool of the trial lawyer. Sounds good, but how do you prepare and make effective use of this tool before a trial judge?
4. While it is impossible to know what sways a judge, a concise, well-organized, and well-supported oral argument—one that digs through the depth of the complexity and resolves into a simple deductive conclusion—is the most effective tool of the trial lawyer. Sounds good, but how do you prepare and make effective use of this tool before a trial judge?
Be familiar with the Court’s process. Each jurisdiction is different in some way. You must know the local rules and procedures. If there is no applicable rule, what is considered good practice in the particular court, or what is preferred by the judge? You should never leave such important details to chance. Discovering that information is fairly easy and only requires a well-placed telephone call. For example, is a brief supporting the motion required or expected? Will the judge see the trial brief before the hearing? How can you get the brief to the judge before the argument? You must also know how much time you have for the argument, whether at trial or on a motion, and you must respect that limitation. Orchestrating the presentation sets the tone for your argument and failing to follow the rules or local practice tells the judge volumes about you.

Every judge wants to make the right decision and is “hungry” for the precedent that leads to resolution of the issue. Never approach or leave an argument with the need for the judge to find additional authorities to make a decision.

Present authority for your position. You must have authority for your position. Every judge wants to make the right decision and is “hungry” for the precedent that leads to resolution of the issue. Never approach or leave an argument with the need for the judge to find additional authorities to make a decision. Whether in a supporting brief or in the argument, you should direct the judge to the particular aspects of a cited case that make it an applicable authority. This is a fundamental step that should not be skipped. It is not practical to expect the judge to read and analyze the precedential value of an authority during the argument. The judge is really not interested in doing your job! It happens frequently, it’s not fair to the judge, and it leaves too much to chance if you care about making an effective argument. When a judge requests authority for a requested action, never rely upon “that’s the way it’s always done” as support for your position. Worse, never respond with, “that’s the way the other judges do it.” I always wonder which law school “teaches” that response! It really happens more often than you can imagine. Lastly, don’t assume that the judge knows the authority for your position, no matter how routine the issue is to you. Even for the most routine issues, make sure you know and cite the authority.

Briefs can help! If you have decided to file a brief, or if a brief is required or expected, focus on how your brief can assist the trial judge in understanding your argument and agreeing with you. It should “walk” the judge through your argument in a deductive format and must be concise, well-organized, researched, edited and yes, simple. Sometimes an outline or bullet format is a better means to communicate your message than the traditional brief format. If effectively prepared—and that includes the format and the headers—the brief is a valuable reminder to the judge of the facts and authorities supporting your argument. Editing is an important skill that may frustrate your legal assistant but will pay dividends in formulating an effective supporting brief. Most often, a twenty page brief (albeit permitted by the rules) sends the message that the attorney has not spent enough time thinking about the issues and solutions to have molded it into a simple deductive argument. Moreover, you should wonder if the judge would have the time to read that brief. Leave the appellate brief for the appellate court.

Use a building blocks argument. Your goal
is to get the judge to “yes.” The most effective way to do so is to present a building blocks or step-by-step argument (if A then B, if B then C . . .) that incorporates the authority for your position and concludes with the solution to the issue. Never risk your case by making abstract arguments that the decision maker may not follow or be able to understand. Choose your issues wisely and stick with them. The scattershot argument communicates that you are not confident in your position and confuses the issue. Alternative arguments may be necessary, but they should be limited and well-supported. If exhibits or diagrams would assist in explaining a complex scenario, then prepare them to simplify the issue or fact pattern. Do not fall into the old belief that demonstrative exhibits are only for juries. The ultimate goal is to present an argument to the judge that ties the facts and issues together and presents a concise, logical, and supported conclusion.

**Put yourself in the judge’s position.** Prepare your argument from the perspective of what you would need to make the decision in this case. Remember the forum, the court’s process, time limitations, and even the number of cases the judge might hear in a day, as well as the judge’s desire to decide the case “from the bench.” Trial judges hear cases every day. There typically are no “reading days,” so the trial judge wants to decide the matter from the bench if possible to avoid a backlog of cases. Remember this is your case and you have “lived” with it prior to the argument, sometimes for extended periods. The judge may have just seen the file for the first time as the argument begins. Don’t assume the judge has read your brief, and even if the judge has read the brief, don’t assume that he or she remembers your key points. Routinely summarize the facts and the issues succinctly. Winning the case means simplifying the complexities and presenting a deductive and well-supported argument that persuades the judge to agree with you. Good lawyers don’t leave that process to chance.

**Never be distracted by your opponent.** Keep your focus on the decision maker, always. If you are interrupted by opposing counsel, ask the judge for assistance. Never be lured into a verbal exchange with opposing counsel during your argument. That exchange, whether merited or not, can never help and often hurts your argument. It is important to remember to stay on point.

Some of these points are basic, but it’s important to revisit them. At times, whether brought on by fatigue, frustration, lack of time, or the insistence of clients, we tend to forget the basics, take shortcuts, or abandon our training. As those circumstances repeat themselves, we develop bad habits and need to be reminded that the basic techniques are the keys to success. In the football vernacular, all the complexities of the sport boil down to “blocking and tackling.” Revisit and practice your basics in preparing an argument, and for the benefit of your case and the judge, “make it simple.”

**ENDNOTES**

3. Id.
4. Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court 524 (2010).
6. Excerpted from quote attributed to Vince Lombardi
Can a defendant introduce medical records without testimony by the health care provider?  
Yes, in certain circumstances. Virginia Code Section 16.1-88.2 provides that, in a civil suit tried in General District Court or appealed to the Circuit Court by a defendant, either party can introduce medical records and invoices upon compliance with the statute’s requirements. The statute requires a sworn statement from the provider that the person named was treated or examined by the provider, that the information in the records is true, accurate, and fully descriptive of the nature and extent of the person’s injuries, and that the statement of costs is true and accurate. In addition, Section 18.1-88.2 requires the party intending to introduce the records and affidavit to provide copies of the records and written notice of intent to introduce the records ten days in advance of the trial.

In a personal-injury action, can a plaintiff testify that he did not seek additional treatment because he lacked health insurance?  
No. The collateral-source rule prohibits introduction of evidence regarding “compensation or indemnity received by a tort victim from a source collateral to the tortfeasor.” Shilling v. Aspinall, 235 Va. 472, 474, 369 S.E.2d 172, 174 (1988). Instruction Number 9.015 of the Virginia Model Jury Instructions – Civil states that “[t]he presence or absence of insurance or benefits of any type, whether liability insurance, health insurance, or employment-related benefits for either the plaintiff or the defendant is not to be considered by you in any way . . .”

Is a plaintiff’s failure to wear safety lap belts and shoulder harnesses evidence of contributory negligence in a personal-injury action arising out of an automobile collision?  
No. Virginia Code Section 46.2-1094 requires any driver or adult occupant riding in the front seat of a motor vehicle to wear the appropriate safety belt system. However subsection D of the statute specifically provides that a violation of this requirement does not constitute negligence, and cannot be considered in mitigation of damages, admitted into evidence, or commented upon by counsel in any action seeking damages for injuries arising from the operation, ownership, or maintenance of a motor vehicle. Therefore, a plaintiff's failure to wear the safety-belt system does not constitute evidence of contributory negligence, and may not be admitted into evidence or mentioned by counsel in opening statement or closing argument.

Can a party introduce a police accident report during the officer’s testimony in a civil or criminal trial?  
No. Virginia Code Section 46.2-378 prohibits these reports from admission into evidence at any civil or criminal trial arising out of a motor-vehicle accident. Therefore, even though the police officer or deputy who responded to the accident scene may testify at trial, the accident report is not admissible in evidence.

Kristine H. Smith is a partner at Edmund & Williams in Lynchburg.
Real Property

Case: Livingston v. Va. Dep’t of Transportation, Record No. 101006 (6/7/2012)

Author: Millette

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

disposition: Reversed

Facts: As part of the Beltway’s construction in the early 1960’s, VDOT straightened, narrowed, and relocated Cameron Run, a stream in Fairfax County. Over time, it filled with silt. The stream backed up during a rainstorm and inundated several homes. The plaintiff homeowners sued VDOT for inverse condemnation, claiming that its negligence in rerouting and maintaining the stream exacerbated the flooding’s severity. The trial court sustained the demurrer, holding that a one-time flooding event could not support a claim for inverse condemnation.

Ruling: On appeal, the SCOV reversed. It held that the trial court erred in holding that a one-time flooding event could not support a claim of inverse condemnation.

The SCOV rejected the other defenses that VDOT asserted.

• It held that the ruling could not be justified on the grounds that the flooding event was an extraordinary “act of God.” To be an act of God, the event must be the sole proximate cause of the injury. The homeowners’ complaint, however, clearly alleged that human agency was a proximate cause of the flooding. Thus, even assuming that a party could oppose an adverse-condemnation proceeding using an act-of-God defense—a case issue the SCOV expressly did not address—the alleged facts did not establish an act of God.

• It rejected VDOT’s argument that the homeowners—who did not buy or rent their properties until long after the construction of the Beltway—lacked standing. The SCOV noted that the gravamen of the homeowners’ complaint was that it was VDOT’s failure to maintain the stream, not its initial construction of the Beltway, that caused the flooding.

• The SCOV rejected VDOT’s argument that an inverse-condemnation “damage” claim must allege that the government took a particular intangible property right (e.g., an easement) from the owner. Although previous cases allowed the owner to base an inverse-condemnation claim on the impairment of an intangible property right, none of them required that the owner show an injury to an intangible property right. The SCOV held that a property owner can base an inverse-condemnation action on physical damage to the property.

• The SCOV rejected VDOT’s argument that it was the county’s rapid urbanization, not the poor maintenance of the stream, that caused the property damage. It held that this was a question of fact properly reserved for the jury.

• It rejected VDOT’s argument that the homes were not damaged “for public use” inasmuch as the plaintiffs did not allege purposeful action by the government. The SCOV held that nothing in the state constitution—or in SCOV precedent applying it—barred a homeowner from recovering for the government’s failure to act, rather than act. A government’s failure to act can give rise to a constitutional obligation to pay just compensation.

• It rejected VDOT’s argument that the “use” in question was not “public.” The SCOV noted that the stream’s relocation and narrowing was part of the Beltway project and was necessary for the continued operation of the road.

• Finally, the SCOV rejected VDOT’s argument that inverse-condemnation claims do not encompass damage to personal property. It noted that earlier cases had recognized claims for injuries other than to land. But it held that, to be compensable, such property must be “appurtenant” to the real estate.

Justices McClanahan and Goodwyn dissented.

Key Holding(s):

• A property owner can base an inverse-condemnation claim on a one-time flooding event.

• To be an “act of God,” the sole proximate cause of injury must be the act of God.

• An owner can base an inverse-condemnation claim on physical damage to property, not just the encroachment on intangible property rights.

• Injuries caused by government negligence can give rise to a compensable inverse-condemnation claim.

• A party can bring an inverse-condemnation claim for damage to personal property if the personal property is appurtenant to real estate.

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Civil Procedure

Case: Piney Meeting House Investments, Inc. v. Hart, Record No. 111548 (6/7/2012)

Author: Mims

Lower Ct.: Spotsylvania County (Beck, David H.)

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

Facts: Plaintiffs had an easement over defendant’s land. Plaintiffs alleged that the defendant had encroached on this easement with various obstacles, including an electric box, generator, well, propane tank, trees, and mulch. The defendant admitted that the electric box and generator interfered with the plaintiff’s use, but denied that the other items did so.

The trial court referred the matter to a commissioner, who found that the electric box, the generator, the mulch, and the trees encroached on the easement, but that the underground well and propane tank did not (except for the tank’s above-ground cap).

The plaintiffs filed exceptions with the circuit court, objecting to the findings regarding the well and the tank, and arguing that they were entitled to attorneys fees because defendant had denied their request that defendant “admit that you have no defenses to Plaintiff’s claims.” The circuit court ordered the defendant to remove all obstructions—including the well and the propane tank—and it awarded plaintiffs attorney’s fees and costs.

Ruling: The SCOV reversed the ruling that the defendant had to remove the well and the propane tank. It held that “the owners of a servient estate may make reasonable use of land burdened by an easement of definite width.” And an encroachment is not “material” where it neither narrows the easement nor unreasonably interferes with its use.

The SCOV also held that the trial court should have deferred to the commissioner’s factual finding, supported by the evidence, that the well and propane tank did not encroach.

The SCOV likewise reversed the attorney’s fees award, noting that plaintiffs’ request that defendant admit that it had no defenses “was not a proper discovery request under Rule 4:11” so there was, under Rule 4:12(c)(4), a “good reason” why defendant did not admit that it had no defenses.

The SCOV affirmed the court-costs award, however, as the plaintiffs had substantially prevailed.

Key Holding(s):

• Owners of a servient estate may make reasonable use of an easement of definite width.

• A request for admission asking that defendant admit that it had “no defenses to Plaintiff’s claims” is improper, and a defendant’s refusal to admit this does not entitle a later-prevailing plaintiff to recover its attorney’s fees.

Land Use

Case: Town of Leesburg v. Long Lane Assocs. Limited Partnership, Record No. 111658 (6/7/2012)

Author: Goodwyn

Lower Ct.: Loudoun County (Brown, J. Howe)

Disposition: Reversed

Facts: Property owner filed an action challenging the rezoning of an abutting parcel. The two properties had once been part of a single tract. Before subdividing, the prior owner had proffered conditions to be imposed on the entire property. The proffers required the prior owner to build a street connecting two thoroughfares, and forbade the owner from using the parcel as a day-care center.

The owner of the abutting parcel obtained a special exception allowing day-care use and removing the requirement that it construct a connecting road. The owner challenged this special exception. The circuit court agreed with the challenge, and held that the owner had a vested right that prevented the Town from removing the conditions imposed on the abutting parcel without the owner’s consent.

Ruling: On appeal, the SCOV reversed. It held that under Code § 15.2-2307, Virginia’s vested rights statute, a landowner cannot acquire a vested right in a proffer. Furthermore, the statute only applies to the property owner, not to adjacent owners.

The SCOV also held that Code § 15.2-2303(A)—which states that proffers remain in effect until a subsequent amendment changes the parcel’s zoning—did not support the owner’s argument. It noted that the town had changed the zoning on the adjacent parcel. So the proffers were properly removed from the neighboring parcel, even though they remained in effect on the owner’s parcel. Nothing in the statute requires that all the owners of subdivided properties subject to a proffer agree to the rezoning of one of the subdivided parcels.

Key Holding(s):

• A property owner does not have a vested right in the continued application of proffers that apply to a neighboring parcel.

• Where an owner subdivides property that is subject to a proffer and then conveys the subdivided parcels to different persons, the locality can change the proffers on one of the subdivided parcels without first obtaining the consent of all owners of the subdivided parcels.

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Local Government

Case: Hill v. Fairfax County School Board, Record No. 111805 (6/7/2012)
Author: Koontz
Lower Ct.: Fairfax County (Alden, Leslie M.)
Disposition: Affirmed

Facts: Before a public meeting on the issue, the members of a school board exchanged emails about the closing of an elementary school. A citizen issued FOIA requests for these communications, which she alleged constituted an improper closed meeting. The school board withheld some of these documents and redacted others.

The citizen then brought a mandamus claim to compel the board to revisit its decision to close the school, and to obtain the documents that the school board had withheld from her. She sought costs and attorney’s fees on the FOIA claim.

The school board ultimately provided the emails. But the trial court held that the back-and-forth communications in the emails did not constitute a closed meeting. It denied the plaintiff’s request for attorney’s fees.

Ruling: The SCOV affirmed. It noted that FOIA defined “meeting” as an “assemblage.” The SCOV held that this connotes individuals being together at the same time, which did not occur in the emails.

The plaintiff argued that the multiple emails back and forth were part of a “ongoing discussion,” and, as such, possessed the requisite simultaneity. The SCOV rejected this argument. It characterized the trial court’s decision that the the emails were not an “assemblage” as a finding of fact. And it found that the trial court’s decision was not plainly wrong or without support in the evidence.

The SCOV also affirmed the trial court’s denial of attorney’s fees and costs. Although it was true that the plaintiff had succeeded in obtaining the “small number of documents” that the board had withheld, she failed in her ultimate purpose, which was to overturn the board’s decision to close the elementary school. Thus, she did not “substantially prevail” and was not entitled to attorney’s fees.

Key Holding(s):

- A back-and-forth series of emails does not constitute an improper closed meeting under FOIA because the lack of simultaneity means that the exchange did not constitute an “assemblage” for FOIA purposes.

Defamation

Case: Mansfield v. Bernabei, Record No. 111314 (6/7/2012)
Author: Goodwyn
Lower Ct.: Fairfax County (Ney, R. Terrence)
Disposition: Affirmed

Facts: Before filing a federal employment case, the employee’s lawyer mailed a demand letter to the employer, enclosing a draft complaint, with the offer of resolving the dispute informally. The complaint allegedly contained defamatory statements about the employer’s attorney. The employer’s attorney brought a defamation action against the employee and the employee’s lawyer.

The trial court held that the draft complaint was protected by absolute judicial privilege because it was published to interested parties in an attempt to resolve a prospective lawsuit.

Ruling: On appeal, the SCOV affirmed. It noted that Virginia’s “broad rule of absolute privilege” is not limited to statements at trial, but encompasses all proceedings of a judicial nature.

In reaching its decision, the SCOV adopted the position expressed in Restatement (Second) of Torts §§ 586 and 587, and the comments thereto. Under the Restatement’s analysis, a party and his attorney have absolute privilege in communications about--but preliminary to--a judicial proceeding that is under serious contemplation. The SCOV limited the privilege to communications made to persons with an interest in the proposed proceeding.

Key Holding(s):

- A communication made before a party commences litigation is absolutely privileged against a claim for defamation where: (1) the communication relates to the legal proceeding that was contemplated in good faith and under serious consideration, (2) the statement was related to that proceeding, and (3) the communication was disclosed to an interested person.

Civil Procedure

Case: Nolte v. MT Technology Enterprises, Record No. 111490 (6/7/2012)
Author: Lemons
Lower Ct.: City of Richmond (Spencer, Margaret P.)
Disposition: Aff’d in Part, Rev’d in Part

Facts: In a business-tort action, the trial court sanctioned the defendants for their failure to respond to discovery, and barred them from either (1) opposing plaintiff’s claims or (2) introducing evidence to support their defenses (including cross-examining plaintiff’s damages witnesses). It also entered default judgment against one of them.

The jury returned a large verdict. Defendants moved to set
Facts: Plaintiff tenant brought a warrant in debt against her landlord, and others, asserting that they wrongfully withheld her security deposit. The general district court ruled in favor of defendants, and the plaintiff appealed to circuit court, which also ruled in defendants’ favor.

Plaintiff filed a motion for reconsideration, making the argument she now advanced on appeal. But she failed to bring the matter on for a hearing and the circuit court did not rule on the motion. The plaintiff appealed and filed a written statement of facts. The written statement of facts did not contain any details about the arguments presented at trial or the basis for the trial court’s ruling, and did not mention the motion for reconsideration.

Ruling: The SCOV dismissed the appeal under Rule 5:25. It held that the written statement of facts did not show the arguments made at trial or the basis for the trial court’s ruling. It further held that there was nothing in the record showing that the plaintiff had brought her motion for reconsideration to the attention of the trial court.

The SCOV observed that one of the purposes of Rule 5:25 was to force a party to state its grounds for an objection and thereby to give the trial court the opportunity to rule intelligently—and to correct—any asserted error. Plaintiff failed to do so either at trial (because there was no mention of the arguments in her written statement of facts) or in her motion for reconsideration (which the plaintiff never brought on for a hearing and upon which the trial court never ruled).

Because nothing in the record showed that plaintiff gave the trial court the opportunity to rule on her assignments of error, she waived those arguments under Rule 5:25.

Justice Mims dissented.

Key Holding(s):
- Merely filing a motion in the trial court’s clerk’s office does not preserve an issue for appeal. The party also must place the motion before the trial court and obtain a ruling on it.

FRAUD

Case: Murayama 1997 Trust v. NISC Holdings, LLC, Record No. 111337 (6/7/2012)
Author: McClanahan
Lower Ct.: Fairfax County (Thacher, Jonahan)
Disposition: Affirmed

Facts: To resolve a previous business-tort dispute, the plaintiff agreed to sell its shares in one of the defendant corporations. The settlement agreement represented that the shares were worth $1 million, and defendants told the plaintiff that they were worth $2 million. As part of the settlement, plaintiff sold them for $2 million. The settlement agreement waived all causes of action arising under it. And it contained disclaimers to the effect that the stock might be worth more than the agreed-upon purchase price. Plaintiff was represented by counsel in that action.
At the time the parties executed the settlement agreement--and unbeknownst to the plaintiff--the defendants were in the process of selling their business to IBM. IBM ultimately paid $367 million for it. If plaintiff had not sold its shares, it would have realized $9 million from this sale. Plaintiff sued defendants for fraud seeking the $7 million difference plus $350,000 for punitive damages. Plaintiff also asserted claims for negligent misrepresentation, breach of fiduciary duty, abuse of process, and unjust enrichment.

The trial court sustained the defendant’s demurrer, finding that the plaintiff’s allegations failed to establish that it had reasonably relied upon (1) the defendants’ silence about the sale and (2) the defendants’ representation of the shares’ value.

Ruling: On appeal, the SCOV affirmed. It noted that, in the settlement-agreement context, a party asserting fraud by the other party must establish “justifiable reliance”—i.e., that it had the right to reasonably rely on the other party’s misrepresentation.

Quoting its earlier decision in Metrocall of Delaware, Inc. v. Continental Cellular Corp., 236 Va. 365, 373-74, 437 S.E.2d 189, 193 (1993), the court held that “there is ‘no logical basis’ for parties who are ‘represented by counsel and involved in an adversarial relationship’ to expect ‘full disclosure to the adverse parties, prior to settlement.’”

Thus, it held that “parties to a settlement agreement that were in an adversarial relationship and represented by counsel at the time of negotiation and settlement . . . will be held to [a] reasonable reliance standard.”

In light of the earlier litigation, the plaintiff had every reason to be skeptical of the defendants’ actions and representations. Upon the pleaded facts, the plaintiff—as a matter of law—could not have reasonably relied on the defendants’ representations vis-à-vis the share price. Because the settlement contained a full release, the trial court correctly sustained the defendants’ demurrer.

The SCOV also held that the trial court’s suspension of discovery pending disposition of the demurrer was not an abuse of discretion.

Key Holding(s):
- In negotiating and executing a settlement agreement with an adverse party, a party who is represented by counsel will be held to a reasonable-reliance standard.

Workers’ Compensation

Case: Napper v. ABM Janitorial Servs.-Mid Atlantic, Inc., Record No. 111300 (6/7/2012)

Author: Lemons

Lower Ct.: Arlington County (Kendrick, Benjamin N.A.)

Disposition: Reversed

Facts: Building owner leased space to tenant, who operated a call center. The lease required the building owner to clean the common areas and the lessee’s office space. The building owner hired a company to manage the property. The property-management company, in turn, hired a maintenance company to clean the building.

A puddle of liquid in the building’s lobby caused one of the lessee’s employees to fall and injure herself. The employee brought a negligence action against the maintenance company and the management company. The defendants filed a plea in bar, contending that the plaintiff was a statutory co-employee of the defendants and, as such, was barred by the workers’ compensation statute’s exclusivity provision.

The trial court sustained the plea. It reasoned that janitorial services were an integral part of the lessee’s business and so defendants were plaintiff’s statutory co-employees.

Ruling: On appeal, the SCOV reversed.

In the workers’ compensation context, courts use the “stranger to the work” test to determine whether a person is an “other party” (and, thus, amendable to suit). Courts examine whether the independent contractor was performing work that is part of plaintiff’s employer’s trade, business, or occupation.

It is not enough that the independent contractor provides a service that is essential to the plaintiff’s employer’s business—it must perform work that is part of the plaintiff’s employer’s business.

Applying that principle, the SCOV held that the defendants’ provision of cleaning services to the call center was not a part of the call center’s trade, business, or occupation. Although janitorial services might be essential to every business, they are not “part of” every trade, business, or occupation. Indeed, there was no evidence that any of the lessee’s employees did any janitorial work. Accordingly, the plaintiff was not a statutory co-employee with the defendants.

Key Holding(s):
- To determine whether an independent contractor is a statutory “co-employee” or, instead, an “other party” for workers’-compensation purposes courts apply the “stranger to the work” test. Under this test, courts examine whether the independent contractor was performing work that was part of plaintiff’s employer’s trade, business, or occupation.

Evidence

Case: Funkhouser v. Ford Motor Co., Record No. 111207 (6/7/2012)

Author: McClanahan

Lower Ct.: Albemarle County (Peatross, Paul M., Jr.)

Disposition: Reversed

Facts: An electrical fire in the dash of a Ford Windstar mini-
van killed a three-year-old child who was playing in it. Plaintiff alleged that Ford knew of the danger of “key-off dash area electrical fires” in Windstar minivans but failed to warn him about this.

The plaintiff sought to introduce evidence of seven other Windstar fires that had occurred before the incident giving rise to the suit. Defendant filed a motion in limine to exclude this evidence, which the trial court granted. The court reasoned that because the plaintiff had not identified a specific mechanical cause for the fire, he could not establish that the same mechanical defect caused the earlier fires. For this reason, the trial court held, it was improper to charge Ford with actual notice of a defective condition requiring a warning. Thus, it held, evidence of those earlier fires was inadmissible.

The trial court also barred plaintiff’s expert from mentioning the studies when offering his opinion.

Ruling: On appeal, the SCOV reversed in part.

It noted that evidence of other similar occurrences is admissible to establish the defendant’s knowledge of the relevant defect. But such other occurrences must occur under substantially the same circumstances and be caused by the same or similar defects or dangers as those in issue. Moreover, the evidence is admissible only for the purposes of establishing notice.

Because the plaintiff brought a failure-to-warn claim—not a defective-design claim—the SCOV held that he did not need to establish that the other incidents had identical mechanical causes as the subject one. He needed only to show that the fires occurred under substantially the same conditions as the subject fire and were caused by the same or similar defects.

The court held that four of the seven reports met this criteria, as they were electrical fires originating in the dashboard area when the key was out of the ignition. The remaining three reports were inadmissible, as there was no evidence of an investigation into the cause or origin of these fires. The plaintiff’s expert could testify about the four admissible fire instances, but not about the three others. Nevertheless, the expert still could rely on the three inadmissible fires, in formulating his opinion, provided that the information or data about them was of a type normally relied upon by others in that field of expertise.

Justices Powell, Kinser, and Goodwyn dissented.

Key Holding(s):

• In a failure-to-warn personal-injury case, evidence of prior similar instances is admissible to show the defendant’s notice of a defect only where the incidents arose under substantially the same conditions and were caused by the same or similar defects as the incident in question.

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**Personal Injury**

**Case:** Cline v. Dunlora South, LLC, Record No. 110650 (6/7/2012)

**Author:** Goodwyn

**Lower Ct.:** Albemarle County (Peatross, Paul M., Jr. (Judge Designate))

**Disposition:** Affirmed

**Facts:** A “dying, dead, or rotten” tree fell on plaintiff’s vehicle as he was traveling along a public highway, injuring him. The tree was on private land. The plaintiff sued the owner, claiming that the owner’s failure properly to maintain the property caused the accident. The defendant demurred, contending that Virginia does not recognize a personal-injury claim for trees that fall on public highways. The trial court sustained the demurrer.

Ruling: On appeal, the SCOV affirmed. It noted that, at common law a landowner did not owe any duty to those outside the land for injuries caused by natural conditions on the land—no matter how dangerous. Although various Supreme Court of Virginia cases have held that neighboring landowners may bring a nuisance claim arising out of encroaching vegetation, no case has held that landowners owe a duty of care to protect passersby on public highways from natural hazards on the property. The landowner’s only duty is to refrain from affirmatively acting in a manner that threatens passersby with hazards that exceed the peril that the state of nature presents.

Justices Lemons, Mims, and Powell dissented.

Key Holding(s):

• A landowner does not owe a tort duty of care to prevent natural conditions—including dead, decayed, or rotten trees—from injuring passersby on a public highway.

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**Workers’ Compensation**

**Case:** Giordano v. McBar Inds., Inc., Record No. 111771 (6/7/2012)

**Author:** Powell

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

**Disposition:** Aff’d in Part, Rev’d in Part

**Facts:** Husband and wife separated but later reunited. After reuniting, however, they kept their finances separate. Husband, who worked as an insulation subcontractor, was killed in a construction accident in which a materials supplier delivered two tons of drywall to the second floor, causing the structure to collapse.

The Workers’ Compensation Commission awarded funeral expenses to the husband’s estate, but denied benefits to widow, finding that she was not her husband’s “dependent.” The widow, suing as the personal representative of the employ-
disposition: Affirmed

The landowners demurred, arguing that neither the leases, the tenant’s estate, nor any statute imposed a tort duty on the landlords. The trial court sustained the landlords’ demurrers. Nevertheless, the SCOV reversed the trial court’s ruling as to the drywall supplier. It held that the exclusivity provision did not apply because the supplier was an “other party.” Its only role in the construction process was to deliver the drywall and place it in locations dictated by the workers.

Key Holding(s):

- Where the Workers Compensation Act applies, the exclusivity provision bars a plaintiff’s claim against the employer even if the Commission earlier had deemed the plaintiff, a non-dependent, to be ineligible for benefits.

- A supplier who does nothing more than deliver materials for the plaintiff’s employer and place them where told is an “other party” under the Act and is not protected by the Act’s exclusivity provision.

Premises Liability

Case: Steward v. Holland Family Properties, Record No. 110113 (6/7/2012)

Author: Lacy

Lower Ct.: City of Suffolk (Andrews, William C. (Judge Designate))

Disposition: Affirmed

Facts: Leased properties had cracking and peeling lead paint. Tenant’s son suffered lead poisoning, causing permanent mental and physical injury. The son, through his next friend, sued landlords for negligence per se, basing his claim on the facts that (1) the leases promised to supply applicable building and housing codes materially affecting safety, and (2) the pertinent building-code provision required that facilities with lead paint be maintained in a condition free of peeling, chipping, and flaking.

The landowners demurred, arguing that neither the leases, the common law, nor any statute imposed a tort duty on the landlords. The trial court sustained the landlords’ demurrers.

Ruling: On appeal, the SCOV affirmed.

Under the negligence-per-se doctrine, a statute may supply the relevant standard of care. In such circumstances, a violation of the statute is a per se breach of the standard of care. The issue in the case, however, was whether the landlords in the first place owed a tort duty of care.

The SCOV held that they did not. There was no common law duty because “[u]nder the common law, in the absence of fraud or concealment, a landlord has no duty of care to maintain or repair leased premises when the right of possession and enjoyment of the premises has passed to the lessee.” The SCOV held that the tenant, not the landlords, had the right of possession. It specifically held that the landlords’ limited right of entry to maintain and to repair the house did not constitute possession by the landlord. Thus, there was no common-law duty of care.

The SCOV likewise held that plaintiff could not base his claim on § 55-248.13(A)(1)--the provision in the Virginia Residential Landlord Tenant Act that requires landlords to comply with applicable building codes. The SCOV held that this statute did not create a tort duty of care.

Plaintiff, however, argued that the statute formed the basis for a negligence per se action. The SCOV rejected this argument, noting that a negligence per se claim requires an underlying duty of care. Although the cited statute might supply a standard of care, it does not supply a tort duty of care.

Finally, the SCOV rejected the plaintiff’s argument that the landlords negligently repaired the property, as plaintiff failed to allege any repairs involving the lead paint.

Key Holding(s):

- In a negligence-per-se case, the allegedly violated statute or regulation provides the standard of care but it does not provide the underlying duty. To bring a negligence-per-se action, the plaintiff must identify an existing tort duty of care.

Business Torts


Author: Lemons

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

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

Facts: The Plaintiff corporation was a navy consultant. It alleged that the defendants, its former employees, conspired to destroy the business and to steal business by improperly using Plaintiff’s confidential and proprietary information. It sought treble compensatory damages and $350,000 in punitive damages from each defendant.

Part of plaintiff’s claim was a claim for lost goodwill. Plaintiff’s expert defined goodwill as “the difference between the fair market value of the company, minus the fair market value of its identifiable assets.” Before trial, the company—along with its parent company—had been sold to Dell, Inc. The expert established the lost goodwill by: (1) calculating the total
goodwill of plaintiff and its parent by subtracting the value of the assets from the sale price, (2) determining how much of that goodwill Dell attributed to the plaintiff, rather than its parent, (3) allocating that goodwill among plaintiff’s contracts by dividing the goodwill by annual revenue, yielding a ratio of $2.57 of goodwill for every $1.00 of revenue, and (4) multiplying the lost revenue caused by the defendants’ departure by this $2.57 figure.

The plaintiff also sought compensation for the computer-forensic investigation it conducted to determine the extent to which the plaintiff’s confidential files and trade secrets had been compromised.

The jury returned a verdict for the plaintiff upon which the trial court entered judgment.

Ruling: The SCOV held that the plaintiff’s goodwill expert did not analyze the issue appropriately, and that the trial court erred in refusing to strike the claim for goodwill. The expert based his estimate of lost goodwill on the subsequent sale of the business—not on comparable other sales. Thus, the court held, the expert needed to show that the sale price to Dell reflected a loss of goodwill attributable to the conspiracy. Because plaintiff’s expert failed to do this, his testimony was insufficient as a matter of law to support an award of lost-goodwill damages.

The SCOV, however, rejected the defendants’ argument that treble damages and punitive damages were duplicative. It said that awarding both was appropriate where they involved separate claims with different legal duties and injuries. The conspiracy and Uniform Trade Secrets Act claims involved different legal duties and injuries, and so awarding both treble and punitive damages was appropriate.

Finally, the SCOV held that the plaintiff could recover the costs of the computer-forensic investigation. It rejected defendants’ argument that these represented litigation expenses, noting that (1) defendants failed to object at trial to the introduction of the detailed invoices, and (2) defendants made no effort to apportion forensic expenses for business purposes from those for litigation purposes.

Justices McClanahan and Powell concurred in part and dissented in part.

Key Holding(s):

- Where a business-valuation expert bases his lost-goodwill estimate on a subsequent sale involving the same firm, the expert must establish whether, and how much, the lost goodwill affected the actual sale price.

- A court may award punitive damages and treble damages concurrently if the two types of damages involve separate claims with different legal duties and injuries.

Fraud

Case: Orthopedic & Sports Physical Therapy Assoc., Inc. v. Summit Group Properties, Record No. 110849 (4/20/2012)

Author: Powell

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

Disposition: Reversed

Facts: A group of physical therapists entered into an arrangement with two physician groups—a cardiology group and an orthopedist group—to erect an office building. They planned to establish a separate entity, an LLC, that would own the building and lease back the space to the health-care groups.

At the time, the physical therapists received most of their referrals from the orthopedist group and had assumed that such referrals would continue in the new office building. But the physician group instead chose to create its own physical-
therapy practice alongside its existing orthopedic and medical practice. The physical therapists subsequently abandoned the premises, violating the terms of the lease.

The LLC that owned the building--whose members included the orthopedic physicians--sued the physical therapists for a breach of the lease. The physical therapists counterclaimed for fraud in the inducement, claiming that the orthopedist group had misled the physical therapists into believing that the orthopedist’s practice would continue to refer patients to it.

At trial, the court instructed the jury that to find that the LLC was liable for fraud, it needed to find that the LLC members authorized the fraudulent conduct. The physical therapists objected to this instruction, arguing that authorization was unnecessary where the action occurred in the “ordinary course of business.” The jury found for the LLC and awarded $187,000 in damages.

Ruling: On appeal, the SCOV reversed.

It agreed with the physical therapists that authorization by the LLC members was not necessary to bind the LLC where the LLC member’s actions were done in the ordinary course of the LLC’s business. And it found that the instruction given to the jury--which failed to mention the ordinary-course-of-business exception--was misleading.

In so ruling the SCOV held that a party is entitled to a jury instruction supporting his or her theory of the case if there is more than a scintilla of evidence to support the claim. Because there was more than a scintilla to support the physical therapists’ argument that the LLC member was acting within the scope of LLC business when he misled the physical therapists into entering into the lease, the trial court erred in not instructing the jury about the ordinary-course-of-business rule. It found that this was not harmless error, as the jury could have been misled into believing that the consent of all members was needed even where the act was done in the ordinary course of the LLC’s business.

The SCOV reversed and remanded for a new trial.

Key Holding(s):

- The fraudulent acts of an LLC member can be attributed to the LLC if the member’s actions were done within the ordinary course of the LLC’s business.

- A party is entitled to an accurate and complete jury instruction supporting his or her theory of the case where there is more than a scintilla of evidence to support it.

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**Contract**

**Case:** Environmental Staffing Acquisition Corp. v. B & R Construction Mgt., Inc., Record No. 111067 (4/20/2012)

**Author:** Powell

**Lower Ct.:** City of Portsmouth (Melvin, Kenneth R.)

**Disposition:** Affirmed

**Facts:** This case arose out of a construction project involving the Portsmouth Redevelopment and Housing Authority (“PRHA”). The developer entered into a contract with contractor. That contract required the contractor to procure a performance and payment bond. It also contained a provision that excluded third-party-beneficiary claims against the owner, PRHA. This provision did not, however purport to exclude such claims against the contractor.

Pursuant to its contract with the developer, the contractor procured a performance and payment bond. When a sub-subcontractor failed to pay for sub-sub-contractor’s work, the sub-subcontractor sought to make a claim on the bond. The bonding company, however, had gone out of business. So the sub-subcontractor sued the contractor, alleging that it was a third-party beneficiary of the contract between the developer and the contractor.

The trial court sustained the contractor’s demurrer, holding both that (1) there was no evidence that the contracting parties ever intended to make the sub-sub-contractor a third party beneficiary, and (2) the contact between the developer and contractor expressly disclaimed that there were any third-party beneficiaries to the agreement.

Ruling: On appeal, the SCOV affirmed. First, it struck two assignments of error as those assignments did not accurately state the trial court’s ruling and so, under Rule 5:17(c)(1)(iii), they were insufficient.

Next, it held that the trial court had erred in concluding that the contract explicitly barred third-party-beneficiary claims against contractor--the provision in question only barred third-party-beneficiary claims against PHRA and HUD.

Nevertheless, the SCOV held that this error was harmless because the sub-sub-contractor had failed to establish that it was a third-party-beneficiary to the agreement. Although the sub-sub-contractor incidentally benefitted from the contact’s bond requirement, the sub-sub-contractor failed to establish that the parties “clearly and definitely” intended to confer a benefit on it. Indeed, a contract provision explicitly stated that the rights were created solely for the benefit of the developer and its successors, including PHRA.

The sub-sub-contractor’s reliance on Code § 2.2-4337--which confers certain rights on providers of labor and material for public buildings--was misplaced because the statute did not alter contract terms. It had a different remedial mechanism.

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Key Holding(s):

- To be a third-party beneficiary to a contract, the contract must clearly and definitely express an intent to benefit that party.
- The fact that a party incidentally benefits from a contract does not, in itself, establish that it is a third-party beneficiary of a contract.
- Assignments of error that do not accurately express the order appealed from are “insufficient” under Rule 5:17(c)(i)(ii).

Real Property

Case: Mathews v. PHH Mortgage Corp., Record No. 110967 (4/20/2012)

Author: Mims

Lower Ct.: Nelson County (Gamble, J. Michael)

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

Facts: Plaintiff property owners conveyed a deed of trust to secure a HUD-insured note. Defendant PHH became holder of the note. When the owners defaulted on loan payments, PHH appointed a substitute trustee to foreclose on the note.

The owners then sued PHH alleging that, under 24 C.F.R. § 203.604—which they claimed that the deed of trust incorporated by reference—PHH needed to have a face-to-face meeting with them at least 30 days before commencing foreclosure proceedings. Because PHH had not had such a meeting, the owners claimed that the foreclosure was improper.

The trial court held that the deed of trust incorporated the regulation, but that the owners could not sue for breach, as they were the first to breach the contract. Moreover, it held that the regulation did not apply to the circumstances of the case because PHH did not have a “servicing office” within 200 miles of the property.

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

First, it held that the owners’ default on the note did not preclude them from enforcing the deed of trust’s conditions precedent. The SCOV noted that the primary purpose of a deed of trust was to allow the creditor to foreclose in instances of nonpayment. So if default on a note eliminated the owners’ ability to enforce the deed of trust’s conditions precedent, this effectively would mean that nonpayment was the only condition precedent in a deed of trust. But a “material breach” must be one that defeats an essential purpose of the contract. The main purpose of a deed of trust is to specify the conditions that occur after a default on the note, so a default on the note does not frustrate the purpose of the deed of trust, it furthers it. Accordingly, a default on the note should not bar enforcement of conditions precedent in a deed of trust.

Second, the SCOV held that the deed of trust incorporated the regulation. The deed of trust’s provision for acceleration of debt specifically stated that it was subject to regulations issued by the HUD Secretary. The fact that the contract did not state which specific HUD regulations applied did not prevent the regulation—which bars a lender from accelerating or foreclosing on a debt unless the lender satisfies certain conditions precedent—from applying to the case. So the regulation was a condition precedent to PHH’s foreclosing on the owners’ note.

Third, the SCOV held that the lender failed to comply with HUD regulations—including the “face-to-face interview” requirement. It held that the regulation applied because PHH had “branch offices” that were within 200 miles of the property. These were loan-origination offices, not servicing offices. Nevertheless the SCOV held that loan-origination offices were “branch offices” for regulation purposes.

The SCOV rejected a HUD “frequently asked questions” document, which came to the opposite conclusion. The SCOV stated that it did not need to defer to HUD’s informal interpretive statement because (1) the interpretation had not gone through the notice-and-comment process, and (2) the term “branch office” is unambiguous and encompasses loan-origination offices.

Because PHH had a “branch office” within 200 miles of the property, the regulation applied. And because PHH failed to comply with the regulation’s face-to-face interview requirement, the foreclosure was improper.

Key Holding(s):

- An owner’s default on a mortgage loan does not preclude him or her from enforcing the deed of trust’s conditions precedent.
- To incorporate a regulation into a contract, the parties need not identify the specific regulations they intend to incorporate.
- A court need not defer to agency pronouncements on the meaning of a regulation where: (1) the interpretation did not go through the notice-and-comment procedure, or (2) the language in question is unambiguous.

Personal Injury

Case: Burns v. Gagnon, Record No. 110754 (4/20/2012)

Author: Millette

Lower Ct.: Gloucester County (Long, R. Bruce)

Disposition: Reversed

Facts: Plaintiff was injured in a violent attack at a high school. The morning before the fight, one of the victim’s friends told the vice principal that the victim was going to get into a fight with another student sometime later that day. But the friend did not state who the other person was or when the
attack would occur. The vice principal stated that he would alert security about this, but failed to do so. Two hours later, the victim was attacked.

In addition to suing his attackers, the student sued the vice-principal, contending that he failed to protect him from the attack. The vice principal demurred, claiming that he did not owe the student a duty of care. The vice principal also asserted a sovereign-immunity plea in bar.

The trial court overruled the demurrer and denied the plea in bar. On the demurrer, the court held that the vice principal owed the student certain unspecified “duties.” The trial court rejected the vice principal’s sovereign-immunity defense because, it claimed, the vice principal was only acting in a ministerial capacity. The court likewise rejected the vice principal’s contention that he was immune under § 8.01-220.1:2, a statute that confers civil immunity on teachers.

At trial, the court allowed the plaintiff to present the deposition testimony of the person who had reported the potential fight to the vice principal. The witness was on active military duty in Georgia, more than 100 miles away. So the trial court held that, under Rule 4:7, the deposition testimony was admissible.

At the close of trial, the court refused to instruct the jury on gross negligence, finding that the facts would not support such an instruction. After the jury returned a plaintiff’s verdict with separate amounts for each defendant, the court asked whether it was the jury’s intent that the damages be several, not joint. The jury said that that was its intent. So the trial court entered judgment against the three codefendants for the amounts that the jury specified.

Ruling: On appeal, the SCOV reversed in part.

It held that the vice principal did not have a tort duty to protect the student. It noted that the circumstances where the law will hold a person liable for failing to protect them adequately are rare, involving either (1) a circumstance where the defendant knew, or should have known, that the victim was in great danger of serious bodily injury or death, or (2) where the defendant had a special relationship with the victim--e.g., a hotel-patron relationship. Neither of those circumstances was present, and the SCOV refused to expand the failure-to-protect cause of action to new circumstances.

Nevertheless, the SCOV held that the vice principal owed a duty to supervise and care for the plaintiff. It stated that Burns could be found liable only if he failed to discharge his duties as a reasonably prudent person would.

The SCOV also held that the vice principal could be held liable under the theory that he assumed a duty to investigate the potential fight and to alert security to it. Adopting the position advanced in the Restatement (Second) of Torts § 324A, it held that the plaintiff could prevail in these circumstances if, in addition to assuming those duties, the vice principal’s conduct (1) increased the risk of the harm; (2) assumed the duties that a third person owed to the victim; or (3) caused others to rely on his assuming the duties.

The SCOV rejected the vice principal’s contention that he was immune under § 8.01-220.1:2. The statute applies only to “teachers” and, under ordinary usage, the vice principal was not a “teacher.”

It also rejected the vice principal’s claim of immunity under Code § 8.01-220.1:2, which provides immunity for the good-faith reporting of bullying. Plaintiff sued the vice principal precisely because he did not report the matter to security, not because the vice principal did so. So the statute did not apply.

Nevertheless, as the employee of an immune entity, the vice principal enjoyed partial immunity. But this applied only to the extent that his actions were “discretionary.” The SCOV held that the vice principal’s response to the report of an impending fight involved the exercise of judgment and discretion. Among other things, he had to evaluate the credibility of the report, determine when to respond, and determine how to respond.

This immunity was not absolute, however. It did not apply if the vice principal was grossly negligent. And that was a question for the jury, not the court, to decide.

Finally, the SCOV rejected the vice principal’s evidence arguments, holding, inter alia, that (1) deposition testimony of a witness who was on active military duty in Georgia--more than 100 miles from the trial court--was admissible under Rule 4:7, and (2) the plaintiff’s use of an affidavit to refresh the recollection of the witness was proper, even where the witness commented on the affidavit.

Key Holding(s):

- School administrators do not owe a tort duty of care to protect students from the violent acts of others.
- School administrators have a duty to supervise and care for students in their charge.
- Where a party assumes a duty, he is liable to the victim if that assumption (1) increases the risk of harm, (2) constitutes the assumption of a duty owed by a third party to the victim, or (3) led others to rely upon that assumption.

Partnerships, LLCs, and Corporations

Case: Cattano v. Bragg, Record No. 110692 (4/20/2012)

Author: Millette

Lower Ct: Albemarle County (Shelton, William R.)

Disposition: Affirmed

Facts: The minority shareholder in a two-lawyer professional corporation suspected that the majority shareholder had engaged in financial improprieties. She demanded information about the firm’s finances. She sued the majority shareholder for breach of contract, to obtain the corporate records, for an accounting, and for dissolution. She brought derivative claims...
The trial court awarded the minority shareholder attorney’s fees for conversion and breach of fiduciary duty. And she sought attorney’s fees.

The majority shareholder argued that the minority shareholder lacked standing to bring a derivative action because she did not fairly represent the interests of the corporation. The trial court rejected this argument. The jury returned a $234,412.18 verdict for the firm on the derivative claim, of which plaintiff received 27.35% percent—representing her stake in the corporation. The jury also awarded the minority shareholder $10,416.66 on the breach of contract claim, and $7,409.90 on the dissolution claim.

The trial court awarded the minority shareholder attorney’s fees on her corporate-records claim, and on her derivative claims.

Ruling: On appeal, the SCOV affirmed.

It held that the minority shareholder had standing under Code § 13.1-672.1(A) to bring the derivative claims, as she “[f]airly and adequately represent[ed] the interests of the corporation.”

It rejected the argument that a lone shareholder could not bring a derivative claim on her sole behalf. The SCOV noted that Virginia law does not recognize a close-corporation exception to derivative actions, and that other jurisdictions have recognized derivative actions where there is just a “class of one.”

The SCOV also rejected the majority shareholder’s argument that the minority shareholder did not fairly and adequately represent the firm. Citing the so-called “Davis factors” that the SCOV had adopted in Jennings. v. Kay Jennings Family Limited Partnership, 275 Va. 594, 659 S.E.2d 283 (2008), it held that—despite economic antagonism and the fact that the majority shareholder opposed the suit—the minority shareholder was not precluded from filing a derivative action. Rather, it held that in close corporations, courts should look to the “totality of the circumstances” and on whether the relief sought would benefit the corporation. As the minority shareholder was knowledgeable about the firm, as she was prosecuting the claim vigorously, and as her interests in the litigation aligned with the firm’s interests, she fairly and adequately represented the interests of the corporation.

The SCOV then held that maintaining a dissolution action did not bar the minority shareholder from bringing a derivative claim. Among other things, it was the majority shareholder’s actions in firing her—not her actions in bringing a dissolution suit—that was the ultimate cause of the firm’s dissolution.

The majority shareholder also argued that the trial court erred in not submitting the issue of standing to the jury. But even if it were appropriate for a jury to decide standing issues—a point that the SCOV did not resolve—a jury was unnecessary because the parties did not dispute the facts relevant to the standing issue. Accordingly, the trial court properly resolved the question.

Lastly, the SCOV held that the trial court properly awarded fees under Code § 13.1-773 and Code § 13.1-672.5(1), as the plaintiff had prevailed on the request for corporate records and the derivative action resulted in a substantial benefit to the corporation.

Justice McClanahan dissented.

Key Holding(s):

- A minority shareholder in a two-shareholder corporation can bring a derivative action against the other shareholder.
- In the close corporation context, the facts that (1) the shareholder bringing the derivative action is economically adverse to the other shareholders, and (2) the other shareholder opposes the action, does not mean that the plaintiff cannot fairly and adequately represent the corporation’s interests.

Civil Procedure

Case: Laws v. McIlroy, Record No. 110485 (4/20/2012)

Author: Lemons

Lower Ct.: Buckingham County (Blanton, Richard S.)

Disposition: Reversed

Facts: The Plaintiffs in two related personal-injury actions submitted undiverted nonsuit orders on January 8, 2010. Plaintiffs filed new actions on January 19, 2010. After doing so, they resubmitted nonsuit orders in the initial case. The court entered those nonsuits on February 4, 2010. Defendants moved to dismiss the refiled actions on statute-of-limitations grounds, arguing that the plaintiffs were not entitled to Code § 8.01-229(E)(3)’s six-month tolling provision because the nonsuits were entered after the plaintiffs had filed their second lawsuits. The trial court agreed and dismissed the actions.

Ruling: On appeal, the SCOV reversed. It held that Code § 8.01-229(E)(3)’s statement that a plaintiff “may recommence his action within six months from the date of the order entered by the court” encompassed situations where the court enters the order after plaintiff files the recommenced action.

It reasoned that, although the word “from” in “six months from the date of the order” indicates a starting point, the six months may be computed backward in time as well as forward in time. Because the plaintiffs refiled their actions within six months before the nonsuit, they were entitled to § 8.01-229(E)(3)’s six-month tolling rule.

Justices Millette, Kinser, and McClanahan dissented.

Key Holding(s):

- Actions filed within six months before a nonsuit or within six months after a nonsuit are timely under Code § 8.01-229(E)(3). The fact that the refiled action is commenced before the nonsuit does not exclude application of the six-month tolling provision.
**Estate and Trusts**

**Case:** Keith v. Lulofs, Record No. 110443 (4/20/2012)

**Author:** Powell

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

**Disposition:** Affirmed

**Facts:** Husband and wife—both of whom had a child from a previous marriage—executed wills in 1987 that were “mirror images” of each other. Each will left the estate first to the surviving spouse, and then equally to the two children. In 1996, after husband died, the wife executed a new will leaving her entire estate to her daughter. She also changed a life insurance policy to make her daughter the 100% beneficiary.

When wife died, the husband’s son brought suit to challenge the 1996 will. He claimed that when husband and wife prepared their wills in 1987, they intended for them to be mutual, reciprocal, and irrevocable. To support this claim, he presented testimony that his parents had told him that they intended for the wills to be mutually binding, that his father had mentioned this on other occasions, that his step-sister had told him that the wills were reciprocal, and that the life-insurance policy had been changed. The attorney who drafted the wills had no recollection of them. The trial court held that the evidence that the son presented was insufficient to establish that the husband and wife intended for their mirror-image wills to be irrevocable.

**Ruling:** On appeal, the SCOV affirmed.

**Key Holding(s):**
- The mere fact that two wills are “mirror images” of each other is insufficient to make them irrevocable.
- In a will contest, the Dead Man’s Statute precludes judgment where the party challenging the will fails to provide independent corroboration of his evidence.

**Evidence**

**Case:** Arnold v. Wallace, Record No. 110394 (4/20/2012)

**Author:** Mims

**Lower Ct.:** Fairfax County (Brodie, Jan L.)

**Disposition:** Affirmed

**Facts:** In a personal-injury action arising out of an auto-mobile accident, the accident victim had her physician testify about her injuries. The defendant then sought to introduce the plaintiff’s chart through this witness. The chart contained the hearsay statements of physicians other than the witness. But the defendant contended that the statements were admissible as business records.

The plaintiff objected on grounds that the defendant had not laid a proper foundation for the business-records hearsay exception. The plaintiff refused, however, to identify the deficiency. Referring to the defendant, the plaintiff said “That’s his job.” The trial court overruled the objection and allowed the defendant to introduce the chart into evidence.

The plaintiff also objected to the defendant’s use of an expert who belonged to the same medical practice as an expert that the plaintiff previously had retained. During voir dire, the expert testified that the partner had not communicated any confidential information to her about the case. But the plaintiff argued that her review of handwritten notes in the chart disqualified her. The trial court did not disqualify the witness.

**Ruling:** On appeal, the SCOV affirmed.

On the foundation issue, the plaintiff argued that the chart was inadmissible because the defendant had not established that the statements therein were facts, not opinion. The SCOV rejected this argument, stating that the onus was on the objecting party to identify the passages within a business record that contained the allegedly inadmissible evidence. The SCOV held that the plaintiff had waived this objection by not identifying any such passage at trial.

The SCOV also upheld the trial court’s decision to allow the expert witness to testify on the defendant’s behalf. The fact that the expert belonged to the same practice group as one of the plaintiff’s experts did not automatically disqualify the expert. There was no evidence that plaintiff’s former expert shared any confidential information with defendant’s experts. And the plaintiff failed to establish that the handwritten notes contained confidential or privileged information.

**Key Holding(s):**
- A party objecting to the introduction of business records on the grounds that certain statements therein are opinion, not fact, must identify the offending statements or else he will waive the objection.
- A party may retain an expert who is employed at the same firm as one of the opposing party’s former experts, provided that the plaintiff’s former expert did not communicate any confidential or privileged information to that expert.
**Partnerships, LLCs, and Corporations**

**Case:** Russell Realty Assoc v. Russell, Record No. 110380 (4/20/2012)

**Author:** Lacy

**Lower Ct.:** City of Chesapeake (Smith, Randall D.)

**Disposition:** Affirmed

**Facts:** A brother and sister had interests in a partnership whose purpose was to manage real-estate and other investments. The sister’s son had an interest in the property and the sister wanted the son to play a role in the partnership’s management. The brother and sister disagreed on this issue and many others.

The stalemate interfered with partnership business opportunities, causing delay or cancellation of lucrative property deals. The brother brought a dissolution action under § 50-73.117(5), claiming that the differences between him, his sister, and her son had frustrated the partnership’s economic purpose and made management not reasonably practicable. The sister countered with an intervenor complaint seeking an equitable accounting, claiming that the brother had breached his fiduciary duties to the partnership, and seeking to remove her brother from the partnership.

After a lengthy bench trial, the trial court found that the brother had not violated any fiduciary duty and denied the sister’s request for an equitable accounting. It also found that the partnership’s economic purposes had been frustrated and it no longer could be operated within the terms of the partnership agreement. Accordingly, it ordered that the partnership be dissolved and its business winded up. The sister appealed the dissolution order.

**Ruling:** On appeal, the SCOV affirmed. It noted that there were three circumstances for dissolution under § 50-73.117(5), any one of which is sufficient to justify dissolution. These are: (1) the economic purpose is likely to be frustrated, (2) a partner’s actions regarding partnership business shows that carrying on in the business it is not reasonably practical; or (3) it is not otherwise practicable to operate under the partnership agreement.

The SCOV held that, as with the LLC statute, the standard for judicial dissolution of a partnership was “strict.” But it rejected the sister’s argument that dissolution under the “economic purpose” prong required a showing of poor financial status. Indeed, the comments to RUPA noted that the drafters deliberately omitted a proviso that required a showing that the partnership operated at a loss.

**Key Holding(s):**
- To dissolve a partnership under Code § 50-73.117(5)’s frustration-of-economic-purpose prong, it is not necessary to show that the partnership has operated at a loss.

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**Insurance**

**Case:** AES Corp. v. Steadfast Ins. Co., Record No. 100764 (4/20/2012)

**Author:** Goodwyn

**Lower Ct.:** Arlington County (Kendrick, Benjamin N.A.)

**Disposition:** Affirmed

**Facts:** A village on an Aleutian Island sued AES, a power company, and other defendants for causing global warming through emission of greenhouse gases, which the village claimed made sea ice melt earlier in the year. AES’s insurer, Steadfast Insurance Co., brought a declaratory judgment action to establish that the lawsuit was not covered because (1) the villagers’ complaint did not allege “property damage” caused by an “occurrence”; (2) the alleged injury occurred before inception of Steadfast’s coverage, and (3) the claims fell within the policy’s pollution provision. The Circuit Court granted Steadfast’s motion for summary judgment, which the SCOV had earlier affirmed.

**Ruling:** On rehearing, the SCOV again affirmed. It noted that, in coverage disputes, courts follow the “eight corner rule,” looking only to the allegations in the complaint and the terms of the insurance policy.

The policy defined “occurrence” to mean “an accident, including continuous or repeated exposure to substantially the same general harmful condition.” And the SCOV had previously held that “accidental injury” is one that happens “by chance, or unexpectedly.” It does not include the consequences of an intentional act, unless this is the result of “an unforeseen cause that is out of the ordinary expectations of a reasonable person.”

The village’s complaint asserted that AES “[i]ntentionally or negligently” released tons of greenhouse gases. And it asserted that global warming was the natural and probable consequences of AES’s intentional acts. Thus, the SCOV held that it was not an “accident” or “occurrence” and there was no coverage under the policy.

Justice Mims dissented.

**Key Holding(s):**
- In coverage disputes, courts apply the “eight corner rule,” looking only to the policy and the complaint in the underlying lawsuit.
- For CGL-policy purposes, an intentional act is not an “accident” or “occurrence” where the harm in question was the natural or probable consequence of the act, even if the insured did not actually foresee the harm when performing the action.

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Local Government
Case: Deerfield v. City of Hampton, Record No. 111144 (4/20/2012)
Author: McClanahan
Lower Ct.: City of Hampton (Parker, Westbrook J.)
Disposition: Affirmed

Facts: The city charter authorized a referendum process. Under this process, a committee of five persons would circulate a petition and file it with the city council. In the event the city council failed to repeal or amend the offending provision, the five-person committee could bring the matter before the circuit court to seek entry of an order calling for a referendum.

A committee was formed to circulate and file a petition for a referendum of the city council’s decision to allow development of certain beachfront property. After the committee filed the petition with the city, the town council repealed the offending ordinance.

The landowner, however, continued to develop the property in accordance with the now-repealed ordinance—citing the zoning administrator’s vested-rights determination. So the committee filed a declaratory judgment action to declare this conduct to be unlawful.

The circuit court held that the committee had standing, but ruled against it on the merits.

Ruling: On appeal, the Supreme Court reversed the trial court’s ruling on the standing issue.

Under the plain language of the city ordinance, the petition committee ceased to have any ongoing justiciable interest in the matter once it secured a repeal of the law that the petition opposed. Nothing in the city charter contemplated any further role for the committee after that point. Therefore, the committee lacked standing to participate in the later land-use challenge regarding that property.

Key Holding(s):
• Where a city ordinance authorized the creation of a five-person committee to organize a referendum of a city ordinance, but contemplated no further role of the committee after the city repealed the offending ordinance, the committee lacked standing to bring a land-use action.

Insurance
Author: Goodwyn
Lower Ct.: City of Richmond (Stout, Walter W., III)
Disposition: Affirmed

Facts: Manufacturer of infant formula brought a coverage suit for losses arising out of product contamination caused by the disintegration of water filters in the product line. The contamination caused melamine and filter materials to be present in the infant formula. Each of the three policies had language stating that liability for release of pollutants was not covered unless the discharge’s cause was itself a covered occurrence. But each of the policies also had separate exclusions for incidents involving “contaminants” or “pollutants”—exclusions that did not have the covered-cause carve-out. The manufacturer claimed that this created a conflict in the policies that should be resolved in favor of coverage. The trial court disagreed and entered judgment for the insurers.

Ruling: On appeal, the SCOV affirmed. It recited the rules that exclusions need to define their scope “clearly and unambiguously,” that exclusionary language will be construed against the insurer, and that the insurer bears the burden of establishing that the exclusion applied. But it noted that the exclusion containing the covered-cause carve-out did not conflict with the other exclusions for contaminants and pollutants. Among other things, it was an exclusion not a coverage grant. The fact that one exclusion had an exception to it did not create a conflict with another exclusion that lacked the exception. The exception did not expand coverage, it merely limited the scope of that one exclusion: “An exception to an exclusion does not create coverage where none exists.”

The SCOV rejected the manufacturer’s argument that the pollution exclusion was intended to encompass only traditional environmental pollution, not “indoor” pollution of the sort involved in the case.

Finally, the SCOV rejected the argument that there was no evidence of “contamination.” It noted that the parties had stipulated that filter material and melamine were present in the infant-formula batches.

Key Holding(s):
• An exception to an exclusion does not expand coverage and so does not conflict with other exclusions that encompass situations where the exception applies.

Intentional Torts
Case: Wyatt v. McDermott, Record No. 111497 (4/20/2012)
Author: Millette
Lower Ct.: U.S. Dist. Ct. (E.D. Va.)
Disposition: Certified Question Answered

Facts: Plaintiff was the child’s biological father. During her pregnancy, the mother assured the father that they would raise the child together. Unbeknownst to the father, however, the mother and her parents hired a lawyer to assist with an adoption. The lawyer instructed the mother to state, falsely, on an adoption form that she did not know the father’s address.

The mother hid the child’s birth from the father and signed an
affidavit of paternity identifying the father. Again, however, she stated that she did not know his contact information. Two days later, with the help of an adoption agency, the mother relinquished custody to the adoptive parents.

The father brought an action in federal district court against the adoptive parents, the adoption agency, and the lawyers involved in the matter. Among other causes of action, the father brought a claim for tortious interference with parental rights. The United States District Court for the Eastern District of Virginia certified to the SCOV two questions: (1) whether there was a cause of action for interference with parental rights, and (2) if so, what were its elements.

Ruling: The SCOV held that there was a cause of action for tortious interference with parental rights. Although no Virginia cases dealt with the issue, the SCOV noted that the pre-1607 common law of England (which Virginia law had incorporated under Code § 1-20) recognized such a right, as had Virginia’s sister states.

Citing a 1998 West Virginia case, the court held that the elements of the cause of action were: (1) the parent has the right to a relationship with the minor child, (2) a person outside the parent-child relationship interfered with this right by removing or detaining the child, or otherwise preventing the parent from exercising parental rights, (3) the interference harmed the parent’s relationship with the child, and (4) damages resulted from such interference.

The old English claim applied only to fathers and sons and compensated the father only for the loss of the son’s services. But the SCOV updated the cause of action to include gender equality and compensation for emotional harms.

To prevent abuse of this cause of action between parents, the SCOV held that parents have claims against only non-parents. And it recognized an affirmative defense in circumstances where the defendant acted in good faith.

Justices Mims, McClanahan, and Goodwyn dissented.

Key Holding(s):
- Virginia law recognizes a cause of action by a parent against a non-parent for tortious interference with parental rights.

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MARCH SESSION 2012

Estates and Trusts

Case: St. Joe Company v. Norfolk Redevelopment and Housing Authority, Record No. 102342 (3/2/2012)

Author: Goodwyn

Lower Ct.: City of Norfolk (Doyle, John R., III)

Disposition: Affirmed

Facts: Plaintiff, the owner of development company, paid a real-estate-services company certain funds to pay a contractor. The agent deposited the funds into its operating account. One of the agent’s creditors, however, had a perfected security interest in the agent’s operating account. Exercising its rights as a secured creditor, the creditor withdrew the funds from the account.

The owner sued the creditor, claiming that there was a constructive trust on the funds, and that the creditor was unjustly enriched. The parties submitted the matter for summary judgment on stipulated facts, and the court granted the owner summary judgment on both its claims.

Ruling: On appeal, the SCOV affirmed. It held that when an agent is entrusted with funds for a particular purpose, those funds are impressed with a constructive trust in favor of the principal. If the funds are diverted into the hands of a third party, the principal can recover them—provided they can be traced and identified. This is so, even if the third party mixes the funds with other funds.

The funds given to the agent in this case were for a specific purpose—payment of contractors. The fact that the funds were placed in an operating account did not preclude a finding that the funds were held for transmission to the contractors.

The SCOV also rejected the argument that a plaintiff asserting a constructive trust must show fraud or improper conduct. Where, as in this case, it is inequitable for the third party to retain the funds, then a constructive trust will attach even if the funds had been acquired fairly and without any improper means.

Finally, the SCOV held that money can be distinctly traced—even when it is commingled with other funds, provided that the account never has less than the amount of the purported constructive trust. If the account falls below the amount, the trust extends only to the lowest account value after the imposition of the constructive trust. This is known as the “lowest intermediate balance” rule and is grounded on the fiction that when money is removed from the account subject to a constructive trust, the account holder first removes funds that are not impressed with the constructive trust.

Because the creditor’s account never fell below the amount of the constructive trust, the owner could recover the funds in full.

Key Holding(s):
- A party asserting a constructive trust over funds need not show that the constructive trustee used fraud or improper means to acquire the funds.

- Funds can be traced into a commingled account, so long as the account never falls below the amount of the constructive trust. If the amount in the account does fall below that amount, there is only a constructive trust for the “lowest intermediate value” of the account.
**Maritime Law**

**Case:** John Crane, Inc. v. Hardick, Record No. 101909 (3/2/2012)

**Author:** Lemons

**Lower Ct.:** City of Newport News (Foster, Aundria D.)

**Disposition:** Aff’d in Part, Rev’d in Part

**Facts:** This was an asbestos-mesothelioma case. Plaintiff’s decedent served in the Navy from 1959 to 1976, working on several different vessels—usually as a shipfitter or machine repairman. In that work, he was exposed to asbestos fibers, which caused his death from mesothelioma. Some of the vessels on which decedent worked went to sea; others were repaired in port.

Plaintiff sued 23 defendants. Before trial, plaintiff settled or nonsuited the 22 other defendants, leaving John Crane, Inc. (“JCI”) as the sole defendant. JCI manufactured asbestos-containing gaskets that decedent used while working on Navy ships. Decedent used gaskets manufactured by other companies, too, which were nearly indistinguishable from JCI’s gaskets. So, although there was evidence that the decedent used JCI gaskets, there was no evidence that JCI manufactured any particular gasket that the decedent worked with.

Before trial, JCI moved to exclude evidence of nonpecuniary damages. It argued that the decedent was a “seaman” for purposes of the Death on the High Seas Act (“DOHSA”). And it noted that the DOHSA precludes recovery of nonpecuniary damages. The trial court rejected this argument.

JCI also moved to exclude evidence that the decedent worked with JCI gaskets. The trial court rejected this argument.

Finally, the plaintiff argued that JCI’s expert—who was unable to tie the use of asbestos to any of the ships on which decedent worked—could not speculate about other asbestos-containing products to which the decedent might have been exposed. The trial court granted plaintiff’s request.

The jury returned a large verdict for the plaintiff, part of which included an award for nonpecuniary damages.

**Ruling:** On appeal, the SCOV reversed the trial court’s “seaman” ruling but affirmed its ruling admitting evidence that decedent worked with JCI gaskets.

The SCOV agreed with JCI that decedent was a seaman. It cited United States Supreme Court precedents that defined “seaman” as one who contributed to the function of the vessel or its mission and who had a substantial connection to a vessel or group of vessels. The SCOV observed that the decedent contributed to the mission of the vessels on which he served and that he had a substantial connection to those vessels. Thus, he was a “seaman.”

Reviewing United States Supreme Court maritime-law precedents, the SCOV also held that nonpecuniary damages were not available to a “seaman.” This was so whether the claimant was suing under general maritime law, under the Jones Act, or under the DOHSA. Thus, the trial court erred in allowing plaintiff to recover nonpecuniary damages.

The SCOV rejected JCI’s appeal of the trial court’s decision to allow plaintiff to introduce evidence of decedent’s exposure to asbestos. It noted that JCI’s argument on this issue had morphed into an argument about the sufficiency, rather than the admissibility, of this evidence. Because the admissibility issue was not briefed, and the sufficiency issue not preserved, JCI had waived its right to argue these points.

Finally, the SCOV held that the trial court properly limited the testimony of JCI’s expert. Because the expert could not tie the evidence to any ship that the decedent actually worked on, his opinions about decedent’s possible use of other asbestos-containing products was of marginal value. It was not an abuse of discretion to exclude it.

**Key Holding(s):**

- For purposes of maritime law, a “seaman” is one who contributes to the function or mission of a vessel and who has a substantial connection to one or other vessels.

- Nonpecuniary damages are not available to a seaman’s decedent who brings an action under the Death on the High Seas Act, under the Jones Act, or under general maritime law.

**Insurance**

**Case:** Christy v. Mercury Casualty Co., Record No. 102138 (3/2/2012)

**Author:** Koontz

**Lower Ct.:** Washington County (Lowe, C. Randall)

**Disposition:** Affirmed

**Facts:** A police officer was injured in a work-related car accident. The officer obtained some workers’ compensation benefits for the injuries, but the workers’ compensation insurer refused to pay for a certain surgical procedure, deeming it to be a pre-existing condition. The officer then sued the insurer of his two personal vehicles. The insurer refused to pay, citing a provision stating that the insurance did not apply “to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any [workers’] compensation law.”

The officer sued the insurer, but the trial court held that the workers’ compensation exclusion applied—even as to those injuries that the workers’ compensation insurer refused to pay.

**Ruling:** On appeal, the SCOV affirmed. It rejected the officer’s argument that the “to the extent” language operated merely as a bar to double recovery. Instead, it held that the language meant that there was no coverage whatsoever for claims that
were payable under workers’ compensation law—even if the workers’ compensation carrier refused to pay for the injuries in question. This was a limitation on the scope of coverage, not a limitation on the amount of coverage.

Justice Powell, joined by Justice Millette and Justice Mims, concurred in part and dissented in part.

**Key Holding(s):**

- A car-insurance policy provision that excludes coverage for injuries “payable” under workers'-compensation law applies to workplace injuries even if the workers-compensation carrier refuses to pay for certain treatments that the insured claimed were related to the accident.

**Civil Procedure**

**Case:**  [Bowman v. Concepcion, Record No. 102144](3/2/2012)

**Author:** Koontz

**Lower Ct.:** Wise County (Kilgore, John C.)

**Disposition:** Affirmed

**Facts:** In a medical-malpractice case, the plaintiff failed to obtain service within one year of filing suit. He obtained an ex parte order that (1) declared that the plaintiff had shown good cause for the delay and (2) purported to extend the time for service. Once served, the defendant moved to dismiss the case, explaining that he had been working in Wise County and the City of Norton during all relevant times and the plaintiff easily could have found him. The defendant also argued that the earlier ex parte order was void, not merely voidable.

The plaintiff, however, stated that it was not the unavailability of the defendant that made service difficult. Rather, it was plaintiff’s inability to find an expert who could provide the certification required by Va. Code § 8.01-20.1 in medical-malpractice cases.

The trial court found that the order extending the service deadline was void, not simply voidable. And it held that the plaintiff had failed to show the requisite due diligence under § 8.01-275.1 and Rule 3:5(e). In particular, it held that the defendant was readily accessible during the relevant period. The plaintiff’s inability to locate an expert did not excuse her failure to obtain timely service on the defendant. Accordingly, the trial court entered final judgment against the plaintiff.

**Ruling:** On appeal, the SCOV affirmed. As an initial matter, however, it rejected the trial court’s finding that the ex parte order was void, not simply voidable. Even though the statute did not authorize it, the trial court still had jurisdiction to enter it.

On the merits, however, the SCOV agreed with the trial-court ruling that the plaintiff had not shown due diligence. The SCOV rejected the plaintiff’s argument that § 8.01-20.1’s requirement for expert certification clashed with § 8.01-275.1’s requirement that plaintiff serve defendant within one year of filing suit. Rather, it held that the two statutes were “complementary” and that their purposes would be frustrated if a plaintiff could indefinitely defer service because it was unable to find a suitable expert. The “due diligence” required by Va. Code § 8.01-275.1 relates to due diligence in serving the defendant, not due diligence in locating an expert.

Justice Powell filed a concurring opinion.

**Key Holding(s):**

- A trial court may not prospectively extend a plaintiff’s time for obtaining service on a defendant. But such an improper extension is voidable, not void.

- For purposes of Code § 8.01-275.1’s one-year service requirement, a party does not exercise due diligence where the defendant is readily available to be served, but the plaintiff cannot locate a medical-malpractice expert willing to certify the case under Va. Code § 8.01-20.1.

**Civil Procedure**

**Case:**  [Wakole v. Barber, Record No. 102176](3/2/2012)

**Author:** Powell

**Lower Ct.:** Fairfax County (Ney, R. Terrence)

**Disposition:** Affirmed

**Facts:** In closing argument in a personal-injury suit, the plaintiff’s attorney presented a chart to explain the plaintiff’s damages request. The chart itemized categories of damages and provided a suggested damages value for each item. The chart then totaled these estimates to arrive at a total damages amount. The defendant objected to the plaintiff’s use of this chart, contending that it invaded the province of the jury and violated Va. Code § 8.01-379.1. The trial court overruled this objection and allowed plaintiff’s counsel to use the chart in her closing argument.

**Ruling:** On appeal, the SCOV affirmed. Although a plaintiff may not invite the jury to perform a per diem estimate of noneconomic damages, that does not mean a plaintiff cannot break down damages into their component parts (provided the evidence supports the damages claims).

The SCOV also rejected the plaintiff’s argument that § 8.01-379.1, by allowing a party to state the amount sued for, limits such discussion to a single number. It held that there was nothing in the statute stating that a plaintiff may only present the amount sued for only as a lump sum.

**Key Holding(s):**

- In closing argument, a plaintiff may break down a damages request into its component parts, provided there is evidence to support each damages category
Business Torts
Case: Collelo v. Geographic Services, Inc., Record No. 101411 (3/2/2012)
Author: Lemons
Lower Ct.: Fairfax County (Ney, R. Terrence)
Disposition: Aff’d in Part, Rev’d in Part

Facts: An employee of Geographic Services, Inc. (“GSI”), a “geonames” company, went to work for Boeing. While at Boeing, the employee worked on geonames-related projects and created software tools similar to those on which he worked at GSI. GSI sued the employee and Boeing, claiming breach of contract, violation of the Trade Secrets Act, and tortious interference with the employee’s contract.

At trial, GSI presented evidence regarding how much GSI’s value had decreased, GSI’s cost in developing the stolen trade secrets, Boeing’s unjust enrichment, and what reasonable royalties for the information would be.

The trial court granted the defendants’ motion to strike. It held that (1) the employee did not breach the non-solicitation provision in the contract because GSI and Boeing did not directly compete against each other, (2) GSI presented no expert evidence to establish contract damages, (3) GSI could not recover both the cost to develop trade secrets and the loss of value occasioned by their misappropriation, as that would amount to a double recovery, (4) GSI could not recover damages for loss of trade secrets because the trade secret’s value had not been diminished and the trade secret was not divulged to third parties, and (5) GSI could not recover punitive damages because there was insufficient evidence of willful or malicious conduct.

The employee also sought attorney’s fees under a contractual provision that, he claimed, entitled him to them. The trial court did not award him those fees.

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

Key Holding(s):
• In a claim under the Virginia Trade Secrets Act, a plaintiff need not show that the wrongdoer used the trade secret to compete with the victim.
• The Virginia Trade Secrets Act allows an aggrieved party to recover for types of losses other than competitive harm.
• In an appropriate case, a plaintiff under the Trade Secrets Act can establish damages by showing what reasonable royalties would have been or by showing what it cost the plaintiff to develop those secrets.

Civil Procedure
Case: Bing v. Haywood, Record No. 102270 (3/2/2012)
Author: Lemons
Lower Ct.: Middlesex County (Long, R. Bruce)
Disposition: Affirmed

Facts: On May 28, 2008, the plaintiff was arrested and transported to the Middle Peninsula Regional Security Center. While there, she was subjected to a body-cavity search. On May 21, 2010, the plaintiff brought suit against the persons who conducted the search, alleging assault and battery, illegal search, and intentional infliction of emotional distress.

Defendants filed a plea of the statute of limitations, arguing that plaintiff’s claims arose out of the “conditions of her confinement” and so were time-barred under Va. Code § 8.01-243.2’s one-year limitations on inmate claims. The trial court sustained the plea.

Ruling: On appeal, the SCOV affirmed. Code § 8.01-243.2 states that a suit “relating to the condition of a detained person’s confinement” must be filed within one year after the cause of action accrues or six months after all administrative remedies are exhausted.

The SCOV held that the plaintiff, a pre-trial detainee, was “confined” in a state or local correctional facility. And searching an inmate for contraband is related to the conditions of confine-
ment. So plaintiff’s suit was barred by § 8.01-243.2.

Key Holding(s):

- Code § 8.01-243.2’s one-year limit on inmate claims applies to pre-trial confinements.
- A claim arising out of a body cavity search for contraband relates to the conditions of confinement, and so is governed by § 8.01-243.2.

Attorney General Investigations

Case: Cuccinelli v. Rector and Visitors of the University of Virginia, Record No. 102359 (3/2/2012)

Author: Millette

Lower Ct.: Albemarle County (Peatross, Paul M., Jr. (Judge Designate))

Disposition: Affirmed

Facts: The state Attorney General issued two “Civil Investigative Demands” (“CID”) to the University of Virginia (“UVA”) pursuant to Virginia’s Fraud Against Taxpayers Act, Code §§ 8.01-216.1 to -216.19 (“FATA”). This statute allows the Attorney General to issue CIDs against any “person.” FATA defines person as “any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust.” Code § 8.01-216.2. The Attorney General claimed that UVA was a “person” because it was a “corporation” established by the Commonwealth.

The trial court held that UVA was a “person” under FATA, but that the CID that the Attorney General issued failed to adequately state the nature of the conduct that allegedly violated FATA.

Ruling: On appeal, the SCOV affirmed—but on different grounds. The SCOV noted that UVA was an agency of the Commonwealth. Citing various canons of statutory construction, the SCOV concluded that FATA did not authorize the attorney general to issue CIDs to agencies of the Commonwealth. Thus, the Attorney General lacked the authority to issue a CID to UVA.

Key Holding(s):

- Virginia’s Fraud Against Taxpayers Act does not authorize the Attorney General to issue civil investigative demands to a university that is an agency of the Commonwealth.

Civil Procedure

Case: Galumbeck v. Lopez, Record No. 102416

Author: Powell

Lower Ct.: City of Virginia Beach (Hanson, Edward W., Jr.)

Disposition: Affirmed

Facts: This was a medical-malpractice wrongful-death claim against a plastic surgeon in which plaintiff’s decedent died from aspiration pneumonia secondary to the surgery. The plaintiff presented evidence that when the decedent began to suffer pain, fever, and severe dizziness after the surgery, the decedent’s sister spoke to a nurse at the surgeon’s office, but that the nurse told her that these symptoms were normal. Decedent died later that day.

At trial, the defendant sought to present a “surgical log” that, he claimed, established that the nurse in question could not have answered the call. He also sought to introduce unpaid medical bills that showed that plaintiff did not pay for the surgery. The trial court denied both motions. But it allowed the plaintiff to present evidence of the bills themselves.

At trial, the plaintiff presented evidence showing that the anesthesiologist was not board-certified. Plaintiff likewise sought to introduce a copy of the defendant’s website, which falsely stated that the defendant used only board-certified anesthesiologists. The defendant objected to this, but the trial court admitted it into evidence.

Finally, the defendant claimed that there was juror misconduct inasmuch as a juror shook the hand of one of plaintiff’s experts and told him “good job.” When questioned in chambers, however, the juror testified that this would not impair his ability to judge the case impartially.

The jury returned a verdict for the plaintiff.

Ruling: On appeal, the SCOV affirmed.

On the juror-misconduct issue, it held that the defendant bore the burden of establishing the juror’s lack of impartiality, yet had not done so. The juror testified that he could remain impartial. As the defendant offered no evidence to counter this, the SCOV affirmed the trial court’s refusal to declare a mistrial on juror-misconduct grounds.

The SCOV also rejected the assignment of error regarding the trial court’s refusal to let defendant introduce the surgical log. It noted that the grounds for this ruling and counsel’s arguments on the point were not included in the record. Although the defendant later sought to “proffer” what the arguments were, and what the evidence would have been, this was done after the court had adjourned for the day and outside the presence of opposing counsel. Because opposing counsel did not acquiesce in or stipulate to the matters discussed in defendant’s purported “proffer,” this proffer did not preserve defendant’s arguments.

The SCOV similarly held that the defendant failed to preserve his objections to the introduction of evidence regarding defendant’s use, vel non, of only board-certified anesthesiologists. Although he raised the matter in a pre-trial motion in limine, he never asked to court to rule on the matter. And when he objected at trial to testimony regarding the anesthesiologist, the mat-
A party who introduces evidence of like kind to the evidence to which he objects has waived its objection to the opposing party’s introduction of that evidence.

Key Holding(s):
• A contract proposal that states that it will be the parties’ written contract upon the recipient’s execution of it is not a “written contract” for purposes of 8.01-246(2)’s five-year limitations period where the recipient fails to execute. This is so, even if the parties otherwise operate under the terms set forth in the unexecuted proposal.

Defamation
Case:    Askew v. Collins, Record No. 110323 (3/2/2012)
Author:  McClanahan
Lower Ct.: City of Williamsburg (Ford, Walter J.)
Disposition: Affirmed

Facts:  The plaintiff in this defamation action formerly worked in the drug court over which the defendant, a former circuit court judge, presided. The plaintiff filed a sexual harassment claim against the former judge, and the matter settled. When the former judge was being considered for reappointment, news of the claim surfaced. Responding to a reporter’s question, the former judge said that “Collins [the plaintiff] was institutionalized.” Although the newspaper discussed the quote internally, it did not publish it. It did, however, publish certain other statements that the plaintiff alleged were defamatory. The plaintiff settled with the newspaper and another co-defendant for $120,000.

The case then went to trial against the judge. The trial court instructed the jury on per se defamation—an instruction to which the former judge did not object. The former judge also did not argue that the evidence was insufficient to establish per se defamation. The jury returned a $350,000 verdict, based on the former judge’s statement that the plaintiff had been institutionalized. The trial court refused to offset this award by the $120,000 settlement with the co-defendants.

Ruling:  On appeal, the SCOV affirmed. The former judge
argued that there was insufficient evidence of damages to support a $350,000 verdict, as the newspaper had not included the institutionalization remark in the story. But the SCOV held that in cases involving per se defamation, damages are presumed and the plaintiff need not separately demonstrate them. As the defendant had not objected to the defamation per se instruction, the jury could presume damages.

The SCOV likewise rejected the former judge’s argument that, under Code § 8.01-35.1, the $350,000 award had to be offset by the $120,000 recovered from the codefendants before trial. This settlement did not involve “the same injury.” The sole basis for the jury’s award against the judge was the “institutionalized” remark, and plaintiff did not allege that any of the co-defendants republished this statement. Because the settlement concerned a different injury from the injury for which the jury held the former judge liable, the SCOV held that § 8.01-35.1 did not apply.

Key Holding(s):

- In a case involving per se defamation, reputational damages are presumed and the plaintiff need not present separate damages evidence of it.

- A defendant is not entitled to an offset under Code § 8.01-35.1 for a plaintiff’s prior settlement with other co-defendants where the injuries for which the court found defendant liable differed from the ones allegedly caused by the settling co-defendants.

Civil Procedure


Author: Kinser

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

Disposition: Affirmed

Facts: The plaintiff entered into a contract with defendant under which the plaintiff would supply the defendant with linen and laundry services. The plaintiff alleged that the defendant failed to pay for those services, and so filed suit to recover the amounts owed. The defendant was an out-of-state corporation, so the plaintiff effected substituted service through the Secretary of the Commonwealth. The Secretary of the Commonwealth filed a certificate of compliance, indicating that it had forwarded the complaint to the “Corporation Trust Company,” the defendant’s designated agent in Delaware.

The defendant failed to appear within 21 days, so the plaintiff moved for a default judgment. The trial court granted this motion, and entered final judgment against the defendant. Within 21 days of this judgment, the defendant filed a motion to set aside the default judgment under Rule 3:19(d)(1). The defendant acknowledged that the Secretary of the Commonwealth sent the process to the correct Delaware address but claimed that the registered agent never forwarded the process to it. Finding that service was proper, the trial court refused to set aside the default judgment.

Ruling: On appeal, the SCOV affirmed. It held that the decision to set aside a default judgment under Rule 3:19(d)(1) rests in the sound discretion of the trial court. Even if all the considerations noted in the rule were met, a trial court still could refuse to set aside the default.

The SCOV also rejected the defendant’s argument that, in order to deny a motion to set aside a default judgment, the trial court needed to make explicit findings as to all the factors mentioned in Rule 3:19(d)(1). While there was authority to the effect that a trial court must do so when granting a motion to set aside a default judgment, there was no such requirement--either in the Rules or in the case law--that a trial court must such findings when denying a motion to set aside a default judgment.

Key Holding(s):

- When denying a Rule 3:19(d)(1) motion to set aside a default judgment, the trial court need not make explicit findings as to all the factors mentioned in the rule.

Insurance

Case: First American Title Insurance v. Western Surety Co., Record No. 111394 (3/2/2012)

Author: Lemons

Lower Ct.: U.S. Court of Appeals (Fourth Circuit)

Disposition: Certified Question Answered

Facts: The owner of real estate wished to refinance. The closing agent obtained a $100,000 bond from Surety, as required under the Virginia Consumer Real Estate Settlement Protection Act (“CRESPA”). The closing agent’s employee absconded with funds that the Bank had supplied to pay off the original mortgages on the property. This put the Bank behind the original deed of trust in order of priority. The owner defaulted and the holder of the original deed of trust foreclosed. The owner declared bankruptcy, leaving the Bank with a $734,296.09 loss.

The Title Insurance company paid off the Bank’s loss. The Title Insurance Company then sued the closing agent’s Surety to recover the $100,000 policy amount. The district court held that the Title Insurance Company could maintain a common-law claim against the surety bond and granted summary judgment in Title Insurance Company’s favor.

Ruling: The SCOV held that CRESPA did not create a private right of action to enforce its terms. CRESPA’s enforcement provisions only authorized state licensing authorities to fine or penalize persons who fail to comply with it.

Nevertheless, the SCOV held that private parties could, consistently with CRESPA, maintain an action against the bond.
Nothing in CRESPA abrogated common-law contract claims against the bond.

Finally, the SCOV held that the Title Insurance company—though lacking standing in its own right—could, as the Bank’s subrogee, bring suit against the Surety. The purpose of the CRESPA-mandated bond was to protect participants in the settlement transaction, including banks.

**Key Holding(s):**

- There is no private right of action to enforce the terms of CRESPA.
- A party can, consistently with CRESPA, maintain a common-law contract action against the CRESPA-mandated bond.
- The subrogee of a bank involved in a CRESPA-covered transaction can bring a claim against the CRESPA-mandated bond.

**Civil Procedure**

**Case:** Casey v. Merck & Co., Inc., Record No. 111438 (3/2/2012)

**Author:** Goodwyn

**Lower Ct.:** U.S. Court of Appeals (Second Circuit)

**Disposition:** Certified Question Answered

**Facts:** A putative class action was filed regarding one of Merck’s products. The federal district court ultimately denied class certification. Plaintiffs then filed a diversity claim in federal court, asserting individual claims regarding the same drug, but they filed after Virginia’s two-year personal-injury limitation period had expired.

Merck moved for summary judgment on statute-of-limitation grounds. The plaintiffs, however, claimed that their action was tolled by the pendency of the putative class action. The district court rejected this argument and granted Merck’s summary-judgment motion. On appeal, the Second Circuit certified questions regarding whether, given the putative class action, equitable tolling or statutory tolling rendered the plaintiffs’ claims timely.

**Ruling:** The SCOV held that neither tolling theory applied.

On the question regarding equitable tolling, the SCOV held that statutes of limitations must be applied according to their terms unless the General Assembly has clearly created an exception to them. As there was no statutory exception that tolled claims while a related class action was pending, the SCOV held that equitable tolling did not apply.

The SCOV also held that there was no tolling under Code § 8.01-229(E)(1), the provision that allows tolling for a previously filed case. Although the SCOV acknowledged that cases from other jurisdictions can toll the statute, it held that the subsequent action must be filed by the same party who filed the previous action.

The only way that the two actions could have been filed by the same person was if the class representatives in the putative class action had representational standing to enforce the plaintiffs’ rights. But Virginia recognizes no representational standing unless the General Assembly specifically authorizes it. The General Assembly has not recognized a class representative as having representational standing for unnamed members of a putative class. As the plaintiffs were not named parties in the earlier class action, that action was a nullity as to them and so the putative class action did not toll the limitations period.

As none of the plaintiffs was a named plaintiff in the putative class action, Code § 8.01-229(E)(1) did not apply to toll their claims.

**Key Holding(s):**

- Virginia law does not allow tolling of the statute of limitations except where the General Assembly specifically authorizes it.
- Code § 8.01-229(E)(1) does not toll the limitations period for unnamed members of a putative class in a class-action suit.

**JANUARY SESSION 2012**

**Constitutional Law**

**Case:** Maretta v. Hillman, Record No. 102042 (1/13/2012)

**Author:** Kinser

**Lower Ct.:** Fairfax County (Devine, Michael F.)

**Disposition:** Reversed

**Facts:** After a divorce and remarriage, the decedent neglected to remove his ex-wife as beneficiary of his Federal Employees’ Group Life Insurance (FEGLI) policy. Upon his death, his ex-wife—and not his widow—received the benefits.

Upon a divorce, Virginia Code § 20-111.1(A) automatically revokes a beneficiary designation for the ex-spouse when the couple divorces. Under the federal law governing FEGLI, however, the named beneficiary is entitled to the benefits even if the named beneficiary is an ex-spouse and even if the decedent has since remarried.

The trial court held that Code § 20-111.1(A) applied and it awarded the benefits to the decedent’s widow, not to his ex-wife.

**Ruling:** On appeal, the SCOV reversed. It held that the FEGLI provisions for designating beneficiaries conflicted with Va. Code § 20-111.1(A). Among other things, FEGLI provides that the named beneficiary on a policy takes precedence over
any court order of divorce, unless the order is received before the insured’s death, which did not occur in the case at hand. The SCOV held that Code § 20-111.1(A) frustrates the FEGLI provision’s policy preferences for (1) administrative simplicity, and (2) respecting the insured’s actual choice of beneficiary. Because Code § 20-111.1 frustrates and conflicts with Congress’ intent, FEGLI preempts Code § 20-111.1.

**Key Holding(s):**

- The Federal Employees’ Group Life Insurance provision concerning eligible beneficiaries preempts Virginia Code § 20-111.1. Where FEGLI applies, benefits must go to the named beneficiary, even if the insured had divorced and remarried before his or her death.

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**Sanctions**

**Case:** Northern Virginia Real Estate, Inc. v. Martin’s, Record No. 101844 (1/13/2012)

**Author:** Lemons

**Lower Ct.:** Fairfax County (Thacher, Jonahan)

**Disposition:** Affirmed

**Facts:** Plaintiff real-estate company and broker sued another brokerage firm and the property owner’s representatives, alleging conspiracy and defamation. Trial revealed the claims to be without factual basis. Plaintiffs nonsued, and the trial court granted a nonsuit, though it suspended the judgment until it resolved defendants’ sanctions motion. After hearing additional evidence, the trial court imposed large sanctions jointly and severally against plaintiffs and plaintiffs’ attorney. The sanctions order was entered more than 21 days after the suspending order. After the trial court assessed sanctions and lifted the suspension, the plaintiff asked the court to suspend that order so that it could prepare a motion for reconsideration. The trial court refused that request.

Plaintiffs and her attorney filed separate appeals. They argued that: (1) the trial court lacked authority to suspend the nonsuit order, (2) the trial court erred in awarding sanctions jointly and severally, (3) the trial court abused its discretion in awarding sanctions under § 8.01-271.1 because it based its conclusion that plaintiff lacked a good-faith factual basis for suit on evidence revealed at trial and during sanctions hearing, and (4) the trial court erred in denying plaintiffs’ request for a hearing on their motion to suspend the final order.

**Ruling:** The SCOV held that under Rule 1:1, the trial court had the power to suspend the nonsuit. So the trial court had jurisdiction to impose sanctions 30 days after granting, but suspending, the nonsuit.

The SCOV further held that the trial court did not abuse its discretion in imposing sanctions, as the facts of the case could not support a reasonable belief that plaintiffs’ claims for tortious interference, conspiracy, and defamation were well-grounded in fact or law.

As for imposing sanctions against both attorney and client, the SCOV held that the text of § 8.01-271.1 authorizes trial courts to impose sanctions against both a party and its attorney. Because the trial court had no way to determine who—as between lawyer and client—was responsible for the sanctioned behavior, it was appropriate for it to impose sanctions jointly and severally. If sanctioned parties wish to allocate sanctions individually, they bear the burden of coming forward with information that enables the trial court to do so.

Next, the SCOV held that the trial court appropriately based the amount of the sanctions award on defendants’ attorneys’ fees and that the amounts claimed were reasonable.

Finally, the SCOV held that the trial court properly refused to enter a suspending order to enable the plaintiffs to file a motion for reconsideration, as Rule 4:15(d) permits a trial court to refuse to hear a motion for reconsideration.

**Key Holding(s):**

- A trial court may suspend the operation of a nonsuit order for more than 21 days in order to dispose of a sanctions motions.
- Under Va. Code § 8.01-271.1, a trial court may impose sanctions jointly and severally against a party and its attorney.
- Under Rule 4:15(d), a trial court need not have a hearing on a motion for reconsideration.

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**Estates and Trusts**

**Case:** Weedon v. Weedon, Record No. 101901 (1/13/2012)

**Author:** Powell

**Lower Ct.:** King George County (Willis, Gordon F.)

**Disposition:** Reversed

**Facts:** Mother of five children was diagnosed with cancer in 2000. A 2003 will included a gift to her church, burial plots for four of her children, and gifts of real estate for three of the children. In 2006, one daughter left her job to be able to care for the mother. After quarrelling with one son at Christmas 2006, the mother told the other children that she was taking that son out of her will. In May 2007, she contacted the law firm who drafted the original will and instructed the paralegal that she wanted the son taken out of the will, which the office did.

A year later, the mother was in the hospital. Before surgery, the mother asked the caretaker daughter to contact the lawyer’s office for additional changes to the will—changes that, with minor exceptions, would make the caretaker daughter the sole beneficiary. A paralegal in the lawyer’s office contacted the mother, who recognized the paralegal’s voice. The two went
through each item of the 2007 will, and the mother stated clearly that she wished to change it to give the caretaker daughter all of her property (other than the burial plots). The paralegal testified that the mother “knew what she was doing and was doing what she wanted.” The paralegal detected no signs that the mother was being coerced.

The attorney faxed the revised will to the hospital, and the mother signed it in the presence of two patient representatives, a social worker, and the caretaker daughter. All the witnesses testified either (1) that they recalled the mother being clear-headed or, (2) that they did not remember specifics, but knew they would not have signed as witnesses if they had doubts about the mother’s capacity to understand the nature of what she was doing.

The mother died the next day.

The daughter probated the 2008 will, which the other four siblings challenged. The children testified that the mother was confused at the time and was influenced by the caretaker daughter. The caretaker daughter, in turn, presented evidence from one of the mother’s friends who stated that--though the mother’s body was weak--the mother could recognize her friend and could converse about the friend’s recent travels. The friend also testified that the mother stated clearly that she wanted to have her caretaker daughter receive all that she had.

The trial court, though acknowledging that the mother had periods of lucidity in 2008, held that the caretaker daughter failed to show that the mother had testamentary capacity when she executed the 2008 will. Among other things, the court noted that the lawyer had not spoken to the decedent directly--using a paralegal, instead, to collect information about changes to the will. Accordingly, the trial court held that the plaintiff lacked capacity in 2008 and, thus, the 2007 will controlled.

Ruling: On appeal, the SCOV reversed. It noted that the mother’s compliance with the statutory requirements for valid execution of a will gave rise to a presumption that she had testamentary capacity. But, in light of the contrary evidence, the caretaker daughter bore the burden of showing testamentary capacity. The SCOV held that she met that burden.

First, the SCOV held that the trial court erred in emphasizing the fact that the mother’s lawyer did not speak with her directly when, in 2008, he orchestrated the modifications to the 2007 will. The lawyer left those duties to a paralegal. The trial court relied on this fact to establish lack of testamentary capacity. But the SCOV held that the paralegal’s testimony that the mother knew what she was doing and was doing what she wanted established testamentary capacity. It also found that the trial court erred in focusing on the fact that it was the caretaker daughter, not the mother, who placed the call to the law office when the mother was in the hospital. Finally, the SCOV held that the trial court erred by placing greater weight on the testimony of the other children, who were not present at the hospital, than on the testimony of persons who were actually in the hospital when the mother signed the 2008 will.

The SCOV also rejected the other childrens’ claim for undue influence. It agreed with the trial court that a presumption of undue influence arose, given (1) the feebleness of the mother, (2) the position of trust the caretaker daughter occupied, and (3) the fact that the mother stated earlier that she wished to dispose of her property differently. But it held that the parties asserting undue influence still needed to show actual undue influence.

To do so, the parties challenging the will must show that the influence was so extensive as to control the mind and direct the actions of the testator--i.e., the testator must have no free will. The burden of establishing undue influence falls on the party asserting it. The trial court, however, never made any findings that the mother’s free will was overcome by the caretaker daughter. Accordingly, it erred in finding undue influence.

Justice Mims dissented, claiming that the trial court’s finding of undue influence was not clearly wrong.

Key Holding(s):
• Parties challenging a will on undue-influence grounds must show that the influence was so extensive as to control the mind and direct the actions of the testator. The testator, in essence, must be shown to have no free will.

Workers’ Compensation
Case: Redifer v. Chester, Record No. 101902 (1/13/2012)
Author: Goodwyn
Lower Ct.: Augusta County (McGrath, John J., Jr.)
Disposition: Affirmed

Facts: Plaintiff was injured at sheep farm when arm became caught in a wool-manufacturing machine. The employer did not have workers’ compensation insurance, but plaintiff was still eligible for--and received--a workers’ compensation award.

The employee filed a lawsuit against the employers, this lawsuit was already pending at the time of the workers’ compensation ruling. After the employee received the workers’ compensation award, the employer moved to dismiss the separate lawsuit. The plaintiff opposed this motion, claiming that an employer who fails to maintain workers’ compensation insurance cannot avail itself of the Act’s limitation on liability, even where the plaintiff receives a full award in the workers’ compensation tribunal. The trial court disagreed, and dismissed the action.

Ruling: On appeal, the SCOV affirmed. Code § 65.2-307(A) states that “the rights and remedies herein granted to an employee . . . shall exclude all other rights and remedies . . . on account of such injury . . . . “ It rejected the plaintiff’s argument that an employer who fails to maintain workers’ compensation insurance is barred from invoking this section.

The section dealing with uninsured employers, Code § 65.2-805(A), gives an injured worker the choice of either obtaining
a workers’ compensation award or filing a lawsuit. Moreover, as interpreted by the SCOV, the statute gives injured employees the right to pursue both remedies simultaneously. But where a plaintiff successfully prosecutes a workers’ compensation claim, is collecting the award from the employer, and is guaranteed to recover the full amount by the Uninsured Employers Fund, the employee cannot obtain a second recovery in an action at law.

Key Holding(s):

- An employee who successfully prosecutes a workers’ compensation claim against an uninsured employer-and who obtains a final collectible order—may not maintain an action at law against the employer for the same injury.

Land Use

Case: Sinclair v. New Singular Wireless PCS, LLC, Record No. 101831 (1/13/2012)

Author: Mims

Lower Ct.: Albemarle County (Padrick, H. Thomas)

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

Facts: A county ordinance gave the planning commission the power to grant waivers from restrictions otherwise imposed by the zoning ordinance. It limited appeals to the board of supervisors to instances in which the waiver was denied or subjected to conditions to which the applicant objected. It did not give adjoining landowners the right to appeal a successful waiver application. A cell carrier applied for a waiver in order to erect a transmission tower. A neighboring landowner unsuccessfully opposed the waiver at the planning-commission stage. He then brought an action in circuit court seeking a declaration that the waiver provision was invalid. He argued that the only deviations from zoning ordinances that the Code permits localities to allow are “variances” approved by the board of zoning appeals and zoning modifications granted by the zoning administrator. The landowner also argued that the waiver provision unlawfully deprived him of the right to judicial review. The trial court rejected these arguments and held that the waiver provision was lawful.

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

It disagreed with the plaintiff’s argument that the waiver was really a variance or zoning modification, subject to the requirements of Code § 15.2-2309(2) and -2286(A)(4). Where a property may be developed consistently with an ordinance, albeit only after the locality’s approval upon certain conditions being met, a variance is unnecessary. This type of approval is a “special exception,” the power to grant which the General Assembly has delegated to localities.

The SCOV agreed, however, that the county’s procedure for reviewing waiver applications was not authorized by state law and so violated the Dillon Rule. The delegation of the power to grant or deny waivers was inconsistent with the general function of planning commissioners. Only zoning administrators and boards of zoning appeals have the power to authorize departures from zoning ordinances. Planning commissions, by contrast, are advisory bodies with no executive, legislative, or judicial powers.

Justice McClanahan dissented in part, stating that she would reverse on both grounds asserted by the appellant landowner. Justice Powell joined this concurrence and dissent.

Key Holding(s):

- Localities can adopt zoning ordinances that allow a particular use but that condition approval on the landowner establishing that it has met certain conditions.

- A locality may not delegate authority to grant or deny waivers to any entity other than the zoning administrator and board of zoning appeals.

- Planning commissions are advisory bodies, with no executive, legislative, or judicial powers.

Land Use

Case: Dykes v. Friends of the C.C.C. Road, Record No. 101630 (1/13/2012)

Author: Koonitz

Lower Ct.: Highland County (Franklin, Humes J.)

Disposition: Reversed

Facts: An unincorporated association brought suit against landowners concerning access to property traversed by a gravel road known as the “C.C.C. Road.” The association claimed that this was a public road and that the landowners wrongfully had barred access over it. The landowners denied this, asserting that there was no record of either (1) it having been dedicated to the public or (2) the government having adopted it into its road systems.

The trial court held that the association failed to establish an express dedication. It also held that the concept of implied acceptance of a road by a locality does not apply to rural roads. And it held that a prescriptive easement could not be established in favor of the general public. Nevertheless, the trial court held that a locality’s “recognition” of a long and continuous use by the general public could establish the public’s interest in using the road.

Ruling: On appeal, the SCOV reversed. It agreed that there was no express dedication of the road by the property owners and no express acceptance of it by the locality. And it also agreed that the facts were insufficient to establish an implied dedication or acceptance. (Among other things, there was no action indicating the unmistakable intent of the property own-
ers to permanently give up the property.) Finally it noted that the government’s acceptance of a rural road must be formal. As a matter of law, there can be no implied acceptance of a rural road.

Turning to the basis for the trial court’s finding of a public road, however, the SCOV held that the trial court erred in finding that the road was public simply by virtue of its long and continuous use by the general public. The public cannot establish a prescriptive easement, as any such putative easement lacks the essential element that the claimant asserts the right to the exclusion of others. Use by the general public establishes, at most, a license by the owner permitting the use.

Although long-continued use of a rural road by the general public may establish an implied dedication of the property, it becomes a public road only if the locality takes an affirmative step to accept the dedication.

**Key Holding(s):**

- A locality’s acceptance of a rural road cannot be implied—the locality must expressly accept it.

- Long-continued use of a road by the general public does not establish a “prescriptive easement” for public use of the road. At most, it is evidence of a dedication. But a dedication is ineffective to create a public road where the locality has never accepted the putative dedication.

### Workers’ Compensation

**Case:** Moore v. Virginia International Terminals, Record No. 101408 (1/13/2012)

**Author:** Powell

**Lower Ct.:** City of Portsmouth (Cales, James A.)

**Disposition:** Reversed

**Facts:** A wrongful-death case arose out of a fatal accident at the Virginia Port of Authority (VPA). The victim and the tortfeasor were both stevedores who worked for different companies. The trial court held that decedent and tortfeasor were statutory employees of the VPA, because the two firms were performing the VPA’s work. Although the victim’s employer had not entered into any contract with the VPA, it had agreed to abide by the VPA’s schedule of rates, which the tortfeasor’s employer had drafted. On these facts, the trial court ruled that the two employees were co-employees, and that the plaintiff’s wrongful-death suit was barred by the Workers’ Compensation Act’s exclusivity provision.

**Ruling:** On appeal, the SCOV reversed. It held that the tests for statutory employee under § 65.2-302(A) presuppose that the owner/contractor has entered into a contract with another.

Citing its 2005 decision in *Hudson v. Jarrett*, the SCOV further held that merely agreeing to the schedule of rates did not create a contract for the victim’s firm to provide stevedore services for the VPA. As the victim’s firm had no contract with the VPA, there was no co-employee relationship between tortfeasor and victim.

**Key Holding(s):**

- For purposes of determining co-employee status under the Workers’ Compensation Act, the Virginia Port Authority’s schedule of rates does not create a contractual relationship between the Authority and the various firms performing stevedore services at the port. Accordingly, it does not create a co-employee relationship between employees of two stevedore services.

### Sovereign Immunity

**Case:** Jean Moreau & Associates, Inc. v. Health Center Commission for the County of Chesterfield, Record No. 101352 (1/13/2012)

**Author:** Millette

**Lower Ct.:** Chesterfield County (Rockwell, Frederick G., III)

**Disposition:** Affirmed

**Facts:** Chesterfield County created a “Health Care Commission” to operate nursing-home, hospital, and health-center facilities. The commission took over a nursing home. It expanded the home to include an assisted-living facility. Later, it decided to add an independent-living facility. The commission awarded the plaintiff a five-year contract to plan and develop the independent-living facility. The contract was subject to approval and ratification by the commission each year.

On May 4, 2006, the commission voted to discontinue the contract, effective June 30, 2006. It notified the plaintiff’s president of this fact in writing. Roughly one month later, the plaintiff sent a letter claiming that it was owed “development fees.” On June 19, 2006, the commission wrote plaintiff and stated that it believed that it had fairly compensated plaintiff for its work, and requested that plaintiff submit the amount owed, citing the relevant contract provision entitling it to such compensation. Plaintiff submitted nine invoices, which the commission paid on July 31, 2006.

Three months later, the plaintiff—acting through counsel—offered to mediate the remaining “deferred development” fees. On January 3, 2007, the commission said it disagreed that any additional payments were required. The plaintiff brought suit approximately two weeks later.

The trial court sustained the commission’s plea in bar. It held that the plaintiff’s contract claim was barred by the Procurement Act’s contractual-claims procedure, as plaintiff did not follow up her June 9, 2006 notice with a claim within 60 days, as required by Code § 2.2-4363(C)(1). And it held that the commission was immune from plaintiff’s quantum meruit claim because, by developing the independent-living community, the commission acted in a governmental capacity.
Ruling: On appeal, the SCOV affirmed. It held that the July 31, 2006 payment was a final payment for purposes of § 2.2-4363. Thus, plaintiff needed to file a claim within 60 days of July 31, 2006. The SCOV specifically rejected the plaintiff’s argument that the July 31, 2006 payment could not be a final payment because it contained no statement indicating it was the final payment. The SCOV held that “[n]othing in Code 2.2-4363 requires a public body to give notice that a payment is final before the 60-day limitations period begins to run.”

The SCOV held that plaintiff did not file a claim within 60 days of the July 1, 2006 final payment. The June 9, 2006 notice was not a “claim”--it was, at best, a notice of a claim. And even if the October 4, 2006 letter could be construed to be a claim, it came after the expiration of the 60-day period. Thus, the SCOV held that the contract claim was barred.

On the quantum meruit claim, the SCOV held that the claim was barred by sovereign immunity. The SCOV held that the commission was a municipal corporation. As such, sovereign immunity attached to its “governmental” functions, but not its “proprietary” functions.

The SCOV held that the commission acted in a governmental capacity during the planning for the independent-living facility, as that facility was an integral part of the continuum of care that the county wished to establish at the center.

Finally, the SCOV rejected the commission’s argument, on cross-appeal, that it was entitled to absolute immunity. The commission had argued that it was entitled to absolute immunity because it was a creation of a county, which was a local subdivision of the state, rather than a municipality. The SCOV disagreed and held that municipal corporations created by counties are entitled to no more immunity than municipal corporations created by a municipality.

Key Holding(s):
- For the 60-day limitations period under Code § 2.2-4363 to begin running, it is not necessary that the public body notify the recipient that the payment is final.

- A municipal corporation created by a county is entitled to the same immunity as a municipal corporation created by a municipality.

- Sovereign immunity applies to quantum meruit claims arising out of a municipal corporation’s governmental actions.

Environmental
Case: Campbell County v. Royal, Record No. 101168 (1/13/2012)
Author: Kinser
Lower Ct.: Campbell County (Gamble, J. Michael)
Disposition: Reversed
Facts: Residents of a manufactured-home park brought suit after learning that their wells had been contaminated by substances leaching from a nearby landfill. They claimed that the contamination was a “discharge of oil,” in violation of Virginia’s Oil Discharge Law and also was a taking of their property without just compensation. The alleged contaminants were benzene and chlorinated hydrocarbons. The trial court held that these constituted “oil” under the Oil Discharge Law’s definition of the term, and so the county was liable for any damages caused thereby. A jury returned a verdict against the county for $9 million.

Ruling: On appeal, the SCOV reversed. It held that the extensive and detailed provisions of the Virginia Waste Management Act and Solid Waste Manufacturing Regulations evinced the General Assembly’s intent that these laws exclusively govern the leaching of waste from a landfill. Moreover, the structure of the Oil Discharge Law reflected the General Assembly’s intent that it apply to sudden releases of oil--not the gradual seepage of leachate and landfill gas.

On the inverse-condemnation claim, the SCOV held that the plaintiff had not offered any instructions keyed to this claim, and so any damages that the jury awarded necessarily related to the Oil Discharge Law claim.

Justice Powell dissented, joined by Justice Lemons.

Key Holding(s):
- Virginia’s Waste Management Act and Solid Waste Manufacturing Regulations are the only state laws that govern the leaching of waste from a landfill. The Oil Discharge Law does not apply to such leaching.
Virginia State Bar Litigation Section
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Willcox & Savage, P.C.
Wells Fargo Center
440 Monticello Ave., Suite 2200
Norfolk, VA 23510
gbryant@wilsav.com

Barbara S. Williams, Esq., Vice Chair
101 Loudoun Street, SW
Leesburg, VA 20175
bwilliams@barbaraswilliams.com

Timothy Edmond Kirtner, Esq., Secretary
Gilmer Sadler Ingram et al.
65 East Main Street
P.O. Box 878
Pulaski, VA 24301-0878
tkirtner@gsish.com

Kristan Boyd Burch, Esq., Treasurer
Kaufman & Canoles
150 West Main St., Ste 2100
P.O. Box 3037
Norfolk, VA 23514
kbburch@kaufcan.com

Scott Carlton Ford, Esq., Immediate Past Chair
McCandlish Holton, PC
P.O. Box 796
Richmond, VA 23218
SFORD@LAWMH.COM

Newsletter Editor:
Joseph Michael Rainsbury, Esq.
LeClairRyan, A Professional Corporation
1800 Wells Fargo Tower,
Drawer 1200
Roanoke, VA 24006
joseph.rainsbury@leclairryan.com

Board of Governors Members:
Thomas Grasty Bell, Jr., Esq.
Timberlake Smith Thomas Moses
P.O. Box 108
Staunton, VA 24402-1018

Hon. B. Waugh Crigler
U.S. Magistrate Judge
Room 328
255 West Main Street
Charlottesville, VA 22902

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

Robert Leonard Garnier, Esq.
Garnier & Garnier, P.C.
2579 John Milton Dr., Suite 200
Herndon, VA 20171

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

Ex-Officio Judicial Members:
Hon. Elizabeth Bermingham Lacy
Supreme Court of Virginia
PO Box 1315
Richmond, VA 23218

Hon. Cleo Elaine Powell
Supreme Court of Virginia
PO Box 1315
Richmond, VA 23219

Committee Chairs & Liaisons:
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McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030

Monica Taylor Monday, Esq., Chair, Appellate Committee
Gentry Locke Rakes & Moore
10 Franklin Road, SE
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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Joseph Michael Rainsbury, Esq.
LeClairRyan, A Professional Corporation
1800 Wells Fargo Tower
Drawer 1200
Roanoke, Virginia 24006
(Main) (540) 510-3000
(Direct) (540) 510-3055
(Fax) (540) 510-3050
joseph.rainsbury@leclairryan.com