Determining whether a statement is one of fact or opinion seems straightforward. A fact can be proven false. An opinion depends on the speaker’s viewpoint and cannot be proven false. Although describing the difference between fact and opinion is easy, differentiating between them in an actual defamation case can be tricky.

The Supreme Court’s recent defamation cases provide much-needed help, offering guidance on the elements of—and the defenses to—defamation claims. Although not marking a change in Virginia law, the detailed and fact-specific analyses in these cases will help practitioners differentiate between fact and opinion in defamation cases.

1. When is a statement defamatory?

“Defamation” is “the offense of injuring a person’s character, fame, or reputation by false and malicious statements; the term seems to include both libel and slander.”¹ To state a claim for defamation under Virginia law, a plaintiff “must show (1) publication, (2) of an actionable statement with (3) the requisite intent.”² “To be ‘actionable,’ the statement must not only be false, but defamatory, that is, it must ‘tend so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’”³ Stated differently, “merely offensive or unpleasant statements” are not defamatory; rather, defamatory statements “are those that make the plaintiff appear odious, infamous, or ridiculous.”⁴

2. Cashion v. Smith: subjective statement, insinuation, or rhetorical hyperbole?

Defendants in defamation cases frequently claim that their statements are not defamatory because the statements were true, were statements of opinion, or were made in a protected context. The Supreme Court provided a detailed analysis of these defenses in Cashion v. Smith, 286 Va. 327, 749 S.E. 2d 526 (2013). In Cashion, the Supreme Court considered whether a trauma surgeon’s allegedly defamatory statements about an anesthesiologist’s treatment

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Is That a Fact? Recent Defamation Decisions of the Supreme Court of Virginia by Dannielle Hall-McIvor

Dannielle Hall-McIvor is an Assistant City Attorney at the Virginia Beach City Attorney’s Office.
This is my last column as the Chair of the Litigation Section’s Board of Governors. I’ve been honored to serve as your chair. The litigation section is the largest section of the VSB and our members have a wealth of experience. I’ve been practicing law for over 26 years, and I’ve learned a few things along the way that I’d like to pass down to other litigators. None of what you will read is new, but sometimes I wonder if others realize how their actions affect others. Here are “Eight Potential Bombs.”

1. **Reading messages on your cell phone.**
   A cell phone is a small, powerful, hand-held computer. But don’t have it out during a business meeting, a luncheon appointment, or a client meeting. Please take an interest in the people you are meeting with. Stay in the present. It will help you get and keep clients.

2. **Treating court personnel without dignity and respect.**
   How do you treat the court reporter, judge’s clerk, and bailiff when you are in the courtroom? How about the clerk’s office staff? Are you dismissive or bossy? Do you ignore these human beings that you might be with for days or weeks during a trial? If you do, the judge and the jury will notice. It will hurt your client. Also, you will regret it when you need something from one of these important players in the courtroom.

3. **Attending court unprepared.**
   I’m sure every litigator reading this doesn’t need to be told to be prepared. But just in case, let me say that I have heard many a judge through the years complain that lawyers appearing before them are not always prepared. Due to that fact, I thought it is worth mentioning here. As litigators we can become full of fear, which may lead to procrastination. Always reach out for help from someone experienced if this happens to you. Build a network of colleagues you can trust and don’t take on projects that you know will cause you not to fully prepare.

4. **Not doing what you say you are going to do.**
   This adage gets violated every day. Have you ever been to a meeting and someone volunteers to perform a task, then doesn’t do it? How about the lawyer on the other side of the case that says, “Your Honor, I will prepare an Order,” and then doesn’t do it? Or a client says they will pay an agreed-upon fee, then doesn’t pay? Be realistic. Don’t volunteer to do anything unless you are willing to actually do it. On time. As promised. You will find that you stand out from the crowd if you stick to this one rule!

5. **Thinking that someone will forget you made a commitment or stating an inaccurate fact or premise of law.**
   Clients, lawyers, and judges have memories like elephants. If you think you can pull the wool over someone’s eyes on one occasion and go back to the same courtroom, opponent, or client and your behavior will be forgotten, think again. Trial judges and appellate judges know which lawyers can be trusted and which cannot. No one forgets, even if you want them to.

6. **Forgetting to thank those who help you.**
   Always thank those that help you. If it is a small thing, you can thank them on the spot. If it is a larger issue, or something important, write a note. It is old fashioned, but sending someone

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Barbara S. Williams was the 2013-14 chair of the Litigation Section and practices in Leesburg and Winchester.
a thank-you note or writing them an email can make a huge impression. Even in this day and age, when we hear that people are going to forget to how to write and only correspond with keyboards, we still are able to buy stamps and use the US mail. Why not do it?

7. Not getting involved in bar work.
A sure way to further your career is to get involved in your state, local, or specialty bar. I learned more by being active in the VTLA about being a good lawyer than I ever learned in my office or in the courtroom. When you get involved in a bar association, you can’t go wrong. You develop relationships that make it easier to ask questions, get help, or learn from the experience of others. You have access to judges outside of the courtroom. You get to learn how to be a leader.

8. Not getting involved in your community.
The public has a dim view of lawyers in general and litigators in particular. A few years ago we were rated below used car salesmen in trustworthiness. Therefore, we need to make sure as litigators that the people around us, the people of our own communities, know us. Many lawyers volunteer. We coach our kids in sports. We sit on boards of non-profits. We volunteer to feed the poor. When your neighbors and your community get to know you through your work in the community, the public rating of lawyers increases. Most people who regularly volunteer in their community say that they get back a whole lot more than they give.

I know I am preaching to the choir on these issues, but it is worth reminding people that we are always on stage as litigators. Remember that others, from the lowest skilled staff in your office to the justices on the Supreme Court, are watching!

Thank you for allowing me to be your Chair this year. I look forward to the Litigation Section’s continued good work with the bar and the public.

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Is That a Fact?

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of a patient were “non-actionable expressions of opinion or rhetorical hyperbole, and whether such statements were protected by qualified privilege.”

Immediately following the death of a patient during surgery, the trauma surgeon criticized the anesthesiologist in front of other members of the operating team. Among other statements, the trauma surgeon remarked:

“He could have made it with better resuscitation.”

“This was a very poor effort.”

“You didn’t really try.”

“You gave up on him.”

“You determined from the beginning that he wasn’t going to make it and purposefully didn’t resuscitate him.”

The trauma surgeon made additional statements to the anesthesiologist immediately after the surgery. In front of another nurse and doctor, the trauma surgeon told the anesthesiologist, “You just euthanized my patient.”

In his amended complaint, the anesthesiologist claimed that the trauma surgeon’s statements constituted defamation and defamation per se. The trauma surgeon and his employer filed demurrers and pleas in bar, alleging that the trauma surgeon’s statements were “non-actionable expressions of
opinion or rhetorical hyperbole.” The defendants also asserted that the statements were qualifiedly privileged.

On review, the Supreme Court divided the trauma surgeon’s statements into two categories: (1) the “non-euthanasia” statements made in the operating room, and (2) the “euthanasia” statements made in the hallway. Whether a statement is an expression of opinion is a question of law. Reviewing the circuit court’s ruling de novo, the Supreme Court found that the trauma surgeon’s statements “‘[t]his was a very poor effort,’ ‘[y]ou didn’t really try,’ and ‘[y]ou gave up on him,’” were subjective and “wholly dependent on [the trauma surgeon’s] viewpoint.” By contrast, the Supreme Court found that “the statements that the patient ‘could have made it with better resuscitation’ and ‘[y]ou determined from the beginning that he wasn’t going to make it and purposefully didn’t resuscitate him’ were not subjective” because the trauma surgeon insinuated that the anesthesiologist “either failed to perform some action necessary to the patient’s recovery or acted affirmatively to prevent it.” Because “insinuations may constitute defamatory statements,” the Supreme Court reversed the circuit court’s ruling that the latter two statements were non-actionable expressions of opinion and remanded this portion of the judgment for further proceedings.

The court next addressed whether the trauma surgeon’s post-surgery euthanasia statements were protected by a qualified privilege. This, in turn, depended on whether the statements were made in good faith. The court held that whether the statements were made in good faith was a question of fact for a jury to decide when qualified privilege already attached. And it held that the burden shifted to the plaintiff to prove by clear and convincing evidence that the defendant lost or abused the privilege. Accordingly, the circuit court erred by ruling that qualified privilege can be lost or abused only upon a showing of personal spite or ill will.

Finally, the Supreme Court examined whether the trauma surgeon’s statements accusing the anesthesiologist of committing euthanasia were non-actionable “rhetorical hyperbole.” In Virginia, rhetorical hyperbole is not defamatory. The court held that the trauma surgeon’s statements that the patient “could have made it with better resuscitation” and “[y]ou determined from the beginning that he wasn’t going to make it and purposefully didn’t resuscitate him” were not rhetorical hyperbole because the statements could “reasonably be interpreted as allegations of fact capable of being proven true or false.”

3. Tharpe v. Saunders: is falsely attributing an opinion to a third party a fact capable of being proved true or false?

In Tharpe v. Saunders, 285 Va. 476, 737 S.E. 2d 890 (2013), the Supreme Court reviewed a defamation claim brought by a construction contractor, Shearin Construction, Inc., and its agent, Jeffrey Tharpe, against its business competitor, J. Harman Saunders Construction, Inc., and owner, J. Harman Saunders. The controversy surrounded Shearin Construction’s request for additional compensation for an excavation plan submitted to the Southside Regional Service Authority. Shearin Construction claimed that it had struck solid rock during the excavation, which would increase the project’s cost. Shearin Construction had requested a similar increase in compensation in a previous project at Fort Pickett. Saunders, the competitor, stated to the Mecklenburg County Administrator and the Southside Regional Service Authority’s executive director that “Tharpe told me...”
that Tharpe was going to screw the Authority like he did Fort Pickett,” a statement subsequently published by the Authority and the news media. The circuit court ruled that the connotation of “screw” is subjective, and whether Tharpe was actually going to “screw” the Southside Regional Service Authority was a matter of opinion. Because a claim of defamation requires a statement that is both false and defamatory, the circuit court dismissed the claim.

The Supreme Court’s review focused on whether attributing the “screw the Authority” statement to the plaintiff was a fact “capable of being proved true or false,” not on whether the attributed statement itself was true or false. The Supreme Court found that “Saunders’ statement that ‘Tharpe told me that Tharpe was going to screw the Authority like he did Fort Pickett’ is indisputably capable of being proven true or false.” The actual truth or falsity of whether Tharpe intended to “screw” the Authority was irrelevant to Tharpe and Shearin’s claims; “Saunders’ statement of fact, if believed by the hearer as coming from Tharpe, by its very nature is alleged to have defamed Tharpe and Shearin.” In falsely attributing a quote to Tharpe, the Supreme Court held that Saunders’ statement was “an actionable statement of fact.”

The Tharpe decision cites decisions from other jurisdictions involving fabricated quotations. Notably, in one of the cited cases, Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 943 P.2d 350, 357 (Wash. Ct. App. 1997) the court held that a claim for defamation could survive on the basis of a false attribution even if the underlying statement is factually correct. This is because the false attributions—which were denied by the third party alleged to have made the statements—“only made it more likely that the story’s readers would take as true various facts that were indeed true.”

The cases cited in Tharpe—particularly the United States Supreme Court’s decision in Masson v. New Yorker Magazine, Inc.—suggest that the relevance of the attributed statement’s truth depends on whether the purported speaker is the plaintiff or is, instead, a third party. 501 U.S. 496 (1991) (stating that a “self-condemnatory quotation may carry more force than criticism by another”).

4. Webb v. Virginian-Pilot Media Companies, LLC: can a reasonable implication be drawn?

In a more recent decision, Webb v. Virginian-Pilot Media Companies, LLC, 284 Va. 84, 752 S.E. 2d 808 (2014), the Supreme Court considered whether a published article created a defamatory implication for which the plaintiff could recover compensatory and punitive damages. In Webb, Phillip Webb, an assistant principal at Oscar Smith High School, sued a local newspaper after it reported that the school division did not discipline Kevin Webb, the assistant principal’s son, following an assault that initially resulted in felony charges. The newspaper article quoted the school system’s “spokesperson verbatim as stating that ‘Kevin Webb ‘did not get preferential treatment because of his dad’s position.’” Yet Phillip Webb claimed that the article falsely implied that he had obtained preferential treatment for his son. In particular, he argued that the newspaper article “created the defamatory implication that he acted unethically ‘by obtaining preferential treatment’” for his son “by juxtaposing an insinuation of special treatment with the reported facts that he was an assistant principal at another school in the same school system,” and that he had been a successful pole vaulting coach at Great Bridge High School where his son and another student involved in the assault had been,
“pole vaulting stars.”

Citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993), the Supreme Court stated that where a plaintiff “alleges that he has been defamed not by statements of fact that are literally true but by an implication arising from them, the alleged implication must be reasonably drawn from the words actually used.” Although the newspaper article insinuated that Kevin Webb might have received special treatment from someone, the Supreme Court found that the article did not “create a reasonable implication that Phillip solicited or procured the insinuated special treatment. It does not state or suggest that Phillip undertook any affirmative action to arrange or endorse the school system’s disciplinary response to the incidents.”

The Supreme Court allowed that the article “may suggest” that school administrators were “favorably disposed” towards Phillip Webb and that “[o]ne might infer” that Kevin Webb would have received “harsher discipline” but for these facts, but the article did not implicate Phillip Webb “as the instigator of any preferential treatment.” As the Court noted, the article disclaimed that implication by quoting the school division’s spokesperson.

Therefore, as a matter of law, the article was not “reasonably capable of the defamatory meaning Phillip [Webb] ascribes to it.” Further, “[a]n implication defaming Phillip [Webb] cannot be reasonably drawn.”

* * *

Although the rulings in *Cashion, Tharpe*, and *Webb* do not enlarge or modify Virginia law on defamation, they help clarify the line between opinion and fact. Collectively, these cases show that while the underlying facts and circumstances of cases may change, Virginia defamation law largely remains the same.

(ENDNOTES)

3. Id. (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993)).
4. Id. (citation omitted).
7. Id.
8. The anesthesiologist named the trauma surgeon and his employer, Carilion Medical Center, as party defendants.
9. Id.
10. Id.
12. Id. at 336-337.
13. Id. at 337.
15. A qualified privilege attaches to “[c]ommunications between persons on a subject in which the persons have an interest or duty.” Id. at 377 (quoting *Larimore v. Blaylock*, 259 Va. 568, 572, 528 S.E.2d 119, 121 (2000)).
16. Id. at 340.
17. Id. at 339 (citing *Yeagle v. Collegiate Times*, 255 Va. 293, 295-96, 497 S.E.2d 136, 137 (1998)).
18. Id. at 340.
21. Id.
22. Id.
23. Id. at 480.
24. Id.
25. Id. at 482 (citation omitted).
26. Id.
27. Id. at 484.
28. Id.
29. Id. at 483-484.
32. Id. at 87-89.
33. Id. at 89.
34. Id. at 90.
35. Id.
36. Id.
37. Id. at 91.
38. Id. at 91.
As more and more attorneys turn to the Internet, webpages, blogs, and other online discussion forums to communicate with potential clients, the balance between upholding attorneys’ free-speech rights under the First Amendment, regulating attorney advertisements, and preventing the disclosure of client confidences grows particularly delicate. The age of readily accessible information, characterized by the phrase, “Google it,” collides with the tradition of protecting attorney-client communications. And with ever-more attorneys embracing blogs as a medium to discuss a wide range of different topics—including recent court decisions or the effect of a new statute on their field of practice—many do so with an eye toward attracting new clients. The temptation for attorneys to include analyses of their own cases involving past or current clients in these online discussions has created a unique problem in the legal profession regarding whether attorney blogs and social-media posts constitute attorney advertising, and whether attorneys may reveal information about past clients in their online communications. The Virginia Supreme Court recently addressed these issues in Hunter v. Virginia State Bar.1

Horace Frazier Hunter, a Richmond, Virginia attorney at Hunter & Lipton, P.C., authored a non-interactive blog entitled “The Week in Richmond Criminal Defense,” accessible from his firm’s website. As of late 2010, Hunter’s blog featured 30 posts accessible to readers, five of which discussed legal or policy issues. The remaining 25 posts discussed recent court cases, 22 of which either identified Hunter as the attorney representing the defendant, or specifically mentioned his law firm. Many of Hunter’s posts also specifically named his former clients and revealed details about their cases. Moreover, in all 21 criminal cases described in Hunter’s blog posts, Hunter’s clients either were found not guilty, had plea bargained to an agreed-upon disposition, or had had their charges reduced or dismissed. None of Hunter’s blog posts included disclaimers.2

The Virginia State Bar Disciplinary Committee (“VSB”) investigated Hunter’s blog and notified him that the posts describing his prior cases did not conform with Virginia Rule of Professional Conduct 7.1(a)(4). This prohibits lawyers from communicating misleading or deceptive claims to the public—including advertisements of specific or cumulative case results—without a disclaimer.3 During his discussions with the VSB, Hunter offered to include a disclaimer on one page of his website stating that his blog posts “should not be construed to suggest a similar outcome in any other case.”4 The VSB found that Hunter’s disclaimer did not comply with Rule 7.2(a)(3), which provides specific instructions for the formatting and content of attorney advertising disclaimers, and ultimately filed an ethics complaint charging Hunter with violating Rules 7.1, 7.2, and 1.6.5 Specifically, the VSB claimed that Hunter’s posts violated Rules 7.1(a)(4) and 7.2(a)(3) because they lacked appropriate disclaimers and were inherently misleading. The VSB further claimed that Hunter’s blog posts violated Rule 1.6 by revealing information that could embarrass or be detrimental to his former clients.6

The VSB conducted a disciplinary hearing,7 during which it presented evidence that Hunter’s former clients had not consented to the disclosure of information about their cases on Hunter’s blog, and that some former clients felt that the disclosed information was embarrassing or detrimental to them.8 Hunter testified that he created his blog,
in part, for marketing purposes and admitted that he blogged only about cases he had won. Hunter asserted, however, that his blog was intended to “combat[] any public perception that defendants charged with crimes are guilty until proven innocent, and show[] commitment to criminal law.” Hunter argued that his blog posts constituted protected speech under the First Amendment and that it was necessary, for accuracy purposes, to refer to his former clients by name.

The VSB ultimately held that Hunter violated Rules 1.6, 7.1(a)(4) and 7.2(a)(3) and imposed a public admonition requiring him to remove from the blog the case-specific content for which he had not received client consent to include, and to post disclaimers that complied with Rule 7.2(a)(3) on each case-related blog post. On appeal, a three-judge panel of the Circuit Court for the City of Richmond upheld the VSB’s decision as to Rules 7.1 and 7.2 and required Hunter to publish a disclaimer on his case-related blog posts informing potential clients that case results depend on a variety of factors unique to each case, and that the case results described therein did not guarantee or predict similar outcomes in future cases. But the Circuit Court held that the VSB’s interpretation of Rule 1.6 violated the First Amendment, so it dismissed that charge.

On appeal to the Supreme Court of Virginia, Hunter asserted that the Circuit Court’s finding that his blog posts violated Rules 7.1(a)(4) and 7.2(a)(3) conflicted with the First Amendment because his blog posts concerned the judicial system and were “quintessentially ‘political speech.’” But the majority, led by Justice Powell, largely agreed with the Circuit Court’s decision.

In analyzing the Circuit Court’s ruling, the Virginia Supreme Court first considered whether Hunter’s blog posts constituted commercial speech, political speech, or a combination thereof. While the mere mention of commercial activity does not bring otherwise political speech outside the First Amendment’s protection, “speech that is both commercial and political . . . is not automatically entitled to the level of protections afforded political speech.” Citing the U.S. Supreme Court’s decision in *Bigelow v. Virginia*, the Court noted that “the diverse motives, means, and messages” of an attorney blog may bring it within the realm of commercial speech, “even though [it] also discuss[es] issues important to the public.”

In determining that Hunter’s blog constituted commercial speech, the Court was persuaded by the fact that his blog was linked to his firm’s commercial website, invited readers to contact his law firm through an electronic form identical to that provided on the firm’s web site, did not allow readers to comment on posts, and clearly sought to “sell” Hunter’s skills as a lawyer through communicating his past case successes. The Court was also persuaded by Hunter’s admission that his blog was, in part, commercially motivated. And it found that “the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter’s otherwise self-promotional blog posts into political speech, ‘than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.’”

The Court next analyzed whether Rules 7.1(a)(4) and 7.2(a)(3), as applied to the commercial speech in Hunter’s blog, conflicted with the First
Amendment. For commercial speech to come within the ambit of the First Amendment, it must concern lawful activity and not be misleading. Noting that “the public lacks sophistication concerning legal services [and] misstatements that may be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising,” the majority determined that Hunter’s blog posts—which overwhelmingly discussed cases in which he had achieved successful results for his clients—had the potential to be misleading.

The Court then determined whether the VSB had a substantial interest in regulating the type of content contained in Hunter’s blog. States may regulate misleading or unlawful commercial speech if (1) they have a substantial interest in doing so, and (2) the method of regulating such speech advances the governmental interest asserted. The Court found that because Hunter’s “self-promoting representations . . . could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire [him],” the VSB had a substantial government interest in regulating such speech. Further, as Rules 7.1(a)(4) and 7.2(a)(3) only require that potentially misleading attorney advertisements include disclaimers, and do not outright bar such speech, the Court found the VSB’s disclaimer requirements were “not more extensive than necessary,” directly advanced the substantial governmental interest asserted, and therefore did not conflict with the First Amendment. The Court then ordered Hunter to post a disclaimer satisfying Rule 7.2’s substantive and formatting requirements.

The Court agreed, however, with the Circuit Court’s finding that the VSB’s application of Rule 1.6 to Hunter’s blog infringed on his First Amendment rights. The VSB asserted that it had a substantial government interest in prohibiting attorneys from disclosing information likely to embarrass or be detrimental to the client, regardless of whether such information had been made public during a criminal trial. The Court disagreed, reasoning that public information about a client and/or former client was outside the scope of the attorney-client privilege. Because all of Hunter’s case-specific blog posts involved concluded cases, and because criminal trials are public events, the court held that the VSB did not have a substantial interest in preventing or punishing the publication of such truthful information. Essentially, “a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.” This decision is significant because it widens the range of client information a lawyer may disseminate, and even supports such public discussions without client consent.

The Supreme Court of the United States denied Hunter’s petition for certiorari in June 2013.

The Hunter decision has significant implications for Virginia attorneys using, or planning to use, blogs, social-networking sites, or other online media sources—whether to market their services, to bring attention to new developments in their field of practice, or simply to engage in intellectual debate regarding recent court decisions, legislative actions, or legal developments. The Court’s analysis of Hunter’s blog posts is instructive in that it requires attorneys to consider their social-media pages or blogs from a potential client’s perspective. Attorneys should analyze whether their blog or social-media posts contain specific or cumulative case results that a potential client may construe as representing the attorney’s ability to duplicate such results in future cases. Attorneys also should consider whether their blog or social-media posts are linked to their law firm or professional websites, and whether such posts invite readers to contact them in the same or similar ways that potential clients would be invited to contact them on their law firm or professional website. Hunter further suggests that non-interactive attorney blogs that communicate past case results in a cumulative manner, as opposed
to inviting debate through reader comments, may be more likely to be construed as commercial speech (as opposed to political or intellectual speech), regardless of the author’s intellectual or political motivations for posting such information.

In light of Hunter, attorneys currently using social-media tools and attorney blogs containing specific or cumulative case results should also review whether their posts contain disclaimers that comply with the Rules of Professional Conduct. To comply with the Rules, a disclaimer must be “in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.”

Further, the disclaimer must state that case results depend upon a variety of factors unique to each case, and do not guarantee or predict a similar result in any future case.

As Justice Powell noted in her majority opinion, including disclaimers in blog posts and other types of online content is not overly burdensome and is a reasonable, effective way for attorneys to share their past successes without misleading potential clients as to their ability to produce similar results in future cases. Social-media tools such as Twitter, Tumblr, and Facebook can do wonders to promote an attorney’s reputation, communicate his or her legal skills, and spread awareness of legal and political issues in a given community. Hunter simply requires an internet-savvy Virginia attorney to think twice about whether his Tumblr account celebrating a string of recent court victories may be misleading to potential clients, and consider whether a disclaimer is required.

Editor’s Note: After the Supreme Court of Virginia decided Hunter, the VSB recodified the rule regarding attorney advertising. The disclaimer requirements now appear at Rule 7.1(b).

(ENDNOTES)

2. Id. at 491–92.
3. Id. at 492; Va. R. Prof. Conduct 7.1(a)(4).
4. Hunter at 491.
5. The VSB also charged Hunter with violating Rule 7.5, but ultimately dismissed that charge. Hunter, 285 Va. at 492 n. 2.
6. Id. at 492.
7. Before the disciplinary hearing took place, Hunter filed suit in the United States District Court for the Eastern District of Virginia, Richmond Division, seeking a declaratory judgment that the VSB disciplinary action was unconstitutional, an injunction prohibiting the VSB disciplinary action from proceeding, compensatory and punitive damages against VSB a committee member and counsel, in their official capacity, and costs and attorney’s fees. The Eastern District dismissed Hunter’s case, finding that the VSB and its officials were protected by the Eleventh Amendment, that VSB’s counsel was entitled to prosecutorial immunity, and that the Younger abstention doctrine applies to pending VSB disciplinary actions. Hunter v. Virginia State Bar, 786 F. Supp. 2d 1107 (E.D. Va. 2011).
9. Id. at 493.
10. Id. at 493.
11. Id. at 493.
12. Id. at 495.
13. Justices Lemon and McClanahan dissented, in part, regarding the majority’s ruling as to Rules 7.1(a)(4) and 7.2(a)(3).
17. Id. at 826 (internal citations and punctuation omitted).
19. Id. at 488 (quoting Fox, 492 U.S. at 474–75).
25. Id. at 501–502.
26. Id. at 502-503.
29. Id.
When this writer retired after serving 32 years as a United States Magistrate Judge in the Western District of Virginia—having presided over hundreds, if not a thousand, settlement proceedings and having reentered the law as what one colleague termed a “newly minted” private mediator—a single question continued to surface. That question was whether there are differences in dispute-resolution proceedings where, on the one hand, an active or retired judge presides over a court-annexed or supervised conference, or, on the other, participates in a private mediation. For ease of delineation between the two, and for the reasons that follow, the court-annexed process will be called a “settlement conference,” and the private process will be called “mediation.” Either can be initiated because they are compelled or authorized by state or federal court pretrial procedures, or because they are initiated by mutual agreement of the parties. Each is intended to bring the parties together in negotiations that will end the controversy between or among them irrespective of whether a suit has been filed. But this writer’s short answer to the question of whether there are differences in the role of a judge who participates in the two processes is an unqualified “Yes.”

The Court-Annexed and Judge-Supervised Settlement Conferences

Most trial lawyers are familiar with local state and federal pretrial procedures or local rules promoting, if not compelling, settlement conferences in civil cases. In some jurisdictions, notably the Eastern District of Virginia, the court issues an order directing the lawyers and their clients (or a party’s representative with authority) to appear before a judge, predominately a United States Magistrate Judge, for a settlement conference that is scheduled for a fixed, relatively short period of time that day. In other courts, such as the Western District of Virginia, settlement conferences are encouraged, though most often they are initiated only by agreement of counsel. The schedule accommodates the calendars of the parties, counsel, and the Magistrate Judge to whom the conference has been referred by order of the presiding District Judge. The time allotted by the court for these conferences varies depending on the complexity of the case, and ranges from several hours to days or weeks, all monitored by the assigned judge.

Despite jurisdictional variations in the model for settlement conferences, there are some common elements. First, the time available for the parties and the court to prepare for the conference itself and for any post-mediation follow-up is limited. More will be said about that below.

Second—although not usually robed—the judge conducting the settlement conference is endowed with all the power of the court to compel attendance and to control the timing and pace of the conference. As a reminder of that authority, the conference usually takes place in the judge’s chambers or at some other location in the courthouse, though there are occasions when judges attend in an office of one of the parties.

There should be no wonder, then, that there is a more court-like atmosphere surrounding settlement conferences. Parties unfamiliar with the process often feel as though they are participating in a formal court proceeding. After all, the proceedings are being held “in the judge’s house,” so to speak,

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Judge Crigler served as a United States Magistrate Judge from 1981 until his retirement in 2013. He is currently a member of The McCammon Group. Judge Crigler expresses his appreciation to John McCan, Esq., the Hon. F. Bradford Stillman (Ret.), and the Hon. Barry R. Poretz (Ret.) for their assistance with this article.
where court security convene the participants. And notwithstanding the usual declarations of impartiality, the settlement judge does represent a client with a stake in the outcome: the docket. The settlement-conference judge’s goal is to serve the interests of the court by closing a case file and removing it from another judge’s docket while leaving time to handle matters on the judge’s own docket. The only way this can occur with any efficiency is if the judge keeps tight control over the process.

There is also considerable confusion in court-annexed proceedings over the extent to which, if at all, a settlement conference judge may or should engage in ex parte communications. Everyone in litigation is acutely aware that a judge, sitting qua judge, is prohibited from engaging in ex parte communications except those relating to routine scheduling matters. Even then, most counsel wish to handle scheduling matters through a judicial assistant or law clerk. While the ethical rule restricting ex parte communications literally does not apply to a settlement conference judge, generally there is reticence on the part of counsel and the judge to engage in any ex parte pre-mediation conferences. While not participating in pre-mediation conferencing saves considerable preparation time for counsel and the court—and guards time the judge needs to spend on his/her own docket—it deprives both the parties and the court of an opportunity to gain valuable, if not essential, insights that would guide the mediation toward reaching a settlement that both parties own.

To begin with, the absence of pre-mediation conferencing deprives the judge of an opportunity to gather useful information concerning case dynamics. It also deprives the judge and the parties of an opportunity to discuss procedural issues (e.g., who will be attending, what authority they bring, and whether any party personally will address the others in any joint session). Instead, an order directs submission of a settlement statement and other materials in advance of the conference. Most often, these statements are little more than reconstituted briefs on dispositive motions—if not the briefs themselves. Not surprisingly, many are adversarial in nature, and offer little more than assessment of the facts and law in a light most favorable to each party. They rarely acknowledge the party’s weakness or other troublesome areas the party reasonably anticipates will be encountered during the conference. In other words, they give the settlement judge little insight about things that might “drive” the settlement discussions once the parties arrive, other than how far apart the parties stand on money.

Unfortunately, submissions tendered without pre-mediation communication between the judge and counsel often forecast the tone a party will likely communicate during the settlement conference. This may produce a combative, hostile, and contentious atmosphere that can be impenetrable until late in the conference, rather than an atmosphere of collaboration. Even worse, without pre-mediation contact, the judge has no way of anticipating the willingness of each party to participate in the conference in good faith. Parties often show up solely because they are ordered to do so.

Given the compression of time and the lack of more in-depth information about the controversy, the mediator needs to maintain control over the process. To avoid being seen as merely a messenger for the parties, the judge soon departs from a role of facilitator and defaults to evaluating the merits of the case, its settlement value, and the risks of an appeal. One colleague has used the metaphor of the settlement-conference judge as a gunslinger who “points the judicial finger,” threatening to pull the trigger unless the parties produce a settlement within
the time frame allotted for the conference. It is not surprising, therefore, that a party may well perceive the judge as an advocate for the other side, or feel brow-beaten into agreeing to a settlement that actually would be unacceptable under other circumstances. At worst, the judge could be viewed as having interfered with the attorney-client relationship by going beyond evaluation and treading into providing legal advice. As a result, there can be “buyer’s remorse,” which may in turn fuel any number of post-conference problems—including wrangling over specific terms for formal settlement papers and attempting to avoid or void the settlement.

Finally, where the settlement conference fails to produce a settlement, there is little post-conference follow-up. The exception may be the complex case where numerous post-session communications and subsequent conferences are anticipated and necessary to resolving the case. Again, the chief reason for the absence of follow-up in the routine case is the lack of time available to the settlement-conference judge. The value of post-session follow-up will be discussed below.

Notwithstanding the issues outlined above, court-annexed and judicially overseen settlement conferences are useful tools for alternative dispute resolution in Virginia, and have served to reduce clogged civil dockets.

**Private Mediations: When the Cape Comes Off**

In serving as a private mediator, the judge exchanges the robe for professional attire, holsters the “judicial finger,” and turns over what can be described as “the invisible wireless remote” of judicial power to the parties themselves. Possibly, for the only time in the history of the controversy, the resolution of the case is in their hands, not the hands of the judge-mediator, the trial judge, or a jury composed of strangers. The loss of the imprimatur of the court and its authority—as well as control of the process—is a scary thought for some former jurists who have spent a career in an outcome-oriented position of “Settle or Else!”

If there is one thing that initially characterizes private mediation and distinguishes it from the typical settlement conference, it is that the parties, not the judge, are in control of the process. Private mediation is initiated by the parties who, upon advice of counsel, have determined that the case should be mediated. Often, counsel have agreed to use a particular private mediator, and they normally have selected the date(s) on which the mediation is to be scheduled and its location.

Additional distinguishing characteristics of private mediation relate to time afforded to the entire process, the means by which the parties and the mediator prepare, the time spent in mediation, the quality of the mediation session itself, and the time devoted to post-mediation efforts where the case failed to settle during the mediation due to an impasse. Statistics have shown that each stage of the process is equally critical to a successful mediation, and if one is missing, the likelihood of success diminishes.

Impasse is the chief enemy of settlement. One wise mediator often counsels private mediators that the best way to avoid impasse and to continue dialogue between the parties during a mediation is to be sufficiently prepared so an impasse does not occur. The rules restricting ex parte communication impede such preparations in settlement conferences. But these rules do not apply to private mediations. Thus, the judge-mediator is free to engage in both joint and individual pre-mediation conferences with counsel; these tools should be employed as early and as often as the dynamics of the case require.

Pre-mediation conferences allow counsel and the mediator to go beyond the routine factual and legal aspects of the case. Discussions touch on a number
of matters critical to adequate preparation—e.g., the scope of any materials to be submitted for the judge’s review, the identity of those who may be participating in the mediation (and their authority), the existence of potential “hot button” or sensitive topics that have crept into the case, corporate representation, and—in personal injury cases—issues related to insurance coverage or liens on any settlement proceeds. The more the mediator knows about these matters, even if learned ex parte, the better the mediator will be prepared to assist the parties in avoiding impasse and facilitating a successful settlement.

If the ability of the mediator to engage in pre-mediation joint and ex parte communications enhances preparation and effectiveness of the mediator, then some may be concerned about whether the mediator could use that information adversely against the parties during the mediation. But strict rules of confidentiality apply and protect the integrity of the process. Customarily, all counsel, all parties, and all non-parties who participate in the mediation sign a mediation agreement, which spells out the terms of confidentiality. Under such agreement, all information gained in the course of the mediation that is not otherwise known or discovered in the case, remains confidential except to the extent waived by the affected party, or to the extent disclosure is required under the law. This has led one prominent mediator in Virginia to translate the protection of confidentiality into a broadened form of a well-known advertising slogan: “What is discussed privately remains private, and what happens in the mediation, stays in the mediation.” Again, control of the confidentiality of any communication is in the control of that party.

So far, this article has emphasized that, in private mediation, control of the process lies with the parties and not the judge, and that the need for a free flow of information from the parties to the mediator is facilitated through joint and ex parte communication under the protection of confidentiality both before and during the mediation. Another significant distinguishing factor is TIME, something few court-annexed proceedings have.

Judicially overseen settlement conferences have severe time constraints. This often deprives the parties of sufficient time to meaningfully process the rapidly evolving events. Although it may be inefficient, there is something productive about allowing the process to reach a point in which parties can either take ownership of the resolution of their conflict (or know that, despite their best efforts, the case could not be settled that day). As stated above, the settlement conference judge often employs techniques that may produce a settlement, but the settlement may be distasteful to a party because the party does not believe he/she played a role in crafting it.

On the other hand, the private judge-mediator serves to facilitate the flow of information in a way designed to keep the parties moving, albeit slowly, toward a resolution. Without information over which the parties have time to process, there is little hope of closure, much less for negotiating on the same track. This is not to say that a party must agree with his/her opponent on all matters, for there will always be those things that mediation cannot resolve; rather, the goal is to have each side understand the case from the opponent’s perspective irrespective of whether they agree on the details. Once there is understanding, the road to settlement is much easier.

Of course, this requires patience and perseverance from the mediator and the parties. The judge-mediator must always remember that he/she no longer serves as an expeditor of the court’s docket, and that it is not the judge’s ideas about where, when, or over what terms the case should settle, but those of the parties. In that connection, the judge-mediator initially must encourage—and then continually remind—the parties to be patient with the process so that the process serves to frame the resolution, even if it does not appear at any one time that the opponent is moving in any direction, much less the right one. It is not until all movement stops that any party is able to make a fully informed decision about settlement. In other words, no one can make a choice until that person sees what the choices are.
That simply takes TIME. Private mediation affords the parties time to engage the process and then let it take effect.

Moreover, when progress stops without a settlement on the date of the mediation, the judge-mediator often follows up with counsel, the parties, or the persons with authority in an effort to end the case. Settlement-conference judges rarely have the luxury of time to engage in post-conference follow-up. It is estimated that post-mediation conferencing, again either joint or ex parte, increases the chance for settlement by as much as 15%.

There is a final distinguishing factor that may cause some to shy away from private mediation: its cost. Although there usually are no additional costs to the parties for the services of the settlement-conference judge, the parties must pay for a private mediator. While this writer is no statistician in this area, the costs are generally less than 1% of the settlement value of the case. This translates to an expense that is far less than the cost of counsel attending and taking one day of depositions in multiple-party litigation. The reality is that private mediations have saved parties billions of dollars in the last 20 years.

**Conclusion**

There are substantive differences between settlement conferences and mediation. The core differences have to do with control of the process, restrictions (or lack thereof) on joint and ex parte communications before, during, and after the mediation, and the time afforded the parties to mediate. The best settlement is one over which the parties have exercised control and have taken ownership. There certainly is a greater prospect of that when the cape comes off.

(ENDERNOTES)

1. Confidentiality is not the only rule, as preeminent as it might be. Courtesy and professionalism are right behind and are expected to be employed.

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**Quit the Comparison, Already - Closing the Door on Remittitur?**

*by Robert L. Garnier*

While Virginia law seemingly allows the reduction of excessive damage awards, two recent Supreme Court of Virginia cases—both involving arguably excessive verdicts—illustrate the court’s strong disfavor of remittitur. In these cases, one involving compensatory damages and the other involving punitive damages, the court disapproved of the trial court’s comparing the remitted award to other damage awards. These cases likely will make it more difficult for courts to rein in jury awards.

As a general matter, Virginia law bars a trial court from reducing a damages amount merely because it disagrees with jurors about the award’s amount. But Virginia law has, at least in the past, vested a trial court with the power to reduce a verdict that it determines to be excessive: “Where the attack upon . . . a verdict is based upon its alleged excessiveness, if the amount awarded is so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision, the court is empowered, and in fact obligated, to step in and correct the injustice.” *Edmiston v. Kupsenel*, 205 Va. 198, 202 (1964); see also *C. D. Kenny Company v. Solomon*, 158 Va. 25, 30-31 (1932) (a verdict significantly out of proportion to injuries suffered may indicate “that the jury has been influenced by passion or prejudice, or in
some way has misconstrued or misinterpreted the facts or the law”). As such, weighing the potentially excessive nature of a damages award necessarily invokes some degree of proportionality determination, comparing the award sought to be remitted to the injury suffered.

In punitive-damages cases, courts often compare the amount of punitive damages to the amount of compensatory damages actually suffered by the plaintiff. Indeed, in State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003)—an insurance bad-faith case—the United States Supreme Court emphasized the importance of numerical proportionality, though acknowledging that other factors were relevant, too. While conceding that the reprehensibility of a defendant’s conduct is an important consideration, the Campbell Court focused on proportionality between compensatory damages and punitive damages. Indeed, it appeared to identify this as the linchpin of the analysis, stating: “We decline again to impose a bright-line ratio which a punitive damage award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” Id. at 425 (emphasis added).

While the Campbell Court professed not to be establishing a “bright-line” test, the announcement of a specific numeric formulation surely came close, allowing for exceptions only in egregious circumstances. The practical effect was to trigger the filing of remittitur motions any time punitive damages exceeded ten times compensatory damages. Indeed, given the protections of due process upon which the Court based its practical admonition, one might anticipate most trial courts to automatically reduce, in almost knee-jerk fashion, any award of punitive damages exceeding the single-digit ratio test announced by the court.

Not so fast, the Virginia Supreme Court has recently said.

In the case of Coalson v. Canchola, 754 S.E.2d 525 (2014), the defendant driver was intoxicated and talking on his mobile phone when he made a left turn across the path of the plaintiff’s car. He had at least seven drunk-driving convictions over two decades—and in multiple states—including having had his driver’s license revoked in 1996. On the day of the accident, he had already had several drinks when a police officer warned him not to drive his car. Despite this admonition, defendant drove to a bar, where he had five or more additional drinks. The accident occurred while he was driving from the bar to a hotel where his girlfriend was staying. The other driver and his passenger suffered minor injuries.

In a consolidated case, the jury awarded compensatory damages of $5,600 to the driver and $14,000 to his passenger. The jury also awarded each plaintiff $100,000 in punitive damages. Arguing that the punitive damage awards were excessive and violated due process, the defendant requested remittitur. The trial court reduced the driver’s (but not the passenger’s) punitive damages award to $50,000. Comparing the awards given to both plaintiffs, it concluded that the driver’s punitive damage awards should not have been the same as the compensatory damages awarded to his passenger, given the difference in their compensatory damages. The judge further determined that the driver’s punitive damages were excessive inasmuch as they were approximately eighteen times the compensatory damages awarded to him, far exceeding the “single digit” proportionality principle the United States Supreme Court had announced in State Farm v. Campbell.

On appeal, however, the Supreme Court of Virginia reversed the trial court’s remittitur of punitive damages. First, it held that the trial court was wrong to compare the two plaintiffs’ compensatory damage awards as a basis for determining appropriate punitive damage awards. Second—and despite the Campbell precedent—the Court rejected a single-digit ratio test, explaining that while the 1:17.86 ratio of the driver’s compensatory damages to puni-
tive damages was high, “given the reprehensible and dangerous nature” of the defendant’s conduct, the ratio was not “unreasonable or strikingly out of proportion.” *Id.* at 530. Rejecting a mere proportionality test, the Court noted that the proper question was whether, considering the reprehensibility of the defendant’s conduct together with other circumstances of the case, the damage award shocked the conscience of the court. It found that the damages award in this case did not shock the conscience. Specifically, the Court said, “[The plaintiff’s] punitive damages are reasonably related to her actual damages and to the degree of necessary punishment, which in this case is great.”

Providing guidance for future consideration of remittitur requests under federal due process analysis and proportionality, the Court in *Coalson* noted that factors that might warrant punitive damages exceeding a 10:1 ratio include exceptionally egregious or reprehensible conduct by a defendant causing low damages, conduct creating a risk for potentially significant damages, and/or a need for punishment and deterrence warranting the imposition of damages in excess of a single digit ratio.

While one might consider the *Coalson* decision a rejection of the United States Supreme Court’s admonition that the ratio between a plaintiff’s harm and the punitive damages awarded should generally be within single digits to satisfy due process, the egregious circumstances before the *Coalson* court might simply reflect the United States Supreme Court’s recognition that greater ratios may be appropriate and constitutional where a defendant’s actions are particularly reprehensible.

Accordingly, the greater lesson from the *Coalson* opinion is that a trial court may not compare damage awards among multiple plaintiffs as a basis upon which to grant remittitur. Instead of determining that one plaintiff has been awarded too much because of what another plaintiff has been awarded, the court must look to the specific underlying circumstances of the case under consideration to determine if a jury’s damage award may stand in that case.

Indeed, the Virginia Supreme Court had already recently expressed this principle of non-comparison in the case of *Allied Concrete Co. v. Lester*, 285 Va. 295 (2013) (the somewhat notorious personal-injury case involving spoliation of social-media evidence). In the *Allied Concrete* case, involving two plaintiffs, the trial court had granted the defendant remittitur of one verdict on the grounds that the jury’s award in question was disproportionate when compared to the award to the other plaintiff. Reversing the trial court’s decision to reduce the damage award, the Supreme Court explained, “Although a trial court may grant remittitur on the grounds that the award is disproportionate to the injuries suffered, . . . we have specifically rejected comparing damage awards as a means of measuring excessiveness.” *Id.* at 312 (citations omitted).

Given a clearly increasing disinclination by the Supreme Court to allow the remittitur of jury awards, a defendant seeking a reduction of awarded damages must not rely solely upon a comparison of damage verdicts and/or on bright-line proportionality tests, but should instead focus the trial judge’s attention on the specific circumstances before the court that demonstrate the shockingly excessive nature of the verdict. Conversely, a plaintiff seeking to preserve a jury award should stress less-quantifiable circumstances warranting the damage award, including—with regard to punitive damages—the exceptionally reprehensible nature of a defendant’s conduct.

The defendant asking for remittitur certainly has a difficult task. Justice McClanahan’s dissenting opinion in *Coalson* paints a bleak picture for those seeking a reduction of excessive jury awards: “In *Allied Concrete*, I expressed my belief that ‘for all practical purposes the last nail in the coffin of remittitur [of compensatory damages] has been driven.’ It appears that remittitur of punitive damages has suffered the same fate.” *Coalson v. Canchola*, 287 Va. 242, 257 (2014) (citation omitted).
**Civil Procedure**

**Case:** Bartee v. Vitocruz (6/5/2014)

**Author:** Lacy

**Lower Ct.:** Dotson, Chadwick S. (Wise County)

**Disposition:** Reversed

**Facts:** After the death of an estate’s coadministrator, the remaining coadministrator brought a wrongful-death medical-malpractice action. The circuit court dismissed the action, holding that the remaining coadministrator lacked standing to sue because the qualification of the two coadministrators was still in effect and so a single coadministrator could not unilaterally bring suit.

**Analysis:** On appeal, the SCOV reversed. It rejected the defendant’s argument that the coadministration powers passed to the administrator of the deceased coadministrator’s estate. And it held that when a coadministrator of an estate dies, the remaining coadministrator can exercise power as the sole remaining administrator of the estate.

**Key Holding(s):**

- When an estate’s coadministrator dies, the remaining coadministrator can exercise power as the sole remaining administrator of the estate.

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**Evidence**

**Case:** Harman v. Honeywell International, Inc. (6/5/2014)

**Author:** Mims

**Lower Ct.:** Gill, Herbert C., Jr. (Chesterfield County)

**Disposition:** Reversed

**Facts:** In a products-liability action against the manufacturer of an allegedly defective autopilot system, a defense expert proposed to testify about the contents of an accident report prepared by the airplane’s manufacturer, Mooney. (Mooney had been a defendant, but was dismissed before trial.) The trial court allowed this testimony, opining that the accident report was a “pamphlet” that was admissible under § 8.01-401.1. The trial court also allowed another witness—the deceased pilot’s flight instructor—to testify that he questioned the decedent’s judgment in deciding to fly on the day in question.

Finally, the trial court allowed the plane’s co-owner to testify that the Mooney airplane was more powerful, complex, and difficult to maneuver than the Cessna that the two men previously had co-owned.

During closing argument, defense counsel—ignoring a pretrial ruling barring evidence of the safety history of the defendant’s autopilot systems—argued that there was no evidence that any similar accident had occurred before. The trial court refused the plaintiff’s request that the court instruct the jury to ignore the remark.

The trial court also refused plaintiff’s counsel’s request that the causation instruction include statements that “there may be more than one proximate cause” and that plaintiff need not establish proximate cause “with such certainty as to exclude every other possible conclusion.”

The jury returned a defense verdict.

**Analysis:** On appeal, the SCOV reversed, ruling that the trial court erroneously allowed the defendant to introduce the contents of the plane manufacturer’s accident report. The document was not the sort of “authoritative literature” contemplated by Code § 8.01-401.1, as it lacked the assurances of trustworthiness that attached to learned treatises. It was not subject to peer review and was not written primarily for professionals with the reputation of the writer at stake. Instead the report was prepared for litigation purposes by an entity who was a party at the time it wrote it. Furthermore, the defense expert failed to establish that he relied on it or that it was a reliable source typically used by experts in the field. The introduction of evidence about this report was not harmless.

As for the other evidence, the SCOV found that the flight instructor’s testimony, which questioned the judgment of the decedent pilot, was inadmissible under Rule 2:701 because it was unnecessary—the jury was capable of listening to the facts and reaching its own conclusion on the matter. But it found that the co-owner’s testimony about the difficulty of flying the Mooney plane was admissible, as it helped the jury to understand the difficulties faced by transitioning from the Cessna to the Mooney.

Next, the SCOV held that the trial court erred in refusing to issue a cautionary instruction after defense counsel’s remarks in closing argument about the autopilot system’s safety history.

Finally, the SCOV held that the trial court did not err in not instructing the jury about multiple causation, as that was not an issue in the case and only would have confused the jury.

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

Case: 
Author: 
Lower Ct.: O’Brien, Mary Grace (Prince William County) 
Disposition: Reversed (Note: reh’g granted 8/1/2014)

Facts: A dump-truck driver with a commercial driver’s license was struck and killed by a train at a private rail crossing. The defendant had a business next to the track and had stacked lumber near the crossing, partially obstructing the view.

The driver’s personal representative sued the company for wrongful death, alleging that it had breached its duty of reasonable care by obstructing the view at the crossing. The company asserted contributory negligence as an affirmative defense.

The company moved to strike—both at the close of plaintiff’s case and at the close of all evidence—arguing that the driver was contributorily negligent as a matter of law. The trial court denied these motions. The jury returned a $2.5 million verdict and the trial court entered judgment for the plaintiff.

Analysis: On appeal, the SCOV reversed, holding that the driver was contributorily negligent as a matter of law.

It noted that the driver was familiar with the crossing, had notice of the sitelines at this crossing, and was familiar with how the stack of lumber interfered with those sitelines. So the driver either: (1) failed to look and listen with reasonable care, (2) failed to see the plainly visible train, or (3) failed to stop before traveling onto the tracks. Under any of those scenarios, he failed to exercise reasonable care for his own safety.

Justices Powell and Mims dissented, opining that the determination whether the driver was contributorily negligent was a question of fact to be decided by the jury. They argued that there are circumstances where a party, exercising reasonable care, may not discover a train until it is too late to stop.

Key Holding(s):

• A driver who was familiar with a railroad crossing that had a partially obstructed view of the tracks was contributorily negligent when he proceeded across the tracks in front of an oncoming train.

Employment

Author: Lemons
Lower Ct.: Cales, James A. (City of Portsmouth)
Disposition: Reversed

Facts: Verizon employees were members of a union. Verizon created an early-retirement plan, which stated that the company had 12,000 excess employees. Later, Verizon and the union told the employees that their jobs were in danger and that if they did not accept the early-retirement plan, they would not receive any enhanced severance benefits. The employees agreed to the early-retirement plan.

Verizon later told the Virginia Employment Commission that there was no such surplus, that the employees’ jobs were not in jeopardy, and that the employees voluntarily resigned. Indeed, Verizon advertised for 200 positions around that time.

The employees brought state-court fraud and negligent-infliction-of-emotional-distress claims against Verizon and the union, alleging that the defendants misled the employees into accepting the early-retirement package. The defendants removed to federal court, arguing that the case was completely preempted by the Labor Relations Management Act (“LMRA”). The federal district court rejected this complete-preemption argument and remanded to state court.

On remand, however, the state circuit court concluded that there was complete preemption under section 301 of the LMRA. It reasoned that to evaluate the plaintiffs’ assertions that the defendants had falsely declared the existence of a surplus, the factfinder would have to consult the collective bargaining agreement (“CBA”). Among other things, the factfinder would have to examine the employees’ rights under the CBA to determine whether the employees reasonably feared dismissal. Thus, the trial court sustained the defendants’ demurrers and dismissed the cases with prejudice.

Analysis: On appeal, the SCOV reversed.

First, it observed that the federal court’s remand order had no preclusive effect; the state circuit court therefore was free to revisit the complete preemption argument on remand.

Second, the SCOV noted that—even if the claims were completely preempted by Section 301 of the LMRA—state courts have concurrent jurisdiction over such claims. Thus, regardless of the outcome of the preemption analysis, dismissal was improper.

Third, turning to the preemption issue, the SCOV held the complete-preemption doctrine did not apply because it was not necessary to consult the CBA to evaluate the merits of plaintiff’s claims. The rights that the plaintiffs asserted were rights that were completely independent of those established by contract. Whether Verizon knowingly made false statements that an employee surplus threatened plaintiffs’ jobs could be
evaluated without knowing what contract rights the employees had under the CBA. Likewise, the employees’ reliance upon the allegedly false statements could be established without referencing the CBA.

Fourth, the SCOV held that the negligent infliction of emotional distress claim was not completely preempted, as it was based on the same underlying facts as the fraud claims.

In a partial dissent, Justice McClanahan opined that evaluating the falsity of the defendants’ statements would require the factfinder to consult the CBA and, thus, the claims were preempted. She noted that a memorandum of understanding between Verizon and the union stated that if enough employees accepted early retirement, no layoffs would have been necessary.

In a separate partial dissent, Justice Powell opined that a review of the CBA—and the employees’ rights thereunder—was necessary in order to evaluate the reasonableness of the employees’ reliance upon Verizon’s representations that their jobs and benefits were in danger.

Key Holding(s):

- A federal court’s remand order has no preclusive effect on the circuit court to which the case is remanded.
- State courts have concurrent jurisdiction over claims under Section 301 of the LMRA.

APRIL SESSION 2014

Estates and Trusts

Case:  Dean v. Morris (4/17/2014)
Author:  Powell
Lower Ct.:  Alper, Joanne F. (Judge Pro Tempore) (Orange County)
Disposition:  Reversed

Facts: The case involved a married couple with children from a previous marriage. The wife predeceased the husband. The wife’s children elected not to probate the wife’s estate, believing that their mother and step-father had entered into an oral contract for him to provide for them in his will. The wife’s children acknowledged, however, that they were never told exactly how much they would inherit if they waited, only that it would be “more” than what they would receive if they probated their mother’s will.

The children presented evidence that, around the time of their mother’s death, their step-father intended to devote one-third of a certain trust to them. But there was uncertainty as to what assets of the estate were to be included in the trust.

The trial court found that the mother’s children had proven, by clear-and-convincing evidence, that an oral contract existed between their mother and step-father, and held that the children were entitled to one-third of their step-father’s estate.

Analysis: On appeal, the SCOV reversed. It noted that in cases alleging an oral contract to dispose of an estate contrary to a probated will, the proponent of the contract must demonstrate—with clear, definite, and convincing evidence—both the contract’s existence and its terms.

Although the plaintiffs had met their burden of showing the contract’s existence, they did not meet their burden of showing its terms. The evidence that the step-father intended to pass one-third of a certain trust to the mother’s children did not establish the definite terms of the alleged oral contract because the proposed funding of the trust was uncertain vacillated over time (and ultimately was reduced to $1).

Key Holding(s):

- A party seeking to establish an oral contract to dispose of an estate contrary to a probated will must prove—with clear, definite, and convincing evidence—both the contract’s existence and its terms.

Civil Procedure

Case:  Lucas v. Woody (4/17/2014)
Author:  Goodwyn
Lower Ct.:  Allen, Michael C. (City of Richmond)
Disposition:  Affirmed

Facts: The plaintiff sued for injuries arising out of her incarceration at the Richmond City Jail between January and March 2008. She filed two actions—against different defendants—in August 2009 and January 2010. When the plaintiff filed those actions, she was not incarcerated.

After the plaintiff nonsuited and refiled, the defendants filed pleas of the statute of limitations, arguing that Code § 8.01-243.2—which applies to plaintiffs “confined in a state or local correctional facility” who bring suit based on the conditions of confinement—required her to bring suit within one year. The trial court sustained the plea. It also denied the plaintiff’s motion for leave to amend to add a federal § 1983 claim, noting that the plaintiff had not met Code § 8.01-6.1’s due-diligence and absence-of-prejudice requirements so as to allow the § 1983 claim to relate back to the initial filing.

Analysis: On appeal, the SCOV affirmed. The principal
issue was whether Code § 8.01-243.2 applied to persons who no longer were incarcerated at the time they brought suit. The SCOV held that it did. The court noted that it would be anomalous for the applicability of a statute of limitations to hinge on a person’s incarceration status—shifting whenever that changed. This would create uncertainty with regard to when a cause of action is extinguished. The only confinement status that matters is the confinement status at the time the action accrues under Code § 8.01-230 (i.e., at the time of the injury). The SCOV also upheld the trial court’s decision denying leave to file an amended complaint asserting § 1983 claims.

Justices Millette, Mims, and Powell dissented, opining that the language “person confined in a state or local correctional facility” denotes only those who are confined at the time of bringing their action and thus limits only suits brought by persons confined at the time of bringing suit.

Key Holding(s):

- Code § 8.01-243.2 establishes a one-year limitations period for incarcerated persons to bring suits relating to their conditions of confinement and applies regardless if the person is confined at the time of bringing suit.

Estates and Trusts

Author: Millette
Lower Ct.: Newman, William T., Jr. (Arlington County)
Disposition: Reversed

Facts: Decedent died with no descendents and was predeceased by his parents. His only sister also predeceased him, herself leaving no descendents. Decedent, however, had 14 second cousins on his mother’s side. On his father’s side, he had only a half uncle.

Applying Code §§ 64.2-202(B) and -203(B), the circuit court held that because the uncle was a half blood, he could receive only half of the paternal interest, with the remaining half of the paternal interest to be divided among the 14 second cousins on his mother’s side (who also split between them the one-half maternal interest).

Analysis: On appeal, the SCOV reversed.

It noted that where a decedent has no surviving spouse, offspring, parents, sibling, or sibling’s offspring, then Code § 64.2-200(A)(5) controls. Under this provision, one half of the estate passes to maternal kindred and one half to paternal kindred. Each half is known as a “moiety” and keeps on its own side, regardless of the remoteness of kin. The moieties are rejoined only if there is no kin within one of the moieties. Code § 64.2-202(A) states that the division of an estate applies to each half portion of such estate when divided pursuant to Code § 64.2-200(A)(5). As the half uncle was the only member of the class of persons to whom the paternal estate passed, he was entitled to the entire paternal-side moiety (i.e., one half of the estate).

The SCOV rejected the argument that Code § 64.2-202(B), which applies to half-blood collaterals, entitled the members of the maternal estate to one half of the half-uncle’s share. There was no whole-blood heir on the paternal side. There was only one heir: the half-uncle. So the entire moiety went to that heir. The fact that the second cousins on the maternal side were whole-blood heirs was irrelevant, as they had no interest in the paternal-side moiety.

The SCOV also held that Code § 64.2-203(B) was irrelevant, as it applied only where a person is related by more than one line of relationship. The half-uncle had only one line of relationship.

Key Holding(s):

- Where there is no surviving spouse, offspring, sibling, sibling’s offspring, or parent, the estate is divided into a paternal side and a maternal side. Where a half-blood relative is the sole heir on one side, that heir is entitled to the entire paternal share regardless if there are whole-blood heirs on the other side.

Land Use

Case: Lamar Company, LLC v. City of Richmond (4/17/2014)
Author: Lemons
Lower Ct.: Hughes, Melvin R. (City of Richmond)
Disposition: Reversed

Facts: Owners and lessee of property containing a billboard visible from I-95 sought a variance from a zoning ordinance that, if complied with, would have made the billboard invisible to I-95. The board of zoning appeals rejected the request. The trial court affirmed the ruling, finding that the board’s decision was “fairly debatable.”

The lessee appealed the trial court’s decision, but the property owners were not parties to the appeal.

Analysis: On appeal, the SCOV reversed.

The SCOV first denied the city’s motion to dismiss the appeal. The city claimed that the owners were necessary parties and that their absence required the court to dismiss the appeal. The SCOV rejected that argument. It noted that that, unlike BZA appeals to the circuit court, there was no statutory requirement that owners be parties to an appeal from the circuit court to
the SCOVA. As the necessary-party doctrine was not jurisdictional, and as the lessee adequately represented the owners’ interests, the SCOV refused to dismiss the appeal.

On the merits, the SCOVA agreed that the trial court erred in using the “fairly debatable” standard of review. The “fairly debatable” standard applies when a locality acts in a legislative capacity. It does not apply to a BZA’s variance decision. The proper standard of review is articulated in Code § 15.2-2314, which states that a trial court may reverse a BZA decision where it is contrary to law or an abuse of discretion.

Justices McClanahan and Goodwyn dissented, noting that the application of the wrong standard of review was harmless error because the circuit court also stated the correct standard and explicitly stated that the lessee had not met its requirements, either.

Chief Justice Kinser wrote a concurring opinion addressing the dissent and noting that where a trial court applies the wrong standard, remand is necessary because it is impossible to determine whether the result would have been identical under the correct standard.

Key Holding(s):

• The fact that a necessary party is absent does not deprive a court of subject-matter jurisdiction.

• Courts may reverse a BZA’s decision to deny a variance where that decision is contrary to law or an abuse of discretion.

• Courts do not review BZA decisions to deny variances using the “fairly debatable” standard.

Real Property

Author:      Mims
Lower Ct.:   Long, R. Bruce (Middlesex County)
Disposition: Affirmed

Facts: In the 1950s a property owner on the Rappahannock River created an island from oyster shells, erected an oyster shack on it, and built a causeway to access it. In 2006, a neighboring property owner sued the owner, claiming that the owner was interfering with her riparian rights. The two neighbors settled the dispute, with the parties executing mutual releases.

The property owner defaulted on the settlement. After the neighbor sued to enforce the settlement agreement, the trial court entered an order in 2010 holding that the neighbor, not the owner, owned the shoreline property.

The neighbor then brought an ejectment action to remove the oyster house. The owner argued that the statute of limitations for ejectment had expired and that he had acquired title to the island by adverse possession. Alternatively, the owner claimed that Code § 28.2-1200.1(B)(2)–which was enacted in 2011 and which concerns certain manmade islands created on Commonwealth-controlled bottomlands before 1960–vested him with title to the island. Finally, he argued that, regardless, he should be able to keep and remove the oyster house, as it was personalty, not realty.

The trial court rejected these arguments, dismissing the owner’s plea of the statute of limitations and concluding, after trial, that he could not rely on the terms of Code § 28.2-1200.1(B)(2) because (1) he did not meet the statute’s substantive require-
It noted that answers about adverse possession and the statute of limitations for ejectment are closely intertwined. As the owner had waived any such claims when he settled the 2006 lawsuit and executed a release, the trial court correctly dismissed the plea in bar.

As for the Code § 28.2-1200.1(B)(2) issue, the SCOV noted that the owner’s appeal did not mention all of the trial court’s bases for rejecting the owner’s arguments. In particular, it did not address the ruling that the 2010 order vested the neighbor with property rights in the island and shack and that the 2011 amendments did not divest her of those rights. Because this ruling was an independently sufficient basis for rejecting the Code § 28.2-1200.1(B)(2) claim, the failure to assign error to it was fatal to the owner’s argument.

Finally, the SCOV held that the shack was a fixture as it was intended to be a permanent addition to the island.

Justice McClanahan concurred, stating that the owner’s failure to present any substantive argument contesting the trial court’s statute-of-limitations ruling should have foreclosed any further consideration of that issue.

**Key Holding(s):**

- Where a trial court provides multiple independent bases for a ruling, an appellant must assign error to all of these bases or else it will waive its challenge to the ruling.

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**Real Property**

**Case:** Robinson-Huntley v. George Washington Carver Mutual Homes Association, Inc. (4/17/2014)

**Author:** Mims

**Lower Ct.:** DiMatteo, Louise M. (Arlington County)

**Disposition:** Affirmed

**Facts:** Plaintiff entered into an agreement with a real estate cooperative under which the cooperative would “provide and pay for” her dwelling. The agreement, however, stated that she had to pay for “minor interior repairs.”

Plaintiff had problems with plumbing in her interior walls and asked the cooperative to pay for the repairs. She also asked for the cooperative to provide its financial records. The cooperative responded with an amendment to its bylaws stating that it provided services to members “at their [i.e., the member’s] expense,” but that it would maintain a general reserve for repairs undertaken in light of the cooperative’s long-term plans.

Plaintiff sued the cooperative, asking inter alia that the court declare the amendment invalid, order the cooperative to repair the pipes, and order the cooperative to prepare a budget and finance committee and disclose its financial records to her. She also sought attorney’s fees under Code § 55-492(A).

The trial court granted the plaintiff’s request to declare the amendment void and to order appointment of a finance committee and preparation of a budget. It declined the plaintiff’s request for attorney’s fees.

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

Plaintiff argued that the trial court erred in refusing to force the cooperative to make the repairs. The issue hinged on whether the “provide and pay” language entailed an obligation to make repairs. The plaintiff argued that the subsequent proviso that the cooperative would not undertake “minor interior repairs” implied that it would undertake other repairs.

The SCOV first addressed the language of the contract. It noted that contract language is ambiguous where it may be understood in more than one way or when it refers to two or more things at the same time. Applying that principle, it held that the “provide and pay” language was, at best, ambiguous. It could have just meant that the cooperative would provide the dwelling unit to the plaintiff—not that it was agreeing to any repairs.

Because the term was ambiguous on its face, the court looked to extrinsic evidence to resolve the ambiguity. It noted that a prior agreement between the cooperative and the plaintiff’s predecessor-in-interest contained a clause after the “provide and pay” language that expressly required the cooperative to make repairs to the dwelling, except “minor interior repairs.” The omission of this repair-mandating language in the plaintiff’s contract, the SCOV held, was evidence that the parties did not intend for the cooperative to make repairs.

The SCOV also noted the absence of evidence of the cooperative performing repairs similar to the ones the plaintiff requested. The only repairs the cooperative performed were those that addressed the tenants’ common problems (e.g., fixing the roof).

The SCOV held that, taken together, these facts supported the trial court’s finding that the cooperative had no contractual obligation to repair the plaintiff’s pipes.

Finally, the SCOV held that the trial court had not abused its discretion in denying attorney’s fees.

**Key Holding(s):**

- A contract is ambiguous where it may be understood in more than one way or when it refers to two or more things at the same time.

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It provided services to members “at their [i.e., the member’s] expense,” but that it would maintain a general reserve for repairs undertaken in light of the cooperative’s long-term plans.
Employment

Case: Lewis v. City of Alexandria (4/17/2014)

Author: McClanahan

Lower Ct.: Clark, James C. (City of Alexandria)

Disposition: Affirmed

Facts: Plaintiff, a former employee of the defendant locality, was fired after complaining that his supervisor had approved certain false claims. Nine months after being fired, the employee obtained a job, albeit one that paid him $10,000 less per year.

The jury returned a verdict for the employee and awarded backpay damages of $104,096. The circuit court doubled this amount, per Code § 8.01-216.8, awarded lost vacation pay of $8,181, and awarded attorney’s fees of $243,684.12.

Plaintiff also sought $57,178 in front pay and $175,130 in lost pension benefits. The trial court denied the request for front pay, ruling that the other awards already had made the employee whole and that the amount was too speculative. As for the lost pension benefits, the trial court ruled that they, too, were too speculative.

Analysis: On appeal, the SCOV affirmed, ruling that the trial court did not abuse its discretion in denying front-pay and pension damages.

The SCOV rejected employee’s argument that the trial court had to award at least some front pay. It held that “front pay is not awarded as a matter of course when reinstatement is denied.” And it is not used where it would confer a windfall on plaintiff. The SCOV noted that other courts have considered a liquidated-damages award when determining whether to award front pay.

The SCOV held that the trial court did not abuse its discretion in refusing to award pension damages because those damages had not vested and it was speculative whether the plaintiff would have employed for the 18 remaining months needed to vest those benefits.

Justice Mims concurred. He disagreed with the ruling that the liquidated-damages award obviated the need to award front pay. But he would have affirmed the front pay issue on the separate ground that the evidence was too speculative.

Key Holding(s):

- Front pay in lieu of reinstatement is not awarded as a matter of course.

- Courts may consider statutory liquidated damages when determining whether to award front pay.

Real Property

Case: Norfolk Southern Railway Co. v. E.A. Breeden, Inc. (4/17/2014)

Author: McClanahan

Lower Ct.: Lane, James V. (Rockingham County)

Disposition: Affirmed

Facts: Norfolk Southern agreed to construct a private grade crossing for the use of property owners and their successors in interest. The agreement specified that it was to be solely for the property owners’ interest and that the property owners would indemnify the railroad for all claims arising out of their use of the grade crossing.

E.A. Breeden, Inc., owned a parcel that was part of the original landowners’ property. It leased this to a tenant. The tenant was injured while using the grade crossing and sued Norfolk Southern. Norfolk Southern settled, and then—in a second lawsuit—sued Breeden under the indemnity agreement. In this second lawsuit, the trial court held that the tenant’s use of the grade crossing was not attributable to Breeden and so Breeden had no indemnity obligation. Norfolk Southern then removed the private crossing.

In a third lawsuit, Breeden sued Norfolk Southern, asserting that Norfolk Southern violated its covenant to maintain the crossing. Norfolk Southern, however, claimed that the indemnity lawsuit established that the tenant’s use of the crossing was unlawful and, thus, that Breeden had violated the covenant, barring Breeden’s right to enforce it against Norfolk Southern. The trial court overruled Norfolk Southern’s demurrer, noting that the earlier ruling established that the tenant was a successor in interest and had his own right to traverse the crossing.

Breeden then sought summary judgment, which Norfolk Southern opposed, inter alia, on the ground that there were genuine issues of material fact on the contract claim (i.e., whether Breeden suffered actual injury) and on the injunction claim (i.e., whether Breeden showed irreparable harm and lack of an adequate remedy at law).

The trial court denied summary judgment, and then held an evidentiary hearing on Breeden’s claim for permanent injunctive relief. It granted Breeden’s request for an injunction ordering Norfolk Southern to restore the grade crossing. But it denied Breeden’s request for attorney’s fees under Code § 8.01-271.1.

Analysis: On appeal, the SCOV affirmed.

It agreed that Breeden did not breach the covenant by allowing his tenant to use the crossing. The tenant, as lessee, was a successor in interest and had an independent right to use the crossing. Nor did the covenant bar Breeden from authorizing its tenant to use the crossing.

As for the propriety of injunctive relief, the SCOV held that a
property owner generally is entitled to injunctive relief upon a showing of a valid covenant and a breach thereof. There is no need to prove damages or an inadequate remedy at law.

The SCOV noted that there are exceptions where the defendant shows hardship out of proportion to the relief sought, where performance is impossible, or where enforcement would be difficult. But it held that Norfolk Southern failed to establish any of these conditions.

It rejected Norfolk Southern’s argument that it was wrongfully deprived of a jury trial, noting that there were no factual issues common to Breeden’s contractual damages claim. In particular, to obtain an injunction, Breeden did not need to prove monetary damages or otherwise quantify the harm resulting from the grade crossing’s removal. The SCOV affirmed, however, the trial court’s denial of sanctions.

Justices Russell, Lemons, and Millette dissented, opining that the trial court should have heard additional evidence concerning the facts and circumstances surrounding the propriety of a permanent injunction.

**Key Holding(s):**

- A party seeking a permanent injunction to enforce a covenant running with the land need only establish the covenant’s validity and breach. It need not show damages or an inadequate remedy at law.

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**FOIA**

**Case:** American Tradition Institute v. Rector and Visitors of the University of Virginia (4/17/2014)

**Author:** Lemons

**Lower Ct.:** Sheridan, Paul F. (Judge Designate)
(Prince William County)

**Disposition:** Affirmed

**Facts:** The plaintiff made a VFOIA request to UVA requesting documents produced by or received by a climate scientist at the university. UVA asked the trial court to require the plaintiff to pay for UVA’s expenses in reviewing documents to determine whether they were discloseable under VFOIA. The trial court agreed that such costs were part of “accessing,” “duplicating,” “supplying,” and “searching,” as those terms ordinarily are understood.

The parties submitted a set of “exemplars” to the trial court. UVA argued that the documents were “proprietary” and, as such, exempt from disclosure under Code § 2.2-3704. The trial court agreed, holding that, for purposes of Code § 2.2-3705.4(4), “proprietary” means a right customarily associated with ownership, title, and possession. It rejected the plaintiff’s argument that, for a disclosure to qualify for an exemption under the “proprietary” exception, such disclosure would have to cause pecuniary harm to the university.

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

First, it held that in the context of a university, “proprietary” means a right associated with ownership, title, and possession of property. It rejected the plaintiff’s pecuniary-harm definition, noting that this was inconsistent with the General Assembly’s intent not to put Virginia’s public universities at a competitive disadvantage by subjecting research to public disclosure. And it cited a lengthy passage from an amicus brief describing the harmful effects on scientific creativity and scholarly communications that a narrow, pecuniary-oriented, construction of “proprietary” would cause.

Second, the SCOV agreed with the trial court that the costs of reviewing documents to determine whether or not they were exempt from disclosure was a part of “accessing,” “duplicating,” “supplying,” and “searching,” as those terms ordinarily are understood.

Third, based on its in camera review of the exemplars, the SCOVA concluded that the trial court’s factual determination that these fell under the “proprietary” exemption was not plainly wrong.

Justice Mims concurred, cautioning against an overly broad application of the SCOV’s “proprietary” definition in other contexts.

**Key Holding(s):**

- For purposes of VFOIA’s exemptions vis-à-vis document requests to public institutions of higher education, “proprietary” denotes rights associated with ownership, title, and possession. It does not mean that the documents’ disclosure would cause pecuniary harm.

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**Real Property**

**Case:** Squire v. Virginia Housing Development Authority (4/17/2014)

**Author:** Powell

**Lower Ct.:** Martin, Everett A., Jr. (City of Norfolk)

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

**Facts:** A homeowner was more than four months in arrears on mortgage payments. After a forbearance period—during which she failed to repay this arrearage—the lender, VHDA, initiated foreclosure proceedings. When a prospective buyer came to the home to inspect it, the homeowner told it that the situation was “in litigation.” The VHDA refused the homeowner’s later mortgage payments, and the house was sold to that buyer at the foreclosure sale.
The deed of trust incorporated federal regulations. Those regulations, in turn, authorized foreclosure only where: (1) the loan was three months in arrears, and (2) the lender had arranged, or made reasonable efforts to arrange, a face-to-face meeting with the borrower. The plaintiff alleged that the VHDA did not comply with either of these requirements. She claimed that the VHDA violated the forbearance agreement. And she claimed that the trustee had breached its fiduciary duty in the transaction. She sought damages and a rescission of the sale. The trial court sustained the defendants’ demurrers.

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

The SCOV rejected the argument that the homeowner was less than three months in arrears, noting allegations to the contrary in the complaint. It also rejected the argument that the VHDA breached the forbearance agreement by refusing to allow her to bring her account current. The complaint alleged that she attempted to do so only after the agreement already had expired. On these points the SCOV affirmed the district court.

As for the face-to-face meeting requirement, however, the SCOV reversed. It held that the plaintiff had adequately alleged that the VHDA and the trustee had breached the deed of trust by failing to comply with regulations requiring such a meeting. Likewise, it held that she had adequately alleged a breach of fiduciary duty by the trustee for disregarding these requirements.

Finally, the SCOV agreed with the trial court that the plaintiff failed to state a claim for rescission or to quiet title. It noted that it would not set aside a foreclosure sale for gross inadequacy of price, absent evidence of fraud or collusion. And it noted that the conversation between the homeowner and the prospective buyer (in which the homeowner said the matter was in litigation) was not enough to divest the purchaser of its bona fide good faith status. Among other things, the case was not in litigation at the time and a lis pendens was filed only several months later.

Justices Kinser, Lemons, and McClanahan dissented from the ruling allowing the claims to go forward on the alleged breach of the regulations concerning face-to-face meetings. They opined that, other than conclusory assertions, the factual allegations were insufficient to establish that the foreclosure sale was caused by the defendants’ failure to hold a face-to-face meeting.

**Key Holding(s):**

- A party may bring a damages claim against a lender and trustee for wrongful foreclosure where: (1) the deed of trust incorporates federal regulations mandating a face-to-face meeting before foreclosing, and (2) the lender and trustee fail to conduct such a meeting.

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**Creditor’s Rights**

**Case:** PS Business Parks, L.P. v. Deutsch & Gilden, Inc. (4/17/2014)

**Author:** Millette

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

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

**Facts:** A judgment debtor had a subsidiary account in a “treasury management service” at SunTrust. Every evening, SunTrust would draw the money out of the judgment debtor’s account and transfer it to a master account owned by a third party, G&D. Money was transferred back from G&D’s account to the judgment debtor’s account on an as-needed basis.

The judgment creditor served a garnishment summons on SunTrust seeking funds out of both the judgment debtor’s subsidiary account and G&D’s master account. Even after SunTrust received the garnishment summons, more than $1 million flowed in and out of the subsidiary account. The exact amount of new funds (as opposed to funds just circulating between the master and subsidiary accounts) was, however, uncertain.

The trial court held that the judgment creditor was not entitled to any of the funds in G&D’s master account. And it held that the judgment creditor was only entitled to $15,050 from the subsidiary account, the amount that SunTrust did not contest.

**Analysis:** The SCOV affirmed the ruling that the judgment creditor could not garnish G&D’s account, holding that this was a debt owed by SunTrust to G&D—not to the judgment debtor—and so was not subject to garnishment.

But the SCOV reversed the ruling that the judgment creditor was entitled only to $15,050. It noted that, after SunTrust was served with a garnishment, all funds flowing into the judgment debtor’s accounts were subject to a lien. Far more than $15,050 of new funds had flowed into the account after SunTrust received the garnishment. But the record was insufficient to determine the amount, as the trial court had not undertaken the inquiry required by Code § 8.01-565. The SCOV remanded with instructions that the district court conduct such an inquiry.

Justice McClanahan dissented in part, opining that the SCOV should not have remanded for an evidentiary hearing because the judgment creditor had neither requested such a hearing below nor assigned error to the trial court’s failure to conduct one.

**Key Holding(s):**

- A judgment creditor cannot garnish a non-judgment-debtor’s bank account even if that entity has an arrangement to automatically transfer funds to and from the judgment debtor’s account.
• Where funds have been transferred into and out of the judgment debtor’s account after service of the garnishment summons and the bank disputes the amounts subject to garnishment, the trial court must undertake an inquiry under Code § 8.01-565 to determine the amount properly subject to garnishment.

**FEbruARY SESSION 2014**

**Charitable Immunity**

**Case:** The Byrd Theatre Foundation v. Barnett (2/27/2014)

**Author:** McClanahan

**Lower Ct.:** Hughes, Melvin R. (City of Richmond)

**Disposition:** Affirmed

**Facts:** Plaintiff, a pipe-organ enthusiast, was injured while repairing the organ at the Byrd Theater. He sued the owner, a non-profit corporation whose purpose was to restore the theater and its organ. He also sued the company who managed the theater.

The owner filed a plea of charitable immunity, claiming that the plaintiff was a beneficiary of the organization. The trial court rejected this argument, holding that the organization’s charitable purpose was to provide a venue for patrons to enjoy the arts and that plaintiff was not receiving any such charitable benefit at the time he was injured.

A separate issue in the case was whether the property manager’s knowledge of the defective plank could be imputed to the owner. The trial court rejected the owner’s jury instruction on the issue. The jury ultimately exonerated the property manager but found the owner liable.

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

It noted that charitable immunity extends only to those negligence claims brought by persons who accept the charitable institution’s benefits. The organ repairer was not accepting the organization’s benefits when he was injured. The organization’s mission was to restore and preserve the theater, not to provide a venue for people to practice their hobby of organ restoring.

The SCOV held that it was unnecessary to reach the notice-instruction issue because the jury had exonerated the property manager, and so the owner’s liability could not have been predicated on the property manager’s knowledge. This meant that any error in the instructions about imputed notice was harmless. As there were other independent bases for the owner’s liability, the verdict against it could stand.

**Key Holding(s):**

• Charitable immunity extends only to those negligence claims brought by persons who accept the charitable institution’s benefits.

**Workers’ Compensation**

**Case:** Rodriguez v. Leesburg Business Park, LLC (2/27/2014)

**Author:** Kinser

**Lower Ct.:** Chamblin, James H. (Loudoun County)

**Disposition:** Reversed

**Facts:** The defendant LLC was a “single source” entity created to develop a parcel and then lease or sell warehouses built on the property. It hired a general contractor to construct the warehouse buildings. The LLC had no role in the actual construction of the buildings.

The plaintiff’s decedent, one of the contractor’s employees, was electrocuted on the job. His statutory beneficiaries brought a wrongful-death claim against the LLC. The LLC filed a plea in bar. It asserted that it was the employee’s “statutory employer” under Code § 65.2-302(A). Thus, the LLC claimed, the Workers’ Compensation Act’s exclusivity provision barred the action.

The circuit court sustained the plea in bar and dismissed the action.

**Analysis:** On appeal, the SCOV reversed.

Whether or not a contractor’s employee is the owner’s statutory employee depends on whether the work is a part of the “trade, business, or occupation of the owner.” That, in turn, depends on the “normal work test”--i.e., whether the work in question was normally carried out by the owner’s employees rather than independent contractors.

In the case before it, the SCOVA examined whether construction work was part of the LLC’s trade, business, or occupation. It held that it was not. Although the construction of the warehouses was indispensable to the LLC’s business, it was not the business itself.

Justice McClanahan dissented, arguing that the evidence showed that construction work was part of the LLC’s trade, business, or occupation.

**Key Holding(s):**

• An LLC in the business of developing a parcel who hires a contractor to build warehouses on that parcel is not itself in the construction trade and business and so is not the statutory employer of the contractor’s employee.
**Civil Procedure**

Case: Coalson v. Canchola (2/27/2014)  
Author: Goodwyn  
Lower Ct.: White, Bruce D. (Fairfax County)  
Disposition: Reversed

**Facts:** A drunk driver talking on cell phone ran into another vehicle, slightly injuring the driver and a passenger. The two injured parties sued the drunk driver, seeking both compensatory and punitive damages. The jury returned a verdict for $5600 in compensatory damages for the driver, and $14,000 for the passenger. It also returned a punitive damages award of $100,000 for each of the plaintiffs.

The defendant filed post-trial motions requesting remittur of both punitive damages awards, arguing that they were excessive under Virginia law and under the Due Process Clause of the Fourteenth Amendment. The trial court held that the driver’s $100,000 punitive-damages award was disproportionate to the injury suffered, and should not have been the same amount as that awarded to the more seriously injured passenger. The trial court remitted the punitive damages award to $50,000, which was less than ten times the actual damages. The driver accepted the reduced award under protest.

**Analysis:** On appeal, the SCOV reversed and reinstated the jury award. It held that it was improper for the circuit court to compare verdicts when assessing whether a punitive damages award is excessive. So the comparison of the driver’s award with the passenger’s award was improper.

Likewise, it held that the ratio of actual to punitive damages (1:17.86) was not excessive given the reprehensibleness of the defendant’s conduct. Under Virginia law, a damages award should be remitted only where it shocks the conscience. Because the award in the case did not shock the conscience, the trial court should not have granted remittitur.

As for the Due Process claim, the US Supreme Court has held that courts evaluating punitive damages awards should consider: (1) the degree of reprehensibleness of the defendant’s conduct, (2) the disparity between actual and potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. The first consideration is the most important.

Given the fact that the defendant had seven prior drunk-driving convictions, was specifically told by a police officer not to drive that evening, but nevertheless chose to endanger other drivers by driving while intoxicated, the court held that his conduct was sufficiently reprehensible for the $100,000 punitive damages award to stand. Although the ratio between harm to plaintiff and punitive damages generally should be in single digits, higher ratios are appropriate where the defendant’s conduct is especially reprehensible and the actual damages are slight.

Justice McClanahan dissented, noting that the ratio of punitives to actual damages was extraordinarily high and opining that it was appropriate to look at ratios of other awards.

**Key Holding(s):**

- In deciding whether to grant remittitur, it is not appropriate for the trial court to compare a punitive damages verdict to verdicts in other cases.
- A high ratio of punitive to economic damages may be appropriate where the actual damages are slight but the defendant’s conduct is especially reprehensible.

**Real Property**

Case: Beach v. Turim (2/27/2014)  
Author: Lemons  
Lower Ct.: Kemler, Lisa Bondareff (City of Alexandria)  
Disposition: Reversed

**Facts:** A property owner in a subdivision claimed that it had an express easement over a neighbor’s property. The subdivision deed stated that “easements are hereby created as shown on the attached plat.” The plat showed the easement’s location, but did not identify the easement’s grantees. The trial court, however, found that there was an express easement and enjoined the owner whose land it traversed from blocking it.

**Analysis:** On appeal the SCOVA reversed.

It noted that easements should be strictly construed, with any doubts resolved against the establishment of the easement. There must be an instrument of conveyance. And that instrument must sufficiently describe the grantees. Although a plat can be part of an easement, this is only for descriptive purposes (i.e., to identify the easement’s metes and bounds).

As for the Due Process claim, the US Supreme Court has held that courts evaluating punitive damages awards should consider: (1) the degree of reprehensibleness of the defendant’s conduct, (2) the disparity between actual and potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. The first consideration is the most important.

Given the fact that the defendant had seven prior drunk-driving convictions, was specifically told by a police officer not to drive that evening, but nevertheless chose to endanger other drivers by driving while intoxicated, the court held that his conduct was sufficiently reprehensible for the $100,000 punitive damages award to stand. Although the ratio between harm to plaintiff and punitive damages generally should be in single digits, higher ratios are appropriate where the defendant’s conduct is especially reprehensible and the actual damages are slight.

Justice McClanahan dissented, noting that the ratio of punitives to actual damages was extraordinarily high and opining that it was appropriate to look at ratios of other awards.

**Key Holding(s):**

- To establish an express easement, an instrument must identify the grantees.
- A plat can be part of a deed establishing an easement, but only for descriptive purposes (i.e., to establish the easement’s metes and bounds).
**Business Torts**

**Case:**  
* Dunlap v. Cottman Transmission Systems, LLC  
(2/27/2014)

**Author:** Kinser  

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

**Disposition:** Certified Question Answered

**Facts:** Plaintiff, an AAMCO franchisee, brought tortious-interference and statutory-conspiracy claims against companies that it claimed had conspired to cause his franchise to be closed.

The Eastern District dismissed the conspiracy claim because, it held, a party cannot predicate a statutory conspiracy claim on an alleged interference with contract. It dismissed the remaining tortious-interference-with-contract and -expectancy claims because they were barred by 8.01-248’s catch-all two-year statute of limitations. It rejected the plaintiff’s argument that a tortious-interference claim was a claim for injury to property.

The plaintiff appealed these rulings to the Fourth Circuit, which issued certified questions to the Supreme Court of Virginia.

**Analysis:** The SCOV held that a plaintiff could ground a statutory conspiracy claim under 18.2-499 and -500 on the unlawful act of tortiously interfering with a contract. The duty not to interfere with others’ contracts is a common law duty. Thus, although a mere contract breach is not an unlawful act sufficient to ground a conspiracy claim, tortious interference with a contract is.

On the separate question of the limitations period for tortious-interference claims, the SCOV noted that the right to performance of a contract is a property right. When a third party tortiously interferes with the contract, it injures that property right. Thus, Code § 8.01-243(B)’s five-year limitations period for property-damage claims applied.

**Key Holding(s):**  
- A party can base a statutory conspiracy claim under 8.01-499 and -500 on a tortious interference with contract/expectancy.
- A claim for tortious interference with contract/expectancy is a claim for property damage subject to Code § 8.01-243(B)’s five-year limitations period.

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**Sanctions**

**Case:**  
* Shebelskie v. Brown  
(1/14/2014)

**Author:** Kinser  

**Lower Ct.:** Spencer, Margaret P. (City of Richmond)  

**Disposition:** Reversed

**Facts:** Two attorneys represented a women in a real-estate lawsuit with her ex-husband.

During the action, the trial court ordered the woman to close on the property, pay costs and attorney’s fees, and pay an additional $12,500. The order did not specify a deadline, the amount of the costs and fees, or the manner of payment. The woman failed to make the payments, and the ex-husband filed a show-cause motion. The trial court issued a rule to show cause why the woman should not be held in contempt.

In the woman’s show-cause brief, signed by one of the attorneys (Wright), the attorney argued that (1) the order directing payment was not yet final, making it unclear whether there was any current obligation to pay, and (2) the order failed to specify the total amount due. At the hearing, the other attorney (Shebelskie) made these arguments orally. Although the trial court did not find the woman in contempt, it found that her attorneys had violated § 8.01-271.1.

**Analysis:** The SCOVA reversed, holding that the trial court had abused its discretion in sanctioning the two attorneys.

As to Shebelski, the SCOVA held that he could not be held liable under § 8.01-271.1 because (1) he did not sign the pleading with the arguments, and (2) his oral arguments were not an “oral motion.” By using the term “oral motion,” rather than “oral argument,” the General Assembly did not intend to include oral arguments in its enumeration of sanctionable conduct.

As to Wright, who signed the pleading, the SCOVA held that the trial court had mischaracterized his arguments. Wright did not argue, as the trial court claimed he did, that there were no payment obligations because the order was interlocutory, because it did not specify a deadline, or because it did not specify that the payments were to be in cash. Rather, Wright argued that the order was insufficiently specific to ground a contempt finding. Under Virginia law, a trial court cannot hold a party in contempt for violating an order that is not definite in its terms. The SCOVA held that Wright “after reasonable inquiry, could have formed a reasonable belief” that his arguments were “warranted by existing law” concerning contempt.

**Key Holding(s):**  
- Arguments made in response to another party’s
motions are not “oral motions” such as can ground liability under Code § 8.01-271.1

Land Use

Case: Board of Supervisors of James City County v. Windmill Meadows, LLC (1/10/2014)

Author: Koontz

Lower Ct.: Curran, Robert W. (Judge Designate)
(City of Williamsburg and James City County)

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

Facts: Before 2010, landowners applied for rezoning and agreed to cash proffers during different stages of development. In 2010, the General Assembly enacted Code § 15.2-2303.1:1(A), which stated that “any cash proffer” be collected only after final inspection and before issuance of a certificate of occupancy.

The county filed a complaint for declaratory judgment seeking a declaration that § 15.2-2303.1:1(A) did not apply to proffers agreed to--but not collected--before its enactment. Three of the owners responded with a counterclaim asking the trial court to issue a declaratory judgment that the statute applied retroactively to all cash proffers agreed to before its effective date. One of the owners just filed an answer, with no counterclaim seeking declaratory relief.

The trial court agreed that the statute applied retroactively to proffers agreed to--but not paid--before its effective date. The trial court awarded attorney’s fees to all of the owners pursuant to Code § 15.2-2303.1:1(C), which authorizes the trial court to award attorney’s fees to parties who successfully challenge a county’s actions that violate Code § 15.2-2303.1:1.

Analysis: On appeal, the SCOV affirmed in part and reversed in part. On the retroactivity issue, the SCOV held that--to express its intent that courts apply a statute retroactively--the General Assembly need not use any particular language. It held that the use of the phrase “any cash proffer” evinced an intent that the statute applied to proffers already agreed to before the statute’s enactment.

It was true that, under Article 1, Section 11 of the Constitution, this could not impair the contract rights of landowners. So, for example, it could not alter a prior agreement under which the owner did not have to pay the proffer until after issuance of a certificate of occupancy. But this constitutional provision was designed to protect private parties, not the Government, and so does not prevent private parties from enforcing § 15.2-2303.1:1 against the Government.

As for attorney’s fees, the SCOV held that the owner who simply answered, and did not file a counterclaim, did not “challenge” the county’s actions for purposes of Code § 15.2-2303.1:1(C). But it held that the counterclaiming landowners could recover them. The declaratory-judgment counterclaims “challenged” the county’s actions in accepting proffers after 2010. And attorney’s fees are available in a declaratory judgment action where otherwise authorized by applicable law.

Key Holding(s):

• Code § 15.2-2303.1:1(A) applies to all payments of cash proffers, regardless of whether they were agreed to before the statute’s effective date.
Key Holding(s):

- The Medical Malpractice Act’s damages cap applies to claims brought by a child injured in utero, but born alive.

Defamation

Case: Web v. Virginia-Pilot Media Companies, LLC (1/10/2014)

Author: Mims

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

Disposition: Affirmed

Facts: Two high-school students were engaged in a series of altercations. The father of one of the students was an assistant principal at another nearby high school. The son of the assistant principal was allowed to remain at the high school. The other student was given only the option to transfer, and dropped out instead.

A reporter for the Virginian-Pilot wrote an article describing the students’ different treatment. The article mentioned that the father of the boy who received favorable treatment was an assistant principal at another high school. But it quoted a school official who stated that this did not influence the son’s school’s decision.

Nevertheless, the father sued the reporter and the Virginian-Pilot, claiming that the article had created the defamatory implication that he had acted unethically to obtain preferential treatment for his son. The trial court overruled the defendants’ demurrer, the case went to trial, and the jury returned a $3 million verdict for the father. The trial court, however, granted the defendants’ motion to strike and entered a judgment for the newspaper and the reporter.

The father appealed this ruling. The defendants cross-appealed the trial court’s ruling overruling their demurrer.

Analysis: The SCOV affirmed the judgment, but held that the trial court should have sustained the demurrer rather than allowing the case to go to trial.

The SCOV noted that, in defamation cases, the trial court performs an “essential gatekeeping function” to ensure that such cases proceed only where the plaintiff alleges statements that actually may have defamed him.

Real Property

Case: CNX Gas Company LLC v. Rasnake (1/10/2014)

Author: Russell

Lower Ct.: Moore, Michael L. (Russell County)

Disposition: Reversed

Facts: This was a dispute over who had certain mineral rights in a parcel. A prior owner of a tract encompassing the parcel had deeded “all the coal” in it, but no other mineral rights. A later deed conveyed the relevant parcel to a third party, but qualified the conveyance with the sentences “This sale is not ment [sic] to convey any coals or minerals. The same being sold and deeded to other parties heretofore.” The question was whether this later deed conveyed non-coal mineral rights to the grantee.

The trial court held that this deed did not convey any mineral rights, as the language was “an unambiguous exception of the coal and minerals located on the property.”

Analysis: On appeal, the SCOV reversed.

It held that the language was ambiguous because it was capable of being understood by reasonable persons in more than one way. Citing the rules of construction that (1) ambiguity in deeds must be resolved in favor of the grantee, and (2) exceptions to granting clauses must be resolved in favor of the grantee, the SCOV held that the deed’s language was meant only to reserve coal rights, not any other mineral rights. Thus, the deed conveyed all non-coal mineral rights to the grantee.

Key Holding(s):

- Ambiguities in deeds should be resolved in the grantee’s favor.
- Exceptions to deeds should be construed in the light most favorable to the grantee.
Land Use

Case: Board of Supervisors of Prince George County v. McQueen (1/10/2014)

Author: McClanahan

Lower Ct.: Sharrett, W. Allan (Prince George County)

Disposition: Reversed

Facts: A landowner wished to develop his property as a “cluster subdivision.” A county ordinance permitted this as a by-right use. Although not required to do so by the ordinance, the landowner sought confirmation from the zoning administrator that his proposed development satisfied the requirements of the cluster-subdivision ordinance. The zoning administrator said that it did and that the owner could proceed with the development on a by-right basis.

The county then repealed the cluster-subdivision ordinance. The owner claimed that the zoning administrator’s letter confirming compliance with the cluster ordinance gave the owner a “vested right” to develop his property in the manner he proposed. He asserted that the letter satisfied Code § 15.2-2307’s requirement that the party asserting a vested right have obtained a “significant affirmative governmental act” with respect to the development of a specific project. He also argued that a subsequent (2010) amendment to the definition of “significant affirmative governmental act”-- which applied when a zoning administrator issued a written determination approving a specific use or density--applied and that the zoning administrator’s letter fell in this category.

The trial court refused to apply this amendment retroactively. But it found that the zoning administrator’s letter was, under Virginia Supreme Court precedent, a sufficiently significant affirmative governmental act. Thus, it declared that the owner had a vested right to develop his property as a cluster subdivision.

Analysis: On appeal, the SCOV reversed. Citing its 2009 decision in Board of Supervisors v. Crucible, the SCOV held that the zoning administrator’s “compliance letter” was not a significant affirmative governmental act. It did not affirmatively approve the development of the cluster subdivision. It did not approve a plat. Nor did it make any other commitment regarding the project. It simply confirmed that McQueen’s proposed development met the general standards for a cluster subdivision--a determination that entailed only a simple mathematical calculation.

The SCOV also rejected the owner’s argument that the 2010 amendment applied, noting that the General Assembly had expressed no intent that it be applied retroactively.

Key Holding(s):

- A letter from a zoning administrator affirming that a proposed development satisfied general zoning requirements is not a “significant affirmative governmental act” that can ground a claim for vested rights under 15.2-2307.

Sovereign Immunity

Case: Robertson v. Western Virginia Water Authority (1/10/2014)

Author: Powell

Lower Ct.: Weckstein, Clifford R. (City of Roanoke)

Disposition: Reversed

Facts: A property owner sued the Western Virginia Water Authority for the damage that a broken sewer line caused to his retaining wall. The owner claimed that the Authority was negligent in maintaining the sewer line. The trial court granted the Authority’s summary-judgment motion, finding that operating and maintaining a sewer line is a governmental function and so the Authority was entitled to sovereign immunity.

Analysis: On appeal the SCOV reversed. Although planning, designing, regulating, and providing a public service are governmental functions, merely maintaining and operating a municipal service is proprietary. Negligently maintaining a sewer is a ministerial and proprietary function. Thus, the Authority was not entitled to sovereign immunity.

Key Holding(s):

- Maintaining a sewer is a proprietary function that is not protected by sovereign immunity.
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