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"TO SEE TO SAY:" THE ESSENTIALS OF VOIR DIRE

by Nathan J. D. Veldhuis

"*Voir dire*," translated literally from the French means, "to see to say." The scope of *voir dire* is established by Va. Code Ann. § 8.01-358, and Va. S. Ct. R. 3A:14. Va. Code § 8.01-358, authorizes the court and counsel to examine prospective jurors to determine whether they "stand indifferent in the cause":

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; the party objecting to any juror may introduce any competent evidence in support of the objection; and if shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.
>
> A juror knowing anything relative to a fact in issue, shall disclose the same in open court.

From a plain reading of this statute, four areas define the scope of *voir dire* in state court in the Commonwealth of Virginia:[1]

(1) Whether a venireman is related to either party;

(2) Whether a venireman has any interest in the cause;

(3) Whether a venireman has expressed or formed any opinion [therein]; and

(4) Whether a venireman is sensible of any bias or prejudice therein.

On their face, these categories appear to overlap conceptually—and sometimes they do. The following case examples will, however, illustrate the "essentials" of these categories.

"Related to Either Party"

"A venireman who has an interest in the cause or who is related to a party is deemed *per se* not to be 'disinterested' and must be set aside for cause; this rule extends to criminal prosecution." *Webb v. Commonwealth*, 11 Va. App. 220, 397 S.E.2d 539 (1990). In criminal prosecution, the arresting officer is not a "party" within the meaning of Va. Code Ann. § 8.01-358, and a juror's relationship to that officer did not require "*per se* dismissal" of that juror from the venire. *Lilly v. Commonwealth*, 255 Va. 558, 499 S.E.2d 522 (1998), *rev'd on other grounds*, 527 U.S.

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Letter From the Chair

by Robert Leonard Garnier

I must confess that being given the opportunity to pen my first Letter from the Chair, to try to "wax eloquent" about any of a vast variety of topics of possible interest to an equally wide variety of Virginia litigators, has been a bit intimidating. I am daunted by the thought that I might have something to say that may be of great use to other attorneys, pondering what litigation secrets I might have to offer to the many of you who are far more seasoned and better attorneys than am I. So, in order to avoid the task at hand, I did what was easy to me – I set my computer aside, went for a run, and started making plans for upcoming activities with several local youth organizations.

That is when it occurred to me: perhaps an important means to improve ourselves as litigators might not be found in the courtroom, in a treatise, or on our own law office desks, but rather, beyond the four walls of our often narrowly tailored law practices. Might we become better lawyers, better litigators, if we try to live fuller and more altruistic lives and allow such lives to shape and define who we are as lawyers, rather than to let our noble profession alone define who we are in life? Surely, at least, volunteering to help meet the needs of others, pursuing personal interests beyond the legal profession, and simply enjoying a more balanced lifestyle should help us combat the substantial stress and related struggles we commonly face as lawyers and better equip us to serve the needs and interests of our clients.

Notwithstanding a recent article in the Virginia Lawyers Weekly reporting on a 20-year longitudinal study of job satisfaction among a group of University of Virginia law graduates, which demonstrated considerable professional satisfaction 20 years into the legal careers of these particular graduates, the same article itself noted that many other studies are replete with evidence that lawyers are "disproportionately prone to divorce, depression, alcoholism, physical illness and suicide." (*From One-L to 20-L: U.Va. law, 20 years on - Virginia study provides unique peek into lawyer job satisfaction*, Virginia Lawyers Weekly, Aug. 16, 2010.) Indeed, according to a Johns Hopkins study in 1990, the legal profession ranked first among 28 professions studied for highest incidence of depression and suicide. (W.W. Eaton, J.C. Anthony, W. Mandel & R. Garrison, *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. Occupational Med. 1079 (1990).)

Why is that? Could it be that very few professions other than litigation involve an adversary always working to prove you wrong or to otherwise disprove, discount, or otherwise discredit all or most of what you say and do? The ranks of our profession are filled with perfectionists often subject to high, or even often unrealistic, client expectations, and as one recent Litigation Section chair aptly observed, "We labor in a crucible in which winning can seem like everything." As litigation attorneys, we constantly strive to prevail while confronted with our clients' significant struggles (people typically see litigation attorneys in their most difficult times), dealing with matters of serious personal injury or death, business fights and failures, divorces and other family disputes,

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and criminal charges. Coupled with long hours, a continuing advancement of technology and increasing client expectations that one's attorney be available "24/7" by mobile phone or internet, pressures to make partner, intrafirm competition, the need to post sufficient billable hours, the need to continually educate ourselves on evolving legal doctrines, general public discontent with lawyers, and many other similar substantial demands on our time, abilities, and general psyche, it is no wonder we litigation attorneys are often frustrated, and at times simply overwhelmed, by the demands of our profession.

The substantial stress that the circumstances of our profession can often place upon us certainly cannot be healthful, and no doubt might negatively impact our ability to well represent our clients. Studies have repeatedly linked stress to, among other things, increased illness, heart and cardiovascular disease, strokes, obesity, depression, anxiety, exhaustion, and, overall, a decrease in productivity, all of which naturally and certainly are counterproductive to well serving and protecting client needs.

If I am correct about this, then I wish to propose in this, my first letter to the members of our Section, a means by which to get a better handle on the pressures that so often accompany our professional calling. That gets me back to my "diversions" from this article—my run and my planning for the Fall activities. In both activities, I am trying to help others. I am running for a charity endurance team and am working with youth with the hope to positively impact their lives. I certainly do not mention these small endeavors of mine as a self-laudatory proclamation, but simply to offer a perspective that came to me as I contemplated this letter. Sure, participating in such acts is intended to help others, but I have also found that they, coupled with other service efforts, have greatly helped me, both personally and, I hope and think, in my ability to well carry out my professional calling. By reaching for some sort of balance in life and a renewed understanding of what I consider to be important in life, that perspective has had the inevitable effect of enabling me to better carry out the duties of my profession as a litigation attorney and seeking to serve the needs of my clients. Indeed, it is well known that altruistic acts of service to others can improve our outlook on life and on others, can decrease feelings of depression or even loneliness (as many litigators can often feel), can reduce blood pressure and improve our cardiovascular system, often expose us to new ideas, people and attitudes, and in some instances, including specifically many I mention below, can even provide experiences and contacts particularly helpful to our careers. In sum, I believe that acts of altruism can only deepen our well of experience, knowledge and well-being from which we draw as we strive to well represent our clients.

I believe that acts of altruism can only deepen our well of experience, knowledge and well-being from which we draw as we strive to well represent our clients.

In light of these benefits, I take this opportunity to note that our Litigation Section, and the Virginia State Bar as a whole, offer many avenues by which to make a difference in our communities and our profession, and in turn, on our own personal and professional lives. Consider whether and how, if even for your own good and that of your clients, you might participate in the follow-

ing opportunities, as well as many others offered by the Litigation Section and the Bar:

Appellate Committee - Our Section's Appellate Committee educates, supports and serves the needs of appellate lawyers throughout Virginia. both by presenting CLEs and providing resources, including the anticipated forthcoming Appellate Handbook incorporating the Supreme Court of Virginia's recent revisions to the appellate rules.

Young Lawyers Conference - The Litigation Section supports the efforts of the YLC, which focuses its efforts on the special interests and concerns of young and new lawyers. Through a diverse group of projects, including the Virginia Domestic Violence Safety Project, Emergency Legal Services, Community Law Week activities, and various community outreach projects, the YLC is a vehicle through which young lawyers can serve the profession and the public and enhance the public awareness of the legal profession.

Senior Lawyers Conference - The SLC focuses on issues of interest to senior lawyers and promotion of the welfare of senior citizens around Virginia, including by publication of the Senior Citizens Handbook.

The Law In Society Scholarship competition - Sponsored by the Virginia State Bar and the Litigation Section, in cooperation with the Virginia State Department of Education, this essay contest is intended to increase awareness and appreciation of our legal system among high-school students throughout the Commonwealth, judged by a panel of volunteers from the Virginia State Bar and teachers and administrators throughout the Commonwealth, with prizes being awarded to students whose essays best demonstrate a superior understanding of the role and value of our legal system in our everyday lives. In the 2010 competition, hundreds of students from 95 schools, as well as homeschooled students, participated in the scholarship contest.

Virginia State Bar Speakers Bureau - consider volunteering your services to the Speakers Bureau, a free public service offering schools, community groups and civic organizations general legal information on important topics affecting the lives of the citizens of Virginia.

In addition to activities and causes advanced by the Virginia State Bar itself, Virginia lawyers can readily find myriad other avenues by which to invest themselves in their communities and serve the needs of others throughout the Commonwealth. Since 1985, **Lawyers Helping Lawyers** has provided, through a professional staff and a statewide network of volunteers, confidential help to members of our legal profession who experience professional impairment as a result of substance abuse and/or mental health problems.

Similarly, many local bar associations throughout Virginia provide excellent means by which to serve others while breaking any monotony of our own litigation practices and, hopefully, expanding our focus and bringing greater contentment to our lives. Without intending to exclude the very many other laudable activities of our local bar associations, many worthwhile opportunities include chances to educate students about Virginia's legal system, including the **Court Tour Programs** of the Fairfax Bar Association and the Prince William County Bar Association, serving area middle school students with tours of the courthouses and participation in mock trials, the Norfolk and Portsmouth Bar Association's

Middle School Mock Trial Project, and the Fredericksburg Bar Association's **Reviving Law Day**, providing speakers to area high schools. Fairfax attorneys can help local teenagers at risk by volunteering to speak to them through the **Devonshire Program**. Similarly, many Valley area attorneys have been refreshed and rewarded by participating in the Roanoke Bar Association's **Barrister Book Buddies** and **Book Nook** programs, reading an hour a month to elementary students in local schools and libraries.

Legal Aid Societies throughout Virginia provide much needed legal assistance and services to the poor and would greatly welcome pro bono efforts from Virginia's litigation bar. Many attorneys have found great satisfaction participating in **Christmas in April** efforts around Virginia, rehabilitating houses of low income homeowners, particularly the elderly and people with disabilities, or through the Richmond area's **Project Homeless Connect**, or in **Wills for Heroes** programs throughout the state, providing free wills and other estate documentation and services to police officers and fire fighters, or by many other programs striving to meet the needs of the less fortunate in our communities.

Our ability to improve our lives—and thus also our careers and our ability to serve our clients—through service to others is not limited to opportunities within the legal profession alone. Indeed, the opportunities to decrease our levels of stress, increase job satisfaction and bring greater meaning to our lives by serving others is countless in number, manner, and scope. Volunteer in a local food pantry; contribute food, supplies and/or time to a community homeless shelter; take a sabbatical from your law office to go on a short-term or long-term mission trip; help organize a charity event; mentor youth through Big Brother Big Sister; improve your own fitness while giving to others by participating on a charitable endurance team (run, walk, bike or tri for others!); sponsor an impoverished child somewhere else in the world; contribute time and resources to your local body of worship; support disaster aid workers (Haiti and other countries remain in great need of support and resources); support or join the leadership of a scouting organization; give blood; tutor a child; rock a baby in a local neonatal intensive care unit; and so forth and so forth, etc. If you want other ideas about how you can serve others in your community and specific opportunities to do so, go to www.allforgood.org or www.volunteermatch.org.

Altruism, paradoxically, will benefit each of us. Yet self interest should not be our primary motivation for our service to others. I am reminded of that familiar saying, often repeated to me by a judge serving in Virginia, "To whom much is given, much is required." As lawyers, much has been given to all of us, and much is required of each of us as we carry out our professional calling. Indeed, did not many of us give voice to "helping others" as a primary reason for going to law school in the first instance? Who knew at the time the great benefit that helping others itself would have on our ability to carry out the profession? ▣

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116, 119, S. Ct. 1887, 144 L. Ed.2d 117 (1999). In a criminal prosecution, the fact that the victim's daughter had been a sworn juror's supervisor did not entitle the Defendant to a mistrial because none of the juror's responses in *voir dire* reflected allegiances or affiliations with the victim's daughter. *Green v. Commonwealth*, 2005 Va. App. LEXIS 266 (July 12, 2005) (unpublished opinion).

The Supreme Court of Virginia has held that a trial court did not abuse its discretion by refusing to ask whether the prospective jurors knew the persons expected to testify "merely to aid the litigants in making peremptory challenges." *Davis v. Sykes*, 202 Va. 952, 121 S.E.2d 513 (1961). In the criminal context, "one related to the victim within the ninth degree by consanguinity or affinity is not competent to serve as a juror." *Salina v. Commonwealth*, 217 Va. 92, 225 S.E.2d 199 (1976). "A relationship does not automatically disqualify a potential juror from being fair and impartial." *Juniper v. Commonwealth*, 271 Va. 262, 407, 626 S.E.2d 383, 412 (2006)(citing *Wise v. Commonwealth*, 230 Va. 322, 325, 337 S.E.2d 715, 717 (1985)).

FURTHER EXAMPLES

- In *Jackson v. Commonwealth*, 255 Va. 625, 499 S.E.2d 538 (1998), the Supreme Court of Virginia held that the trial court did not err in refusing to strike for cause a prospective juror whose first cousin was the wife of the Commonwealth's attorney.

- In *Wise v. Commonwealth*, it was held that the trial court did not err in failing to strike a prospective juror for cause who was "a golfing buddy" and "long standing" friend of the Commonwealth's attorney.

- In the civil context, the Supreme Court of Virginia recently upheld a decision of the Circuit Court of Roanoke County, ruling that it was not an abuse of discretion to deny plaintiff's challenge of a venireman whose sister was a paralegal for defense counsel and had worked on the case when that venireman stated that he had no bias towards either side. *Hawthorne v. VanMarter*, 2010 Va. LEXIS 54 (2010).

"Whether He Has Any Interest in the Cause"

The purpose of the *voir dire* examination is to ascertain whether any juror has any interest in the case or any bias or prejudice in relation to it, and that he in fact stands "indifferent in the cause."

In the criminal context, it has been held, "*per se* disqualification of venireman is not favored; mere interest in the subject matter of the prosecution does not, *per se*, require that a venireman be set aside for cause." *Webb v. Commonwealth*, 11 Va. App. 220, 222, 397 S.E.2d 539, 540 (1990). A stockholder in a victim corporation in a criminal case is "interested" in the cause and should be set aside. *Salina v. Commonwealth*, 217 Va. 92, 225 S.E.2d 199 (1976). "A veniremen who has an interest in the cause…is deemed *per se* not to be 'disinterested' and must be set aside for cause." *Webb*, 11 Va. App. at 222, 397 S.E.2d at 540. The purpose of the *voir dire* examination is to ascertain whether any juror has any interest in the case or any bias or prejudice in relation to it, and that he in fact stands "indifferent in the cause." Questioning beyond this scope lies within the sound discretion of the trial court. *Davis v. Sykes*, 202 Va. 952, 121 S.E.2d 513 (1961), *Hope Windows, Inc. v. Snyder*, 208 Va. 489, 158 S.E.2d 722 (1968).

FURTHER EXAMPLES

- "'A stockholder in a company which is party to a lawsuit is incompetent to sit as a juror'

because such a person 'could [not] be said to stand indifferent in the cause.'" *Roberts v. CSX Transp.*, 279 Va. 111, 116, 688 S.E.2d 178, 181 (2010) (quoting *Salina v. Commonwealth*, *supra*).

- "That a stockholder in a company which is a party to a lawsuit is incompetent to sit as a juror is well settled." *Salina v. Commonwealth*, 217 Va. at 93, 225 S.E.2d at 200 (citing *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971 (4th Cir. 1971).

- "A stockholder in a corporation is not only incompetent to act as a juror in a case where the corporation is a party, he is likewise incompetent to serve where the corporation has a direct pecuniary interest in the controversy." *Id.* (citing 50 C.J.S., J*uries*, § 213 (1947); 47 Am. Jur.2d *Jury*, § 325 (1969)).

- In a criminal prosecution for larceny of oysters, the Supreme Court of Virginia held that it was not error for the trial court to refuse defendant's request to ask the jury whether any of them owned, leased, or operated assigned oyster grounds. *Melvin v. Commonwealth*, 202 Va. 511, 118 S.E.2d 679 (1961).

- A prospective juror was disqualified from serving on civil jury where the juror was represented in a similar matter by the same firm as was representing the plaintiff. This was so, notwithstanding the fact that the juror stated that she could be totally fair to both sides. *Cantrell v. Crews*, 259 Va. 47, 523 S.E.2d 502 (2000).

Jurors are not required to be totally ignorant of the facts and issues on which they sit.

"Whether He Has Expressed or Formed Any Opinion"

Whether a venireman can lay aside a preconceived opinion and render a verdict based solely on the evidence is a mixed question of law and fact. Resolution of the question rests with the sound discretion of the trial court. *Calhoun v. Commonwealth*, 226 Va. 256, 307 S.E.2d 896 (1983). The trial court is not required to exclude all jurors who have any preconceived opinion of the case. *Id.* To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective jurors impartiality would be to establish an implausible standard. *Id.* Jurors are not required to be totally ignorant of the facts and issues on which they sit. *Justice v. Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980), cert. denied, 455 U.S. 983, 102 S. Ct. 1491, 71 L. Ed. 2d 693 (1982). The Supreme Court of Virginia has held, for example, that a trial court did not abuse its discretion in refusing to allow plaintiff to examine the jury panel about the medical-malpractice insurance crisis since the requested examination would have injected the subject of insurance into the trial. *Speet v. Bacaj*, 237 Va. 290, 377 S.E.2d 397 (1989).

FURTHER EXAMPLES

- When a venireman knows of an accused's previous conviction of the same offense for which he is being retried, the venireman cannot qualify as a juror in the new trial. *Barker v. Commonwealth*, 230 Va. 370, 337 S.E.2d 729 (1985).

- In the criminal context, a prospective juror should be excluded for cause where that juror was adamant in stating that she believed the defendant was guilty based on what she read in the paper and that he had to be guilty because he was present at the scene of the

crime. *Green v. Commonwea*lth, 262 Va. 105, 546 S.E.2d 446 (2001).

"Whether He is Sensible of Any Bias or Prejudice"

The court's duty, in the exercise of its discretion, is to impanel jurors who are free from bias or prejudice against the parties and who stand indifferent in the cause. *Scott v. Commonwealth*, 1 Va. App. 447, 339 S.E.2d 899 (1986), aff'd, 233 Va. 5, 353 S.E.2d 460 (1987). Where *voir dire* examination discloses that a juror is leaning one way or another and will not act with impartiality, the juror is biased and must be removed. *Educational Books, Inc. v. Commonwealth*, 3 Va. App. 384, 349 S.E.2d 903 (1986).

One year ago, the Supreme Court of Virginia re-emphasized the standard that courts must employ when ruling on juror bias.

> once a jury has been empanelled and the impartiality of a juror is subsequently brought into question, it is an abuse of discretion to deny a motion for mistrial if the proponent of the motion establishes the probability of prejudice such that the fairness of the trial is subject to question … the standards regarding determinations of juror impartiality and probable prejudice are the same for civil and criminal cases.

Robert M. Seh Co. v. O'Donnell, 277 Va. 599, 605, 675 S.E.2d 202, 206 (2009).

An indication on the part of a potential juror that he will give unqualified credence to the testimony of a law enforcement officer based solely on the officer's official status constitutes impermissible bias. *Gosling v. Commonwealth*, 7 Va. App. 642, 645, 376 S.E.2d 541, 544 (1989). In the prosecution for driving under the influence, it was improper for the trial court not to allow defendant's counsel to ask venire members whether or not any of them thought it improper to drive after drinking alcoholic beverages. Any juror who thought it improper to drive after drinking might not have evaluated impartially his defense. *Henshall v. Commonwealth*, 3 Va. App. 213, 348 S.E.2d 853 (1986). The Supreme Court of Virginia has held, with respect to an arguably biased venirewoman, the proof that she was impartial and fair must come from her and not be based on her mere assent to persuasive suggestions. *Breeden v. Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976). In the criminal context, any reasonable doubt as to a juror's qualifications must be resolved in favor of the defendant. *Id.*

… proof that she was impartial and fair must come from her and not be based on her mere assent to persuasive suggestions.

FURTHER EXAMPLES

- Veniremen who are biased either in favor of the death penalty under all circumstances or those who are biased against its imposition in all circumstances should be stricken from the panel for cause. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).

- Where a cashier was murdered in an armed robbery, the defendant's proposed questions as to whether prospective jurors had family or friends who were cashiers dealt with prospective bias and prejudice and was within the criteria of this section. *Mackall v. Commonwealth*, 236 Va. 240, 372 S.E.2d 759 (1988), cert denied 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 607 (1989).

- The Virginia Supreme Court has held that the circuit court did not abuse its discretion by allowing the Commonwealth's Attorney to ask jurors whether they, or their family members, or friends, had ever been prosecuted for a criminal offense, and whether they felt that

the person prosecuted was treated fairly by the justice system, as the questions were designed to discover a potential juror's possible prejudice against the Commonwealth. *Green v. Commonwealth*, 266 Va. 81, 580 S.E.2d 834 (2003), cert denied, 540 U.S. 1194, 124 S. Ct. 1448, 158 L. Ed. 2d 107 (2004).

* * *

The scope and breadth of *voir dire* are set by statute and Virginia Supreme Court Rule. A review of the cases reveals the great deference that the Supreme Court of Virginia affords to trial courts on the issue of *voir dire's* scope and breadth. Thus, it is well worth an attorney's time to learn the types of circumstances, outlined above, which can and cannot be cured by a venireman's statement that she can be impartial and fair and decide the case solely on the evidence adduced and the law. In the end, the current state of the law is clear: attorneys and the court are entitled to "see" what potential jurors "say" in order to ensure an impartial panel.

1. As mentioned, Va. S. Ct. R. 3A:14, "Trial Jurors", provides expanded boundaries of *voir dire* explicitly:

   (a) Examination. After the prospective jurors are sworn on the *voir dire*, the court shall question them individually or collectively to determine whether anyone:

   (1) is related by blood or marriage to the accused or to a person to whom the alleged offense was committed;

   (2) is an officer, director, agent or employee of the accused;

   (3) has any interest in the trial or the outcome of the case;

   (4) has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would effect his impartiality in the case;

   (5) has expressed or formed any opinion as to the guilt or innocence of the accused;

   (6) has a bias or prejudice against the Commonwealth or the accused; or

   (7) has any reason to believe he will not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence. Thereafter, the court, and counsel, as of right may examine on oath any prospective juror and ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

   (b) Challenge for Cause. The court, on its own motion or following a challenge for cause may excuse a prospective juror if it appears he is not qualified, and another shall be drawn or called and placed in his stead for the trial of that case.

Virtually all of the Virginia appellate cases dealing with the boundaries of *voir dire* are criminal cases; however, it appears that the concepts involved, related to the scope of *voir dire*, are generally shared in the civil context. There is no corresponding Rule in Part III of the Rules of the Supreme Court of Virginia covering civil cases.

A prior version of this article was published in the Journal of the Virginia Trial Lawyers Association.

More Money the Second Time Around . . .

by Thomas Strelka

Has this ever happened to you? A prospective client enters your office with a civil claim that sounds promising, but may have some baggage. Another attorney had previously represented the client on the same civil claim before taking a nonsuit and stepping out of the case. The Virginia Code gives you six months to reinitiate the action, but other attorneys have turned the client down and now only three months remain on the calendar. Some of you may see too many red flags and would politely turn down the claim and refer the client to another attorney. Now imagine that the claim the prospective client presented is easily worth a very large amount of money and the case is not overly complex. Hmmmmmmm….

In my personal experience with this situation, I started from scratch on the pleadings. I added a number of claims and greatly increased the *ad damnum* clause, bumping the matter from general district to circuit court. At that time, I perceived the nonsuit statute to be fairly unambiguous and my prior experience told me that as long as one operated within the scope and limitations set by the statute, it would be smooth sailing. Virginia Code § 8.01-380(A) provides that "[a]fter a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause is shown for proceeding in another court, or when such new proceeding is instituted in a federal court."

Opposing counsel, however, was quick to point out—both to me and to the court—that the case law surrounding nonsuits was still fairly split. This is so despite a 1996 Supreme Court of Virginia case that many claimed would silence the issue. In *Conner v. Rose*, 252 Va. 57 (1996), the plaintiff suffered a nonsuit in general district court, increased her *ad damnum*, and timely re-filed in circuit court. The defendant claimed that the statute required the plaintiff to reinitiate her action in the general district court. In his opinion, Justice Hassell used fewer than five hundred words to analyze the above-quoted excerpt from Va. Code § 8.01-380. After holding that the language was clear and unambiguous, the Court held that the plaintiff could re-file in the circuit court because the general district court no longer had jurisdiction.

Despite the Court's ruling in *Conner,* the Circuit Court of Loudon County took another approach. In *Spear v. Metropolitan Washington Airports Authority*, 78 Va. Cir. 456; (2009), after suffering a nonsuit, the plaintiff increased her *ad damnum* clause from $350,000 to $500,000. The defendant argued that by increasing the *ad damnum*, the plaintiff had not recommenced her action within six months after the entry of the nonsuit order, as required by Va. Code § 8.01-229(E)(3) and the issue was now time barred. In ruling on the matter, the court opined, "[t]he real issue, as it appears to me, is whether the amount of damages requested should be considered in determining whether the recommenced action is the same as the action that was nonsuited. I think it should be." *Id*. at 458. The court further noted, "[t]he amount sued for has just as much significance as the nature of the claim." Ultimately, the circuit court held that Spear had not recommenced her action and that it was now time barred. Spear appealed this decision to the Supreme Court of Virginia. The Supreme Court of Virginia granted the petition for appeal and as of the date of the writing of this article, oral arguments were scheduled for the fall session with a decision likely to follow in early 2011. (Supreme Court of Virginia Record No. 092451).

If the Supreme Court of Virginia affirms *Spear*, it would not only seemingly obliterate the ruling in *Conner*, but the result would essentially prevent any alteration of the *ad damnum* clause after suffering a nonsuit. Attorneys looking to re-file after a nonsuit in early 2011 would be wise to look toward the ruling in *Spear*. Depending on the Court's ruling in 2011, you just might find that you're stuck with the amount of damages cited in the initial pleading. If you are defense counsel fighting against an increase in the *ad damnum* clause, you may wish to incorporate language that references the forthcoming *Spear* decision in any order denying your motion in case the Supreme Court of Virginia agrees with the ruling in *Spear*. If the case law flips, you will surely want to have the opportunity to revisit this issue.

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Four Things You *Thought* You Knew About the New Appellate Rules

by L. Steven Emmert

On July 1, 2010, Virginia's appellate rules got a complete makeover. The rules governing practice in the Supreme Court and the Court of Appeals had been in place since the mid-1980s, but in response to a series of recommendations from the Appellate Rules Advisory Committee, the justices promulgated these revisions after a lengthy period of review.

You've probably read some generalizations about the new rules, and you may even have applied a few of them by now. But some of the rules aren't exactly what you might have been told. Here are a few misconceptions you might have about the changes.

The new rules harmonize practice in the two appellate courts. The best-known example of this principle is the elimination of the requirement for questions presented in the Court of Appeals; now, you list assignments of error in both courts. Rules 5:17(c)(1), 5A:12(c)(1), and 5A:20(c). That eliminates the previous procedural trap of presenting questions in the Court of Appeals, and then forgetting to convert those to assignments of error when you appeal on to the Supreme Court. Another one that's getting plenty of attention (partly due to some rejected petitions that now have to be redone) is the Supreme Court's adoption of the previous rule in the Court of Appeals, requiring you to specify where in the record you preserved the issue that you now want to appeal. Rule 5:17(c)(1).

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But there are still some significant procedural differences between the two courts. For example, in the Supreme Court, Rule 5:6(a)(1) provides that petitions, briefs, and motions have to be filed in 14-point type, using one of just three permissible fonts. There's no such requirement in the CAV, where you can use any font you want, as long as the type is at least 12-point. Rule 5A:4(a).

Another key difference that *every* appellant will need to remember is the due date for the first brief. In the Court of Appeals, that date is measured from the date on which the appellate clerk receives the record from the trial court or the Workers' Compensation Commission; the brief is due 40 days later. Rules 5A:12(a) and 5A:19(b)(1). But in the Supreme Court, you still measure the time for filing a petition for appeal by starting on the date of entry of final judgment, and then adding three months. Rule 5:17(a)(1). If you're filing a petition for appeal in either court (in criminal and traffic cases in the Court of Appeals, and in almost all cases in the Supreme Court), the filing deadline is mandatory, so practitioners must know and respect this difference.

Next, let's compare the brief-length limits in both courts:

Petition for appeal

- Old SCV and CAV limits: 35 pages
- New SCV limit: 35 pages or 6,125 words. The rule now excludes the cover page, required tables, and the certificate from the limit, so petitions can actually be a bit longer than before.
- New CAV limit: 12,300 words. Note the enormous disparity between the word-count limits in the two courts.

Brief in opposition

- Old SCV and CAV limits: 25 pages
- New SCV limit: 25 pages or 4,375 words.
- New CAV limit: 8,800 words. Again, a brief in the Court of Appeals can be twice as long as its parallel in the Supreme Court.

Merits briefs
- Old SCV limit: 50 pages
- Old CAV limit: 35 pages
- New SCV limit: 50 pages or 8,750 words
- New CAV limit: 12,300 words

Reply briefs
- Old SCV limit: 15 pages
- Old CAV limit: 10 pages
- New SCV limit: 15 pages or 2,625 words
- New CAV limit: 3,500 words

These significant differences can trip up practitioners, who need to know about the significantly shorter requirements for briefing in the Supreme Court. You can't simply repackage your original brief from the Court of Appeals, slap a new cover on it, and expect that it will automatically be rules-compliant in the Supreme Court.

You can't simply repackage your original brief from the Court of Appeals, slap a new cover on it, and expect that it will automatically be rules-compliant in the Supreme Court.

The changes reflect brand-new procedures. Many of them do, such as the provision for obtaining a partial final judgment (Rule 5:8A) to enable an appellant to appeal immediately in certain multiparty litigation. In contrast, there are several things that may look new, but simply provide an express description of the courts' previous practices. Here are a few key examples:

- The rules now spell out how you can cite unpublished opinions, and explain what degree of deference the courts give those rulings. Rules 5:1(f) and 5A:1(f). You're allowed to cite them; but you might have to provide a copy, and as always, they're accepted only as persuasive, not as authoritative.

- Rule 5:1A(b) will quickly get the attention of lawyers practicing in the Supreme Court: If a rules violation results in the dismissal of an appeal, the court may report the defaulting attorney to the Virginia State Bar. That's not quite the same as a formal Bar complaint, but nervous attorneys are not likely to be assuaged by the fine distinction. The court has been doing this for a few years now, although it exercises some discretion over when it does so. (Note the use of the word *may*, which in this instance really is permissive and not mandatory.)

- In those dreaded situations where you have to resort to a written statement of proceedings, new Rules 5:11(f) and 5A:8(c) explain something that has been the courts' expectations all along: Those statements aren't supposed to be mere recitations of testimony. You need to include things like objections, motions, arguments, proffers, and so forth. Remember, appellate courts don't review trial courts; they review trial courts' *rulings*. Unless the ruling made it into the record somehow, it will be invisible on appeal. The written statement should give the appellate court a fair summary of what a transcript would have done, and that's more than mere testimony.

- The old rule relating to petitions for appeal in the Supreme Court required a separate section for assignments of error. That provision ended with the ominous warning, "If the petition for appeal does not contain assignments of error, the appeal will be dismissed." But in practice, the Supreme Court would also dismiss an appeal where the petition contained assignments that weren't sufficient, even though the rule didn't specify that. The new rules spell out that insufficient assignments will lead to the appellate death penalty in both courts. Rules 5:17(c)(1)(iii) and 5A:12(c)(1)(ii).

- Attorneys in the uncomfortable position of having to file an *Anders* brief now have the previous common-law requirements for those briefs spelled out in the rules. Rules 5:17(h) and 5A:12(h). The rules even helpfully give you the correct citations for *Anders v. California* and its Virginia counterpart.

- When a petition for appeal is required, only the appellant gets to argue the writ. Appellees have always been allowed to come and watch, presumably to offer the Death Stare to the attorney for the appellant as she walks to the lectern. But how does the appellee even know when to show up? Rule 5:17(j)(4) formalizes the Supreme Court's long-standing practice of providing that notice upon written request by the appellee. There's no exact parallel to this rule in Part 5A, but I'm confident that the Clerk of the Court of Appeals will extend the same courtesy; all you have to do is write a polite letter asking to be notified.

- This one's often viewed as an important strategic factor for appellees: *In the Supreme Court only*, where an appellee assigns cross-error, the writ panel will not even consider those assignments until and unless it has decided to grant a writ to the appellant on at least one assignment of error. This long-standing practice is now spelled out in Rule 5:18(c)(4)(i). It means two very important things for appellees: (1) You don't have to worry about whether your zinger of an assignment of cross-error will make the writ panel more likely to grant an appeal to your opponent. (2) If you're content with the outcome below, you can use cross-error safely. But if you affirmatively want some appellate relief, the only way to ensure that your request gets considered has always been to *file your own notice and petition for appeal*. If you rely upon a review based wholly on cross-error, you may find that your assignments never see the light of day.

- Finally, the old rules on oral argument on the merits (Rules 5:35(b) and 5A:28(b)) stated that the parties would be allotted 30 minutes per side. Litigants who expected such temporal largess from the court almost always went away feeling cheated out of their time; the court generally gave each *case* 30 minutes, so each side got only 15. New Rules 5:33(b) and 5A:28(b) now reflect the 15-minute-per-side limit. Note that the rules still permit either court to allow a longer or shorter time in a given case. But unless you're handling something on the order of a review of a death sentence, don't expect a request for more time to be granted.

if you affirmatively want some appellate relief, the only way to ensure that your request gets considered has always been to *file your own notice and petition for appeal.*

The new rules are supposed to be more user-friendly, but they really aren't. In many ways, they really are; see, for example, the enumeration above, of those previously unwritten rules that now appear in the sunshine for the first time.

The best-known instances of this concept provide for the liberalization of relief from certain appellate errors that previously resulted in a dismissal. For example, Rules 5:11(a) and 5A:8(a) previously provided a hard 60-day deadline for the filing of transcripts. The CAV version of this rule used to state that you could apply for an extension, as long as you asked *before* the expiration of the 60 days. Now, both rules give appellants a grace period. But as with the list of nonconformities that began this essay, the two courts now apply different procedures. In the Supreme Court, Rule 5:11(d) now gives the appellant a 10-day window within which to supplement, correct, or modify a defective (or even untimely) transcript. Even after the expiration of that 70th day, an appellant can still get relief if he persuades two justices to grant it. (I strongly urge that no one ever rely upon this provision; I suspect that such leave will be given out with tweezers, if at all.)

In the Court of Appeals, in contrast, an appellant can petition the court for an extension, so long as she files the motion within 90 days after date of judgment. There is no of-right 10-day window as there is in the Supreme Court, and any relief at all is based

on the court's discretion and a showing of good cause for the extension.

In both courts, then, relief under these rules still isn't easy, and the best advice is to get the transcript filed early. But where previously you faced dismissal and a Bar complaint from the client, now there is at least a procedural mechanism to keep your appeal alive.

One rule, by way of liberalizing relief, may actually frighten some practitioners. New Rule 5:1A, which is unique to the Supreme Court (there is no parallel provision in Part 5A), provides for a show-cause order in the event of a party's failure to meet a nonjurisdictional requirement. That sounds ominous until you consider that the earlier practice was simply to dismiss the appeal, with no opportunity to ask for relief beforehand. This one really is a helpful addition for those practitioners who don't get it perfect the first time.

Briefs may now be streamlined by the removal of the previous obligation to cite Southeastern Reporter in addition to the official reporter in Virginia cases. Cases from other jurisdictions should still include the unofficial reporters, but this will save briefwriters the trouble of looking up a Southeastern cite that, probably, no one looks at anymore.

Some of the rule changes are just make-work for lawyers. This one is just plain false. The rules usually singled out for this criticism actually force you to be a better advocate. There is, for instance, a new requirement for the filing of motions in Rules 5:4(a)(1) and 5A:2(a)(1): Before filing a motion, you must pick up the phone (or these days, at least fire off an e-mail) to let your opponent know what you'll be filing, and you have to find out if she'll consent. You then certify that you've made (or at least attempted) that contact, and what her response was.

That may sound like make-work, but it avoids sandbagging your opponent with a surprise motion filed the day before a three-day weekend (compelling professionalism) and makes it much more likely that your motion will be granted, assuming you get the consent (thus enhancing your effectiveness as an advocate). This provision has been grafted onto the Virginia rules from the Fourth Circuit's rulebook; it has worked in that court for many years now.

The rules usually [criticized as make-work] actually force you to be a better advocate.

One change highlighted earlier in this essay emphatically forces practitioners to do a better job: Petitions for appeal in both courts now must contain an exact reference to the place in the record where the issue was preserved for appellate review. This may actually prevent some doomed petitions from ever being filed; if the briefwriter concludes that the issue wasn't preserved, he will either try to leave that section blank (which will be a clear red flag for the court) or else he'll sensibly decide to omit that issue from the appeal. In the past, some lawyers never even checked to see if the issue was preserved. The result was all too often a troublesome question during the writ argument after the appellee pointed out a violation of Rule 5:25 or 5A:18.

Another new requirement compels briefwriters to include something that experienced appellate advocates have been incorporating all along: A statement of the standard of review for each issue. Rules 5:17(c)(6) and 5A:20(e). The standard of review is very often case-dispositive in appeals, and the court generally begins its analysis in its opinions by setting forth the standard. If the issue is that important to the court, it should be that important to the lawyers who practice there. ▣

Recent Civil Cases from the Supreme Court of Virginia

APRIL, JUNE, SEPTEMBER SESSIONS 2010

Fraud

Case: *Abi-Najm v. Concord Condominium, LLC, 091546* (*9/16/2010*)

Author: Lemons

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

Disposition: Reversed

Facts: Plaintiffs, condominium owners, alleged that sales agents misrepresented the type of floors that would be installed in their units. The type of flooring actually installed was inferior to the promised flooring. Plaintiffs did not discover this, however, until *after* their transactions closed.

Plaintiffs brought claims for breach of contract, consumer fraud, and fraud in the inducement. The trial court sustained the defendant's demurrer, citing both the doctrine of merger and the economic-loss rule.

Ruling: The SCOV reversed the merger ruling. It held that the merger doctrine does not apply to contract provisions that (1) are collateral to the transfer of title, and (2) are not addressed in the deed. Such provisions survive the execution and delivery of the deed.

The SCOV also reversed the economic-loss rule holding. It held that, to determine whether the economic-loss rule bars a contract-related cause of action, one needs to know "the source of the duty violated." Because both of the plaintiffs' non-contract causes of action—for violation of the Virginia Consumer Protection Act and fraud in the inducement—had alleged that the seller breached a duty that was *independent of any duties it assumed pursuant to the contract*, the economic loss rule did not apply.

Key Holding(s):

- The merger doctrine does not bar contract provisions that are collateral to the transfer of title and are not otherwise addressed in the deed.

- To determine whether a contract-related claim is barred by the economic-loss rule, one needs to determine whether the source of the duty alleged to have been breached was independent of the contract.

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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.

Civil Procedure

Case: *Aguilera v. Christian, 091493* (*9/16/2010*)

Author: Lacy

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

Disposition: Affirmed

Facts: Pro-se plaintiff authorized out-of-state attorney to sign his name on a personal-injury complaint.

Circuit court granted summary judgment because complaint was filed by neither plaintiff nor an attorney licensed to practice in Virginia.

Ruling: On appeal, SCOV held that the plaintiff had violated § 8.01-271.1, as the complaint was not signed either by the pro se plaintiff or by an attorney licensed to practice law in Virginia. It therefore was a nullity.

Key Holding(s):

- A pro se litigant may not authorize an out-of-state attorney to sign the pro se litigant's name on a pleading.

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Land Use

Case: *Arogas, Inc. v. Frederick County Board of Zoning Appeals, 091502* (*9/16/2010*)

Author: Hassell

Lower Ct.: Frederick County (Prosser, John R.)

Disposition: Affirmed

Facts: Property owners' predecessors in interest applied for rezoning, and submitted a written proffer prohibiting sale of diesel fuel on the rezoned property.

After a public hearing, the county board of supervisors limited the scope of the proffer to sale of diesel for over-the-road truck carriers.

Zoning officials rejected the owner's site-plan application because it involved the sale of diesel to over-the-road trucks. The zoning officials determined that this was inconsistent with the proffers. It therefore refused to review the application.

The purchasers of the property argued that the proffers were invalid because they were amended without further public hearing.

Ruling: The SCOV rejected this argument. It held that § 15.2-2285 authorized localities to make changes to proffers after a public hearing.

The SCOV further held that, in analyzing the issue, the Circuit Court properly remanded the issue to the zoning authorities rather than determining, in the first instance, whether the proposed site plan was consistent with the zoning and proffers.

Key Holding(s):

- A board of supervisors may, after a hearing on the matter, allow a party requesting a rezoning to make changes to a proffer. A further hearing is not required.

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Civil Procedure

Case: *Jamerson v. Coleman-Adams Constr., Inc., 091685* (*9/16/2010*)

Author: Lacy

Lower Ct.: Bedford County (Updike, James W.)

Disposition: Affirmed

Facts: Fire station contracted out work to install metal pole that would expedite firefighters' exit from station. The contractor subcontracted steel-fabrication work to another company. The pole was manufactured and installed in 1998-99.

Plaintiff firefighter was injured in 2006 when the platform on the pole collapsed. Firefighter sued contractor and subcontractor. Defendants argued that matter was barred by Virginia Code § 8.01-250's statute of repose for building materials. The plaintiff argued that the pole was "equipment or machinery" and, hence, was excluded from the statute of repose. The trial court dismissed the action, finding that the pole was NOT "equipment or machinery" and was covered by the statute of repose.

Ruling: The SCOV affirmed and held that the pole was NOT "equipment or machinery." It noted that there was no single determinative test for whether an item is "equipment or machinery" and that each case is decided on its own particular facts.

The SCOV rejected plaintiff's argument that the mere existence of a warranty--basically, the steel subcontractor's oral promise to stand behind its product--meant that the product was "equipment or machinery." Nor was the fact that the steel subcontractor exercised quality-control a basis for finding the pole to be "equipment or machinery." The SCOV also rejected arguments that the pole was "equipment or machinery" because it was a customized product, assembled at the site pursuant to installation instructions provided by the manufacturer.

The SCOV found that the pole served a similar purpose to a ramp, door, or stairs when incorporated into the building structure. It was constructed of "ordinary building materials" and so fell within the statute of repose.

Justices Mims and Goodwyn concurred, agreeing with the result but arguing that the SCOV should jettison its unworkable "ordinary building materials" jurisprudence.

Key Holding(s):

- There was no single determinative test for whether an item is "equipment or machinery" under Code § 8.01-250. Each case must decided on its own particular facts.

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Civil Procedure

Case: *Shipe v. Hunter, 091738* (*9/16/2010*)

Author: Russell

Lower Ct.: Arlington County (Newman, William T.)

Disposition: Affirmed

Facts: Personal injury complaint bore written signature of Virginia lawyer followed by initials of non-Virginia lawyer. The non-Virginia lawyer's name also appeared on the complaint next to his own initials.

The circuit court found that only the out-of-state lawyer had signed the complaint, making the complaint a legal nullity under Code § 8.01-271.1 and Rule 1A:4. As this made the action untimely, the circuit court dismissed with prejudice.

Ruling: The SCOV affirmed. It rejected the plaintiff's argument that a person may make another his agent for purposes of signing a pleading. It held that Code § 8.01-271.1 and Rule 1A:4 impose heightened signature requirements to make lawyers fully accountable for their actions and to protect the public from frivolous legal actions.

Furthermore, correction of a pleading that is rendered a nullity because it violates the signature requirements of Code § 8.01-271.1 and Rule 1A:4 does not relate back for statute-of-limitations purposes.

Key Holding(s):

- A Virginia lawyer may not validly authorize an out-of-state lawyer to sign his name to a pleading. Any such pleading is a nullity.

- Correction of a pleading that is rendered a nullity because it violates the signature requirements of Code § 8.01-271.1 and Rule 1A:4 does not relate back for statute-of-limitations purposes.

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Insurance

Case: *Uniwest Construction, Inc. v. Amtech Elevator Servs., Inc., 091495* (*9/16/2010*)

Author: Mims

Lower Ct.: Fairfax County (Williams, Marcus D.)

Disposition: Affirmed in Part, Reversed in Part

Facts: Insurance-coverage dispute. Plaintiff was general

contractor on a building-renovation project. Defendant was subcontractor hired to perform elevator work. One of the subcontractor's employees was killed and another severely injured on the job. The surviving employee and the estate of the deceased employee sued the general contractor.

The subcontract had three provisions that protected the general contractor against personal-injury claims arising out of the subcontractor's work:

First, it incorporated the terms of the prime contract, which required the subcontractor to indemnify the general contractor to the extent that the injuries arose out of the subcontractor's negligent acts.

Second, the subcontract explicitly required the subcontractor to indemnify the general contractor, regardless of whether the injury arose, in part, out of the general contractor's negligence.

Third, it required the subcontractor to conform with certain work specifications, which required subcontractors to name the general contractor as an additional insured on the project. The subcontractor's primary and umbrella policies both had provisions deeming the general contractor to be an additional insured if the subcontractor's agreements with the general contractor mandated such coverage.

The general contractor and its insurers settled the case for $9.5 million. The general contractor brought an indemnity action against the subcontractor.

Ruling: The SCOV held that the subcontract provision requiring the subcontractor to indemnify the general contractor, regardless of whether the general contractor contributed to the injury, violated Va. Code § 11-4.1. The statute voids any construction contract provision that indemnifies a party for damages "caused by or resulting solely from the negligence of the indemnitee." The SCOV held that the statute bars any "indemnification provision that reaches damage caused by the negligence of the indemnitee, even if the damage does not result *solely* from the negligence of the indemnitee." (Emphasis added).

The SCOV further held, however, that the subcontract provision that incorporated the prime contract required the subcontractor to indemnify the general contractor. The general contractor's duty to indemnify the owner became, by operation of this provision, the subcontractor's duty to indemnify the general contractor.

The SCOV also held that, by referencing the project specifications, the subcontracts imposed a duty on subcontractor to name the general contractor as an additional insured.

Key Holding(s):

- A construction contract provision that requires an indemnitor to indemnify the indemnitee for the indemnitee's own negligence is void under Va. Code § 11-4.1, even where the indemnitee is not solely responsible for the damage.

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Civil Procedure

Case: *Van Dam v. Gay, 091659* (*9/16/2010*)

Author: Russell

Lower Ct.: Stafford County (Kloch, John E.)

Disposition: Affirmed

Facts: Legal malpractice action. In 1986, defendant attorney drafted a property settlement agreement stating that his client would receive survivor's benefits from the client's husband's retirement pay.

Ex-husband died in 2006. He had two retirement plans—one from his military service and one from his civil-service employment. The wife applied for benefits and was denied on the grounds that the verbiage in the property settlement agreement was insufficient, as a matter of federal law, to entitle her to benefits. She sued her divorce lawyer for malpractice.

Ruling: The SCOV held that the claim was time-barred. The cause of action accrued upon the termination of the undertaking for which the plaintiff engaged the attorney.

The SCOV held that the plaintiff suffered a legal injury when the circuit court entered a divorce degree that incorporated the defective property settlement agreement.

The fact that plaintiff did not suffer most of her injury until after her ex-husband died was "immaterial." As was the fact that it was difficult for her to ascertain the existence of a cause of action until her husband died.

Key Holding(s):

- A legal-malpractice claim against a divorce lawyer arising out of a defective property settlement agreement accrues upon the termination of the lawyer's representation of the plaintiff in the divorce.

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Civil Procedure

Case: *Virginia-Pilot Media Companies, LLC v. Dow Jones & Company, Inc., 091661* (*9/16/2010*)

Author: Russell

Lower Ct.: City of Virginia Beach (Shockley, A. Bonwill)

Disposition: Reversed

Facts: Newspaper filed ex parte petition in circuit court seeking an order to allow it to publish legal notices pursuant to Va. Code § 8.01-324(A). The Circuit Court entered the order. A competing paper moved to intervene to set aside the order. The trial court determined that it had jurisdiction over the original petition but that the competing paper lacked standing to challenge the order.

Ruling: The SCOV reversed. It held that the trial court lacked subject matter jurisdiction over the original petition. The statute only authorized petitions for parties who lacked a second-

class mailing permit. Applying the rule of expressio unius est exclusio alterius, the SCOV held that the general assembly intended *not* to confer circuit court jurisdiction over parties that, like the petitioning newspaper, had second-class mailing permits.

Justices Lemons and Kinser dissented on the grounds that the competing newspaper lacked standing, and thus the case was not properly before the court.

Key Holding(s):

- Code § 8.01-324(A) does not authorize newspapers that have a second-class mailing permit to petition the circuit court for permission to publish legal notices.

- Under the doctrine of expressio unius est exclusio alterius, when a statute expressly includes a specific item in one provision, it implicitly omits that item from other provisions.

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Civil Procedure

Case: *Wintergreen Partners, Inc. v. McGuireWoods, LLP, 091378* (*9/16/2010*)

Author: Goodwyn

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

Disposition: Affirmed

Facts: Plaintiff ski resort brought legal malpractice claim after its appeal from an $8.3 million verdict was dismissed because the law firm handling the case failed to file the necessary transcripts. Defendant law firm defended on the grounds that the appeal would have failed anyway.

The plaintiff in the underlying case sought damages against the ski resort under two theories: (1) the negligence of defendant's employee, a co-defendant, imputed to defendant under principles of respondeat superior, and (2) premises liability.

The jury returned a verdict against the employer, but in favor of the co-defendant employee. The verdict form did not ask the jury to specify the theory or theories on which they based their verdict.

The issue in the underlying appeal was whether the jury could have consistently found in favor of the employee but against his employer. The defendant law firm claimed that this appeal would have failed because the jury could have found against the ski resort on premises-liability grounds. As this did not involve principles of respondeat superior, it would have been consistent with a jury verdict for the employee.

The trial court agreed and granted the defendant law firm's motion for summary judgment.

Ruling: The SCOV affirmed.

To begin, it held that in a legal malpractice claim involving an appeal, the plaintiff must show that–had a timely appeal been filed–the judgment against him would have been reversed. It then recited the principle that a verdict for the servant exonerates the master–but only where the master's liability derives solely from the servant's acts. The SCOV noted that the jury was instructed on both respondeat superior and premises-liability theories. Thus, it could have found against the ski resort on the premises-liability theory regardless of the culpability of the servant. Consequently, the jury's verdict was not inconsistent, and the plaintiff's appeal would have failed.

Key Holding(s):

- In a legal malpractice case involving an appeal, the plaintiff must show that–had a timely appeal been filed–the judgment would against him would have been reversed.

- A jury verdict in favor of a servant and against the master is not inconsistent where there is an alternate basis for liability against the master–one that is *not* predicated on principles of respondeat superior.

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Local Government

Case: *Advanced Towing Company, LLC v. Fairfax County Board of Supervisors, 091180* (*6/10/2010*)

Author: Russell

Lower Ct.: Fairfax County (White, Bruce D.)

Disposition: Affirmed

Facts: County ordinance stated that companies that towed trespassing vehicles must tow them to storage sites within Fairfax County. Plaintiff, a towing company in an adjacent county, challenged this ordinance on the grounds that it violated Equal Protection rights under the state and federal constitutions because (1) it discriminated against them--and in favor of business located in the county, and (2) this discrimination had no rational basis. It also argued that the law violated Dillon's Rule.

The trial court sustained the county's demurrer and denied the towing company's motion to reconsider.

Ruling: The SCOV affirmed. Because the case did not involve any "suspect classification," the SCOV applied the "rational basis" test. Under this standard, the courts must defer to a legislative choice if there is "any reasonably conceivable states of facts that could provide a rational basis for the classification." The county claimed that it had a rational basis for its in-county towing requirement because this was the only way the locality could enforce its other towing regulations. The SCOV held that this was a rational basis for the county's action.

The SCOV also rejected the plaintiff's Dillon Rule argument. Code § 46.2-1232(A) authorized localities to regulate towing, but was silent as to the manner of executing this power. So the locality could exercise reasonable discretion in fashioning ordinances establishing how and where towed vehicles were to be stored.

Key Holding(s):

- Under the deferential "rational-basis" test, a local government's legislative action withstands an equal-protection challenge where there are any reasonably conceivable facts that could provide a rational basis for the classification.

- Under Dillon's Rule, where a statute authorizes a locality to act in a given field but does not prescribe the precise manner of acting, a locality may exercise reasonable discretion in fashioning ordinances to accomplish the authorized action.

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Land Use

Case: *Covel v. Town of Vienna, 091343* (*6/10/2010*)

Author: Mims

Lower Ct.: Fairfax County (Klein, Stanley P.)

Disposition: Affirmed

Facts: In three consolidated cases, landowners opposed local government actions concerning a historic district. They challenged the local board of review's refusal to issue "certificates of appropriateness" for certain proposed modifications to their property. The landowners argued that the refusal to issue those certificates was improper because the ordinances establishing the historic district were invalid.

The landowners also brought a declaratory judgment action against the local governing body. They claimed that the historic district was invalid because (1) it encompassed an entire geographical area, rather than individual structures, (2) there were procedural defects in the manner in which the historic district was created, and (3) the ordinance establishing the district was unconstitutionally vague.

The trial court sustained the locality's demurrer to these clams.

Ruling: The SCOV affirmed.

To begin, it held that a party may not base its appeal of a board of review's denial of a "certificate of appropriateness" on the alleged invalidity of the ordinance. The validity of the ordinance should be raised in an action against the governing body.

The SCOV further held that the locality did not exceed its authority by creating a historic district that encompassed an entire area. The statutes in effect at the time, former Code §§ 15.1-503.2 and -430(b), allowed districts to encompass "historic areas" and "places" in addition to specific structures. This demonstrated "clear intent by the General Assembly to permit localities to create historic districts without landmarks, buildings, or structures."

The SCOV held that any procedural defects in the creation, in 1979, of the historic district were cured by the enactment, in 2000, of Code § 15.2-1427(C), which stated that all ordinances enacted before that date were to be deemed to be validly created unless the ordinance violated the Constitution of the United States or the Virginia Constitution.

Finally, the SCOV rejected the as-applied vagueness challenge by a landowner whose application for a new fence had been rejected. It stated that his application was manifestly incomplete, as it had omitted many required details. Consequently, the board of review's denial of the application on grounds of its incompleteness was an objectively sound one.

Key Holding(s):

- A landowner challenging a decision of an historic district board of review may not base its appeal on the alleged invalidity of the ordinance creating the historic district. Such claims must instead be brought against the local governing body.

- The plain language of former Code §§ 15.1-503.2 and -430(b) allowed historic districts to encompass "historic areas" and "places" in addition to specific structures.

- The enactment, in 2000, of Code § 15.2-1427(C) cured all pre-existing non-constitutional procedural defects in the enactment of local ordinances.

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Estates and Trusts

Case: *Dolby v. Dolby, 091023* (*6/10/2010*)

Author: Millette

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

Disposition: Reversed

Facts: Testator executed promissory note in his name alone. The note was secured by property that he solely owned at time of executing note. Testator later married. He executed a deed transferring property to himself and his new wife as tenants by the entirety with rights of survivorship. Testator remained sole obligor on note.

Upon testator's death, the new wife obtained title to property by operation of law. The executors of testator's estate argued that the new wife should be liable for the note secured by the property. The trial court found that the mortgage debt was not an obligation of the estate and that the property should pass to the new wife subject to the debt.

Ruling: The SCOV reversed. It held that the mortgage debt was a personal debt of the testator. And it further held that this debt was not secured by property owned by testator upon his death--as it passed as a matter of law to his wife. So the mortgage debt was an obligation of--and should be paid from--the testator's estate.

Key Holding(s):

- Where a testator has solely entered into a mortgage loan, that loan is the obligation of his estate even where: (1)

it was secured by property held by the testator and his widow as tenants by the entirety, and (2) the widow obtained title to the property upon the testator's death by operation of law.

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Personal Injury

Case: *Evans v. Evans, 091469* (*6/10/2010*)

Author: Lemons

Lower Ct.: Bedford County (Updike, James W.)

Disposition: Reversed

Facts: Father placed four-year-old child in a foam seat in the bed of his pickup truck. The truck was in an accident that severely injured the child. The child sued the father for negligence. The father demurred, citing Code §§ 46.2-1095 and -1098. Section 46.2-1095 requires that children under eight years old be placed in a suitable child restraint. But it also states that "a violation of this section shall not constitute negligence." Code § 46.2-1098 further states that "[v]iolations of this article shall not constitute negligence per se."

The trial court sustained the demurrer. Although it acknowledged that the plaintiff was seeking a claim for common-law negligence--not a violation of 46.2-1095--it nevertheless found that the statutes were inextricably entwined with the plaintiff's claims because the jury surely would realize that the father's actions violated the statute.

Ruling: The SCOV reversed. It held that these statutory provisions do not abrogate any common law negligence claim that the child otherwise might have. They simply forbade: (1) using a violation of the statute as as negligence per se, and (2) introducing evidence of such a violation at trial. For the General Assembly to have abrogated the common-law negligence claim, it needed to do so expressly.

Justice Kinser dissented and Justice Mims filed a concurring opinion.

Key Holding(s):

- Code §§ 46.2-1095 and -1098 did not abrogate a child's right to bring a common-law negligence claim based on being improperly restrained in a vehicle.

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Land Use

Case: *James v. City of Falls Church, 090444* (*6/10/2010*)

Author: Kinser

Lower Ct.: Arlington County (Newman, William T.)

Disposition: Affirmed

Facts: Church sought to consolidate seven continguous lots into a single parcel. It got a "zoning interpretation" from the zoning administrator, who advised that the consolidation would be permissible. But the city's ordinances defined consolidation as a form of subdivision--a subject over which the planning commission had authority. So the church submitted a consolidation application to the planning commission.

A senior planner in the planning division recommended against consolidation, noting that the consolidation would eliminate lot lines, thereby violating a provision in the city code. The planning commission denied the consolidation application for the reasons stated in the senior planner's report. The church appealed the ruling to the circuit court.

The circuit court granted the city's motion to strike. It rejected the church's claim that the application denial "was not properly based on the applicable ordinances and was arbitrary and capricious." And it rejected the argument that the planning commission had to defer to the zoning administrator's interpretation of zoning ordinances. Thus, it dismissed the church's appeal from the planning commission.

Ruling: The SCOV affirmed. It rejected the church's argument that the trial court improperly resolved a conflict of evidence in favor of the city--noting that the church had wrongly characterized the basis for the trial court's ruling, which did not hinge on any disputed facts.

It further rejected the argument that the planning commission had unlawfully denied the application out of a desire to have the applicant reveal its future plans for the site. The SCOV held that, though interested in the church's future plans, the planning commission had actually based its denial of the application on the fact that the consolidation would have violated certain ordinances.

The SCOV rejected the argument that the planning commission could not modify the opinion of the zoning administrator. It noted that the statute the church relied on, Code § 15.2-2311, only bars a "zoning administrator or other administrative officer" from later modifying a zoning administrator's "written order, requirement, decision, or determination." Because the planning commission was not a "zoning administrator or other administrative officer" and the zoning administrator's interpretation was not a "written order, requirement, decision, or determination," the planning commission was not precluded from reaching a conclusion different from the zoning administrator.

Finally, the SCOV rejected the argument that the planning commission lacked authority to interpret zoning ordinances, noting that Code § 15.2-2259(A) specifically required planning commissions to identify the ordinances, regulations, or policies that grounded their denial of a subdivision application.

Key Holding(s):

- Under Va. Code § 15.2-3211, a zoning administrator's written opinion about a zoning ordinance is not binding on a planning commission's decision whether to approve a consolidation application because (1) a planning commission is not an "administrative officer" and (2) the issuance of such an opinion is not a "written order, requirement,

decision or determination."

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Estates and Trusts

Case: *Ladysmith Rescue Squad, Inc. v. Newlin, 091388* (*6/10/2010*)

Author: Russell

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

Disposition: Reversed

Facts: Testator created charitable remainder unitrust that, each year, gave income beneficiaries the right to the lesser of (a) the trust's income, or (b) 6% of the trust assets. Upon the death of the last named individual, the remaining property was to be distributed between two charities.

The income beneficiaries and one of the charities brought suit, asking the court (1) to divide the trust into two equal trusts--one for each charity, and (2) to commute one of the trusts and distribute its assets between the charity and the income beneficiaries. The other charity objected to this arrangement. The trial court, however, agreed to divide the trusts and to commute one of them, as requested.

Ruling: The SCOV reversed. It noted that under Code § 55-544.17, the court could divide the trust only where "the result does not materially impair rights of any beneficiary or adversely affect achievement of the purposes of the trust." The court held that the proposal to divide the trusts and to commute one of them would frustrate the testator's intent. It rejected the argument that the testator could not have forseen that the beneficiaries "would rather have [thei]r money today than wait." And it pointed out that the plan would have frustrated the testator's evident intent to defer payment and to qualify for certain tax advantages.

Key Holding(s):

- Under Code § 55-544.17, a court can divide a trust only where doing so "does not materially impair rights of any beneficiary or adversely affect achievement of the purposes of the trust."

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Religious Institutions

Case: *Protestant Episcopal Church in the Diocese of Virginia v. Truro Church, 090683* (*6/10/2010*)

Author: Koontz

Lower Ct.: Fairfax County (Bellows, Randy I.)

Disposition: Reversed

Facts: The Episcopal Church is a "province" of the Anglican Church active in the United States. Certain congregations sought to disaffiliate from it in the wake of certain of its decisions relating to homosexuals. They aligned themselves with another Anglican "province"--the Church of Nigeria--which had established a mission in the United States (the "Convocation of Anglicans in North America," or "CANA") and had begun accepting former Episcopal Church congregations. The congregations brought a declaratory action under Va. Code § 57-9(A), seeking permission to continue to occupy and control property held in trust by Episcopal Church.

Ruling: The Court found that the congregations failed to satisfy the requirements of Code § 57-9(A). This provision only allowed a congregation to invoke its provisions where (1) a "division" had occurred in the church, (2) to which the congregation was "attached," and (3) the congregation chose to join a different "branch" of the same church.

The Court found that there was no division in the "Anglican Church" as a whole, as this was merely a "family of churches," not a "unified whole."

Although the SCOV found that there *was* a division within the Episcopal Church and the Diocese of Virginia--to which the congregations belonged--it found that CANA was not a "branch" of the Episcopal Church. Rather, it was a preexisting branch of the Church of Nigeria. So the congregations could not invoke Code § 57-9(A) to acquire its property.

Key Holding(s):

- For purposes of Code § 57-9(A), a church is not a "branch" of another church where it descends from a completely different ecclesiastic governing body.

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Estates and Trusts

Case: *Smith v. Mountjoy, 091470* (*6/10/2010*)

Author: Kinser

Lower Ct.: Fauquier County (Parker, Jeffrey W.)

Disposition: Affirmed

Facts: Husband executed a durable power of attorney naming his wife as attorney-in-fact. The couple owned various properties as tenants by the entirety with rights of survivorship. Without her husband's knowledge, the wife created two trusts--one for herself and one for her husband. She then conveyed an undivided one-half interest in each property to each of the two trusts.

The trusts had unequal terms. Whereas the husband's trust transferred the corpus to the wife if he predeceased her, the wife's trust had no similar provision. If she predeceased him, the trust only gave the husband income and such principal as the trustee deemed were necessary and proper for the husband's support, maintenance, and medical care. Upon the husband's death, the corpus of the wife's trust would go to other designated beneficiaries.

The wife died. Upon her death, the husband learned of the

trust arrangement and immediately sought to revoke his trust. He then brought suit against the trustee of the wife's trust, stating that his wife lacked authority to convey his the properties and asking that he be declared the sole owner of the one-half interest in the properties held by the wife's trust. Meanwhile, he also sought income and principal payments from the wife's trust. The trustee of the wife's trust argued that this demand for payment from the wife's trust constituted a ratification of the arrangement.

The trial court held that the conveyances were gifts and that they exceeded the wife's authority as attorney-in-fact. It rejected the argument that the husband ratified these actions by demanding a distribution from the wife's trust.

Ruling: The SCOV affirmed. It held that that the transfer was a gift because the husband's transfer of his interest in the properties to the trusts was a detriment to him with no countervailing benefit. Conversely, the transfer conferred a benefit on the wife that she did not have when the properties were held as tenants by the entirety. Thus, the transactions were not supported by consideration, should be considered a gift, and exceeded the wife's authority under the durable power of attorney. Likewise, the SCOV held that the husband did not ratifiy these transactions. He acted immediately to terminate his trust. And his demand for payment from the wife's trust did not amount to a ratification because that trust was funded with assets beyond the properties in question.

Key Holding(s):

- A transaction that benefits the holder of a durable power of attorney, but offers no countervailing benefits to the person on whose behalf the holder purports to act, is a gift to the holder of the power of attorney.

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Business Torts

Case: *Syed v. ZH Technologies, Inc., 091172* (*6/10/2010*)

Author: Lemons

Lower Ct.: Fairfax County (Bellows, Randy I.)

Disposition: Affirmed in Part, Reversed in Part

Facts: Business partners in technology industry had a falling out. One of them started up a rival company. The original company sued the departing partner and his wife, alleging breach of fiduciary duty, conversion, unjust enrichment, fraud, statutory conspiracy, and tortious interference with contractual relationships.

At trial, the defendants moved to strike the original company's claims, arguing that its corporate existence was terminated at the time of the events in question. The trial court rejected this argument and denied the motion.

The fiduciary-duty claim was predicated upon the departing partner's former status as an employee. But the defendant denied being an employee. Plaintiffs asked to be able to change their theory to base breach-of-fiduciary-duty claim on status as partner. The trial court said that it would not allow this; nevertheless, it instructed the jury on this theory and allowed the plaintiffs to argue it to the jury.

The jury found for the plaintiffs on the fiduciary duty claim, awarding $22,500 in damages. It also found liabilty on the conspiracy and tortious-interference claims, but awarded plaintiffs $0 actual damages. It awarded punitive damages against the rival company for $375,000 and against the former partner for $375,000.

The trial court ordered a new trial on the conspiracy and tortious-interference claims. The jury returned a sizable verdict on those claims, finding both compensatory damages and punitive damages.

Ruling: The SCOV affirmed the denial of the motion to strike. It held that under the 2004 amendments to Code § 13.1-754, when a corporation's existence is reinstated, the legal consequence of actions by officers, directors and agents during the termination period are determined as though the corporation remained in existence throughout that period.

The SCOV reversed the fiduciary duty verdict. It held that it was fundamentally unfair for the court to have instructed the jury on--and allowed counsel to present argument to the jury about--a partnership fiduciary-duty theory that had never been pleaded. So it remanded for a new trial on the issue.

The SCOV reversed the conspiracy and punitive damages verdict. It held that the jury's finding of $0 damages on these claims demonstrated that plaintiffs suffered no injury or compensable damages. As these are elements of statutory-conspiracy and tortious-interference claims, the jury's verdict was tantamount to a finding that the plaintiffs had no viable claims under those theories. So the SCOV held that judgment should be entered for defendants on these claims.

The award of punitive damages was improper because "an award of compensatory damages . . . is an indispensible predicate for an award of punitive damages, except in actions for libel and slander."

Key Holding(s):

- When a corporation is reinstated after a period of termination, the legal consequence of actions by officers, directors, and agents is the same as if the corporation had remained in existence throughout the termination period.
- Where a theory has not been pleaded, it is fundamentally unfair to instruct the jury on that theory and to allow counsel to argue the unpleaded theory to the jury.
- A finding of $0 compensatory damages is fatal to statutory-conspiracy and tortious-interference claims, even where the jury awards punitive damages.
- A finding of compensatory damages is an indispensible

predicate to an award of punitive damages.

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Contract

Case: *TC Midatlantic Development, Inc. v. Commonwealth, 091271* (*6/10/2010*)

Author: Lacy

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

Disposition: Affirmed in Part, Reversed in Part

Facts: Government-construction contract required that, before filing suit, the contractor (1) provide timely written notice of its intent to file a claim, and (2) that any such claim be filed within 60 days after final payment. Further, it forbade filing suit until the government issued a written decision on the claim (unless more than 90 days had passed after submission of the claim or final payment, whichever was later). These requirements, however, only applied to "Phase I" of the project. They did not apply to "Phase II."

The government issued a letter terminating the contract on February 16, 2007. The letter informed the contractor that it could file a formal claim.

The contractor filed suit in April 2007, alleging breaches to agreements relating to both Phase I and Phase II. It failed to allege, however, that it had submitted a timely claim. The trial court sustained the government's demurrer, holding that the February 16, 2007 letter commenced the 60-day period for filing formal claims.

Ruling: The SCOV affirmed the denial relating to Phase I. It held that compliance with the notice and claim provisions in the contract was a condition precedent to instituting legal action and that "allegations of compliance with that section are necessary to state a cause of action." Because the complaint did not allege compliance and the exhibits accompanying it failed to showed compliance, it affirmed the trial court's ruling sustaining the demurrer.

The SCOV reversed, however, as to the count relating to Phase II. It held that the notice provisions did not apply to Phase II and so the trial court improperly dismissed that count for failure to provide adequate notice of a claim. It rejected the government's alternate argument because the argument had not been included in the demurrer and so, under Code § 8.01-273, it could not have been considered by the trial court.

Finally, the SCOV rejected the argument that the trial court abused its discretion in not giving the contractor leave to amend. It noted that nothing in the record showed that the contractor actually asked for leave to amend. An order dismissing a case with prejudice does not preclude a request for leave to amend. So the contractor should have asked for this relief.

Key Holding(s):

- Where a contract requires that a party satisfy certain conditions precedent before filing suit, the failure to allege satisfaction of those conditions is fatal to a complaint.

- The fact that a trial court dismisses a case "with prejudice" does not foreclose a party from seeking leave to amend a pleading.

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Estates and Trusts

Case: *Von Schilling v. Schilling, 091055* (*6/10/2010*)

Author: Mims

Lower Ct.: City of Hampton (Lerner, Louis R.)

Disposition: Reversed

Facts: Testator prepared a will in 1984. In 2005, she prepared a holographic writing devising all her property to her son. Testator died in 2008. The son filed a petition to establish that the writing was a valid will, relying on Code § 64.1-49.1--which took effect after the writing was made but before the testator's death. The trial court refused to apply Code § 64.1-49.1, stating that this would be a retroactive application of the law.

Ruling: The SCOV reversed and held that Code § 64.1-49.1 applied. It noted that a will is an "ambulatory" instrument whose character is first fixed upon the death of the testator. Thus, the court applies the law in effect at the time of the testator's death.

Key Holding(s):

- In determining whether a writing is a valid will, a court must apply the law in effect on the date of the maker's death.

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Civil Procedure

Case: *Walton v. Mid-Atlantic Spine Specialists, 091009* (*6/10/2010*)

Author: Millette

Lower Ct.: City of Newport News (Tench, C. Peter)

Disposition: Reversed

Facts: Doctor wrote attorney about his possible negligence in reading the plaintiff's x-rays. He left a copy of this letter in an unmarked binder next to a manila folder with the patient's medical records. In an earlier workers' compensation case, the patient's employer had subpoenaed records. The doctor sent out documents to a copy service, which copied and produced the letter to plaintiff's employer's counsel.

The plaintiff obtained a copy of the letter--a fact that she dis-

closed during discovery in the medical-malpractice action. A year later, the doctor moved to bar use of the letter, claiming that it was protected by the attorney-client privilege.

Ruling: The SCOV held that the doctor waived the privilege as to the letter.

The SCOV held that the waiver was not "involuntary" because there was no evidence that it was produced as a result of criminal activity or bad faith. The disclosure, instead, was inadvertent.

The SCOV applied a five-part test to determine whether the inadvertent production waived the privilege, examining (1) the reasonableness of the precautions to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege has used its unavailability for misleading, improper, or overreaching purposes. No single factor is dispositive.

Applying those standards to the facts before it, the SCOV found that the doctor had waived the privilege.

Key Holding(s):

- For purposes of evaluating waiver of attorney client privilege, a disclosure is "involuntary" only where it was the result of criminal activity or bad faith.

- In examining whether an inadvertent disclosure waived attorney-client privilege, courts should look to the following factors, among others: (1) the reasonableness of the precautions to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege has used the document's unavailability for misleading, improper, or overreaching purposes.

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Real Property

Case: *Bailey v. Town of Saltville, 090989* (*4/15/2010*)

Author: Goodwyn

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

Disposition: Affirmed

Facts: In 1909, property owner deeded strip of land to railroad for use as a right of way. The railroad abandoned the railroad line and donated the corridor to the Town of Saltville by way of a quitclaim deed. Subsequent owner of surrounding land brought a quiet-title and ejectment suit, asserting (1) that the 1909 deed only conveyed an easement and (2) that the easement rights were extinguished by the abandonment of the railroad line. The trial court disagreed. It noted that the 1909 deed contained no words of restriction, and thus conveyed a fee-simple interest, not merely an easement.

Ruling: The SCOV affirmed. It observed that the lease described the conveyance as "all that certain strip or parcel" and that the grantor warranted "the land hereby conveyed." The plain meaning of this language was to transfer complete ownership to the railroad. The Code in effect at the time stated that, absent words of limitation, a conveyance of real estate should be deemed a conveyance of a fee simple. As there were no such words of limitation in the 1909 deed, the SCOV held that it was a transfer of a fee simple.

Key Holding(s):

- A deed that conveys a strip of land without any words of limitation conveys a fee simple, regardless of whether the parties state that that the strip is to be used as a right of way.

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Civil Procedure

Case: *City of Alexandria v. J-W Enterprises, 090659* (*4/15/2010*)

Author: Lacy

Lower Ct.: City of Alexandria (Haddock, Donald M.)

Disposition: Affirmed

Facts: While working, in uniform, at a restaurant, an off-duty police officer observed a group of patrons who left without paying their bill. Believing that he had observed a misdemeanor, he pursued them. When the patrons' car drove straight at the officer, he fired his gun at the vehicle, killing one the passengers. The city settled with the decedent's estate, and brought a contribution action against the restaurant. After a bench trial, the trial court concluded that the city was not entitled to contribution because, inter alia, the officer was engaged in a public function at the time of the shooting.

Ruling: The SCOV affirmed. It held that the question whether the officer was acting as a public officer at the time of the shooting was a question of fact. In analyzing the issue, the factfinder should look at the nature of the act in question. The facts supported the trial court's conclusion that the officer was acting in his official capacity at the time of the shooting. He was attempting to apprehend persons who had committed a misdemeanor in his presence.

Key Holding(s):

- For tort-law purposes, an off-duty police officer--working in uniform as a security detail for a private company--acts in his "official capacity" when he attempts to apprehend persons whom he has observed committing a misdemeanor.

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Insurance

Case: *Copp v. Nationwide Mutual Ins. Co., 090345* (*4/15/2010*)

Author: Carrico

Lower Ct.: Montgomery County (Turk, Robert M.D.)

Disposition: Reversed

Facts: College student, who was an insured under his parents' homeowners liability and umbrella insurance policies, got into an altercation with a group of persons following a "beer-pong" game. Outnumbered, the student swung wildly and hit one of the persons in the group. This fractured the victim's orbital socket, requiring surgery. The student pleaded no contest to assault and battery. The victim sued the student to recover for his injuries.

The insurers filed a declaratory-judgment action. Citing an exclusion for injuries "intended or expected by the insured," the insurers claimed that they had no obligation to defend the student. The student responded by citing an exception to this exclusion where the insured was attempting to protect person or property.

The trial court decided the matter exclusively on the pleadings. It held that the claim was for an intentional act and that the insurers were not required to defend the student. The trial court ignored the exception for defense of person or property.

Ruling: The SCOV reversed. It noted that the "eight-corners rule" applicable to coverage cases ordinarily only encompasses the complaint and the policy. But where the insured asserts a personal-defense exception to a policy exclusion for intentional acts, the court must consider the insured's claim that he caused injury or damage in an attempt to protect his person or property. Where such a defense is not "inherently incredible," the insurer has a duty to defend.

Key Holding(s):

- Where a policy exclusion for intentional acts contains an exception for defense of person or property, the insurer must defend the insured if the insured has a credible claim that he was acting in defense of person or property.

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Real Property

Case: *Hafner v. Hansen, 090972* (*4/15/2010*)

Author: Keenan

Lower Ct.: Arlington County (Alper, Joanne F.)

Disposition: Reversed

Facts: During remodeling project, homeowner discovered a buried sewer line running under property. The sewer line serviced an apartment building. The homeowner demanded that the apartment owner purchase an easement. When the apartment owner refused, the homeowner brought trespass claim. The apartment owner defended by claiming that it had a prescriptive easement.

The evidence showed that, while one of the homeowners' predecessors might have known of sewer line, there was no evidence that the predecessor had knowledge for the requisite 20-year period. Nor was there any evidence that they told their successors about this line. Property records did not reference it. Nevertheless, the trial court found that there was a prescriptive easement.

Ruling: The SCOV reversed. It noted that to establish a prescriptive easement, a claimant must show that use of the servient estate was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the servient estate.

Because the sewer line was concealed, there was no presumption of adverse use under a claim of right. The evidence presented at trial failed to establish adversity because (1) there was no evidence that the homeowners' predecessors knew that the line--which had previously serviced the house--continued to service the apartment after the home switched to another line, and (2) even if they had this knowledge, they neither had it for the requisite period nor shared the knowledge with their successors in interest.

Key Holding(s):

- No prescriptive easement arises for underground pipes where (1) the pipes are not physically apparent and (2) the landowner lacks notice of the pipes' existence.

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Civil Procedure

Case: *Hawthorne v. VanMarter, 091127* (4/15/2010)

Author: Keenan

Lower Ct.: Roanoke County (Dorsey, Charles N.)

Disposition: Affirmed

Facts: When attempting to overtake a speeding vehicle, a police vehicle struck another vehicle that was exiting its driveway--killing the driver and injuring a passenger. The accident occurred in Roanoke County, but the plaintiffs sued in the Circuit Court for the City of Roanoke. They claimed that defendant resided and/or conducted substantial business there. The trial court found otherwise and transferred venue to Roanoke County.

The officer filed a plea in bar on the issue of sovereign immunity. The circuit court held a hearing on the issue and ruled that claims of ordinary negligence were barred by sovereign immunity. Plaintiffs later discovered eyewitness accounts, but the circuit court refused to rehear the sovereign-immunity issue.

During voir dire of the jury, the plaintiffs moved to strike several jurors on the grounds that they were not impartial or free of bias. The jurors, who either had indirect social relationships

with the officer or had direct personal relationship with other police officers, said they could perform their duties impartially. The trial court refused to allow counsel to question each of these jurors to explore their potential biases, and denied the motion to strike them for cause.

At trial, the defendant presented two experts in the field of emergency vehicle training instructions. The witnesses related the factors that an officer must take into account when deciding whether to pursue a speeding vehicle and to activate a siren. The defendant also presented testimony of (1) an accident investigator who testified about the decedent's line of sight before the accident, and (2) a mechanical engineer who testified about the force of the impact.

Over the plaintiffs' objections, the court instructed the jury that the driver of an emergency vehicle need not heed speed limits, provided he is not grossly negligent. The court held that this accurately stated the law when given in conjunction with the instruction that the driver of a law enforcement vehicle can disregard speed limits only when he displays flashing emergency light(s) and sounds a siren. The court also instructed the jury that a driver always has a duty to exercise ordinary care, but refused the plaintiff's request that this instruction mention the forfeiture of a right of way.

The jury returned a defense verdict. Both the injured party and the personal representative of the decedent filed notices of appeal. The personal representative, however, filed his petition pro se. Defendant moved to dismiss the appeal on the grounds that a personal administrator must always proceed by counsel, he cannot proceed pro se.

Ruling: The SCOV dismissed the appeal filed by the personal representative. It cited authority that "an administrator of an estate may not file an action in a pro se capacity" and extended that rule to appeals. The mere fact that a co-plaintiff (the injured person) also filed an appeal did not perfect the administrator's appeal.

Turning to the injured person's appeal, the SCOV held that the trial court did not abuse its discretion by transferring venue to Roanoke County. The record supported the trial court's conclusion that the defendant lived in Roanoke County. And it also supported the conclusion that the defendant did not regularly conduct substantial business activities there--mere "transient activities, considered as a whole, do not constitute substantial business activity."

The SCOV held that the denial of individual voir dire was not an abuse of discretion. And it found that the record supported the trial court's finding that the challenged jurors could serve impartially. Among other things, each stated that he or she would follow the law even if he or she disagreed with it.

The SCOV also upheld the rulings on jury instructions. It said that the court's responsibility is to see that the law has been clearly and accurately stated and that the instructions cover all issues fairly presented. The SCOV does not review them in isolation; it considers the instructions as a whole. Read as a whole, the instructions properly instructed the jury on the legal issues.

Key Holding(s):

- The personal representatve of an estate cannot appeal a case pro se. Any appeal must be prosecuted by counsel.
- A trial court does not abuse its discretion by transferring venue where the facts support the trial court's determination that venue does not lie in the chosen jurisdiction.
- The trial court has discretion whether to allow individual voir dire of prospective jurors.
- The trial court does not abuse its discretion in seating jurors with alleged indirect biases, where those jurors affirmatively state that they could follow the law and serve impartially.
- The SCOV reviews jury instructions as a whole, and will uphold the trial court's decision to give instructions where, so read, the instructions clearly and accurately state the law.

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Civil Procedure

Case: *Idoux v. Helou, 090674* (*4/15/2010*)

Author: Hassell

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

Disposition: Affirmed

Facts: Plaintiff brought a warrant in debt against alleged tortfeasor who was deceased. The general district court dismissed the claim. Plaintiff then brought a complaint in circuit court against the decedent's "estate." The second suit was filed within two years after accident. After expiration of the two-year limitations period, the estate filed a plea in bar, stating that it could not be a proper party and that the statute of limitations had run.

The plaintiff sought to take advantage of Code § 8.01-6.2(B), which tolls the limitations period in a case brought against an "estate" where the personal representative was unable to legally receive service at the time service is attempted. The plaintiff also invoked Code § 8.01-229(B)(2), which establishes the limitations period on a claim against the personal representative of a dead person as the later of the original limitations period or one year after the qualification of the decedent's personal representative.

The circuit court sustained the plea in bar.

Ruling: The SCOV affirmed. It applied the plain language of 8.01-6.2(B) and held that the statute did *not* apply because plaintiff had not shown that the personal representative was unable to legally receive service at the time it was attempted. The SCOV rejected the plaintiff's argument that the fact that the complaint against the estate was a nulllity meant that the estate's personal representative was unable to receive service. Such a reading would render other portions of 8.01-6.2(B) superfluous. Section

8.01-6.2(B) does not operate to toll the limitations period on an invalid lawsuit against an "estate" where the administrator of the estate was legally able to receive service of the action, had it been filed with the proper name.

Likewise, it held that 8.01-229(B)(2) did not apply because no action was filed against the personal representative within the requisite periods. The action against the decedent's "estate" was not an action against the decedent's personal representative.

Key Holding(s):

- Section 8.01-6.2(B) does not operate to toll the limitations period on an invalid lawsuit against an "estate" where the administrator of the estate was legally able to receive service of the action (had the action been filed with the proper name).

- Section 8.01-229(B)(2) does not apply to actions filed against a decedent's "estate." It only applies to actions brought against the decedent's personal representative.

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Legal Malpractice

Case: *Johnson v. Hart, 090984* (*4/15/2010*)

Author: Lemons

Lower Ct.: City of Virginia Beach (Lowe, Frederick B.)

Disposition: Affirmed

Facts: Plaintiff, the testator's daughter, hired a lawyer to represent the estate. At the close of the administration, the plaintiff was the sole beneficiary of estate. In her individual capacity, she brought a legal malpractice claim against the lawyer, alleging that he had committed negligence in representing the estate. She claimed that she, as sole beneficiary, had inherited the estate's malpractice claim. Further, she claimed that Code § 8.01-13, which permits beneficial owners of claims to sue in their own name, authorized the suit against the lawyer.

The trial court rejected this argument. Although it agreed that plaintiff was a beneficial owner of the malpractice claim, it held that the SCOV had interpreted § 8.01-26 to exclude the assignment of legal malpractice claims. Thus, it found that § 8.01-13 should not be used to circumvent the bar on assigning legal-malpractice claims.

The defendant signed the order "seen and consented to." On appeal, the plaintiff claimed that this waived the defendant's right to cross-appeal the trial court's finding that the plaintiff was a beneficial owner of the malpractice claim.

Ruling: The court rejected the argument that endorsing an order "seen and consented to" was a waiver of an objection to an unfavorable ruling. Counsel for defendant had clearly expressed his opposition to this ruling in memoranda to the court. Seen in that context, his endorsement--while consenting to entry of the favorable ruling--did not abandon counsel's previously stated arguments that the plaintiff was not the beneficial owner of the legal malpractice claims.

Turning to the merits, the court found that plaintiff could not assert the legal malpractice claim. Legal malpractice claims require that the plaintiff establish an attorney-client relationship with respect to the transaction in question. And plaintiff did not stand in that relationship with the defendant. Nor was plaintiff the beneficial owner of the claim. The statute barring assignment of legal malpractice claims, Code § 8.01-13, prevented this beneficial ownership.

Key Holding(s):

- Endorsing an order as "seen and consented to" does not amount to a waiver of objections to unfavorable rulings, where the party consenting to the order has previously articulated objections to the ruling in question.

- Legal malpractice claims require an attorney-client relationship. A beneficiary of an estate may not bring a legal malpractice action against the lawyer who formerly represented the estate, where the claims arise out of the lawyer's representation of the estate.

***

Personal Injury

Case: *Kimble v. Carey, 090947* (*4/15/2010*)

Author: Millette

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

Disposition: Affirmed in Part, Reversed in Part

Facts: The defendant, driving while intoxicated, rear-ended a construction truck on a freeway. The plaintiff, travelling in the opposite direction, stopped to assist the defendant but was hit by another vehicle while attempting to cross the freeway. Plaintiff filed a personal injury claim, alleging that defendant's negligence gave rise to a dangerous situation that prompted plaintiff to render emergency assistance. Upon learning of the defendant's intoxication, the plaintiff sought leave to amend the complaint to assert willful or wanton conduct. The trial court denied this motion, reasoning that the degree of the defendant's negligence was irrelevant. At trial, it excluded evidence of the defendant's intoxication. At the close of evidence, the court granted the defendant's motion to strike, holding that reasonable minds could not differ on whether the plaintiff was reckless and rash in undertaking her rescue efforts.

Ruling: The SCOV held that an accident victim may be liable to an attempted rescuer where the initial accident was caused by the victim's negligence.

But it affirmed the rulings denying the motion to amend and granting the motion to exclude evidence of intoxication. It noted that the *degree* of the defendant's negligence in occasioning the attempted rescue was irrelevant to whether plaintiff had a right to recover under rescue doctrine.

Finally, the SCOV reversed the ruling granting the motion to

strike. It said that the pivotal issue--i.e., whether the plaintiff acted in rash and reckless disregard for her own safety when she crossed the highway--was one for the jury because reasonable minds could have disagreed.

Key Holding(s):

- An accident victim may be liable to an attempted rescuer, injured during a rescue attempt, where the victim's negligence caused the initial accident necessitating rescue.

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Estates and Trusts

Case: *Lane v. Starke, 090404* (*4/15/2010*)

Author: Russell

Lower Ct.: Surry County (Sharrett, W. Allan)

Disposition: Reversed

Facts: Testator gave his wife the use of real estate for the remainder of her life, or until her remarriage. Upon her death or remarriage, the property was to go to certain of testator's children, on the condition that they pay one-half the assessed value of the property back into the estate.

The wife died without remarrying, and children sought to pay half of the assessed value into the estate. This raised two questions: (1) Did the children have vested rights in the property? and (2) What was the valuation date by which the property was to be reassessed: the date of the testator's death or the date of his wife's death?

The trial court held that the will created contingent remainders in the children and that the payment of half the assessed value had to be made before the wife died. Because this had not been done, the trial court held that the children's rights under this clause were extinguished and the property passed through the will's residuary clause.

Ruling: The SCOV reversed. First, it held that the will was unclear about the time of vesting. So under Virginia's early-vesting rule, the children's remainder interest vested immediately upon the testator's death. Second, it held that the valuation date was the time of the mother's death. On this point, it noted that will was unclear about whether payment of one-half the assessed value was a condition precedent or a condition subsequent. So it used the default rule, which treated it as a condition subsequent. And because their duty to pay did not arise until their mother's death, the amounts the children were required to pay depended on the assessed value of the property at the time of the mother's death.

Key Holding(s):

- Where a will is unclear about the time a remainder interest becomes vested, Virginia's early-vesting rule treats the right as vesting at the time of the testator's death.

- If a will is unclear about whether a requirement imposed upon a devisee is a condition precedent or condition subsequent, the condition is treated as a condition subsequent.

- Where a duty to make a payment under a will does not arise until a certain event occurs, the amount of the payment will be determined as of that date.

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Land Use

Case: *Schefer v. City Council fo the City of Falls Church, 090803* (*4/15/2010*)

Author: Koontz

Lower Ct.: Arlington County (Newman, William T.)

Disposition: Affirmed

Facts: Zoning ordinance imposed varying height restrictions for buildings in residential districts depending on whether the lot was larger or smaller than a certain "standard" lot size. Property owner challenged this ordinance on the grounds that (1) it violated the uniformity requirement of Code § 15.2-2282, and (2) it violated the equal protection clause. The trial court rejected these arguments and granted summary judgment for the locality.

Ruling: The SCOV affirmed. It noted that the purpose of the uniformity statute was to ensure that zoning regulations are non-discriminatory. It held that the ordinance in question dealt with two different classes of uses--buildings on "standard" and sub-"standard" lot lot sizes--and so did not violate the uniformity requirement of 15.2-2282. It did not single out similiarly situated properties for different uses. The SCOV rejected the equal protection challenge, noting that the statute was not facially discriminatory because it was not inherently suspect and did not infringe on the exercise of a fundamental right.

Key Holding(s):

- A zoning ordinance that imposes different height restrictions on structures erected on different-sized lots does not violate 15.2-2282's uniformity requirement and is not facially discriminatory under the equal protection clause.

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Land Use

Case: *Shilling v. Baker, 090906* (*4/15/2010*)

Author: Lacy

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

Disposition: Affirmed

Facts: Previous landowner scattered cremated remains on a portion of the land, which they called the "Baker Cemetery." Subsequent landowner agreed to allow them to bury an urn with

ashes on the site. But this was *after* the county had enacted a zoning ordinance regulating cemeteries. The subsequent landowner then contracted to sell the land, contingent on condition that it relocate the "Baker Cemetery." Family members sued asking the trial court (1) to declare that the "Baker Cemetery" was a lawful cemetery under the Rockingham County zoning ordinance, and (2) to enjoin the relocation of the cemetery. The trial court found that it the cemetery was not grandfathered by the zoning ordinance because no human remains were buried there prior to the enactment of the zoning ordinance.

Ruling: The SCOV affirmed. It noted that the zoning ordinance defined cemetery as "land used for the burial of the dead." As there had been no burial on the site prior to enactment of the zoning ordinance, the cemetery was not grandfathered as a non-conforming use. The court noted that Virgina's statutes relating to cemeteries and interment all require the creation of a permanent resting place--either underground or in a confined space or container. The mere scattering of cremains also did not satisfy the dictionary definition of interment as "the act or ceremony of depositing a dead body in a grave or tomb."

Key Holding(s):

- Merely scattering cremated remains on a portion of property does not create a cemetery.

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Insurance

Case: *Simpson v. Virginia Municipal Liability Pool, 090596* (*4/15/2010*)

Author: Russell

Lower Ct.: Nottoway County (Warren, Thomas V.)

Disposition: Affirmed

Facts: Police officer stopped a speeding vehicle. The driver fled the vehicle. The officer was injured when he attempted to apprehend the driver. The driver's automobile insurer refused coverage because (1) the injuries did not arise out of the use of the vehicle, and (2) the injuries were intentional. Two policies--one issued by the officer's private insurer and one issued by the Virginia Municipal Liability Pool ("VMLP") provided uninsured motorist coverage for the police cruiser.

The VMLP brought a declaratory judgment action to determine which, if any, of these three automobile insurers covered the injury in question. The circuit court determined that none of them covered the injury because none of the participants in the incident was "using" or "occupying" a vehicle at the time of the incident. Vehicles played no role in the officer's injury. He was injured when the pursuit was over.

Ruling: The SCOV affirmed. It said there were no "bright line" rules in cases applying "use" or "occupancy" language in automobile insurance policies. The critical inquiry was whether there was a causal relationship between the incident and the use of the insured vehicle, *as a vehicle*. In analyzing this, the court must consider what uses reasonably could be contemplated by the parties to the insurance agrement. And it also must look at what the insured person was doing at the time of the injury and whether that bore any nexus to the use of the vehicle *as a vehicle*. Because the vehicles in question played no role in the officer's on-foot pursuit of the suspect, the court held that there was no "use" or "occupancy" of a vehicle at the time of the injury. So none of the insurance policies covered the incident.

Key Holding(s):

- Where an automobile insurance policy conditions coverage on the insured's use or occupancy of a vehicle, there is no coverage where neither the insured vehicles nor anything anyone was doing with the insured vehicles played any role in causing the injury.

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Real Property

Case: *Snead v. C&S Properties Holding Co., Ltd., 090524* (*4/15/2010*)

Author: Lemons

Lower Ct.: City of Fredericksburg (Ledbetter, William H. (Judge Designate))

Disposition: Reversed

Facts: In a deed, the grantors reserved a 60-foot-wide easement for ingress and egress. The easement was appurtenant to the grantors' remaining property. A gravel road was placed on part of the easement. On other parts, the grantee's successors placed various items--including a fence running parallel to the easement--and it also stored various "port-a-potties" there. The fence prevented use of a significant portion of the easement and made it more difficult for certain vehicles to traverse it. The objects did not, however, encroach on the gravel road.

Plaintiffs--successors to the grantors who had retained the lease--brought an injunction action against grantees' successors to force them to remove the objects from the easement. The trial court found a valid easement, but refused to order the objects removed, stating that "it would be a useless and unduly burdensome act to compel the defendants to remove all objects within the [easement]."

Ruling: The SCOV reversed. It found that the trial court's denial of injunctive relief was plainly wrong because the man-made improvements and obstructions in the easement prevented the use and enjoyment of a significant portion of it This was not changed by the fact that the gravel road was left unimpeded. There still was a material encroachment on the easement.

Key Holding(s):

- Structures placed in an easement can constitute a material encroachment on the dominant owner's rights even where a road still exists to provide ingress and egress.

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