



New Va. Law Overturns State Supreme Court Ruling Limiting Transfers of LLC Membership Interests, but Potential Traps for the Unwary Remain

by Arthur E. Schmalz

The Virginia General Assembly rarely adopts legislation for the specific purpose of overturning a ruling of the Commonwealth’s highest court. And in an age of partisan conflict, it’s also unusual for a new law to pass with virtually no opposition. Approved by the General Assembly on April 3, 2013, with only one dissenting vote, Senate Bill 779 (“SB 779”) is one of these uncommon legislative actions.

The bill’s summary explains that it “overturns the Virginia Supreme Court’s finding in *Ott v. Monroe*¹ that current law precludes” an assignee of a membership interest in a Virginia limited liability company (“LLC”) from participating in the company’s management and affairs²—even, seemingly, where the company’s governing documents expressly grant such rights. This aspect of *Ott* has been a source of concern and controversy ever since the case was decided in November 2011.

Having taken effect on July 1, 2013, SB 779 should eliminate most of the concern and uncertainty that arose after *Ott*. But potential traps for the unwary

remain. In particular, assignees can participate in the company’s management and affairs only if they become members in accordance with the requirements of the Virginia Limited Liability Company Act (“LLC Act”).³ Additionally, the new legislation does not relax *Ott*’s rather strict standard for overriding the LLC Act’s presumption that a member’s death results in dissociation from the company.

The *Ott* decision

In order to understand the significance of SB 779, it is first necessary to examine the Court’s decision in *Ott v. Monroe*. *Ott* involved a Virginia LLC known

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Letter from the Chair • Gary Bryant

When I began practicing law in 1986, the American Bar Association's Commission on Professionalism published "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism." The article includes the following quotation:

Lawyers are now to a greater extent than formerly businessmen, a part of the great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class.

The quote predates the study by more than 80 years. Chief Justice Louis D. Brandeis made the comment in 1906 expressing concern about the migration of the practice from profession to business.

The ABA's Commission on Professionalism made a number of recommendations for "rekindling" lawyer professionalism, urging its members to "resist the temptation to make the acquisition of wealth a primary goal of the law practice," to search for methods which "simplify and make less expensive the rendering of legal service," and to "increase their participation in, and recognize their obligation to provide, true pro bono services." For Virginia lawyers, the Commission's goals are not merely aspirational—they are specifically incorporated in our Rules of Professional Conduct. Rule 6.1 states as follows:

- (a) A lawyer should render at least two percent per year of the lawyer's professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase availability of pro bono legal services.

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...

- (c) Direct financial support of programs that provide direct delivery of legal services to meet the needs described in (a) above is an alternative method for fulfilling a lawyer's responsibility under this rule.

Unfortunately, the number of hours lawyers are devoting to true pro bono services is dropping. According to an online survey conducted by *The American Lawyer*, it is now down almost twelve percent from its peak in 2009. The survey notes two reasons for the drop. First, a firm's willingness to provide pro bono services seems to be linked to how well the firm is doing financially, and many firms have not been doing well lately. Second, since the vast majority of pro bono service is performed by associates, a firm's ability to provide those pro bono hours diminishes as firms cut back on hiring. Making matters worse, many organizations that depend on federal and state funds to help provide legal-aid services are finding their budgets cut to the bone. Adding to the problem, the economic decline is pushing a greater number of people into poverty, driving up bankruptcy, and increasing child custody, foreclosure, and landlord/tenant cases—areas that represent the bulk of indigent legal needs.

If our willingness to support pro bono programs (either through direct financial support or by providing pro bono services) rises and falls with the health of the economy, then true pro bono services will be least available when they are needed most. Financial difficulty cannot be a justification for abrogating our responsibility under Rule 6.1. While we all tighten our belts in difficult economic times, the Rule does not require monetary support. During lean years when billable hours are more difficult to find, a lawyer can fulfill that responsibility with his or her time.

When confronted with our lack of participation in pro bono activities, most lawyers complain that their expertise is not well suited to the needs of the indigent. But, if you ask the lawyers working for practically any legal aid organization throughout the Commonwealth, they will tell you that it takes very little to get “up to speed” on the practice areas that make up the bulk of indigent legal needs. Most offer CLE training that will prepare any member of the VSB Litigation Section to handle simple landlord-tenant disputes or uncontested domestic relations matters. Indeed, most legal-aid service providers will mentor any lawyer interested in helping to shoulder the burden of providing legal services to the poor.

The business of law is important, and few of us would practice for long if we ignored it. But “law as a business” cannot supplant “law as a profession.” Although the rules of professional conduct did not *create* the obligation to provide pro bono services, they remind those of us who are privileged to practice law that we should honor our obligations as officers of the court. ♦

New Va. Law Overturns Ruling

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as L&J Holdings, LLC (the “Company”), which was formed by Admiral Dewey Monroe, Jr. (“Dewey”) and his wife, Lou Ann (“Lou Ann”). Pursuant to the Company’s operating agreement, Dewey and Lou Ann were the sole members of the Company, with 80% and 20% membership interests, respectively. Lou Ann was the managing member, and Joseph G. Monroe (“Joseph”) was named as the successor managing member in the event of Lou Ann’s death, disability, removal, or resignation.

Paragraph 2 of the Company’s operating agreement stated that “[e]xcept as provided herein, no Member shall transfer his membership or ownership, or any portion or interest thereof, to any non-Member person, without the written consent of all other Members, *except by death, intestacy, devise, or otherwise by operation of law.*”⁴ Paragraph 10(C) allowed any

member to transfer his or her membership interest to “[o]ther Members [or] [t]he spouse, children or other descendants of any Member.”⁵

Dewey died in 2004. Dewey’s will left his entire estate to his daughter, Janet (“Janet”). Relying on this bequest and the operating agreement provisions mentioned previously, Janet claimed to be the valid assignee of Dewey’s 80% membership interest, and his corresponding right to control the Company. Attempting to exercise such control, Janet acted to remove Lou Ann as the Company’s managing member and to appoint herself to that position. Janet also removed Joseph as the successor managing member and appointed another individual in his place. She then filed a complaint seeking a declaratory judgment that all of her actions were lawful and valid. Lou Ann and Joseph filed a demurrer in response.

In the trial court, Janet argued that her late father’s bequest left her in control of the Company, because paragraph 2 of the Company’s operating agreement expressly authorized assignment of a membership interest “by death . . . [or] devise.”⁶ The trial court, however, disagreed and sustained the demurrer to Janet’s complaint.

On appeal, the Supreme Court of Virginia affirmed. It concluded that Dewey’s death caused his “dissociation” from the Company pursuant to Code § 13.1-1040.1(7) (a), notwithstanding the language in paragraph 2 of the operating agreement. According to the Court, “Paragraph 2 . . . does not address statutory dissociation and does not state an intent to supersede Code § 13.1-1040.1(7) (a). Consequently, it lacks specific language that would constitute an exception to the rule of dissociation set forth in Code § 13.1-1040.1.”⁷

Under the LLC Act, a dissociated member of an LLC or his successor is reduced to the status of an “assignee,” as defined in Code § 13.1-1039(A).⁸ Prior to enactment of SB 779, Code § 13.1-1039(A) stated that an “assignee” was not entitled to participate in the management or affairs of the company, and could only receive the share of profits, losses and distributions corresponding to the assignor’s membership interest.⁹

Accordingly, under that version of the statute, by becoming an assignee, a dissociated member (or his or her assignee) would lose all voting and control rights that he or she had prior to dissociation, and would retain only the right to receive distributions and allocations of profits and losses. Because the Court ruled that Dewey's death had dissociated him from the Company, and thereby transformed his interest into that of an "assignee," it held that Janet succeeded only to her late father's economic interests in the Company; Lou Ann, therefore, retained managerial control, even though she held only a 20% membership interest in the Company.¹⁰

Having determined that the operating agreement was not specific enough to override Dewey's statutory dissociation under Code § 13.1-1040.1(7)(a), the Court's analysis seemingly could have ended there. But the Court went further, observing that, "[e]ven if Paragraph 2 had superseded dissociation under Code § 13.1-1040.1, *it is not possible for a member unilaterally to alienate his personal control interest in a limited liability company. Code § 13.1-1039(A).*"¹¹ Indeed, the Court continued, "[I]t was not within Dewey's power under the Agreement unilaterally to convey to Janet his control interest and make her a member of the Company upon his death *because the Agreement could not confer that power on him.*"¹² This language seems to say that, even if the Company's operating agreement had explicitly allowed Dewey to bequeath his membership interest and corresponding rights to Janet, the transfer still would have been ineffective without the other members' consent.

In reaching these conclusions, the Court focused entirely upon Code § 13.1-1039(A), in particular, the third sentence which provides that "[a]n assignment does not entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights of a member."¹³ The Court observed that this sentence, unlike the first sentence, lacks the following proviso that expressly allows members to alter the statutory default provisions: "[u]nless otherwise provided in the articles of organization or an operating agreement...."¹⁴ The

Court reasoned that the absence of the proviso from the third sentence evidenced the General Assembly's intent to prohibit members from providing "otherwise" in the company's governing documents to override the statutory limitations on assignees' rights.¹⁵ The Court's ruling, thus, made it difficult, if not impossible, for assignees to obtain the full panoply of rights in the LLC that their assignor had possessed – even where, as in *Ott*, the LLC's governing documents purported to confer such rights on the assignee.

Concerns over *Ott*

Two primary concerns arose after *Ott*. First, it imposes a fairly rigorous standard for LLC members to contract around the statutory default rule that a member's death dissociates him from the company. An operating agreement or articles of organization must "address statutory dissociation" sufficiently to "state an intent to supersede Code § 13.1-1040.1(7)(a)."¹⁶ The Court held that language allowing transfer of a membership interest "by death . . . or devise" was not explicit enough to "constitute an exception to the rule of dissociation set forth in Code § 13.1-1040.1."¹⁷

It is debatable whether this rather strict requirement is fully consonant with Code § 13.1-1001.1(C), which provides that the LLC Act "shall be construed in furtherance of the policies of giving maximum effect to the principle of freedom of contract and of enforcing operating agreements."¹⁸ *Ott* makes no mention of this statutory rule of construction.

Second, and of far greater concern, is *Ott's* broad language stating that LLC members are prohibited from unilaterally alienating their personal control interests in the company, even if such action were authorized by the company's operating agreement or articles of organization. This could, among other things, make it virtually impossible for a controlling member to implement a succession plan for a spouse or child to assume managerial control upon the member's death or disability. Many, if not most, LLC operating agreements contain language that purports to allow such transfers. The Court's ruling in *Ott*,

however, created significant doubts over whether such provisions remained valid.

This aspect of Court's decision also seemed to overlook Code § 13.1-1040(A) which then, as now, expressly allows an LLC's governing documents to make an assignee a member automatically, without having to obtain the consent of the other members:

*Except as otherwise provided in writing in the articles of organization or an operating agreement, an assignee of an interest in a limited liability company may become a member only by the consent of a majority of the member-managers (other than the assignor member) of a manager-managed limited liability company of which one or more members is a manager, or by a majority vote of the members (other than the assignor member) of any other limited liability company.*¹⁹

And when an assignee becomes a member in accordance with these provisions, the assignee obtains the very same "rights and powers" that the assignor member had.²⁰ Thus, even before SB 779's adoption, an operating agreement could—under Code § 13.1-1040(A)—automatically make an assignee a member with full voting and control rights. The Court in *Ott*, however, concluded that Dewey could not unilaterally transfer "Janet his control interest and make her a member of the Company upon his death because the Agreement could not confer that power on him."²¹ This conclusion arguably conflicts with the express language of Code § 13.1-1040(A) which clearly does allow operating agreement provisions that automatically confer membership status upon assignees.

The *Ott* decision does not appear to recognize this conflict. Early in its analysis, the Court observed that an assignee "has no control interest in a limited liability company without becoming a member," and added that "Code § 13.1-1040(A) "provides the means by which the assignee of a financial interest may become

a member."²² But the Court doesn't acknowledge the "[e]xcept as otherwise provided" language in its later pronouncement that an operating agreement cannot confer membership rights upon an assignee without the other members' consent. Thus, *Ott* rendered uncertain the legality of operating-agreement provisions that automatically make assignees members with full voting and control rights.

The adoption of SB 779

Senator John C. Watkins, of Senate District 10, introduced SB 779 at the start of the 2013 legislative session. He did so for the specific purpose of overturning *Ott*'s ostensible limitations on assignee rights. The measure proposed to add to the third and fourth sentences of Code § 13.1-1039(A) the missing "magic words" that the *Ott* Court said were necessary in order for an LLC's operating agreement or articles of organization to opt out of the statutory limitations on assignees' rights: "Unless otherwise provided in the articles of organization or an operating agreement" ²³ The bill received the endorsement of the Virginia Bar Association and unanimously passed both houses of the General Assembly.²⁴

In late March, the Governor recommended that, instead of adding the "magic words" to the beginning of the third sentence of Code § 13.1-1039(A), the General Assembly should replace them with the following phrase: "Except as provided in subsection A of 13.1-1040."²⁵ By linking Code §§ 13.1-1039(A) and -1040(A), this change harmonizes the potential inconsistency between the two statutes that became apparent after *Ott*.

On April 3, 2013, both houses concurred in the Governor's recommendation, 40-0 in the Senate, and 92-1 in the House.²⁶ The approved amendment to Code § 13.1-1039, which took effect on July 1, 2013 as Chapter 772 of the 2013 Acts of Assembly, states:

- A. Unless otherwise provided in the articles of organization or an operating agreement, a membership interest in a limited liability

company is assignable in whole or in part. An assignment of an interest in a limited liability company does not of itself dissolve the limited liability company. ~~An~~ *Except as provided in subsection A of § 13.1-1040, an assignment does not entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights of a member. Such* *Unless otherwise provided in the articles of organization or an operating agreement, such an assignment entitles the assignee to receive, to the extent assigned, only any share of profits and losses and distributions to which the assignor would be entitled.* (emphasis added).²⁷

Potential pitfalls remain even after enactment of SB 779

The newly adopted amendment to Code § 13.1-1039(A) should eliminate arguments based upon *Ott* that an assignee is statutorily prohibited from participating in the management and affairs of the company, regardless of whether the company's governing documents provide to the contrary. But under the new law, if assignees are to have such participatory rights, LLC members must do more than simply say so in the company's operating agreement or articles of organization. The assignee must also become a member pursuant to Code § 13.1-1040(A), which can happen in one of two ways. One way is to obtain the consent of a majority of the other member-managers (or members in an LLC managed by a non-member). The other way is to include language in the company's governing documents that automatically confers membership status upon (or particular types

of assignees) without having to obtain approval of the other members. The latter approach is highly recommended whenever LLC members want the rights to transfer their voting and control interests to a chosen successor (again, usually a surviving spouse or child), without the risk of having their succession plans thwarted by other members who might otherwise refuse consent in the future.

The newly adopted amendment to Code § 13.1-1039(A) should eliminate arguments based upon *Ott* that an assignee is statutorily prohibited from participating in the management and affairs of the company, regardless of whether the company's governing documents provide to the contrary.

In addition, the new legislation does nothing to assuage the Court's somewhat demanding requirements for overriding statutory dissociation under Code § 13.1-1040.1(7)(a). If members of an LLC want to avoid dissociation upon their death (which converts their interest to that of a mere assignee), then the company's operating agreement or articles of organization must include language that explicitly expresses "an intent to supersede Code § 13.1-1040.1(7)(a)." ²⁸

Conclusion

The General Assembly's new amendment to Code § 13.1-1039(A) alleviates most of the concerns resulting from the *Ott* decision. Nonetheless, potential traps for the unwary remain. In order for assignees to participate in the management and affairs of an LLC, they must be made members of the company in accordance with Code § 13.1-1040(A). Additionally, *Ott's* strict requirements for overriding statutory dissociation continue to be controlling law in Virginia.

Members of Virginia LLCs who wish to opt-out of the statutory default provisions governing assignments of membership interests and dissociation are well advised to have knowledgeable legal counsel examine their company's governing documents to determine whether they contain language sufficient to meet the new requirements. ♦

(ENDNOTES)

1. 282 Va. 403, 719 S.E.2d 309 (2011).
2. See legislative summary of SB 779, available on the internet at: <http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB779>.
3. The LLC Act is codified at Va. Code Ann. §§ 13.1-1000 through 13.1-1080 (2011 Repl. Vol. & 2012 Supp.).
4. *Ott*, 282 Va. at 404, 719 S.E.2d at 310 (emphasis added).
5. *Id.* at 404, 719 S.E.2d at 310.
6. *Id.*
7. *Id.* at 406, 719 S.E.2d at 312.
8. Va. Code Ann. § 13.1-1040.2(A) (2011 Repl. Vol.).
9. Va. Code Ann. § 13.1-1039(A) (2011 Repl. Vol.).
10. *Ott*, 282 Va. at 406, 719 S.E.2d at 312.
11. *Id.* (emphasis added).
12. *Id.* at 407, 719 S.E.2d at 313. (emphasis added). To the extent that these conclusions are, in fact, unnecessary to the Court's holding, they would constitute dicta. *E.g.*, *Lofton Ridge, LLC v. Norfolk S. Ry.*, 268 Va. 377, 380, 601 S.E.2d 648, 651 (2004) (observing that a court's justification for a ruling that is "unnecessary to the holding . . . is dicta.").
13. Va. Code Ann. § 13.1-1039(A) (2011 Repl. Vol.).
14. *Ott*, 282 Va. at 406, 719 S.E.2d at 312 (quoting Va. Code Ann. § 13.1-1039(A)).
15. *Id.* at 406, 719 S.E.2d at 312.
16. *Id.*
17. *Id.*
18. Va. Code Ann. § 13.1-1001.1(C) (2011 Repl. Vol.).
19. Va. Code Ann. § 13.1-1040(A) (2011 Repl. Vol.) (emphasis added).
20. Va. Code Ann. § 13.1-1040(B) (2011 Repl. Vol.).
21. *Ott*, 282 Va. at 407, 719 S.E.2d at 313 (emphases added).
22. *Id.* at 406, 719 S.E.2d at 312.
23. See <http://lis.virginia.gov/cgi-bin/legp604.exe?131+ful+SB779ER>.
24. See <http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB779>.
25. See <http://lis.virginia.gov/cgi-bin/legp604.exe?131+amd+SB779AG>.
26. See <http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+SB779>.
27. 2013 Va. Acts. Ch. 772 (text available at: <http://lis.virginia.gov/cgi-bin/legp604.exe?131+ful+CHAP0772>).
28. *Ott*, 282 Va. at 406, 719 S.E.2d at 312.

Well, That Clears *That* Up!: *Funkhouser* and the Admissibility of Similar Occurrences to Support a Claim of Failure to Warn

by *Kenneth Falkenstein*

Under what circumstances can a plaintiff introduce evidence of prior similar occurrences to support a claim for failure to warn of a defective condition? Not sure? Don't feel too bad—the Supreme Court of Virginia isn't either.

The "similar occurrences" question was presented to the Supreme Court in the recent case of *Funkhouser v. Ford Motor Co.*¹ The facts in the case are tragic: Three-year-old Emily Funkhouser was playing inside her mother's 2001 Ford Windstar minivan. The engine was not running, and there was no key in the ignition. Nevertheless, a fire spontaneously erupted from the dashboard area leaving Emily with third-degree burns over 80% of her body. She later died in the hospital.²

Emily's father ("Funkhouser"), the administrator of her estate, filed a product-liability suit in the Albemarle County Circuit Court against Ford, alleging that the fire had resulted from a faulty electrical connection at the rear of the cigarette-lighter socket. The trial court, however, granted Ford's motion in limine to exclude evidence of other Ford Windstar fires, holding that none of those fires was caused by the same defect alleged by Funkhouser. Funkhouser then nonsuited the product-liability suit and refiled, asserting a theory that Ford failed to warn of the danger of key-off electrical dashboard fires.³

In the refiled action, Funkhouser retained an expert who was prepared to testify that "although

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there are multiple options within the instrument panel and surrounding area that could explain the electrical fire, the most likely origin point of the fire was in the lower portion of the panel in the vicinity of the wiring harness, cigarette lighter and the controls for the heating and AC system.” The expert further opined that the cause of the fire was the ignition of combustible materials:

by heat energy generated by abnormal and undesired electrical activity within the lower portion of the center instrument panel in the vicinity of the wiring harness, cigarette lighter and the controls for the vehicle’s heating and air conditioning system. Further, the source of ignition was likely electrical activity emanating from one of the wires or connector in this vicinity.⁴

In other words, Funkhouser’s expert could testify that the fire was electrical and where it originated, but he could not identify its specific cause.

Funkhouser sought to introduce evidence of seven other Windstar dashboard fires, and Ford again filed a motion in limine to exclude this evidence. In all seven prior instances, a fire erupted while the van was parked with the engine off and with no key in the ignition. In four of these instances, the cause of the fires was professionally investigated and found to have originated in the dashboard area and to have been caused by the failure of electrical wiring or other components within the dashboard area (hereinafter “Investigated Incidents”). In the other three incidents, no investigation was conducted into the cause or origins of the fires (hereinafter “Uninvestigated Incidents”).⁵ In all four of the Investigated Incidents—as in the Funkhouser incident—the investigations identified the nature of the fire (electrical) and the origin of the fire (within the dashboard) but were not able to identify the precise *cause* of the fire within the dashboard.

The trial court, per Judge Paul M. Peatross, Jr., granted Ford’s motion to exclude. It cited the Supreme Court’s rulings in *Jones v. Ford Motor Co.*⁶ and *General Motors Corp. v. Lupica*⁷ that, in failure-to-warn cases, evidence of similar occurrences is admis-

sible to prove that a defendant had notice of and actual knowledge of a defective condition “provided the prior incident occurred under substantially the same circumstances” and was “caused by the same or similar defects and dangers as those in issue.”⁸ Judge Peatross ruled that because “[t]he exact defect is not known in the Funkhouser fire . . . it is not fair to Ford to say it is the ‘same or similar defect and danger’” as those in the other fires, explaining his ruling as follows.⁹

The Court finds that the Funkhouser defect has to be identified with specificity to charge Ford with actual notice of that defect, which it had knowledge of by specific defects identified in the seven fires. The Court finds that the specificity required is lacking based on the *Jones* and *Lupica* cases. Even if there were enough specificity [in the present case], there is not enough specificity noted in the seven fires to say what the defect was that Ford had to warn of or correct. Furthermore, whether work had been done on those vehicles is not known and whether the original equipment as manufactured was in place in the seven fires is not known. Additionally, arson was not ruled out in some of the fires.¹⁰

After the trial court granted the motion in limine, Funkhouser asked it to clarify whether its ruling precluded Funkhouser’s experts from relying on the evidence of the seven other fires in forming their opinions as to whether Ford knew or had reason to know of the dangerous condition. The Court ruled that evidence of the prior fires was inadmissible, “including as a predicate for the testimony of [Funkhouser’s] expert witnesses.”¹¹

Funkhouser I

Funkhouser appealed to the Supreme Court of Virginia. He asserted that evidence of the other seven fires was admissible and that, even if inadmissible, it should be allowed to serve as a basis for Funkhouser’s experts’ opinions that—under industry standards and practices—Ford had reason to know of the defects. Justice Elizabeth A. McClanahan wrote the majority opinion, affirming in part and reversing

in part. The Supreme Court ruled that the Investigated Incidents were admissible for all stated purposes. And it ruled that Funkhouser's experts could rely on both the Investigated Incidents and Uninvestigated Incidents in forming their opinions. But it held that Funkhouser could *not* introduce testimony about the Uninvestigated Incidents under direct examination at trial ("*Funkhouser I*"). Justice Cleo Powell, with two other justices joining her, dissented, writing that the trial court's ruling that excluded all of the prior incidents for any purpose was correct on the merits and should have been affirmed.

The majority and minority did not disagree on all aspects of the case, however. They agreed that in order for Funkhouser to establish Ford's liability for failing to warn of a dangerous condition in the dashboard electrical system, Funkhouser had to prove that Ford:

(a) knew or had reason to know that the Funkhouser minivan was likely to be dangerous for the use for which it was supplied to Funkhouser, (b) had no reason to believe that Funkhouser would realize the minivan's dangerous condition, and (c) failed to exercise reasonable care to inform Funkhouser of the minivan's dangerous condition or the facts which make it likely to be dangerous.¹²

They also agreed that evidence of other similar occurrences was admissible to prove that Ford knew of or had reason to know of the danger to the Funkhousers if—and only if—"the prior incident occurred under substantially the same circumstances' and was 'caused by the same or similar defects and dangers as those in issue.'"¹³

The divide between the two sides boiled down to one very specific issue: What is the level of specificity required to show that the prior incidents were

caused by the same or similar defects and dangers as those in issue?

The majority, per Justice McClanahan, ruled that the trial court erred in its assertion that the Funkhouser defect must be "identified with specificity to charge Ford with actual notice of that defect." Rather, wrote Justice McClanahan:

The divide between the two sides [in *Funkhouser I*] boiled down to one very specific issue: What is the level of specificity required to show that the prior incidents were caused by the same or similar defects and dangers as those in issue?

The defect and danger alleged by Funkhouser is the potential for key-off electrical dashboard fires. Whether the Funkhouser minivan is unreasonably dangerous and whether Ford knew or should have known of the unreasonably dangerous condition are essential elements of Funkhouser's failure to warn and were not proper issues for the court to resolve on Ford's motion to exclude evidence of the other Windstar van fires.¹⁴

Justice McClanahan also stated that the trial court incorrectly required a level of specificity that applied to claims for specific design or manufacturing defects—not cases of failure to warn of a more generalized danger:

Funkhouser is asserting that the minivan was unreasonably dangerous due to the potential for key-off electrical dashboard fires, not due to a specific design or manufacturing defect. Thus, the issue presented by Ford's motion to exclude evidence of the other Windstar van fires was whether the other fires were caused by key-off electrical dashboard fires. Funkhouser was not required to allege a specific mechanical defect to establish the similarity of the fires.¹⁵

The majority ruled that the four Investigated Incidents were specific enough to meet this standard and were therefore admissible.¹⁶ The three Uninvestigated Incidents did not meet this standard and therefore were inadmissible.¹⁷ The majority also

ruled that Funkhouser's experts could *rely* on all of the seven prior incidents in formulating their opinions "on what the industry standard would be in response to . . . reports of unexplained, key-off fires," but they were prohibited from *testifying* during direct examination about the Uninvestigated Incidents.¹⁸

In dissent, Justice Powell argued that the majority had failed to distinguish between whether (1) the prior incidents had *occurred* "under substantially the same circumstances" as the Funkhouser fire and (2) whether the prior incidents were *caused* by "the same or similar defects and dangers" as those alleged in the Funkhouser fire.¹⁹ Justice Powell agreed that the first prong of this test had been satisfied, i.e., that the prior incidents had occurred "under substantially the same circumstances" as the Funkhouser fire.²⁰ Justice Powell, however, concluded that Funkhouser could not meet the second prong, i.e., that the prior incidents were caused by "the same or similar defects and dangers" as those alleged in the Funkhouser fire.²¹ Specifically, Justice Powell noted that Funkhouser had had to nonsuit the original suit because he could not meet the level of specificity required to support a design-defect claim, and in this failure-to-warn case he likewise could not prove that the fires in the other vehicles were caused by the same or similar defects and dangers as those in the Funkhouser fire.²²

Justice Powell also contended that the majority had wrongly applied a "should know" standard to Ford. She claimed that the established law in Virginia—under *Jones*, *Lupica*, and numerous other cases—was that Ford could be held liable only if it knew or "had reason to know" of the defect:

"[R]eason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as

so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.²³

In other words, Justice Powell claimed that, by applying a legally incorrect "should know" standard to Ford, the majority had assigned to Ford a duty that has never existed in Virginia failure-to-warn cases, i.e., the duty to actively investigate and determine the existence or non-existence of various facts. Under established Virginia law, Ford had a duty to know only what it had a "reason to know," i.e., facts that could be reasonably inferred from Ford's already-existing knowledge. Ford did *not* have a duty to proactively conduct an investigation to learn new facts.²⁴

Justice Powell concluded that none of the prior incidents provided Ford with information specific enough that Ford had reason to know of a specific defect that would render the Funkhouser minivan dangerous for its intended use:

Because Funkhouser cannot show what defect caused the fire in his Windstar, he necessarily cannot show that the defect in the other Windstars were similar. Even if he could pinpoint the defect that caused the fire in his Windstar, the evidence regarding the cause of all seven of the other fires is inconclusive. Accordingly, I would affirm the decision of the trial court on all issues.²⁵

Without identifying a common defect, Justice Powell argued, the plaintiff failed to establish a failure-to-warn claim.

Funkhouser II

Justice Powell's dissenting opinion ultimately prevailed. After a rehearing, Justice Leroy F. Millette, Jr., withdrew his support for Justice McClanahan's position to join and form a majority in support of Justice

Powell's opinion. *Funkhouser I* was issued on June 7, 2012. On September 17, 2012, the Court entered an order withdrawing this opinion and authorizing a rehearing. The Court then rendered a new opinion on January 10, 2013, with Justice Powell writing for the majority and Justice McClanahan writing the dissent ("*Funkhouser II*"). Justice Powell's later (and binding) argument mirrors the argument that she made in her initial dissent. Justice McClanahan's dissenting opinion in *Funkhouser I* mirrors the argument that she made in her majority opinion in *Funkhouser II*.

Funkhouser's Lessons

So where does that leave us? The biggest take-away is that the Court has now implied that the standard of specificity required to show the cause of prior incidents in a failure-to-warn case is the same standard that is required to show the cause of prior incidents in design- and manufacturing-defect cases. A plaintiff who cannot meet the standard of specificity required to support a products-liability case apparently will not be able to fall back on a more relaxed standard in a claim for failure to warn. In addition, for a plaintiff to prevail in a failure-to-warn claim, he must prove that the defendant knew or had a "reason to know" of the defect. The defendant has *no* duty to proactively investigate and learn facts that he "should" know.

Funkhouser II also sets a much higher bar for getting a trial court's rulings on this subject reversed on appeal than had *Funkhouser I*. Whereas Justice McClanahan, in *Funkhouser I*, applied a *de novo* standard of review based on Funkhouser's assertion that the trial court had erred in its interpretation and application of Virginia law,²⁶ Justice Powell, in *Funkhouser II*, applied the far more stringent abuse-of-discretion standard that is traditionally applied to appellate review of evidentiary rulings.²⁷ *Funkhouser II* therefore sets the precedent that appeals of trial-court rulings on the admissibility of prior similar occurrences in failure-to-warn cases are reviewed only for abuse of discretion, not *de novo*.

So how confidently can a practitioner rely on *Funkhouser II* as precedent? This question is difficult

to answer. On one hand, the fact that the Supreme Court took the rare step of withdrawing Justice McClanahan's original majority opinion and replacing it with Justice Powell's opinion would indicate that the Court has expressly and decisively resolved the issue. On the other hand, this change occurred because a single justice changed his mind—showing how delicately balanced the Court is on this issue. Any future change in the make-up of the Court could be cause for it to revisit *Funkhouser II*. Consider yourself duly warned. ♦

(ENDNOTES)

1. The original opinion was reported at 284 Va. 214, 726 S.E.2d 302 (2012) (hereinafter referred to as "*Funkhouser I*"). This opinion was withdrawn by an order entered Sept. 17, 2012. The case was reheard, and a new and binding opinion was reported at 285 Va. 272, 736 S.E.2d 309 (2013) (hereinafter referred to as "*Funkhouser II*").
2. *Funkhouser I*, 284 Va. at 218, 726 S.E.2d at 304-05; *Funkhouser II*, 285 Va. at 276, 736 S.E.2d at 311.
3. *Funkhouser I*, 284 Va. at 218, 726 S.E.2d at 305 n. 3; *Funkhouser II*, 285 Va. at 276, 736 S.E.2d at 311.
4. *Funkhouser I*, 284 Va. at 219, 726 S.E.2d at 305; *Funkhouser II*, 285 Va. at 276, 736 S.E.2d at 311.
5. *Funkhouser I*, 284 Va. at 219-22, 726 S.E.2d at 305-07; *Funkhouser II*, 285 Va. at 276, 736 S.E.2d at 311.
6. 263 Va. 237, 559 S.E.2d 592 (2002).
7. 237 Va. 516, 379 S.E.2d 311.
8. *Funkhouser I*, 284 Va. at 224, 726 S.E.2d at 308; *Funkhouser II*, 285 Va. at 277-79, 736 S.E.2d at 311-12.
9. *Funkhouser I*, 284 Va. at 223, 726 S.E.2d at 307; *Funkhouser II*, 285 Va. at 279, 736 S.E.2d at 312.
10. *Funkhouser I*, 284 Va. at 223, 726 S.E.2d at 307; *Funkhouser II*, 285 Va. at 279, 736 S.E.2d at 313.
11. *Funkhouser II*, 285 Va. at 279-80, 736 S.E.2d at 313.
12. *Funkhouser I*, 284 Va. at 224, 726 S.E.2d at 308.
13. *Id.* at 224, 726 S.E. 2d at 308.
14. *Id.* at 226, 726 S.E. 2d at 309.
15. *Id.* at 226, 726 S.E. 2d at 309 n. 8 (citation omitted).
16. *Id.* at 228, 726 S.E. 2d at 310-11.
17. *Id.* at 228-29, 726 S.E. 2d at 311.
18. *Id.* at 229-30, 726 S.E. 2d at 311-12.
19. *Id.* at 231, 726 S.E. 2d at 312.
20. *Id.*
21. *Id.* at 231-32, 726 S.E. 2d at 312-13.
22. *Id.*
23. *Id.* at 232, 726 S.E. 2d at 313 n. 1 (quoting *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 135-36, 413 S.E.2d 630, 635 (1992)).
24. *Id.*
25. *Id.* at 233, 726 S.E. 2d at 313.
26. *Funkhouser I*, 284 Va. at 223-24, 726 S.E.2d at 308.
27. *Funkhouser II*, 285 Va. at 280, 736 S.E.2d at 313.

The “Hanging Tickler” System

by John Lowe

On our listserv, one frequently sees posts from new lawyers asking basic questions. One of the great benefits of membership is having such help available from experienced practitioners. But sometimes the most basic tips are not published—either because no one asks or because they don’t arise in the context of a case. I write to offer a suggestion for a tickler-file system that is simple, easy to use, and effective. It has been a cornerstone of my case administration.

Every lawyer needs a system that reminds him or her of important dates and events. Statutes of limitations immediately leap to mind. But we also need effective reminder systems for other important dates: due dates for responsive pleadings, due dates for expert disclosures, and a host of other important deadlines. Computer-based systems—either stand-alone software or systems devised by lawyers on their own—can address this problem. And many may find such systems satisfactory for tickler files. But the disadvantage of most such systems is that they take some time to input the information, date, etc.

The system I advocate is as simple to operate as it is to set up. It requires dedication of only a single file drawer in one’s desk. In that drawer are 43 hanging files. The first 31 are labeled 1 through 31. The remaining 12 are labeled with abbreviations of the months. Thus, each month has a hanging file and each day of the next 31 days has a hanging file.

The folders are arranged chronologically. Thus, if today is the 15th of the month, then the next hanging file is “16.” Files 17 through 31 follow. Then comes the file for the next month, followed by files 1 through 16.

Then, in the essence of simplicity, you just drop notes or documents into the hanging file for the day on which you need the reminder. Because of the hanging files’ size, you can use full-size letters or other documents as the reminders. The reminder document—be it a document or a note—also can be dropped into a file a day earlier than the due date, as a reminder and early tickler for the needed date. I frequently drop several notes into different day files for important events. That

way, I receive plenty of reminders in advance—as well as a reminder on the actual due date.

As you remove the reminders for the day, you move that numbered-date hanging file to the back of the numbered files (in front of all the month files except for the next month—the next month file hangs after the 31 hanging file immediately ahead). When you reach the last day of the month, you take the reminders from that hanging file and also the reminders from the next month file which is now positioned right after the 31 file. Then you move that month file to the back of the 11 other month files. As you reach each successive day, starting with the first, you place those files immediately after the new “next month” file—and so on.

As you find a reminder that you have placed in a hanging file for a week ahead of the deadline—to remind you to start preparing for the event—you can move the reminder ahead just a day or two for further stimulus leading up to the due date.

For me, the major advantages of the system are the ease of making an entry and the ease of receiving reminders. I can just drop the entire 8.5 by 11 document into the due-date file a day or so early, and that’s it. The fact that I can drop in an entire document—a brief, for example—makes it quick and easy. No need to create separate notes; the document itself can be the tickler. But I can also drop small notes, magazine articles I have cut out, printouts of e-mails, and a host of other reminders that will help me schedule my work and activities.

Someone may say, “But you can’t take that with you if you go out of town or to a downtown court.” True. But if I am going out of town, I can check a few days ahead and make notes on the appropriate days in my pocket calendar or computer calendar to take with me for that limited time and purpose. It is also very easy and understandable for a secretary or paralegal to check for you if you are out of town.

The system isn’t for everyone. But its simplicity and ease of use may jump-start you where you have no effective tickler/reminder system already in place. I have used it with great success and facility in my 30 or so years as a very active trial lawyer. ♦

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Virginia's New Permissible Venue Statute: What is a "Practical Nexus"?

by Robert C. T. Reed, Esq.

Nathan J. Veldhuis, Esq.

The 2013 session of the General Assembly made significant changes to a plaintiff's ability to sue a defendant in a venue where the defendant regularly conducts substantial business activity. Legislation was initially proposed that would altogether remove this basis for venue. As part of a larger compromise, however, the resulting action preserved venue based on substantial business activity, but added a new "practical nexus" requirement.¹ The legislation, enacted by the General Assembly and signed by Governor McDonnell, went into effect on July 1, 2013.

Venue as it has been

The Virginia Code presents two categories of proper venue: Category A, preferred venue and Category B, permissible venue.² In cases where there is no preferred venue, a plaintiff may choose one of the enumerated permissible venues to file suit.³ The new statute does not change Category A, preferred venue. The General Assembly only altered Code § 8.01-262, the provision dealing with permissible venue.

Under the prior version of Code § 8.01-262, venue was permissible where the cause of action arose⁴ or where a defendant (1) resides (or, if a defendant is a corporation, where the mayor, rector, president or chief officer resides);⁵ (2) has his principal place of employment;⁶ (3) has a registered office or agent;⁷ or (4) regularly conducts substantial business activity.⁸ Additional permissible venues relate to particular causes of action, including actions to recover personal property,⁹ actions against a fiduciary,¹⁰ actions for improper message transmission,¹¹ and actions involving delivery of goods.¹² If none of the foregoing applies, then venue is proper where the defendant

owns property,¹³ or if no such venue exists, where the plaintiff resides.¹⁴

The General Assembly's most significant change to the permissible-venue statute appears in Va. Code Ann. § 8.01-262(3), which allows venue where the defendant regularly conducts substantial business activity. The General Assembly last altered this subsection in 2004, when it replaced the phrase "regularly conducts affairs or business activity" with "regularly conducts substantial business activity," thereby limiting its scope.¹⁵ This venue provision has been the subject of much legal wrangling ever since.

The Virginia Supreme Court has weighed in three times to provide some guidance.¹⁶ First, in *Meyer v. Brown*, the Supreme Court addressed the term "regularly."¹⁷ It held that the defendant—who only occasionally visited Richmond to conduct business with insurance brokers—had not conducted sufficiently "regular" business activity to make venue in Richmond permissible under § 8.01-262(3).¹⁸ In *Barnett v. Kite*, the Supreme Court held that the statute only refers to the business activity of the named defendant and does not contemplate the business activity of entities in which the defendant has an ownership interest.¹⁹ Most recently, in *Hawthorne v. VanMarter*, the Supreme Court addressed the term "substantial."²⁰ It upheld a trial court's decision to transfer venue, holding the defendant's transient activities within the venue (driving through for work, shopping, attending community college courses, collecting mail and storing items at an old address) did not constitute "substantial business activity."²¹ Within those loose guideposts, circuit courts have regularly been called upon to interpret this venue provision by defendants objecting to venue and plaintiffs seeking to establish proper venue.²²

As of July 1, 2013, there is a new threshold deter-

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mination for litigators to fight over when arguing whether a defendant does or does not conduct substantial business activity within a particular venue.

Venue as it is now

Some of the changes to the permissible-venue statute are cosmetic—tidying up awkward language²³ and ugly numbering.²⁴ But the changes also add a “practical nexus” requirement to venue based upon substantial business activity.²⁵

Under the new § 8.01-262(3), a plaintiff will still be able to sue a defendant in a venue where that defendant regularly conducts substantial business activity, “*provided there exists any practical nexus to the forum including, but not limited to, the location of fact witnesses, plaintiffs, or other evidence to the action.*”²⁶ In other words, there must be a “practical nexus” between the cause of action and the forum.

Battle lines

The new statute raises several questions, which litigation will need to resolve. The overarching inquiry is to determine what is meant by “any practical nexus to the forum.” Subsidiary questions will follow, e.g., what is meant by “location of”?; what is meant by “fact witnesses”?; what is meant by “other evidence to the action”?; and how much nexus between the cause of action and the forum must there be before it is considered “practical”?

“Practical Nexus”

The term “practical nexus” is not new to Virginia venue law. It first appeared in *Norfolk and Western Ry. Co. v. Williams*, 239 Va. 390, 389 S.E.2d 714 (1990). In that case, the Virginia Supreme Court held that the trial court abused its discretion when it denied defendant’s motion to transfer venue under Virginia’s *forum non conveniens* statute, Code § 8.01-

265.²⁷ Section 8.01-265 authorizes the circuit court to transfer venue from a plaintiff’s chosen proper forum to another proper forum upon a showing of “good cause.”²⁸ “Good cause” includes, among other things, “the avoidance of substantial inconvenience to the parties or the witnesses.”²⁹ But the *Williams* Court also noted that plaintiff’s chosen venue “had no *practical nexus* whatsoever with the instant action.”³⁰ The

Court held that the weight given to a plaintiff’s choice of forum diminishes when there is “at best a technical, formal connection with the original court chosen.”³¹ Following *Williams*, trial courts began transferring venue solely because of a lack of nexus between the chosen forum and the cause of action—without considering inconvenience to the parties or witnesses.³²

In 1999, the Virginia Supreme Court—recognizing confusion among the circuit courts—agreed to address the issue. In *Virginia Electric & Power Co. v. Dungee*,³³ the defen-

dant, Virginia Power, relied on *Williams* to argue that the lack of a practical nexus alone provided “good cause” to transfer venue.³⁴ The trial court denied Virginia Power’s motion. On appeal, the Supreme Court affirmed. It agreed that the non-existence of a practical nexus was one factor that a trial court may consider, but it held that this was not a decisive factor.³⁵ Thus, even though the defendant showed that there was no practical nexus with the chosen venue, the Supreme Court found that the trial court did not abuse its discretion in denying Virginia Power’s motion to transfer venue. It found that Virginia Power failed to present sufficient evidence of substantial inconvenience to parties or witnesses.³⁶

In the post-*Williams*, pre-*Dungee* series of trial-court opinions, practical nexus was sometimes identified as the main basis for transferring or retaining venue.³⁷ That line of cases, however, provides only limited insight into the factors courts will have to consider when assessing “practical nexus” under the

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new permissible-venue statute. To the extent those courts accounted for the location of plaintiff, fact witnesses, or other evidence in determining “practical nexus,” their analyses merged with analyses of whether the parties and witnesses would be substantially inconvenienced if they had to appear at trial.

In *Williams* and *Dungee* the “practical nexus” issue arose in *forum non conveniens* motions, i.e., motions to transfer from one permissible venue to another. As of July 1, 2013, however, courts also can consider “practical nexus” when determining whether venue is permissible in the first place, at least under the substantial-business-activity venue provision.

At what time is practical nexus determined?

Trial courts usually assess “substantial business activity” as of the time of filing suit.³⁸ Thus, courts generally will not regard events that have occurred after suit is filed; doing so would allow a party to manipulate venue later in the case.³⁹ The new statute is, however, silent on the issue. Should the existence of a “practical nexus” be evaluated at the time the cause of action arises? At the time suit is filed? At the time the motion objecting to venue is heard? At any other time prior to trial? Or at the time of trial?

When ruling upon *forum non conveniens* motions, it makes sense for trial courts to consider where witnesses or evidence will be at the time of trial. But evaluating the location of witnesses and evidence as of the time of trial arguably is *inappropriate* when ruling on whether venue is permissible in the first place. Suppose a court chooses the time of trial as the appropriate period with reference to which to evaluate permissible venue. If the existence of venue depends on the anticipated location of witnesses and evidence at trial, a defendant may seek to defeat venue after suit is filed by simply removing evidence from the chosen venue so that it no longer has a practical nexus to the cause of action.

People, entities, and evidence tend to move around throughout the course of litigation. A chosen venue that has a practical nexus to the cause of action when the action arises may lose that nexus by the time suit is

filed. Similarly, a chosen venue that has no practical nexus to the cause of action when it arises may come to have a practical nexus by the time of filing by the relocation of fact witnesses, plaintiffs, or evidence. Courts will have to grapple with temporal arguments presented by plaintiffs and defendants in future cases.

What is meant by “location of”?

The new venue statute identifies the “location of fact witnesses, plaintiffs, or other evidence” as possible factors creating a “practical nexus.” The term “location” is broad. The General Assembly did not use the term “residence” to limit where plaintiffs or fact witnesses must be located to determine “practical nexus.” The ambiguous term “location” can have many interpretations, such as the plaintiffs’ or witnesses’ places of employment, schools, guest homes, or even actual physical location. It could also allow for locations outside of the chosen venue so long as the proximity suggests a practical nexus.⁴⁰ Does a plaintiff’s chosen venue share a practical nexus to a cause of action arising outside the venue if the plaintiff, several eyewitnesses, and some important physical evidence are brought into the venue at the moment suit is filed, only to disperse elsewhere thereafter? Perhaps trial courts will consider the permanency of persons and evidence within the chosen venue in determining whether a “practical nexus” exists.

Who are “fact witnesses”?

Trial courts will have to consider the location of “fact witnesses” in determining whether there is a practical nexus between the forum and the cause of action. In practice, fact witnesses are generally regarded as any witnesses who will not provide expert-opinion testimony.⁴¹ Nevertheless, some witnesses are not so easily defined. For example, in personal-injury and medical-malpractice litigation, a plaintiff’s treating health care provider often serves a dual role as both fact witness and expert.⁴² Plaintiffs will likely contend that their treating health care providers are fact witnesses for purposes of determining “practical nexus,” although such witnesses

may later be designated to present expert opinions at trial. Defendants, undoubtedly, will contend that the location of treating health care providers should not be considered, because they are experts and not “fact witnesses.” There may be some cases where it is unclear whether a health care provider is a retained expert or a treating physician entitled to “fact witness” status.

What is “other evidence”?

The statute makes clear that the listed factors do not exhaust the items a trial court may consider in determining “practical nexus.” As if to emphasize the breadth of possible considerations, the final listed factor is “other evidence to the action.” The location of any evidence—which includes items, documents, records, recordings, or anything else that tends to make the existence of any fact more probable—can be considered in determining “practical nexus.”⁴³ Perhaps the venues in which opposing counsel’s offices are located may each have a “practical nexus” to the cause of action by virtue of the fact that they are often the repositories of much of the evidence in the case.

What degree of nexus makes it practical?

Trial courts will have to determine what degree of evidence linking a cause of action to the chosen forum will create a “practical nexus.” The statute uses the term “any practical nexus.” The statute then makes clear that “practical nexus” includes the location of witnesses, plaintiffs, or other evidence. The use of the word “any” implies that the location of a single listed item is all that is necessary to satisfy the precondition. On the other hand, trial courts may instead rule that a chosen venue’s nexus to the cause of action is not necessarily “practical” just because one piece of evidence is located in the venue. The venue where the cause of action arose will likely be

sufficient to create a “practical nexus” in most cases. Only time will tell what significance the location of plaintiffs, fact witnesses, and other evidence will have in determining “practical nexus.” Trial courts likely will have to consider the value of the location of various fact witnesses and evidence on a case-by-case basis.

The venue where the cause of action arose will likely be sufficient to create a “practical nexus” in most cases. Only time will tell what significance the location of plaintiffs, fact witnesses, and other evidence will have in determining “practical nexus.”

Who has the burden?

Normally, “the party objecting to venue has the burden of establishing that the chosen venue is improper.”⁴⁴ Thus, defendants will have the burden of establishing that the chosen venue lacks “any practical nexus” to the cause of action. This could be difficult. To meet their burden, Defendants will have to account for the location of every piece of evidence and every witness in the case. Further, defendants will waive any defect in venue if they fail to object within 21 days of service.⁴⁵ But at that early stage in

litigation, parties often are unsure about who the fact witnesses are and what the evidence will be.

Although it technically will be defendant’s burden to show a “practical nexus,” plaintiffs should not be complacent. In response to a defendant’s venue motion, a plaintiff should be prepared to explain to the court why a “practical nexus” exists in the forum.

Conclusion

All practitioners need to be mindful of the recent changes to the permissible-venue statute. Those who are considering filing suit in a venue based on the regularly conducted substantial business activity of the defendant must be prepared with some reasons why a “practical nexus” exists. Litigators who defend such cases should be prepared to file objections to venue under Va. Code Ann. § 8.01-264, asserting that the “practical nexus” test has not been met.

The “practical nexus” concept previously served as

only one factor in determining “good cause” to transfer venue in forum *non conveniens* motions. Now, it is a *decisive* determination trial courts *must* make in assessing whether venue is proper where a defendant regularly conducted substantial business activity. ♦

(ENDNOTES)

1. See H 1618, Va. Acts, Chapter 71, 2013 Sess. (Va., March 5, 2013). Accessible at <http://leg1.state.va.us/cgi-bin/legp504.exe?131+ful+CHAP0071+pdf> (last accessed March 15, 2012).
2. See Va. Code Ann. § 8.01-261-262.
3. See Va. Code Ann. § 8.01-262.
4. See Va. Code Ann. § 8.01-262(4).
5. See Va. Code Ann. § 8.01-262(1).
6. See *id.*
7. See Va. Code Ann. § 8.01-262(2).
8. See Va. Code Ann. § 8.01-262(3).
9. See Va. Code Ann. § 8.01-262(5).
10. See Va. Code Ann. § 8.01-262(6).
11. See Va. Code Ann. § 8.01-262(7).
12. See Va. Code Ann. § 8.01-262(8).
13. See Va. Code Ann. § 8.01-262(9).
14. See Va. Code Ann. § 8.01-262(10).
15. See *Sandler v. Wintergreen Partners, Inc.*, 71 Va. Cir. 155, 157 (Va. Cir. Ct. 2006).
16. See *Meyer v. Brown*, 256 Va. 53, 500 S.E.2d 807 (1998); *Barnett v. Kite*, 271 Va. 65, 624 S.E.2d 52 (2006); *Hawthorne v. VanMarter*, 279 Va. 566, 692 S.E.2d 226 (2010).
17. *Meyer*, 256 Va. at 57, 500 S.E.2d at 810.
18. *Id.*
19. *Barnett v. Kite*, 271 Va. at 70, 624 S.E.2d at 55.
20. *Hawthorne*, 279 Va. at 580, 692 S.E.2d at 234-35.
21. *Id.*
22. Trial courts that have issued opinions analyzing the term “substantial business activity” tend to compare a defendant company’s business activity in the forum with the company’s overall business activity when determining whether the activity in the venue is “substantial.” See e.g., *Sandler*, 71 Va. Cir. 155 (Va. Cir. Ct. 2006) (holding business activity is not substantial when defendant’s advertising purchases in venue amounted to about one percent of its overall advertising budget); *Garland v. Shoosmith Bros. Inc.*, 73 Va. Cir. 515 (Va. Cir. Ct. 2007) (holding that \$51,000 in contracts with the forum and revenue of \$107,000 derived in the forum does not constitute substantial business activity when those amounts only account for less than one percent of defendant’s total revenue).
23. The new statute also does away with permissible venue where a corporate “mayor, rector, president or other chief officer resides” and opts for a more intuitive approach, making venue permissible where a corporate principal office or principal place of business is located.
24. The new statute renumbers the subparts to § 8.01-262(5) relating to partitioned personal property.
25. See H 1618, Va. Acts, Chapter 71, 2013 Sess. (Va., March 5, 2013). Accessible at <http://leg1.state.va.us/cgi-bin/legp504.exe?131+ful+CHAP0071+pdf> (last accessed March 15, 2012).
26. *Id.*
27. See *Williams*, 239 Va. at 396, 389 S.E.2d at 718 (1990).
28. See Va. Code Ann. § 8.01-265.
29. *Id.*
30. *Williams*, 239 Va. at 396, 389 S.E.2d at 717 (emphasis added).
31. *Id.* at 395, 389 S.E.2d at 717.
32. See e.g., *Jonak v. Wintergreen Dev. Inc.*, 43 Va. Cir. 234 (Va. Cir. Ct. 1997) (transferring action from City of Charlottesville to Nelson County because nexus stronger in transferee forum than in original forum).
33. See *Virginia Electric & Power Co. v. Dungee*, 258 Va. 235, 520 S.E.2d 164 (1999).
34. See *id.* at 246, 520 S.E.2d at 170.
35. See *id.*
36. See *id.*
37. See *Slone v. Hickock*, 20 Va. Cir. 325 (Va. Cir. Ct. 1990); *Virginia Radiology Assoc., P.C. v. Culpeper Mem. Hosp., Inc.*, 21 Va. Cir. 157 (Va. Cir. Ct. 1990); *Beverly v. Charles Machine Works*, 24 Va. Cir. 344 (Va. Cir. Ct. 1991); *Gentry v. Toyota Motor Sales, USA, Inc.*, 29 Va. Cir. 140 (Va. Cir. Ct. 1992); *Wray v. Floyd & Beasley Transfer Co.*, 29 Va. Cir. 126 (Va. Cir. Ct. 1992); *Jonak*, 43 Va. Cir. 234 (Va. Cir. Ct. 1997).
38. See *Duncan v. Brannock*, 78 Va. Cir. 169, 170 (Cir. Ct. 2009) (citing *Jones v. Rusteau*, 43 Va. Cir. 311 (Cir. Ct. 1997)).
39. See *Jones*, 43 Va. Cir. at 312 (“to hold otherwise would be to allow a defendant who resides or works in the place where suit is filed to ‘defeat’ venue by moving or finding new employment outside of that forum”).
40. See *Gentry*, 29 Va. Cir. at 143 (finding a practical nexus between the City of Danville and the cause of action because the accident occurred twenty minutes from Danville in Eden, North Carolina).
41. See *Ligon v. Southside Cardiology Assoc., P.C.*, 258 Va. 306, 313, 519 S.E.2d 361, 364 (1999) (discussing the admission of evidence concerning habit in a medical malpractice action, the Court distinguished between fact witnesses and experts, stating “[t]he testimony of fact witnesses is relevant to show what actually happened on a particular occasion. The testimony of expert witnesses relates to the same specific incident by establishing a standard of care applicable to the defendant’s actions on that particular occasion and by accessing whether those actions conformed to the established standard of care.”); see also, Va. R. S. Ct. Rule 2:702.
42. See e.g., *Ward v. Ward Trucking of Pa., L.L.C.*, 77 Va. Cir. 239, 239 (Va. Cir. Ct. 2008) (noting that plaintiff’s treating physicians “seem to occupy both positions, as fact witnesses and experts.”).
43. See Va. R. S. Ct. Rule 2:401.
44. *Meyer*, 256 Va. at 57, 500 S.E.2d at 809.
45. See Va. Code Ann. § 8.01-264.

View from the Bench • By Diane M. Strickland

After a Decade: Some Plat“a”tudes

In the mediator’s opening comments, we are taught to include a brief biographical sketch—years and areas of practice, time on the bench, and experience as a mediator. When this year I found myself reporting that I had retired from the bench and began mediating with the McCammon Group ten years ago, I was a bit taken aback. *“How time flies when you are having fun”*. . . and fun is what it has been for me. As I tell all who inquire whether I like being a mediator, I thoroughly enjoy helping people to help themselves.

In addition to enjoying the practice of mediation, I have also learned a thing or two in the past 10 years. Having already dropped one plat“a”tude, and presumably you are still reading, I will take a chance on employing a few more to share my reflections. I use the “a” because “plata” is something of value in Spanish; and it is my hope that these thoughts will be more than mere banalities.

“You can’t fit a square peg into a round hole”

In Virginia, we are fortunate that mediation is an option, not a requirement. Parties who come to the table voluntarily, armed with knowledge of the process, are far more likely to achieve consensus.

Lawyers inform their clients of the alternative of mediation in compliance with the duties imposed by Rule 1.4 of the Rules of Professional Conduct. If the client chooses mediation, counsel should explain the different role that the attorney will play, that of negotiator and conciliator rather than that of litigator. The client should be fully prepared to actively participate in the process, assisting in presentation of the facts and making decisions. It must be made clear to the client that they, not the mediator, will be the

decision maker. In this manner, the square corners are rounded.

By contrast, many states require mediation as a predicate to having a case heard. When the client and counsel feel that the mediation process is one which they must endure in order to have their day in court, the effort put forth is often inadequate to resolve the dispute. The parties will simply spend the required number of hours to entitle them to a trial without genuinely discussing the issues. In this manner, the corners remain square.

“A stitch in time saves nine”

Mediation can be initiated at any time—prefiling, prior to discovery, post discovery, substituted for the trial date or even on appeal. Commencing the mediation process before filing suit or before discovery can save time and expense.

Making an informed decision regarding when to mediate requires an evaluation of a number of factors. Do both sides have sufficient knowledge of the facts to appropriately value the case? Are there legal questions requiring a ruling by the court? Are there expert opinions that need to be disclosed? Is an evaluation of the demeanor of parties/witnesses through depositions instructive in valuing the case?

While time and expense can be conserved with early mediation, it is seldom economically beneficial to commence the process only to have to adjourn for a court ruling or a deposition. Another significant consideration in making the call on when to mediate is the issue of confidentiality. Often there exist important reasons for one or both sides to avoid potential publicity of filing suit. Adverse impacts on an individual’s reputation or on the economic interest of a corporation may favor early mediation, in order to keep the case out of the public limelight.

Diane M. Strickland is a mediator at the McCammon Group and served as a circuit court judge from 1987-2002.

Preserving relationships is a further factor to be taken into account in selecting the time for mediation. Whether it be business colleagues, spouses, neighbors, or communities, the trial-preparation process can widen the rift and aggravate the damage. When the parties need to maintain relationships for economic or personal reasons, earlier intervention will facilitate greater healing.

You also should consider the impact of the litigation process on the client. Assess how the demands of responding to discovery requests and attending depositions can disrupt your corporate client's business. Factor in the impact on a physician's practice of a pending medical malpractice trial. Address with your individual client their tolerance for stress and allow that to guide you in determining when to commence mediation.

"You catch more flies with honey than vinegar"

Perhaps it is stating the obvious to note that the mediation environment differs from the court room, and the demeanor of counsel is a matter of import. While advocacy has its place in mediation, adopting an adversarial attitude is rarely helpful. Noting a pertinent case supporting one's position may have value; arguing the case exhaustively does not. Making observations regarding how an opposing party will play to a jury may be useful, but attacking that party does not promote resolution. Pointing out the strengths of the background facts and expert opinions may enhance bargaining position; but an extended debate over the merits of opposing experts rarely advances agreement. Withholding pertinent information and alluding to it is rarely effective; information must be shared to be factored into the other side's valuation.

The best advocates in mediation are those who effectively and courteously make their point and move on. Maintaining civility at all times not only

results in respect from the other side, but also increases the likelihood of settlement. It is not necessary to convince the opposition (or the mediator) that your position is correct; rather they need only appreciate that it might be accepted by the court or the jury. This can be accomplished most effectively by not becoming adversarial.

"A bird in the hand is worth two in the bush"

The best advocates in mediation are those who effectively and courteously make their point and move on.

Calculating your best day at trial is only one of the variables to be considered when determining a fair settlement of your client's dispute. Also to be considered are the time saved, the expense saved, the stress avoided and, perhaps most importantly, the uncertainty of litigation. Over the more than 15 years that I served on the bench, I saw some unusual verdicts; and before that,

during my 14 years as a trial lawyer, I received some surprising verdicts. It is challenging to predict which witness or piece of evidence or instruction of law will be the determining factors in the final decision. This uncertainty is avoided in mediation where the stakeholders are also the decision makers.

While your best day at trial may be your starting point in the evaluation, no worthy opponent will voluntarily agree to that assessment. They are looking for their best day as well. Mediation is a matter of compromise; to achieve a settlement, both sides must give. While this results in parties potentially leaving the process with less than they might have achieved through litigation, it may just as likely result in securing more than might have been accomplished through trial. There is a certain comfort that comes from avoiding the extremes of the range of outcomes, and a mediated agreement accomplishes that goal.

"All things come to those who wait"

Mediation can be a frustratingly slow process, though rarely as time consuming as trial. The frustra-

tion is produced by several sources.

Counsel and clients often initiate negotiations by assuming positions on the outer limits of—if not altogether off of—the playing field. The common wisdom is that this will allow enough room to move as will be required by their opponent's equally extreme opening demand or offer. These extremes can be avoided, through premediation discussions, guided by the mediator, with the goal of commencing negotiation within the scope of a realistic trial outcome. However, even when the process begins with the parties miles apart, resolution can be accomplished with patient deliberation.

Another source of frustration results from the downtime waiting while the mediator is working with the other side. Advising your client to bring work or reading materials can be helpful in this respect. If hosting, consider providing a television and snacks in the caucus rooms.

Co-defendants or multiple plaintiffs should attempt to work out their differences before mediating with the opposition. Much valuable time can be expended trying to determine the percentage of contributions or settlement proceeds to be allocated while the other side is left hanging. The mediator can assist by hosting a conference call or premediation gathering with one side to address division of responsibility or proceeds.

Frustration also occurs when part way through the process, it becomes apparent that the person with the full authority to settle is not at the table. While it is the norm to address this issue during the premediation conference call, for a variety of reasons the ultimate decision maker is sometimes not available in person. Technology has assisted us to some extent by providing teleconferencing, Skype participation or, at least, involvement via conference call. When all of these approaches fail, it is critical that the final decision maker be reachable by phone when necessary. The downside to this approach is that it is extremely difficult to bring the decision maker up to speed on the information shared, the in-person observations of

the parties, and the momentum of the negotiations.

Even with the best preparation, the mediation day can go slowly. Prepare your client by explaining that mediation is an incremental process and that just as they may not wish to take that big step to move the cause along expeditiously, the same can be expected from the opposition. Whether the dance is done slowly or at a more upbeat pace is not predictive of outcome. What does determine success is the willingness to remain open minded, to listen carefully to the information shared, to reexamine strengths and weaknesses, and to adjust positions based upon what is learned.

“All's well that ends well”

When you reach accord, reduce the agreement to writing. It becomes an enforceable contract, though it is rare to have a mediated agreement require enforcement due to the participation of the parties. The document can be as bare boned or as detailed as may be required; just be certain not to make it “subject to execution of a formal agreement” *Golding v. Floyd*, 261 Va. 190 (2001).

It is helpful to bring a draft agreement to the mediation. Better yet, share the proposed draft, minus the items to be mediated, with the other side prior to mediation. This not only gives them “skin in the game” but also projects a positive sense that agreement will be reached.

With the execution of the agreement, success is achieved. The client is satisfied because they have been heard and have had a hand in crafting the resolution. They have avoided the costs, time expenditure, and stresses resulting from trial. Relationships have been preserved and uncertainty avoided. You can move on with satisfaction to your next case and to your next mediation. ♦

A Practical Guide to Mental Commitments & Judicial Authorization of Medical Treatment in Virginia— Part 1: Mental Commitment

by James C. (“Jim”) Martin

Many of us have received the call. A frantic friend or former client telephones you for advice about a mentally ill family member who is about to be involuntarily committed. In all too many cases, the response is, “I really don’t know anything about that area of law.” The object of this Guide is to enable you to provide intelligent advice in such circumstances.

The attorney’s role & basic duties

The procedures involved in an involuntary mental commitment appear at Code § 37.2-800 through § 37.2-847. Code § 37.2-814(E) delineates the role and the responsibilities of counsel in commitment proceedings, stating that “[t]he role of the attorney shall be to represent the wishes of the client, to the extent possible.” The “to the extent possible” language reflects the fact that parties in these proceedings frequently cannot rationally evaluate or express their wishes. Nevertheless, the provision makes it clear that attorneys in mental-commitment hearings are advocates for the client. They do not serve the same function as guardians *ad litem*.

As for basic duties, Code § 37.2-814(E) states that, where possible, the attorney—during or before the commitment hearing—shall interview: (1) the client; (2) the petitioner; (3) the [independent] examiner described in § 37.2-815; (4) the community services board staff, and (5) any other material witnesses. It also states that the attorney shall examine all relevant diagnostic and other reports; present evidence and witnesses (if any) on his client’s behalf; and “otherwise actively represent his client in the proceedings.”

Legal procedures & standards

Va. Code § 37.2-817(C) sets legal standards for whether a “respondent”—i.e., the patient—may be involuntarily committed to a hospital. It is a multifaceted test, which must be satisfied by a clear-and-convincing-evidence standard. To begin with, the district-court judge or a “special justice” (a local attorney appointed by the court to handle these proceedings) must find that the person has a mental illness. The judge or justice then must find that there is a substantial likelihood that, as a result of mental illness, the person will in the near future either: (1) cause serious physical harm to himself or others or (2) suffer serious harm due to his inability either to protect himself from harm or to provide for his basic human needs. Finally, the judge or justice must find that all available less-restrictive treatment alternatives to involuntary inpatient treatment have been investigated and determined to be inappropriate.

In my experience, the hospital usually has little trouble meeting the standard—though this of course varies according to the circumstances and who is sitting on the bench.

How they get there: the basic commitment process prior to the hearing

The commitment process begins with a Petition identifying the party asking for the commitment. Usually, it is either a relative or a nurse. Before the hearing, there will have been either a Temporary Detention Order (“TDO”) (see § 37.2-809) or an Emergency Commitment Order (“ECO”) (see § 37.2-808) issued by a magistrate, allowing the hospital or the police to hold the patient until the hearing. An ECO lasts up to 4 hours, and can be extended for

2 hours. A TDO must be served within 24 hours. Under § 37.2-814, the hearing must be held within 48 hours of the execution of the TDO. But if the 48 hours expires on a weekend, legal holiday, or day on which the court is closed, the period is extended until the close of business on the next day that is not a weekend or holiday. At the hearing, you should point out if any of these time periods have been violated—among other things, a violation of the 48-hour rule deprives the court of jurisdiction. There are, however, no exclusionary-rule or double-jeopardy “tricks” that could permanently “spring” your client because of improper procedures. If there are irregularities, the hospital or petitioner can take out new papers (i.e., a new TDO and Petition).

Two basic reports will be generated before the hearing. The local Community Services Board (“CSB”) will send someone to evaluate the patient and make a written recommendation. In addition, an Independent Examiner (“IE”)—a psychiatrist, psychologist, or other mental-health worker—will examine the patient and prepare a written report pursuant to § 37.2-815.

Involuntary commitments initially last for up to 30 days from the date of the hearing. The “up to” language means that even if the judge or special justice commits the patient at the hearing, the doctor can release the patient at any time without going back to court to ask permission to do so. Recommitments, similarly, may be ordered for up to 180 days.

If the patient has the capacity to accept voluntary admission, § 37.2-814(B) allows the judge or special justice to rule that the patient is “capable and willingly accepts voluntary admission for inpatient treatment.” If so, the patient must agree to stay at least three days from the day of the hearing. Thereafter, the patient can give two business days notice for a hearing to contest the voluntary commitment. Patients who are

being held in custody on criminal charges cannot, however, commit themselves voluntarily. *See* Va. Code § 19.2-169.6.

Attorney preparation: reviewing the papers

As a patient’s attorney, the first thing you should do is review the papers. These include the Petition; the TDO (when was it served?); the ECO (if there is one); the CSB pre-screening report; and the IE’s report. If you are reviewing the papers the afternoon or evening before the hearing—and this usually is your only chance to do it before the hearing date—the IE report may not have been completed. You can check for it again in the morning before the hearing. You also can ask to see the client’s medical chart, if needed.

If possible, I find it best to review the papers before meeting the client. Otherwise you will occasionally get a client who insists that you read the reports verbatim out loud,

or let them laboriously read everything that is being said about them and who says it. This is often counterproductive and time-consuming, particularly if you have a number of hearings to prepare for. Reading the reports before the meeting also can alert you to what the client’s behavior is likely to be and what evidence will be used to convince the judge or special justice to commit him.

Attorney preparation: the client interview

Be careful. Unlike jails, modern mental hospitals tend not to have screens or windows behind which you may talk to your client. It is therefore a good idea to ask a nurse or doctor—if you can find one—whether the particular patient is actively psychotic, thereby making a one-on-one meeting problematic or dangerous. Don’t assume that they’ll tell you this just because you’re asking to see the patient. If there is a

Unlike jails, modern mental hospitals tend not to have screens or windows behind which you may talk to your client. It is therefore a good idea to ask a nurse or doctor—if you can find one—whether the particular patient is actively psychotic...

substantial danger, you should insist on having a staff member (preferably a large male) accompany you. A few patients can be talked to securely through a window because they are in seclusion from the other patients.

Upon meeting the patient, introduce yourself by name, and explain that you will be the patient's lawyer at the hearing. Ask questions such as how he's doing, how long he's been here, whether he's doing better since he's been here. Do not give him your card or phone number unless he requests it and you really need to.

After the introduction, explain that you are going to review his rights with him. Tell the patient that the doctor thinks he needs to stay in the hospital a while longer to try to get better. Explain that the doctor is asking for an order from the judge to keep him at the hospital for *up to* 30 days [or *up to* 180 days for recommitment] after the hearing. Assure him, however, that the doctor can let him go at any time.

You also should tell the patient that if he agrees that he needs to stay longer, he can ask for a voluntary admission. But tell him that, in a voluntary admission, he must agree to treatment and will have to wait at least three days (72 hours) from the date of this hearing before asking for another hearing. Also tell him that if, at any time after the three days, the patient thinks he's ready to go but the doctors do not, he must notify them that he wants a hearing—in two business days, the patient will have another hearing to decide if he should stay for up to 30 days. At this point, you should ask the patient whether he wants to stay voluntarily, or wants you to help get him out. If he expresses a wish to go home, you should inquire whether he has any place to go.

Code § 37.2-814(D) requires that a written explanation of rights be given to the patient/client, and that an attorney explain those rights to the patient. The official form describing those rights is Form DC-493, available in the general district court clerk's office or on the Internet. Tracking § 37.3-814(D)'s requirements, the form explains (i) the right to retained

or appointed counsel; (ii) the right to present any defenses such as an independent evaluation, expert testimony and other witnesses; (iii) the right to be present and testify; (iv) the right to appeal to the circuit court; and (v) the right to a jury on appeal. It also apprises the patient of hearing procedures. Many clients, however, are severely mentally ill and will be confused by a verbatim recitation of Form DC-493. I suggest that you paraphrase it while simultaneously pointing to the part of the form you are paraphrasing.

If you are court-appointed and the patient says he wants to hire an attorney (and seems serious about it), tell him that he is entitled to a reasonable opportunity to do so. *See* Code § 37.2-814(C). But warn him that this probably means the judge will have to put off the hearing, during which time he likely will have to stay in the hospital. If the patient wishes to call witnesses at the hearing, ask for their names and telephone numbers. Finally, you should inform the patient that he has been, or soon will be, visited by someone from the community services board and by an independent examiner. Tell the patient that each of them will write a report to the judge on whether they think he should stay in the hospital. But advise the patient that he can ask the judge to talk to these people in person or over the phone instead of just reading the reports.

Attorney preparation after the client interview

Preparation usually involves just noting any procedural defenses or substantive weaknesses in the case. You rarely will have time to do much more than determining whether there are any witnesses—live or on-the-phone—who could help. I generally do not belabor the possibility of witnesses once it is clear that the patient understands that he can get them and that this is done by giving you their information. If you go beyond that and ask, "So do you have any witnesses?" or reiterate "Please give me their names, addresses, and phone numbers," a mental patient may misinterpret this as meaning that he *must* have witnesses. In such a circumstance, mental patients often will come up with witnesses who are more hindrance

than help. “Mom wants me home” will usually (once you call Mom) turn out to mean “Mom wants me home when I’m well.” Nevertheless, it is essential to try to find and talk to any witnesses the client does give you.

An ethical difficulty sometimes arises when the witness tells you that they’re not ready for the client to come home, but asks you not to tell the client that. Although you can’t lie to your client or keep secrets from him, I see no absolute obligation to volunteer such information in cases when the client doesn’t specifically ask for it. Disclosing it to the client can create an explosive situation at the hearing, and make treatment much more difficult.

Exploring alternatives to commitment sometimes can be a viable defense. Code § 37.2-817(C) requires that such possibilities be investigated and deemed inappropriate before the court orders involuntary commitment. Keep this in mind when talking to any witnesses. You may be able to use facts gleaned from the papers, the patient interview, and witness interviews to come up with alternative treatment possibilities. This could be going to another mental facility that the client prefers (and has funding for), or it could be residing with a family member or close friend and receiving outpatient treatment (usually with the local CSB).

The attorney should make sure that the proposed outpatient solutions are, in fact, workable. For example, if the client has had suicidal ideation, you will want to know if he’s going to be home alone if released back to the family home. Mandatory outpatient treatment (“MOT”), which the court can monitor, is specifically provided for in § 37.2-817 and § 37.2-817.1. This provides a reasonable alternative in many cases. But it is unfunded in some areas, so arguing for it would be a waste of time there. You need to find out what the situation is in your area. If

you can establish a feasible community-based treatment alternative, the patient should be released as the facility will have failed to meet its burden under the statutory standard.

Although judges and special justices vary, mental commitment hearings tend to be more informal than most civil or criminal trials; they tend to be viewed as more of an administrative hearing.

Motions for continuance & pre-hearing release

If the patient wants to retain counsel, Code § 37.2-814(C) states that the judge or special justice “shall give him a reasonable opportunity to employ counsel at his own expense.” Under § 37.2-813, the court has the authority to release the patient on a recognizance or secured bond “if it appears from all evidence readily available that the person does not meet the commitment criteria. . .”

The hearing

Although judges and special justices vary, mental commitment hearings tend to be more informal than most civil or criminal trials; they tend to be viewed as more of an administrative hearing. Don’t be shocked if the judge skips a step or procedure that you consider to be essential to the case—even one mandated by the statutory scheme. It’s your job to speak up for your client if you need to, and you shouldn’t be afraid to do so. But if the evidence for commitment is overwhelming, there is no need to treat it like a capital-murder case just to convince your client you are doing a good job. In such a case—which is a lot more frequent than not—I try to strike a balance between “just sitting there” and turning the proceedings in to a theatre of the absurd.

Pursuant to Code § 37.2-804.1, witnesses who cannot be personally present may testify by telephone. And the evidence in the hearing may well contain hearsay. (The reports, for example, are admissible). But I haven’t found any authority stating whether hearsay is admissible in these hearings.

Regardless of any hearsay objection, the attorney should challenge any unreliable evidence.

Code § 37.2-814(A) states that, at the commencement of the commitment hearing, the judge or special justice must inform the patient of his right to apply for voluntary admission. If the patient accepts voluntary admission—and the court believes or determines that he is capable of doing so—the patient and doctor (or hospital representative) will sign a voluntary-commitment form and the proceedings will conclude without a formal hearing.

If, however, there is no voluntary commitment or motion for a continuance, the hearing will proceed. A CSB representative should be there (or be present by phone). This may or may not be the person who completed the prescreen report, so it is important to bring out any favorable points during cross. The Independent Examiner's report also will be read. As with the CSB representative, you can require that the IE be available by phone during the hearing. The doctor may testify or his opinion may be presented through a hospital representative. Favorable points to elicit from a witness on cross can include contradictions in details in the reports, staleness or unreliability of relevant information, or even an opinion that one or more of the criteria have not been met. For instance, the CSB representative (or other witness) might believe that the patient is no longer a danger to himself or others, but think that he is unable to care for himself and provide for his basic needs. If so, you can shift your focus away from the danger-to-self component and towards the self-care component of the commitment criteria.

As in a criminal case, you should move to strike at the close of the case against the client if there is a possibility that you can prevail without having the client

testify. If not, or if such a motion is overruled, any evidence you have on behalf of the client is presented. If your client has decided not to take the stand, you should make this fact known to the judge—either at the beginning of the hearing or very quickly upon

the overruling of the first motion to strike—lest the court proceed to examine the client. This is particularly important when the client also has criminal charges pending in which the Commonwealth could use the tape of the mental hearing. If I have witnesses other than my client, I usually put the client on first (the opposite of my usual procedure in criminal cases). That way, I can ask the client one more time if he wants the other witness(es) to testify. But putting the client on last is fine, too.

If your client insists that you try to get him out, you have to make some kind of argument to this end.

But the argument has to be non-frivolous, which often presents a challenge. The most difficult situation is probably when your client is alleged to be a danger to himself or others, especially if he is suicidal with a specific plan. You probably won't have any evidence to refute this—other than the client's testimony, which often ranges from contradictory to incoherent. In such a case, the client often hangs on your every word, expecting you to get him out. If you just say "we submit it," he may rage about "the kangaroo court." But if you say something like, "We ask the court to consider both sides of the evidence and arrive at a just decision," you might calm a mental-hearing client down. When you say "just decision" the client may hear "my client is obviously right" and leave the hearing relatively happy even if he does not get out. The reality is that many patients actually want to stay and get treatment.

Where the client is alleged to be delusional or otherwise unable to care for himself, to provide for

..you can argue that [the patient's] delusional state does not necessarily mean he should be locked up. Even a person who thinks he is Napoleon Bonaparte may be able to care for himself and function well in society.

his basic needs, or to protect himself from harm, you can argue that his delusional state does not necessarily mean he should be locked up. Even a person who thinks he is Napoleon Bonaparte may be able to care for himself and function well in society. Although I have never actually had a “Napoleon” client, I have had several who had apparently delusional beliefs that they were working undercover for the FBI, the CIA, the local police, or the military. In these situations, you should still *treat your client like a human being*. For example, in one of my cases I actually contacted the agency for whom the patient claimed he was clandestinely working. The fact that I took his claim seriously seemed to calm him down from his hysterical state. Not too long thereafter, he acknowledged his working-undercover belief to be mistaken.

Appeals & habeas

If the court orders involuntary commitment, the client has 10 days to note an appeal to the circuit court. *See* Va. Code § 37.2-821. It is important to remember that “the 30-day clock is ticking” because the current statute does not allow the circuit court to affirm the lower court decision for *another* 30 days (on an original commitment), but only for the remainder of the original 30 days. (But the form orders generally used are based on a former statute under which there *was* a second 30-day period by the circuit court). These appeals are supposed to take precedence over everything else on the circuit court docket, but your clerk and/or judge may be unaware of this. Code § 37.2-821(C) states that the Commonwealth Attorney must defend the commitment in circuit court.

Since you already have told the client prior to the hearing of his right to appeal, I do not think you are under any *per se* obligation to re-inform him of this or to specifically ask him after the hearing if he wants to appeal. Since you don’t want to encourage frivolous appeals by people who often have little grasp of the situation, I would advise attorneys to just say “good luck” after the hearing and to make sure the client has his copy of the written explanation of rights, unless

you believe an appeal is warranted. However, if the client does appeal, I think you must affirmatively ask him whether he wants a jury, both in fulfillment of your duty as an attorney and so that the court knows when to schedule the appeal.

If the circuit court affirms the commitment, a petition for appeal may be filed in the Supreme Court of Virginia, which should be accompanied by a Motion to Expedite since even in a 180-day recommitment the case could easily be mooted out by the appeal taking longer than the commitment period. In addition to the appeal process, Code § 37.2-844 also allows a petition for a writ of habeas corpus to challenge the legality of the detention.

Conclusion

Defending mental clients is rewarding and interesting. More so than in other areas of the law, you will meet individuals who elicit descriptions like “sincere,” “haunted,” “searching,” and even “spiritual.” They all deserve good counsel. ♦

Recent Civil Cases from the Supreme Court of Virginia

JUNE SESSION 2013

Civil Procedure

Case: *Friends of the Rappahannock v. Caroline County Board of Supervisors* (6/6/2013)

Author: Millette

Lower Ct.: Ellis, Joseph (Caroline County)

Disposition: Affirmed

Facts: The Caroline County Board of Supervisors granted a landowner a permit to use land adjacent to the Rappahannock River for a sand and gravel operation. Neighboring landowners and an environmental group sued the Board and the landowner in circuit court protesting this decision and seeking a declaratory judgment.

The environmental group claimed that using the land as a sand and gravel operation would impair the group's interest in water quality, interfere with the scenic beauty of the river, and frustrate the group's education and conservation efforts. The neighbors claimed that such a use would make it more difficult to find tenants, interfere with a right of way, create stagnant ponds, frighten away wildlife, destroy the scenic beauty of the area, cause health problems from dust and particulates, and impair their recreational use of the river.

The Board and the landowner argued that the plaintiffs lacked standing because they were not "aggrieved parties," and they were seeking to vindicate interests shared by the entire public. The trial court agreed, ruling that the complaint's injury allegations were conclusory and that the plaintiffs did not suffer a loss that differed from that suffered by the public generally.

Analysis: On appeal, the SCOV affirmed. It rejected the plaintiffs' argument that the trial court erred by using an "aggrieved party" test—rather than the declaratory-judgment statute's "justiciable interest" test—to determine standing. The court noted that in declaratory judgment cases involving land-use decisions, "any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without a difference."

For a non-owner to have standing to bring a declaratory-judgment action challenging a land-use decision, it must show (1) ownership or occupation of real property within or close to the land subject to the decision, and (2) particularized harm to a personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally. Proximity alone does not confer standing.

Applying that test, the SCOV held that the neighboring land-

owners failed to establish any particularized harm—distinct from harm to the general public—that they would suffer if the landowner were permitted to use the land as a sand and gravel operation. They cited no facts showing that the proposed use would cause any actual harm to them.

Key Holding(s):

- In determining standing in declaratory judgment cases involving land-use decisions, there is no distinction between an "aggrieved party" and a party having a "justiciable interest."
- For a non-owner to have standing to bring a declaratory judgment action challenging a land-use decision, it must show (1) ownership or occupation of real property within or close to the land subject to the decision, and (2) particularized harm to a personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.
- In a challenge to a land-use decision, proximity to the subject land does not by itself confer standing.



Land Use

Case: *Martin v. City of Alexandria* (6/6/2013)

Author: McClanahan

Lower Ct.: Brown, J. Howe (City of Alexandria)

Disposition: Reversed

Facts: Property owners who wished to build a townhouse in an historic part of Alexandria applied to the Board of Zoning Appeals ("BZA") for a variance on setback requirements. To support their application, they argued that their property was the only vacant buildable lot on the block, was wider and shallower than most of the other lots in the area, was adjacent to historic siding on the home to its west, and was situated such that enforcement of zoning and historic-district regulations would impose a hardship on them. The Board of Architectural Review ("BAR") approved the design and the BZA granted the variance, which the circuit court upheld.

Analysis: On appeal, the SCOV reversed. Under Alexandria's City Charter, which closely tracks Code § 15.2-2309(2), a party seeking a variance must either: (a) show that the property was acquired in good faith and was unusually situated so that strict enforcement of the zoning ordinance would effectively prohibit or unreasonably restrict the use of property,

or (b) satisfy the BZA that the granting of the variance would alleviate a clearly demonstrable hardship, and would not merely confer a special privilege or convenience on the landowner.

In addition, the landowner must show: (1) that strict application of the zoning ordinance would impose undue hardship, (2) that such hardship was neither shared generally with other property owners nor created by the landowner, and (3) that authorizing the variance will neither detrimentally affect neighboring landowners nor change the character of the zone.

Finally, the City Charter required landowners seeking a variance to show that the property's situation was not of a general or recurring nature such as to make a general amendment to the zoning ordinance practicable.

Considering those factors, the SCOV held that the landowners had not established that they qualified for a variance. The landowners argued that they suffered a "unique hardship" inasmuch as they sought a new-home construction, whereas most of the properties in the historic district already were built up. The SCOV rejected this argument, noting that the zoning ordinance applied both to existing and newly constructed buildings.

The SCOV also rejected the landowners' argument that their lot was wider and shallower than most lots on the street, making it difficult to build a house within existing zoning confines. The SCOV noted that this argument, if accepted, "would justify variances for the one-third of the properties that are even shallower than the [landowners'] property." The practical effect of this, it said, would be to nullify the zoning ordinance.

Finally, the SCOV rejected the argument that preserving the historic character of the area required a design that needed the variances. The landowners presented no evidence that they had tried, and failed, to design the house in compliance with the zoning and architectural requirements. And even though the BAR had approved their design, this did not mean that the property met independent zoning requirements.

Key Holding(s):

- A party seeking a variance must either: (a) show that the property was acquired in good faith and was unusually situated so that strict enforcement of the zoning ordinance would effectively prohibit or unreasonably restrict the use of property, or (b) satisfy the BZA that the granting of the variance would alleviate a clearly demonstrable hardship—not merely confer a special privilege or convenience.
- A party seeking a variance must also show that: (1) strict application of the zoning ordinance would impose undue hardship, (2) such hardship neither is shared generally with other property owners nor is created by the landowner, and (3) the authorization of the variance will neither detrimentally affect neighboring landowners nor change the character of the zone.



Real Property

Case: *Martin v. Garner* (6/6/2013)

Author: McClanahan

Lower Ct.: Brown, J. Howe (City of Alexandria)

Disposition: Affirmed

Facts: The owners of two neighboring parcels contested ownership of an alley that separated them. When the original owner deeded the properties, the property descriptions defined them as extending "to an alley," with a right of way common to the abutting parcels and to other neighboring properties.

To determine ownership of the alley, the owners of one parcel brought a declaratory judgment action against the owners of the other parcel. The plaintiffs also named other nearby property owners as defendants, even though there had been no dispute with them before the lawsuit.

The trial court held that both parcels extended to the alley's centerline. And it held that there was no justiciable controversy with the other neighbors.

Analysis: On appeal, the SCOV affirmed, stating that "[i]t is an established rule in Virginia that a conveyance of land bounded by or along a way carries title to the center of the way, unless a contrary intent is shown." It noted that this rule applied regardless of whether the way is a public or private one. Because the deeds splitting up the parcel expressed no contrary intent, the SCOV held that each parcel extended to the centerline of the alley.

As for the other defendants, the SCOV held that the trial court properly dismissed them. For an action to be justiciable under the declaratory judgment statute, Code § 8.01-184 to -191, there must be an "antagonistic assertion and denial of right" that is ripe for disposition. Because the plaintiffs did not allege that there was an antagonistic assertion and denial of right as between them and the other neighbors, the pleadings did not establish a justiciable controversy as to them.

Key Holding(s):

- A conveyance of land bounded by a way carries title to the center of the way, unless the conveyance shows a contrary intent.
- For a claim to be justiciable under the declaratory judgment statute, there must be an antagonistic assertion and denial of right as between the litigants.



Civil Procedure

Case: *New Dimensions, Inc. v. Tarquini* (6/6/2013)
Author: Goodwyn
Lower Ct.: Finch, Gaylord L., Jr. (Prince William County)
Disposition: Reversed

Facts: A female design and sales consultant brought an Equal Pay Act (“EPA”) claim against her former employer, a homebuilding company. The former employer answered the complaint, but did not assert the four EPA defenses enumerated in 29 U.S.C. 206(d)(1). The trial court barred the former employer from introducing evidence to support those defenses, reasoning that they were affirmative defenses that the defendant waived by not timely raising them. After a three-day bench trial, the trial court ruled in plaintiff’s favor.

Analysis: On appeal, the SCOV reversed.

Citing the “reverse-Erie” doctrine, the SCOV applied federal substantive law and state procedural law. It then held that the issue of whether the EPA’s defenses were “affirmative defenses” presented a question of substantive law, and that federal law treated them as affirmative defenses. On the distinct question of whether and when affirmative defenses must be pleaded, however, the SCOV held that Virginia law applies.

The SCOV then held, as a matter of Virginia state law, that the defendant did not need to plead the EPA statutory defenses. It acknowledged that most affirmative defenses must be pleaded in order to avoid unfair surprise or prejudice to the plaintiff. But it held that this is not the case for defenses included in the statute creating the cause of action as there is little risk of surprise or prejudice in such cases.

Key Holding(s):

- Where a party brings a federal statutory cause of action in state court, the state court must apply federal law to substantive issues and state law to procedural issues.
- A party need not plead affirmative defenses if those defenses are included in the statute giving rise to the cause of action.



Mental Health

Case: *Paugh v. Henrico Area Mental Health and Developmental Servs.* (6/6/2013)
Author: Powell
Lower Ct.: Yoffy, James S. (Henrico County)
Disposition: Reversed

Facts: Appellant was involuntarily committed by a special justice under Code § 37.2-817. He appealed this order to the

circuit court for a de novo hearing pursuant to Code § 37.2-821(B). The hearing took place two months after the initial involuntary commitment. By that time, the appellant had been released from confinement. At the hearing, the circuit court evaluated the appellant’s mental status as of the date of the original commitment, not the date of the hearing. Thus, even though the appellant did not satisfy the requirements for commitment as of the time of the hearing, the circuit court held that the initial commitment was proper because the appellant met the conditions for commitment at that time.

Analysis: On appeal, the SCOV reversed. It held that when a circuit court conducts a de novo hearing under Code § 37.2-821(B), the court must view the committee’s condition as of the date of the hearing, not the date of the initial confinement.

The SCOV further held that the appeal was not mooted by the appellant’s release from confinement. Civil commitment had consequences that were collateral to the confinement. Among other things, a statute barred an involuntary committee from possessing a firearm. Citing the collateral-consequence exception to the mootness doctrine, the SCOV held that the case was not moot.

Key Holding(s):

- In a Code § 37.2-821(B) de novo appeal of an involuntary commitment, the circuit court must evaluate the party’s mental status as of the time of the hearing, not the time of the original commitment.
- Release from confinement does not moot an appeal of an involuntary commitment order where the order has collateral consequences.



April Session 2013

Civil Procedure

Case: *Caperton v. A.T. Massey Coal Co., Inc.* (4/18/2013)
Author: Lemons
Lower Ct.: Vanover, Henry A. (Buchanan County)
Disposition: Reversed

Facts: Plaintiff coal suppliers contracted with a coal broker to supply a set amount of metallurgical coal. After the coal broker came under new ownership, it attempted to supply a major steel producer with an inferior blend of coal. The steel producer then ceased buying from the broker. The broker in turn cut its purchases from the suppliers in half, invoking the contract’s force-majeure clause and claiming that the steel producer was planning to close its Pittsburgh plant.

The suppliers sued the broker for breach of contract in West

Virginia state court. The jury found that the broker breached the contract, and it awarded the suppliers \$6 million in damages.

Concurrently, the supplier's controlling shareholder brought a business-tort claim against the broker in West Virginia state court. Among other things, the plaintiff alleged that the defendant had made several false representations and had misused confidential information disclosed during defendant's abortive bid to purchase plaintiff.

After years of proceedings in West Virginia state and federal courts--including a trip to the United States Supreme Court--a West Virginia court dismissed the action, without prejudice, on the ground that the forum-selection provision in the parties' contract mandated that the business-tort case be heard in Virginia.

The plaintiff then refiled the action in Buchanan County Circuit Court. The defendant filed a plea of *res judicata*, arguing that because all of the business-tort claims arose out of the defendant's invocation of the force-majeure clause, the final judgment in the contract claim foreclosed the business-tort action. The circuit court sustained the plea, ruling that in 1998, the time of the earlier judgment, Virginia used a transactional test to determine whether two actions were identical for *res judicata* purposes.

Analysis: On appeal, the Supreme Court of Virginia reversed. It held that in 1998--before the adoption of the present Rule 1:6--Virginia used the "same evidence" test to determine whether two causes of action were identical for *res judicata* purposes. The trial court should not have applied a "transactional" test.

Applying the "same evidence" test, the SCOV held that the two actions were *not* the same cause of action. The evidence needed to support the business-tort claim against the defendant differed from the evidence needed to support the contract action. Thus, *res judicata* did not bar the plaintiff's business-tort claim against the defendant.

Key Holding(s):

- Before the adoption of present Rule 1:6, Virginia courts used the "same evidence" test to determine whether two causes of action were identical for *res judicata* purposes.



Insurance

Case: *Doctor's Company v. Women's Healthcare Assocs., Inc.* (4/18/2013)

Author: Millette

Lower Ct.: McCahill, Burke F. (Loudoun County)

Disposition: Affirmed

Facts: An insurer brought a declaratory-judgment action

to determine coverage under a medical-malpractice policy it issued to the defendant, an obstetrics practice. The underlying claim was a contract action against the obstetrics practice that arose in connection with a birth injury. The child's parents claimed that the obstetrics practice breached their agreement to participate in the Virginia Birth-Related Neurological Injury Compensation Act, resulting in the parents' inability to recover under the Fund.

The practice's medical-malpractice policy covered damages that it had to pay out on those "Claims covered by this Policy *resulting from* . . . Professional Services rendered by the" obstetrics practice. The policy defined "claims" as "demand[s] for payment of damages or for services *arising from* a Professional Services Incident . . . not otherwise excluded . . ." The policy had an exclusion for "[l]iability arising out of any . . . violation of any statute."

The insurer contended that the contract action did not "result from" the provision of health care because the alleged wrongdoing was the misrepresentation about coverage in the birth-injury fund, not the actual performance of professional services. In the alternative, the insurer claimed that the policy's statutory-violation exclusion barred coverage. The trial court rejected these arguments and held that the policy covered the obstetrics practice for the contract action.

Analysis: On appeal, the SCOV affirmed. The SCOV rejected the insurer's argument that the contract claim did not "result from" a "professional services incident." First, it observed that the insurer's argument focused on the "resulting from" language in the coverage provision; it ignored the "arising from" language in the policy's definition of a "claim." Noting the "apparent conflict," the court construed the "ambiguity" against the insurer, holding it to the broader "arising from" standard. And it held that the term "arising from" was sufficiently broad to encompass the contract claims asserted against the insured. Among other things, the plaintiff in the underlying contract action could not establish damages unless the obstetrics practice had performed professional services.

The SCOV also rejected the insurer's argument that the underlying claim fell under the policy's statutory-violation exclusion. The exclusion required that the claim "aris[e] out of" a statutory violation. But the SCOV held that the liability under the contract claim did not arise out of any violation of the birth-injury statute. It arose out of the practice's failure to participate in the birth-injury fund after stating that it would participate. Indeed, the statute "has no private cause of action." Because the breach of the statute, if any, was merely incidental to the contract claim, the claim did not arise out of a statutory violation.

Key Holding(s):

- The term "resulting from" requires a greater nexus with the event than does the term "arising out of."
- A statutory-violation exclusion does not apply to

where the alleged statutory violation is not the grounds of liability and is merely incidental to a contract claim.



Local Government

Case: *County of Albemarle v. Camirand* (2/28/2013)

Author: Millette

Lower Ct.: Higgins, Cheryl V. (Albemarle County)

Disposition: Reversed

Facts: Retired employees sued in circuit court to appeal a decision of the Albemarle County Board of Supervisors regarding retirement benefits. Code § 15.2-1246 requires parties appealing a governing body's disallowance of a claim to serve written notice of the appeal the governing body's clerk *and* to execute a bond to the county. The retirees filed a bond, but not a separate notice. The bond, however, referenced the appeal.

The county argued that the failure to file a separate notice was fatal to the appeal. The trial court disagreed and the matter was tried to a jury, who returned a verdict in the retirees' favor.

Analysis: On appeal, the SCOV reversed. It held that the plain language of Code § 15.2-1246 required both a bond and a notice of appeal. Although the bond's preamble referenced the appeal, this prefatory language had no independent legal force and did not constitute a notice.

Key Holding(s):

- A party appealing a local governing body's disallowance of a claim must file both a notice and a bond.
- Prefatory language in the preamble of an instrument has no legal force.



February Session 2013

Land Use

Case: *D.R. Horton, Inc. v. Board of Supervisors for the County of Warren* (2/28/2013)

Author: McClanahan

Lower Ct.: Ledbetter, William H. (Judge Designate) (Warren County)

Disposition: Affirmed

Facts: As part of a rezoning, a developer proffered that it would build a wastewater treatment plant and pay \$8000 for each lot upon the issuance of a building permit. Later, the developer proposed that the lots be allowed to hook up to a nearby town's water/sewer in lieu of a wastewater treatment plant, and that the developer would pay the county an additional \$4000 for each lot. The developer and the county never executed an agreement, though the county voted to allow the properties to connect to the water/sewer lines.

The developer later sold the property to a third-party, who objected to the additional \$4000 assessment. Nevertheless, to obtain building permits for the lots, the purchaser paid the sum "under protest and with a full reservation of its rights and remedies." Later, the purchaser sought a declaratory judgment that the county could not lawfully impose the additional \$4000 assessment against it. The circuit court agreed. In 2011—i.e., after the developer already had paid the \$4000 fee for all the lots—the circuit court entered an order declaring that the developer did not have to pay the fee. The developer then brought a reimbursement claim against the county, which the county denied.

In the appeal of the county's decision, the circuit court rejected the developer's claim, holding that it had waived its arguments under the "voluntary payment" doctrine.

Analysis: On appeal, the SCOV affirmed. It recited the "voluntary payment rule," under which the payment of an illegal demand with full knowledge of the facts making it illegal is deemed to be voluntary and cannot be recovered where: (1) there is no immediate and urgent necessity for the payment, (2) the payment is not needed to release person or property from detention, and (3) the payment it is not needed to prevent an immediate seizure of person or property. The fact that the party making the payment files a written protest does not make the payment involuntary.

The SCOV rejected the developer's argument that the county's refusal to issue building permits without the fees amounted to a seizure of a property right. Although development rights are property rights, the County's unlawful demand did not cause the purchaser to lose any development rights.

It rejected the argument that the developer faced criminal charges if it proceeded without obtaining permits, noting that the county had not threatened the purchaser with criminal charges.

The SCOV also noted that there was no “immediate and urgent necessity” to pay the demand. To be an immediate and urgent necessity, the plaintiff must prove that it could not extricate itself from the predicament through legal methods. There was no evidence that the developer could not have sought an appropriate legal remedy during the three-and-a-half year period during which it paid the \$4000 assessments.

The SCOV rejected the developer’s argument that it had adequately protested the legality of the fees, noting that under the voluntary-payment doctrine such protests do not render a payment non-voluntary.

Finally, the SCOV rejected the purchaser’s claim that the county was unjustly enriched, citing authority to the effect that the voluntary payment rule is a defense to claims asserting unjust enrichment.

Key Holding(s):

- The payment of an unlawful demand with full knowledge of the facts making it illegal is deemed to be voluntary and cannot be recovered where: (1) there is no immediate and urgent necessity for the payment, (2) the payment is not needed to release person or property from detention, and (3) the payment is not needed to prevent an immediate seizure of person or property.
- Payment of an unlawful demand is not rendered “involuntary” simply because the payor protests that the demand is unlawful.



Civil Procedure

Case: *Daily Press v. Commonwealth* (2/28/2013)

Author: Mims

Lower Ct.: Conway, H. Vincent, Jr. (City of Newport News)

Disposition: Vacated

Facts: A newspaper sought to review the exhibits from a criminal trial involving allegations of felony child neglect and second-degree murder. The trial court initially refused and entered an order sealing the entire file. But after the newspaper moved to intervene and to withdraw the sealing order, the trial court partially relented. It withdrew the sealing order over the entire file, but allowed the parties to withdraw the trial exhibits. Later, it ordered that the original exhibits be returned to the file at the conclusion of the trial of one of the co-defendants.

The reporter filed a mandamus petition in the Court of Appeals, which the Court of Appeals denied. The reporter then filed a petition for appeal of the sealing order, over which the Court of Appeals declared that it had no jurisdiction.

The exhibits were eventually returned to the file and the news-

paper was allowed to view them.

Analysis: On appeal, the SCOV reversed the trial court’s decision to allow the parties to withdraw the exhibits pending the outcome of the trial of one of the codefendants.

It rejected the argument that the issue was moot. It held that this doctrine did not apply where the issue is one that is “capable of repetition, yet evading review.” The controversy was capable of repetition in future criminal trials. Because criminal trials are of short duration, the issue would evade review if traditional mootness principles applied.

Turning to the merits, the SCOVA held that the public’s right to attend criminal trials is implicit in the First Amendment, though such a right has to be weighed against a criminal defendant’s right to a fair trial.

The circumstances for sealing criminal-trial exhibits are narrow, and require specific findings, made on the record, that (1) there is a substantial probability that a defendant’s right to a fair trial would be jeopardized by publicity and that closing the proceedings would prevent that prejudice, and (2) reasonable alternatives to closure cannot adequately protect the defendant’s fair-trial rights.

Because the trial court failed to make any such findings, it was inappropriate to close public access to the trial exhibits.

The SCOVA also held that the trial court’s order violated Code § 17.1-208, which states that records and papers maintained by the clerk “shall be open to inspection by any person.” The SCOVA held that this right of access is equivalent to the constitutional right of access, and so the trial court’s order violated §17.1-208 for the same reason it was unconstitutional.

Key Holding(s):

- A case is not moot where the issue it presents is capable of repetition yet evades review.
- Before a trial court can close criminal proceedings, it must make specific findings, on the record, that (1) there is a substantial probability that a defendant’s right to a fair trial would be jeopardized by publicity and that closing the proceedings would prevent that prejudice, and (2) reasonable alternatives to closure cannot adequately protect the defendant’s fair-trial rights.



Civil Procedure

Case: *Daniels v. Mobley* (2/28/2013)

Author: Goodwyn

Lower Ct.: Shadrick, Thomas S. (City of Portsmouth)

Disposition: Vacated in part and Affirmed in Part

Facts: Plaintiff operated a bingo hall where, for several years, he hosted Texas Hold ‘Em poker games for the

Virginia Fraternal Order of Police and for charity. The Commonwealth's Attorney sent Plaintiff a letter stating that the games violated Code § 18.2-325 and demanding that Plaintiff shut down the poker games or else face prosecution.

Plaintiff shut down the poker games, and then brought an action seeking a declaration whether Texas Hold 'Em constitutes illegal gambling under Code § 18.2-325 (which defines "illegal gambling") and whether Code § 18.2-328 (which holds an operator of an "illegal gambling facility" criminally liable) is facially unconstitutional and void for vagueness.

The trial court ruled that Texas Hold 'Em was illegal gambling under § 18.2-325, and that § 18.2-328 was not unconstitutionally vague.

Analysis: The SCOV vacated in part and affirmed in part.

It held that the Trial Court lacked jurisdiction over the declaratory judgment regarding § 18.2-325 because it sought to resolve a disputed *issue*, not to adjudicate *rights*. In order for a controversy to be "justiciable," it must involve "specific adverse claims, based upon present rather than future or speculative facts." Plaintiff framed his action as a request for a general determination of whether Texas Hold 'Em violates § 18.2-325, not a specific determination of his rights. The claim therefore was not justiciable.

The SCOV further noted that the plaintiff's requested declaration concerned the interpretation of a criminal statute. With limited exceptions, a declaratory judgment action is not the proper vehicle to collaterally impede a threatened criminal prosecution. Among other things, criminal actions have a different burden of proof, so any declaration in a civil action would not be binding on a criminal court--it would just be an advisory opinion.

Finally, the SCOV noted that the declaratory-judgment action was barred by sovereign immunity. The practical effect of a judgment in the plaintiff's favor would be to enjoin the Commonwealth from acting. The Commonwealth, however, is immune from injunction actions.

To the extent the complaint challenged the constitutionality of § 18.2-328, however, the SCOV held that the controversy was justiciable. Challenges to the constitutionality of a United States law and/or to self-executing provisions of the Virginia Constitution are both justiciable.

The SCOV, however, rejected the constitutional argument on the merits. The plaintiff claimed that the definition of "illegal gambling" was unconstitutional because it did not have an exception for games in which skill predominates. But the SCOV pointed out that another provision, Code § 18.2-333, specifically exempted contests of speed or skill from the statute's operation. So § 18.2-328 was constitutional.

Key Holding(s):

- To be justiciable, a declaratory judgment action has to seek more than mere resolution of a disputed legal

issue; it has to seek and adjudication of the parties' rights.

- A declaratory judgment action is not an appropriate vehicle for judicial interpretation of a criminal statute.
- Sovereign immunity protects the Commonwealth from injunction actions.



Professional Responsibility

Case: *Hunter v. Virginia State Bar* (2/28/2013)

Author: Powell

Lower Ct.: Code § 54.1-3935 Panel (City of Richmond)

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

Facts: A criminal-defense lawyer maintained a blog that discussed his cases. In it, he disclosed his clients' names and provided details about their cases. The lawyer did not first obtain permission to do so. But he claimed that all the information he disclosed was publicly available. The VSB investigated the matter and asked the lawyer to post a disclaimer on his blog, which the lawyer refused to do.

The VSB initiated a disciplinary proceeding against the lawyer, charging that he violated Rules of Professional Conduct 7.1 and 7.2 because the blog posts were misleading and did not contain a disclaimer. It also alleged that he violated Rule 1.6 by revealing information that could embarrass or harm his clients.

The VSB found that the lawyer violated Rule 1.6 by "disseminating client confidences." It further found that the blog was an advertisement, made for commercial purposes, that violated Rule 7.1's prohibition on advertisements that create an unjustified expectation about the results the lawyer can achieve. Finally, it found that he violated Rule 7.2 because the blog did not contain a disclaimer. The VSB admonished the lawyer and required him to put a Rule 7.2(a)(3)-compliant disclaimer on all of his case-related posts.

The lawyer appealed the case to a three-judge panel, which reversed the Rule 1.6 finding. It held that the VSB's interpretation of Rule 1.6 violated the First Amendment. But it upheld the VSB's finding that the blog posts violated Rules 7.1 and 7.2. The circuit-court panel admonished the lawyer and required him to post this disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case."

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

As a threshold matter, the SCOV found that the blog posts were commercial speech. They were motivated, at least in part, by economic motives. They predominantly described cases in

which the lawyer's client had a positive outcome. They mentioned the lawyer's law firm. They were on the law firm's commercial website. They did not have a forum where viewers could discuss the results. And they invited viewers to "contact us." The mere fact that five of the posts concerned general policy issues did not transform the blog into political speech.

It then held that applying Rule 7.1 and 7.2 to regulate the lawyer's blogs did not violate the First Amendment. It applied the U.S. Supreme Court's *Central Hudson* analysis, which requires courts to analyze: (1) whether the speech concerns lawful activities, (2) whether it is misleading, (3) whether the government interest is substantial, and (4) whether the regulation is no more restrictive than necessary.

The SCOV held that requiring the lawyer to post disclaimers did not violate the First Amendment. Addressing the *Central Hudson* factors, it found that the blog posts "have the potential to be misleading," which disclaimers could ameliorate. It held that the government has "a substantial interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire [the lawyer]." And it held that requiring a disclaimer was no more restrictive than necessary.

On the Rule 1.6 issue, however, the SCOV found that the VSB's interpretation of Rule 1.6--an interpretation under which a lawyer could be prevented, after the conclusion of a case, from discussing public facts that are embarrassing or detrimental to the client--violated the First Amendment. It distinguished cases in which the lawyer discussed a then-pending case. And it concluded that "a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."

Finally, as to the content of the required disclosure, the SCOV held that the circuit court panel should have enforced Rule 7.2(a)(3)'s requirements, including rules as to the formatting of a disclaimer. The circuit-court panel erred by ordering a disclaimer that did not comply with Rule 7.2(a)(3).

Justice Lemons, joined by Justice McClanahan, dissented.

Key Holding(s):

- Lawyer blog posts constitute commercial speech where: (1) they discuss particular cases that the lawyer was involved in, (2) they predominantly discuss cases in which the lawyer had a positive outcome, (3) they provide no forum for viewers to discuss the posts, (4) they are motivated in part by the desire to attract potential clients to the lawyer's firm, and (5) they invite readers to "contact us."
- A lawyer is free to discuss publicly available information about past cases even where such discussion may prove to be embarrassing or detrimental to the former client.



Land Use

Case: *Norfolk 102, LLC v. City of Norfolk (2/28/2013)*

Author: Kinser

Lower Ct.: Thomas, Norman A. (City of Norfolk)

Disposition: Affirmed

Facts: Two businesses serving alcoholic beverages brought a vested-rights challenge to a 2009 decision by the City of Norfolk, which had revoked a blanket special exception that had permitted them to operate as entertainment establishments.

The businesses were located in Norfolk's Waterside Festival Marketplace. When the zoning district was first established, it permitted sale of alcohol for on-site consumption, provided the business obtain a "use permit," which the City granted via ordinance. It also allowed issuance of "sub-use permits," which required the zoning administrator's approval. The two businesses obtained the appropriate permits.

Later amendments to the zoning ordinance reclassified the districts and placed Waterside within an R-1-A district. So restaurants serving alcohol needed to obtain City Council approval. At around the same time, the Waterside complex was expanded, and the businesses relocated. The two businesses received a document from the zoning administrator titled "Cash Receipt" and stating that it was a "Zoning Clearance for Business License." This document stated that the businesses' use was for an "Eating Place"--a term not defined in the applicable zoning ordinance.

Shortly thereafter, the City issued a blanket authorization for operation of "entertainment establishments" in the Waterside Festival Marketplace. The exception was subject to several conditions, including that a violation of ABC restrictions would be considered a violation of the special exception. The two businesses were cited several times for ABC violations.

In 2009, the City sought to repeal the blanket special exception and to require each ABC-licensed business in Waterside to obtain an individual special exception. Before the blanket exception was put in place, the two businesses applied for special exceptions. The businesses learned of opposition to their applications only the day before the City Council hearing on the matter, and had to obtain substitute counsel on short notice. The City Council denied the applications. At the same hearing, the City Council repealed the special exceptions--this, even though the matter was not on the pre-published agenda.

Nevertheless, the two businesses continued their operations. The City filed an injunction action in Circuit Court, and the two businesses filed a counterclaim and a separate action under Code § 15.2-2285(F).

The two businesses claimed that the City Council's consideration of the ordinance repealing the special exceptions was a denial of due process and that they had vested rights because the businesses were opened before the ordinance with the blanket exception went into effect.

The Circuit Court rejected these arguments. It held that City Council did not violate principles of due process because the two businesses received actual notice and had a reasonable opportunity to be heard. It rejected the two businesses' vested-rights arguments because (1) the original zoning ordinance did not apply because the businesses later relocated to an area outside the original Waterside, and (2) the businesses did not have an individual special exception under the later zoning ordinance--they simply fell under the now-repealed blanket exception. Their operation of the businesses before the promulgation of the blanket special exception was illegal and the City's acquiescence did not give rise to vested rights.

Analysis: On appeal, the SCOV affirmed. It held that Code § 15.2-2307 contemplates the vesting of a permissible use, not an impermissible use. When the two businesses relocated, the ordinance in place required a special exception, which the two businesses did not obtain. Whatever vested rights the businesses may have had in their original locations disappeared when they relocated to parcels that lay mostly outside the Waterside area that the original zoning ordinance covered. And, in any event, they did not have a right to use property as "Entertainment Establishment" under the original ordinance.

The SCOV further held that Code § 15.2-2311(C) did not apply because the zoning administrator's "Cash Receipt," which purportedly authorized use as an "eating place," did not vest any right in using the property as an "Entertainment Establishment," which was the use that the two businesses claimed was vested. The apparent acquiescence of City officials did not satisfy the requirements of § 15.2-2311(C).

Finally, the SCOV held that the consideration of the issues at the meeting was not a violation of due process. Under Code § 15.2-2204(B), a party's actual notice of, or active participation in, a proceeding waives right to challenge the proceeding based on failure to provide the requisite notice. And constitutional due process requires only notice and the opportunity to be heard--both of which the two businesses enjoyed.

Key Holding(s):

- Code § 15.2-2307 contemplates the vesting of a permitted use, not an impermissible use.
- A locality's acquiescence in an illegal land use does not vest the landowner with a right to continue the illegal use.
- Due process requires only that a person who is to be deprived of a property interest have notice of the action and an opportunity to be heard.



Defamation

Case: *Tharpe v. Saunders* (2/28/2013)

Author: McClanahan

Lower Ct.: Markow, Theodore J. (Halifax County)

Disposition: Reversed

Facts: Plaintiffs were a construction company and its employee, Tharpe. The company previously had an excavation contract with the United States for work at Fort Pickett. During this project it hit rock and sought a change order. The company later entered into a separate excavation contract with Southside Regional Service Authority. This time, too, it hit rock and requested a change order.

The owner of a competing construction company, Saunders, told the Authority's executive director that "Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett."

Plaintiffs brought a defamation action against Saunders and Saunders's company, asserting that the statement was false and that Tharpe had never made such a remark. Defendants demurred, claiming that the remark was the expression of an opinion and did not contain any provably false statements. The Trial court agreed, noting that "what is meant by the word 'screw' is dependent upon the speaker's viewpoint." Holding that the statement was opinion, the trial court sustained the defendants' demurrer to the defamation claim.

Analysis: On appeal the SCOV reversed. It acknowledged that "pure expressions of opinion" were constitutionally protected. But it said that pure expressions of opinion do not contain a provably false factual connotation.

Turning to the statement at issue, the SCOV held that the statement that the plaintiff had *told* the defendant he was going to screw the Authority was provably true or false. This was a false attribution of a statement that Tharpe maintained he never uttered. Whether Tharpe actually said the words that defendant attributed to him is a fact that can be proven to be true or false. This was so regardless of the truth or falsity of the attributed remark.

Key Holding(s):

- Falsely attributing a statement to someone can give rise to a defamation claim regardless of whether the falsely attributed statement is provably true or false.



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

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