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Bye, Bye, *Blackwelder*? Recent Cases and the Standards for Preliminary Injunctions in Virginia's Federal and State Courts

by Bradfute W. Davenport, Jr. and Joshua D. Heslinga

If asked to name something significant that happened in 1977, what would you say? Jimmy Carter was inaugurated. Elvis Presley died. *Star Wars* was released. *Rocky* won Best Picture at the Academy Awards. The Oakland Raiders won the Super Bowl, and the Yankees took the Series.

Even if the above is not what comes to mind, you probably did not think of the law of preliminary injunctions in Virginia. Yet 1977 was a watershed year in that regard. The Fourth Circuit decided *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), announcing a preliminary-injunction standard that then became known by that name. In state courts, 1977 brought no great changes, but the brief statute that governs "temporary injunctions"—Va. Code § 8.01-628—was reenacted as part of new Title 8.01.[1]

1977-2007: Nothing changes

Over the next thirty years, not much changed. For Virginia's federal courts, the "balance-of-hardship test" embraced by *Blackwelder*[2] became more refined and easily summarized, but it did not change significantly. The same four factors governed: (1) the likelihood of irreparable harm to the plaintiff if a preliminary injunction is denied, (2) the likelihood of harm to the defendant if a preliminary injunction is granted, (3) the plaintiff's likelihood of success on the merits, and (4) the public interest.[3]

The order of consideration and relative weight of the four factors also remained constant. The "first step" was to balance the harms, the two "most important factors."[4] That balance dictated the standard applied at the second step of the analysis, "result[ing] in a sliding scale" being applied to the third factor: the chances of success on the merits.[5] "[I]f a decided imbalance of hardship should appear in plaintiff's favor," the plaintiff need only "present a 'substantial question.'"[6] "As the balance tips away from the plaintiff, a stronger showing on the merits is required."[7] Where "the balance of hardship st[ands] at equipoise … the probability of success begins to assume real significance."[8] The fourth factor—the public interest—has remained as vague as *Blackwelder* left it.

State courts, too, saw little change in the thirty years

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by Jennifer Lee Parrish

In my world of insurance defense law, where I used to try cases before a jury over $3,500 disputes, I find myself trying cases less and less often as the years go by. In various legal associations, groups are beginning to have seminars on what is being coined as "The Disappearing Jury Trial." In these seminars, I have heard some exclaim the benefits of fewer trials, and others express woeful chagrin at the concept.

Those who express glee at the decrease in jury trials include the increasingly larger percentage of senior attorneys and retired judges who are now private mediators and arbitrators, along with others in the legal profession who share the belief that alternative dispute resolution benefits all parties in legal disputes. But those who favor the jury trial system wonder how, without trials, we will know the value of a case in a particular jurisdiction, or the appropriate advice to provide to clients on what to offer or accept? They wonder how they will be able to train younger lawyers how to practice litigation.

In October, 2008, the U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics (also known as USDOJOOJPBOJS) published a study based upon a "Civil Justice Survey of State Courts, 2005." The report, entitled *Civil Bench and Jury Trials in State Courts, 2005*, noted that the total number of civil trials declined by over 50% from 1992 to 2005 in the nation's 75 most populous counties. It found that trials of tort cases decreased by 40%, real property cases by 77% and contract cases by 63%. The study also found that in 2005, plaintiffs were significantly more likely to win in a bench trial compared to a jury trial. Although this study included numbers from both bench and jury trials, it found that a jury decided almost 70% of the approximately 26,950 general civil trials disposed of in 2005. The Court Statistics Project of the National Center for State Courts (NCSC) reported that the number of civil cases filed in state courts increased by 5% in the general jurisdiction courts of the 43 states surveyed from 1996 to 2005. Yet, among 79 jurisdictions that could provide information on the total numbers of general civil dispositions, the rate of cases disposed of through trial was just under 3%. That means that a staggering 97% of filed civil cases in these 79 jurisdictions were disposed of without any trial.

As part of the USDOJOOJPBOJS study, it was also found that the average number of months from the filing of a civil case its disposition by a jury was 26.1 months. The average number of months for a jury disposition of tort cases was 26 months, for contract cases, 26.2 months, and for real property cases, 30.4 months.

There are potentially many reasons why we have seen a decrease in civil jury trials in our society in recent years. This decrease is clearly an example of the free market working within the legal system. Most civil cases involve numerous choices by the potential parties, such as whether to resolve the dispute without legal action or whether the potential legal action is worth the costs based upon the expected benefit. Individuals must always consider the opportunity costs of asserting what they believe are their legal rights, in most cases, to recover money. When dispute resolution by jury trial becomes too risky, too expensive, and

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too slow, the market leads to other options that may be less risky, less expensive, and more prompt. As those alternatives to litigation become too expensive, our legal services market will no doubt find other methods that make the current system of mediation and arbitration obsolete. Some already believe that the current choices for mediation and arbitration are out of reach, based upon hourly rates of formally trained mediators in ranges well over $500 per hour.

As successful trial lawyers know, it is essential to be prepared for a jury trial in order to fairly resolve the case short of a jury trial. If a lawyer is caught short by missing discovery deadlines or failing to timely procure experts for a trial, the alternative resolution for the case may be less favorable because the lawyer is not prepared for the trial, and the alternative resolution then becomes the mandatory one. In other words, despite the fact that approximately 97% of civil cases are settling prior to trial, a good lawyer must prepare fully for every case as if that case is going to trial. Only then can the parties be assured of having the choice of settling the case or proceeding to trial if the settlement terms are unfavorable.

Regardless of the continual changes that the free market may effect on the provision of legal services and choices for the resolution of civil disputes, the role of the attorney and counselor-at-law remains the critical component. Although the role of the trial lawyer may be evolving due to the decreased numbers of trials and increased numbers of non-trial dispute resolution, successful outcomes would be rare without the services of trained and experienced litigation lawyers to guide clients in making the appropriate choices among their legal options.

Ultimately, each of us must abide by the choice made by our clients, after full disclosures by us of the benefits and pitfalls of proceeding to the jury trial. For some, the choice of a jury trial remains the best method of resolving a civil dispute.

Blackwelder *cont'd from page 1*

after 1977. Section 8.01-628 has not been amended. It still reads, in its entirety, that "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." Largely left to their own devices by statute, Virginia circuit courts also did not get clear guidance from the Supreme Court of Virginia, which did not issue an opinion concerning preliminary injunctions.

Despite this silence, the Fourth Circuit concluded in 1988 that "there is no great difference between federal and Virginia standards for preliminary injunctions" and that "[b]oth draw upon the same equitable principles."[9] Encouraged by those pronouncements and with nothing from the Supreme Court of Virginia to the contrary, a number of Virginia circuit courts have used the *Blackwelder* test or a blend of the *Blackwelder* factors with related concepts, like preservation of the status quo or the lack of an adequate remedy at law.[10]

Foreshadowing: *Blackwelder* criticized

Even in the Fourth Circuit, however, *Blackwelder* has lost considerable sway over the years. In the 2001 *Safety-Kleen* case, for example, a majority of the panel expressed dissatisfaction with *Blackwelder*. Judge Luttig wrote that *Blackwelder* "contravene[s] Supreme Court precedents by overvaluing the inquiry into the relative equities of granting and denying a requested injunction to an extent that essentially denies any value whatsoever to the inquiry into the likelihood of success on the merits."[11]

Judge Luttig's concurrence listed many ways in which *Blackwelder*'s analysis was unsupported by and inconsistent with Supreme Court precedent, and then summarized: "To the contrary of all of the above, barely a year and a half before this court decided *Blackwelder*, the Supreme Court—in an opinion nowhere even cited or referenced in our *Blackwelder* decision—discussed and applied the applicable four-factor test, *precisely as had the district court whose opinion we criticized and whose judgment we reversed in Blackwelder*; did not distinguish among any of the four factors as to their order of consideration, hierarchy of importance, or comparative weights; characterized this four-factor test as the 'traditional' standard governing injunctions; and unmistakably required that the plaintiff show a likelihood of success on the merits in order to prevail."[12]

[2008] is another watershed moment for the law of preliminary injunctions. Thanks to two preliminary-injunction decisions from the United States Supreme Court, Blackwelder's analysis of the four factors is no longer defensible in Virginia's federal courts. And a decision from the Supreme Court of Virginia brought some long-needed clarity to Virginia state-court standards.

Later cases sometimes noted Judge Luttig's criticism,[13] but the Fourth Circuit continued to recite and apply *Blackwelder* regarding the order and weight of the four factors, including the sliding scale applied to the third—i.e., likelihood-of-success—factor.[14]

2008: Significant changes in federal and state court

Barack Obama's election may be the most noted event of 2008, but the year is another watershed moment for the law of preliminary injunctions. Thanks to two preliminary-injunction decisions from the United States Supreme Court, *Blackwelder*'s analysis of the four factors is no longer defensible in Virginia's federal courts. And a decision from the Supreme Court of Virginia brought some long-needed clarity to Virginia state-court standards.

Federal courts: *Blackwelder* dead or fading fast

Recent Supreme Court cases should be the nail in *Blackwelder*'s coffin.

In *Munaf v. Geren*,[15] decided in June 2008, the Supreme Court considered two *habeas* petitions by detainees, who sought, *inter alia*, preliminary injunctions to prevent transfer to Iraqi custody. In one case,

the district court granted the requested injunction; in the other, it dismissed the petition. The D.C. Circuit affirmed both decisions.

The Supreme Court vacated and remanded. Regarding the preliminary injunction, the Court "beg[a]n with the basics": "A preliminary injunction is an 'extraordinary and drastic remedy,'" that "is never awarded as of right. Rather, a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'"[16] The Court commented that "one searches the opinions below in vain for any mention of a likelihood of success as to the merits of Omar's habeas petition. Instead, the District Court concluded that the 'jurisdictional issues' presented questions 'so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.'"[17] The D.C. district court did not rely on *Blackwelder* specifically, but it expressly stated that "[t]he four factors should be balanced on a sliding scale, and a party can compensate for a lesser showing on one factor by making a very strong showing on another factor"; it concluded that the petitioner prevailed when "balancing the hardships"; and it made the *Blackwelder*-esque conclusion that it need not analyze the chances of success on the merits beyond finding that the petitioner met a lower, "substantial question" threshold.[18]

The Supreme Court's opinion in *Munaf* does not directly address *Blackwelder*. Its holding that the lower courts erred by not fully analyzing the likelihood of success on the merits[19] is, however, difficult to harmonize with *Blackwelder*'s approach.

In November 2008, the Supreme Court returned to preliminary-injunction law in *Winter v. Natural Resources Defense Council, Inc.*[20] To prevent injury to certain sea animals, the Ninth Circuit had affirmed a district court's grant of a preliminary injunction imposing restrictions on the Navy's use of active sonar. The Supreme Court reversed.

Citing *Munaf* and other cases, the Court explained that "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest."[21]

As in *Munaf*, the lower courts in *Winter* employed a flexible analysis in which a strong showing on one factor compensated for a much weaker showing on another. The twist this time was that the lower courts had concluded there was a *strong* likelihood of success on the merits, making the "'possibility' of irreparable harm" sufficient.[22] The Supreme Court again rejected such a sliding scale, stating: "We agree with the Navy that the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."[23] Citing *Munaf*, the Court repeated its statement that "[a] preliminary injunction is an extraordinary remedy never awarded as of right" and held "[i]n each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'"[24]

The Supreme Court's two-fold rejection of sliding scales among the preliminary-injunction factors may at last have made an impression on the Fourth Circuit. In *W.V. Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, the Fourth Circuit reversed a district court's grant of a preliminary injunction against enforcement of a West Virginia statute's restrictions on lottery-related advertising.[25] Quoting *Winter* and not citing *Blackwelder* or its progeny, the Court of Appeals announced the following standard: "In order to receive a preliminary injunction, a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'"[26] Although they do not yet have a statement from the Fourth Circuit addressing *Blackwelder*'s fate, Virginia's federal district courts have begun to take notice of and apply *Munaf* and *Winter*.[27]

State courts: the Supreme Court of Virginia weighs in at last

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Blackwelder *cont'd from page 5*

On June 6, 2008, six days before *Munaf*, the Supreme Court of Virginia decided *Levisa Coal Co. v. Consolidation Coal Co.*,[28] bringing some clarity to state law regarding preliminary injunctions.

Levisa Coal presented an odd procedural posture. The plaintiff sought injunctive and declaratory relief, but the parties "engaged in a lengthy period of discovery before Levisa Coal sought a hearing to request entry of a preliminary injunction."[29] After an extensive evidentiary hearing, the circuit court concluded that Levisa had an adequate remedy at law and that preliminary-injunctive relief could result in "'astronomical' harm" to Consolidation.[30] Consolidation submitted a draft order denying the preliminary injunction, and Levisa submitted a number of objections. The court entered a modified version of Consolidation's order that "in substance reflected the court's rulings on Levisa Coal's requests for a preliminary injunction and declaratory relief." Despite the fact that Consolidation's draft had not done so, the court's order provided that it was a final order.[31]

The Supreme Court of Virginia first noted that the procedural posture of the case—specifically the fact that "the hearing was noticed on Levisa Coal's request for a temporary injunction"—meant that it did not need to address all of the assignments of error.[32] The Court's explicit attention to this detail suggests that *Levisa Coal* should be construed to apply to preliminary injunctions.

After reversing because the circuit court erred on a legal issue on which it based its denial of injunctive relief, the Court addressed both Levisa's standing to seek preliminary-injunctive relief and the proper standards to apply to such a request. The Court noted that Consolidation had "urged the application of a four-factor approach for determining whether a preliminary injunction should issue, similar to that adopted by the United States Court of Appeals for the Fourth Circuit in *Blackwelder*," but the Court expressly declined to express any opinion on that argument.[33]

Instead, the Court stated twice that "the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case."[34] It also held that, "unless a party is entitled to an injunction pursuant to a statute, a party must establish the 'traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law' before a request for injunctive relief will be sustained."[35] The Court rounded out its discussion with substantial detail on how these prerequisites apply in a trespass case, a discussion that included the relative harms to the parties.[36]

Although *Levisa Coal* clarifies that certain equitable principles are central to preliminary-injunctive relief, the case does not express the sum total of factors that may apply in a particular case.

Although *Levisa Coal* clarifies that certain equitable principles are central to preliminary-injunctive relief, the case does not express the sum total of factors that may apply in a particular case. In addition to individual case factors, the rationales behind other permanent injunctive relief prerequisites may apply in the preliminary context as well. For example, a court may require some showing that future harm is likely if an injunction is to be issued to prevent such harm, and requested injunctive relief must be both specific and practical.[37]

Conclusion

Virginia litigants, in both federal and state court, must carefully apply these recent decisions to their facts. *Winter* and *Munaf* dictate that federal courts are to apply the four-factor test for preliminary-injunctive relief in a straightforward way. These cases also may signal that preliminary injunctions will be tougher to obtain because litigants may no longer use "sliding scales" to downplay one factor because of a strong position on another factor. The Virginia state-court landscape remains less certain than the federal one, but the Supreme Court of Virginia now has provided substantial guidance.

[1] As in § 8.01-628, the proper terminology in Virginia state court is to speak of "temporary" and "permanent" injunctions. "Preliminary" injunc-

tions are a federal term. For the sake of convenience, to avoid any confusion between "temporary" injunctions and the federal concept of "temporary restraining orders," and because the federal term is probably more widely known, however, this article refers to "preliminary" injunctions throughout.

2 550 F.2d at 194-95.

3 *See, e.g.*, *id.*; *accord Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991).

4 *Blackwelder*, 550 F2d. at 195; *Rum Creek*, 926 F.2d at 359.

5 *Sun Microsystems, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 333 F.3d 517, 526 (4th Cir. 2003).

6 *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001). Or, as prior cases stated in a more verbose manner, it is "'enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Blackwelder*, 550 F.2d at 195; *accord Rum Creek*, 926 F.2d at 359.

7 *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526 (quoting *Rum Creek*, 926 F.2d at 359).

8 *Blackwelder*, 550 F.2d at 195 n.3; *see also Direx Israel, Ltd v. Breakthrough Medical Corp.*, 952 F.2d 802, 808 (1991).

9 *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 173 (4th Cir. 1988).

10 *See, e.g.*, *Danville Historic Neighborhood Ass'n v. City of Danville*, 64 Va. Cir. 83, 83-84 (Danville 2004); *SmartMail Servs. v. Ellis*, 66 Va. Cir. 507 (Chesterfield 2003); *Hotjobs.com, Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36, 39 (Fairfax 2000); *Seniors Coalition, Inc. v. Senior Foundation, Inc.*, 39 Va. Cir. 344 (Fairfax 1996); *Ible v. Commonwealth*, 11 Va. Cir. 130, 131 (City of Richmond 1987). The Fourth Circuit treats preservation of the status quo as a primary purpose of preliminary injunctive relief, not as a factor in the test for whether such relief will be awarded. *See Capital Tool*, 837 F.2d at 172 ("the purpose of a preliminary, as opposed to a final, injunction 'is merely to preserve the relative positions of the parties until a trial on the merits can be held'") (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

11 274 F.3d at 868 (emphasis in original). Judge Widener wrote that he "share[d] the extent of Judge Luttig's dissatisfaction with our circuit's *Blackwelder* decision and cases following, even if my reasoning may not be exactly the same." *Id.*

12 *Id.* at 869-70 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975)). Judge Luttig went on to write that *Blackwelder* weakened the intellectual rigor and accountability of the judiciary, labeling it an example of "the intellectually lazier and jurisprudentially misbegotten enterprise of decision by personal policy preference." *Id.* at 871. In the end, he concluded that "the saving grace that I find for our bald departure from the standard repeatedly articulated by the Supreme Court is that our fealty to *Blackwelder* and *Rum Creek Coal* has been, at least in recent years, more rhetorical than real, as we have hewed closer and closer to the Supreme Court standard." *Id.*

13 *See In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526 (noting the criticism but holding that "we remain bound by the test as it has been consistently articulated and applied by prior appeals"); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 n.2 (4th Cir. 2002) (same).

14 *E.g.*, *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526; *see also Equity in Ath. v. United States Dep't of Educ.*, 291 Fed. Appx. 517, 520 (4th Cir. 2008); *HCI Techs., Inc. v. Avaya, Inc.*, 241 Fed. Appx. 115, 120-121 (4th Cir. 2007).

15 553 U.S. ___, 128 S.Ct. 2207 (2008).

16 *Id.* at 2219.

17 *Id.* (quoting *Omar v. Harvey*, 416 F. Supp. 2d 19, 23-24 (D.C. 2006)).

18 *Omar*, 416 F. Supp. 2d at 22, 29.

19 *See Munaf*, 128 S.Ct. at 2219.

20 129 S.Ct. 365 (2008).

21 *Id.* at 374 (emphasis added, citations omitted).

22 *Id.* at 375.

23 *Id.*

24 *Id.* at 376.

25 553 F.3d 292, 307 (4th Cir. 2009).

26 *Id.* at 298 (quoting *Winter*, 129 S.Ct. at 374). *Musgrave* remains the Fourth Circuit's last word on the matter, as of April 3.

27 *See Lorillard Tobacco Co. v. S&M Brands, Inc.*, 2009 U.S. Dist. LEXIS 40371 at 9-11 (E.D. Va. May 13, 2009) (acknowledging criticism of Blackwelder within the Fourth Circuit and that Munaf has changed the landscape by requiring demonstration of a likelihood of success on the merits); *Quesenberry v. Volvo Group N. Am., Inc.*, 2009 U.S. Dist. LEXIS 22468 at 27 (W.D. Va. Mar. 10, 2009) (referring to Winter as setting forth a "somewhat revised standard" that was then employed by the Fourth Circuit in *Musgrave); Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship*, 2009 U.S. Dist. LEXIS 2541 at 4-6, 37 (E.D. Va. Jan. 14, 2009) (beginning by stating the Blackwelder "balance-of-hardship" test, but citing and relying on both *Munaf* and *Winter* in denying a preliminary injunction).

28 276 Va. 44, 662 S.E.2d 44 (2008).

29 276 Va. at 52, 662 S.E.2d at 48. The Complaint was filed on June 10, and the preliminary injunction hearing took place on November 15 and 16. *See id.* at 51, 52, 662 S.E.2d at 47, 48. Such a delay certainly casts doubt on the need for pre-judgment injunctive relief.

30 *Id.* at 54-55, 662 S.E.2d at 49.

31 *Id.* at 55, 662 S.E.2d at 50.

32 *Id.*

33 *Id.* at 60 n.6, 662 S.E.2d at 53 n.6. Although some may lament that the "posture" of the appeal in *Levisa Coal* led the Court to conclude that it was "not necessary" for it to express an opinion on *Blackwelder*, *id.*, the developments in federal courts' preliminary injunction standards since June 2008 suggest that the Court's caution has rewarded practitioners by avoiding the state's highest court endorsing an analysis implicitly but clearly rejected by the United States Supreme Court.

34 *Id.* at 60, 61, 662 S.E.2d at 53. The Court labeled this statement both as "well established principles" and "the guiding principle." *Id.*

35 *Id.* at 61, 662 S.E.2d at 53; *accord Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc.*, 239 Va. 468, 471-72, 391 S.E.2d 304, 306 (1990) ("as a general rule, proof of irreparable damage is absolutely essential to the award of injunctive relief"). The Supreme Court of Virginia has occa-

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Strategies for Defending Against Non-Compete Litigation

by R. Scott Oswald and Jason Zuckerman

I. Introduction

To prevent losing valuable employees and trade secrets to competitors, a growing number of employers are requiring employees to sign non-compete agreements. In the current economic climate, it is fairly challenging for most persons to find work. Trying to find a job that is consistent with the limitations in a non-compete can be unduly burdensome and in some instances may preclude a laid-off worker from earning a livelihood, without receiving any compensation from the former employer whose restrictive covenant is preventing the employee from working. The good news for employees is that in Virginia, non-competes are critically examined and a broad-form agreement that is not narrowly tailored to serve the employer's business interest is likely unenforceable. In addition, an employer's effort to enforce an invalid non-compete can give rise to sanctions and tort liability. This article suggests strategies to consider when defending against a lawsuit seeking to enforce a non-compete.[1]

II. Is the Restrictive Covenant Valid?

In Virginia, courts enforce non-compete agreements only when "the contract (1) is narrowly drawn to protect the employer's legitimate business interest, (2) is not unduly burdensome on the employee's ability to earn a living, and (3) is not against public policy."[2] This analysis focuses primarily on the following factors:
(1) the temporal scope of the non-compete;
(2) the geographic scope of the non-compete; and
(3) the clarity and unambiguous nature of the non-compete.

In other words, an employer must narrowly tailor the time, function, and geographic restrictions in a non-compete agreement to protect nothing more than its legitimate business interest.[3]

A Non-Compete Must be Narrowly Drafted

In *Omniplex World Servs. Corp. v. United States Investigations Serv.*,[4] for example, the Virginia Supreme Court held that the non-compete provision in question was overly broad and unenforceable because the language of the restrictive covenant barred the employee from performing "any services… *for any other employer* in a position supporting OMNIPLEX's customer."[5] The employee provided "general administrative security support, monitoring alarms and intrusion detection system[s]" for her employer, Omniplex.[6] After a few months of employment with Omniplex, the employee received a job offer for an administrative assistant position with another company where her duties would be limited to arranging travel, and obtaining visas and passports.[7] Despite the obvious differences between the employee's new duties and those performed in her former position, Omniplex filed suit against her to enforce the non-compete. According to Omniplex, the employee violated the non-compete by working for an employer who supported an Omniplex customer.[8] The Court, however, rejected Omniplex's argument, finding that a covenant not to compete is enforceable only where it prohibits employees from competing directly with the former employer or prevents employment with a direct competitor, not where it prohibits a former employee from any form of employment, including work wholly unrelated to the employee's work for the former employer.[9] The Virginia Supreme Court reiterated this principle in *Motion Control Sys. Inc. v. East.,*[10] when it declared a non-compete unenforceable because it "imposed additional restraints which [were] greater than reasonably necessary to protect [the employer] in [its] legitimate business enterprise."[11] In particular, the non-compete restricted a former engineering manager from doing work for "any business that designs, manufactures, sells or distributes motors."[12] The Court found that the stated prohibitions could include a wide range of enterprises unrelated to "the business actually being protected," and there-

fore could not be enforced.[13] The message to be gleaned from these cases is that a Virginia court will not enforce a non-compete that fails to limit the scope of prohibited employment to those businesses that engage in activities that are "the same or similar" to those of the former employer.

B Non-Compete Must Not Be Unduly Burdensome on the Employee

To be enforceable, a non-compete must be reasonable in function, duration, and geographic scope. For example, Virginia courts likely would not enforce a restrictive covenant that forbids an employee from engaging in the business of importing cigars anywhere in the world due to the unlimited geographic scope of the provision.[14] Similarly, a non-compete that prohibits a former plumber from working in any "household" in 38 states is likely unenforceable because the restriction would unduly hinder the plumber's ability to earn a living.[15] Virginia courts will not enforce a restrictive covenant that is "unduly harsh, and oppressive in curtailing [an employee's] legitimate efforts to pursue her livelihood,"[16] including a non-compete that:

- applies for an unlimited time;
- extends the restrictions to areas where the employer once did business; [17]
- extends the restrictions to locations where the employer only intends to do business; or
- extends the geographic reach of the agreement to an area that is not coterminous with that of the business at the time of the agreement.[18]

In determining the reasonableness and enforceability of restrictive covenants, however, courts do not consider function, geographical scope, and duration as three separate and distinct issues,[19] but instead consider these limitations together. [20] Thus, courts will enforce an agreement that, for one year and without geographical limitations, forbids an employee from selling publications that compete with the employer's publication because it "limits the prohibited activities to those in direct competition" with the employer and "does not prohibit [the employee] from continuing to work in [his] field."[21] Conversely, Virginia courts will find a non-compete that lacks geographic limitation, applies a lengthy time restriction, and restricts "any business similar to the type of business conducted" by the corporation, unduly harsh and unenforceable. [22] While these examples provide guidance on what Virginia courts likely will consider reasonable, there is no hard and fast rule. Each case will turn on its own facts and the reasonableness of the restraint will, among other things, be determined by the position and seniority of the employee, the length of the employee's service, the nature of the industry, and the length of time during which any trade secrets giving rise to enforcement of a non-compete are expected to remain economically valuable to the employer.

C Non-Compete Must Not Be Contrary to Public Policy

A non-compete may be unenforceable where it goes against public policy, including where the non-compete imposes anticompetitive restraints on trade,[23] requires an employee to abandon the only occupation for which the employee is trained, or obliges an employee to relocate in order to be able to work. For example, in *Wheeler v. Fredericksburg Orthopedic Assocs., Inc.*,[24] the covenant restricted a doctor in a sub-specialty medical practice from practicing medicine within a thirty-five mile radius of his former employer. The court invalidated the restrictive covenant, finding that Fredericksburg residents would suffer irreparable harm if the former employee was not allowed to practice medicine within a thirty-five mile radius of the city. In general, a Virginia court is likely to find a non-compete that restrains trade and defeats competition void as against public policy and thus unenforceable under Virginia law.

III. Consider Filing a Declaratory Judgment Against the Employer

Where a former employer threatens to bring an action to enforce an invalid non-compete, consider striking first by filing a declaratory judgment action to declare the non-compete unenforceable. This strategy turns the table by forcing the employer to defend the

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validity of the non-compete and puts the plaintiff in the driver's seat. Prior to pursuing this strategy, however, it is important to evaluate potential counterclaims that the employer may bring once it is sued.

IV. Assert the "Unclean Hands" Defense

To challenge an employer's attempt to enforce a non-compete, an employee may rely upon the "unclean hands" doctrine. According to this doctrine, "he who asks equity must do equity, and he who comes into equity must come with clean hands."[25] In the context of non-compete litigation, this doctrine provides that a court of equity will not enforce a non-compete where there is evidence demonstrating that the employer engaged in wrongful or inequitable conduct with respect to the matter in litigation. This defense is often raised where an employer unilaterally changes the terms and conditions of the employment agreement or breaches the employment agreement by refusing to pay an employee for owed wages and bonuses.[26] Other types of employer conduct that might constitute unclean hands include sexual harassment, racial discrimination, termination without cause, and retaliation against an employee who discloses information about the employer's violation of a federal or state regulation.

V. Potential Tort Liability for Attempting to Enforce an Unenforceable Non-Compete

To apply maximum pressure on a former employee to comply with a non-compete, some employers routinely send demand letters to a former employee's new employer demanding that the new employer terminate its relationship with the employee. Where the employer is seeking to enforce an invalid non-compete, this tactic can give rise to tort liability.[27]

Virginia courts recognize a cause of action for tortious interference of a business or contractual relationship where there is an "intentional interference with contract inducing or causing a breach or termination of the relationship or expectancy."[28] The tort of tortious interference requires a plaintiff to establish: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.[29] While Virginia courts have not yet addressed a claim for tortious interference against a former employer, cases from other states hold that a former employer can be liable for tortious interference where a new or potential employer withdraws an offer of employment because the former employer, in bad faith, threatened to enforce a non-compete. In *Voorhees v. Guyan Mach. Co.*,[30] a West Virginia court recognized a claim for tortious interference where a former employee's new employer terminated his employment after receiving threats that the former employer "would go to the highest court of the land to enforce [the non-compete]," and the employee was terminated by his new employer. The *Voorhees* Court concluded that the extent of competition between the former and new employer was so minimal that the former employer lacked a legitimate business interest warranting enforcement of the non-compete. The employee recovered both compensatory and punitive damages for the harm he suffered as a result of the employer's improper threat to enforce an unenforceable non-compete.

VI. Potential Sanctions for an Employer Seeking to Enforce an Invalid Non-Compete

Virginia law prevents courts from revising or "blue-penciling" overly broad portions of a non-compete to sever unenforceable provisions. Thus, if one provision is invalid, the entire non-compete is invalid and unenforceable as a matter of law. If an employer seeks to enforce a non-compete that is obviously void, an employee may move for sanctions against the employer and its attorney for bringing a frivolous suit.

VII. Request the Inclusion of a Garden-Leave Provision

Before signing a non-compete agreement, an employee should request that the employer include a "garden-leave" provision in the non-compete. A garden-leave clause requires the employer to continue pay-

ing the former employee her salary and benefits in exchange for the employee's agreement not to compete with the employer. This arrangement benefits both the employer and the employee because it gives employers necessary protection against unfair competition yet ensures that employees are financially secure during the non-compete period. While Virginia courts have not yet addressed the enforceability of a garden-leave provision, other courts have held that a former employee is entitled to garden-leave pay where she is unable to find new employment because of a non-compete.[31]

VIII. Conclusion

In sum, an employee faced with a lawsuit to enforce a non-compete or faced with the threat of non-compete litigation has many options to challenge the enforceability of the non-compete, including the unclean hands defense. In addition, an improper attempt by an employer to enforce a non-compete can give rise to tort liability and sanctions. As a lawsuit to enforce a non-compete is typically accompanied by a motion for a preliminary injunction or a motion for a temporary restraining order, it is critical to quickly assess and implement options available to the employee to gain the upper hand in the litigation.

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[1] This article is intended only to provide basic information concerning non-compete litigation. It is not, nor is it intended to be, legal advice upon which you should rely or act.

[2] *Omniplex World Servs. Corp. v. United States Investigations Servs., Inc.*, 270 Va. 246, 249 (2005).

[3] *Simmons v. Miller,* 261 Va. 561, 581 (2001) (holding that analysis of the three factors "requires consideration of the restriction in terms of function, geographic scope, and duration."); *See also Advanced Marine Enters., Inc. v. PRC, Inc.*, 256 Va. 106, 119 (1998) (finding that eight-month duration informed the evaluation of both the geographic scope and function components of a restrictive covenant).

[4] *Omniplex*, 270 Va. at 250 (2005).

[5] *Id.*

[6] *Id.* at 248.

[7] *Id.*

[8] *Id.* at 254.

[9] *Id.* at 249.

[10] *Motion Control Sys., Inc. v. East*, 262 Va. 33, 36 (2001). *See also Modern Env't Inc. v. Stinnett*, 263 Va. 491, 493-94 (2002).

[11] *Id.*

[12] *Id.* at 38.

[13] *Id.* at 36, 38.

[14] *Id.*

[15] *Phoenix Renovation Corp. v. Rodriguez,* 439 F. Supp. 2d 510, 521-22 (E.D. Va. 2006)

[16] *Simmons v. Miller*, 261 Va. 561, 581 (2001) (finding a non-compete agreement to be unenforceable where the restriction was lengthy in duration, was without any geographical limitation, and was unduly harsh and oppressive in curtailing the employee's legitimate efforts to pursue her livelihood).

[17] *Roanoke Eng'g Sales Co. Inc. v. Rosenbaum,* 223 Va. 548, 553 (1982).

[18] *See e.g., Meissel v. Finley*, 198 Va. 577, 582 (1956) (affirming non-compete agreement that prohibited former partner from writing insurance or surety bonds for five years within 50-mile radius).

[19] *Omniplex,* 270 Va. at 255.

[20] *Id.*

[21] *Mkt. Access Int'l., Inc., v. KMD Media, LLC,* 272 Va. Cir. 355, 359 (Fairfax County 2006) (non-compete agreement that had no geographical limitation was still enforceable because it allowed employee to continue to work in his field).

[22] *Simmons*, 261 Va. at 581.

[23] *Omniplex*, 270 Va. at 249 (concluding that "[b]ecause such restrictive covenants are disfavored restraints on trade… any ambiguities in the contract will be construed in favor of the employee.").

[24] *Wheeler v. Fredericksburg Orthopedic Assoc.*, 44 Va. Cir. 399, 402 (1998).

[25] *Albert v. Albert*, 38 Va. App. 284, 299 (2002) (citing *Walker v. Henderson*, 151 Va. 913, 927-28 (1928)).

[26] *Parr v. Alderwoods Group, Inc.*, 268 Va. 461(2004) (Employer's breach of the integrated contract precluded it from enforcing the remaining provisions of the contract, including the non-compete provisions. Accordingly, employee was relieved of any obligations under the restrictive covenant).

[27] *Hilb, Rogal & Hamilton Co. of Richmond v. DePew*, 247 Va. 240 (1994) (articulating the rule that a tort action exists against one who intentionally interferes with another's contractual rights).

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Assigning Cross-Error in a "Failure to Rule" Situation: Waiver Possibility Presents Unexpected Danger

by Stephen R. McCullough, L. Steven Emmert, and Frank K. Friedman

Attorneys who pay any attention at all to appellate practice know that the appellant has to assign specific errors in the petition for appeal, or else the whole process will be cut painfully short. This requirement also applies to appellees who are dissatisfied with some aspect of the final judgment. They must assign cross-error to those unfavorable rulings, or else those issues on which they lost at trial become final.

Ordinarily, assigning cross-error is straightforward enough. In the typical scenario, one party has prevailed and the other party has filed a petition for appeal to the Supreme Court of Virginia. If the appellee's counsel believes the circuit court or the Court of Appeals has made a prejudicial error, he must assign cross-error in the brief in opposition to bring that error to the attention of the Supreme Court, despite the fact that his client prevailed below. Va. S. Ct. R. 5:18(b). If no cross-error is assigned, the court will not consider the issue on appeal. *Id.; Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000) ("[I]f a matter is appealed and a party fails to preserve a challenge to an alleged error by the trial court by assignment of error or cross-error, the judgment of the trial court becomes final as to that issue."). For example, the circuit court may have ruled favorably on the question of liability, but erred in some respect in calculating damages. Alternatively, the Court of Appeals may have explicitly rejected one theory, but affirmed the circuit court's judgment on a second theory. In those instances, where there is a *tangible ruling* of the court that goes against the prevailing party, that ruling clearly calls for an assignment of cross-error.[1]

But the Supreme Court sometimes holds that a prevailing party must make an assignment of cross-error when a circuit court or the Court of Appeals has simply declined or "failed to rule" on a particular point of law. *See Horner v. Dept. of Med. Health*, 268 Va. 187, 194, 597 S.E.2d 202, 206 (2004), *Loving v. Hayden*, 245 Va. 441, 445, 429 S.E.2d 8, 11 (1993) and *Wells v. Shoosmith*, 245 Va. 386, 288 n.1, 428 S.E.2d 909, 910 n.1 (1993). This situation can arise in seemingly harmless settings. Attorneys often present their cases based on a number of alternative arguments or theories. A circuit court or the Court of Appeals often will rule on one of the theories and decline to rule on the others. In other words, the court from which the appeal initiated has not *rejected* the alternative theories; it simply declined to rule because it saw no need to do so, having already made a case-dispositive ruling. The failure to assign cross-error in this situation can prove fatal to the party who prevailed at trial.

Wells v. Shoosmith illustrates this reading of the cross-error rule. *Wells* involved a dispute over the validity of leases to land. The property owner argued that the description of the land in the leases was so vague that it made the leases invalid. He also contended that the documents were in fact mere licenses and that the licenses had been revoked. *Id.* at 387, 428 S.E.2d at 910. The trial court ruled in favor of the owner on the first ground, and found it unnecessary to rule on the second issue. On appeal, the Supreme Court reversed the trial court's ruling on the vagueness ground. To the owner's dismay, it then ruled that the revocation theory was waived because the chancellor had not ruled on the issue and the land owners had "failed to assign cross-error to the chancellor's failure to rule for them on this issue." *Id.* at 391-92, 428 S.E.2d at 913. The case was not returned to the trial court to address the undecided issues.

The same result occurred recently in *Virginia Baptist Homes v. Botetourt County*, 276 Va. 656, 668 S.E.2d 119 (2008), in which the trial court made

detailed and sweeping findings that a retirement community was neither "religious" nor "benevolent." The circuit court, having disposed of the case, did not reach the separate question of whether the community was "not for profit." When the Supreme Court overturned the trial court's decision, it also ruled that it would not address the alternative ground of whether the home was a nonprofit. The Court reasoned that there was no assignment of cross-error by the County with respect to a "lack of finding" by the trial court on this issue. Therefore, the Court reversed the trial court and entered final judgment, without remanding the case to the trial court to resolve whether the home was a nonprofit. *Id.* at 669, 668 S.E.2d at 125.

It is, of course, fairly standard procedure that the appellant—the loser in the circuit court—must assign error to the trial court's failure to rule. *Flippo v. CSC Assoc. III, L.L.C.*, 262 Va. 48, 60-62, 547 S.E.2d 216, 223-25 (2001); *Nelson v. Davis*, 262 Va. 230, 235 n.3, 546 S.E.2d 712, 716, n.3 (2001). For example, if the judgment rests on three grounds, challenging only one of those grounds will not suffice to obtain reversal because the other two grounds upon which the judgment rests would still remain. This is different, however, from requiring the *prevailing* party to also claim error when the lower court stops short of ruling on every possible issue, for purposes of judicial economy.

But the Court does not always require cross-error when a lower court fails to rule. Two decisions illustrate this phenomenon, one very recent and one more distant. In *Nassif v. Bd. of Supervisors of Fairfax County*, 231 Va. 472, 480, 345 S.E.2d 520, 525 (1986), the County argued that when the County appealed, "Nassif should have cross-appealed and assigned cross-error to the trial court's failure to rule favorably on the other asserted basis for challenging the assessment." The Court rejected this argument as unpersuasive, noting that it would "serve no useful purpose" to require a victorious party to assign cross-error to the trial court's failure to rule in the victor's favor on alternative, redundant, grounds:

> When this Court rules that the judgment of a trial court is erroneous it does not matter whether that judgment is erroneous for one reason or ten; it is no longer viable. Unless we say otherwise, the slate is wiped clean, with the result that on remand the parties begin anew. It would serve no useful purpose, we think, to require a prevailing party to assign error to his failure to win on all points in order to protect his right to a full and complete trial, should his apparent victory be reversed and the case remanded.

Id. at 480-81, 345 S.E.2d at 525. More recently, in *Burwell's Bay Improvement Ass'n v. Scott*, 277 Va. 325, 672 S.E. 2d 847(2009), a dispute over title to land, the Court reversed the judgment of the trial court, but—noting that the trial court had not ruled on the alternative ground of adverse possession—the Court simply remanded the case to the trial court for consideration of this remaining issue. 277 Va. at 322, 672 S.E. 2d at 851. There was no cross-error assigned to the failure of the trial court to rule, and no discussion by the Court of such a requirement. The Court's treatment of the "failure to rule" in *Nassif* and *Burwell's Bay* is hard to square with the rulings in *Wells* and *Virginia Baptist Homes*.

But the Supreme Court sometimes holds that a prevailing party must make an assignment of cross-error when a circuit court or the Court of Appeals has simply declined or "failed to rule" on a particular point of law.

The failure to assign cross-error in this situation can prove fatal to the party who prevailed at trial.

The "failure to rule" waiver interpretation of the cross-error rule seen in *Wells* and *Virginia Baptist Homes* is counterintuitive on several levels. For a party who has prevailed, it is not obvious—as the term "cross-error" suggests—that a failure to rule is "error." Indeed, the Supreme Court repeatedly admonishes Virginia courts not to issue advisory opinions. *See, e.g., City of Fairfax v. Shanklin*, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964). A circuit court or the Court of Appeals could reasonably conclude that, because it is ruling favorably on one theory, it need not issue an advisory (or certainly unnecessary) opinion on the remaining theories advanced by that litigant.[2] If

Cross-Error — cont'd on page 14

Cross-Error *cont'd from page 13*

this practice is sound jurisprudence, and no error has been committed, counsel may understandably believe that an assignment of cross-error is not necessary because no error is present.

There are other troublesome aspects to requiring the prevailing party to assign cross-error in a "failure to rule" situation. Virginia law provides that a lower court should not be reversed when it was correct, albeit for the wrong reason; the Supreme Court has said as much on many occasions. *See, e.g., Robbins v. Grimes*, 211 Va. 97, 100, 175 S.E.2d 246, 248 (1970) ("We do not hesitate, in a proper case, where the correct conclusion has been reached but the wrong reason given, to sustain the result and assign the right ground.") This is the well-established "right for the wrong reason" doctrine. *Mathy v. Comm.*, 253 Va. 356, 362, 483 S.E.2d 802, 805 (1997); *Doswell Ltd. Ptnr. v. Virginia Elec. & Power Co.*, 251 Va. 215, 225, 468 S.E.2d 84, 90 (1996); *Richmond, F & P.R.R. v. Metro. Wash. Airports Auth.*, 251 Va. 201, 214, 468 S.E.2d 90, 98 (1996); *Hogg v. Plant*, 145 Va. 175, 182, 133 S.E. 759, 761 (1926). In fact, in these "right for the wrong reason" cases, had the court invoked the "failure to assign cross-error" rule, then arguably the result would have been a waiver rather than an affirmance. These two doctrines are fundamentally at odds with each other, and unfortunately, appellate litigants have no way to reliably predict which one the Supreme Court will apply in a given appeal.

Reversing a lower court that reached the correct result also ignores the mandate of the General Assembly that "no judgment shall be arrested or reversed" "[f]or any … defect, imperfection, or omission in the record, or for any error committed on the trial," "[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached." Code § 8.01-678. This language addresses a situation where the trial court reached the correct result on an erroneous rationale.

Moreover, the purpose served by requiring cross-error in a "failure to rule" situation is not clear. Because a trial involves a significant expenditure of resources, and the judgment of a court is presumed to be correct,[3] a party who challenges that judgment as wrong is quite properly forced to point out with specificity where the error lies. That is why the party who seeks to *reverse* the lower court must assign error to a ruling. Ordinarily, application of cross-error falls within that logic: the party (although prevailing below) seeking to disturb an aspect of the judgment must show why the judgment is wrong. But a prevailing party who argues that the lower court was correct, although under a different rationale, is not seeking to disturb anything; he seeks to *preserve* the judgment below.

An additional source of confusion is that the Court of Appeals does not require counsel to assign cross-error in a "failure to rule" situation. The court has decisively rejected such a requirement. *See Tyszcenko v. Donatelli*, 53 Va. App. 209, 224 n.11, 670 S.E.2d 49, 57 n.11 (2008) ("requiring the *prevailing* party to object to the trial court's choice of one asserted ground for awarding the requested relief over another does not comport with our sense of logic or reason") (emphasis in original). Thus, in appeals from workers' compensation or domestic relations cases, no assignment of cross-error is required when a circuit court declines to rule on an alternative theory. Similarly, in *Driscoll v. Comm.,* 14 Va. App. 449, 451-52, 417 S.E.2d 312, 313 (1992), the Court of Appeals observed: "An appellee is subject to the limitations of Rule 5A:18 only where it asserts an error that seeks to *reverse* a judgment." (emphasis supplied)

In this respect, the Court of Appeals is in accord with both the United States Supreme Court and the Fourth Circuit. *See, e.g.*, *Catawba Indian Tribe of S.C. v. City of Rock Hill*, 501 F.3d 368, 372 (4th Cir. 2007) (noting that the court was "entitled to affirm "the district court on any ground that would support the judgment in favor of the party below" and that "[i]t is well accepted . . . that without filing a cross-appeal . . . , an appellee may rely on any matter appearing in the record in support of the judgment below.") (citing *California v. Rooney*, 483 U.S. 307, 311 (1987) and *Blum v. Bacon*, 457 U.S. 132, 137 n.5. (1982)).

Finally, there are practical difficulties with the "failure to rule" cross-error requirement. First, it is not always easy to force overworked judges to issue surplus

decisions. Second, the waiver rule will lead to inefficient and unjust results where Circuit Court judges, who have ruled on carefully briefed dispositive issues, will then be asked to "bullet-proof" the other five remaining issues without such careful briefing or discussion. Indeed, if assigning error to a failure to rule is required, does it constitute waiver to fail to ask the trial court to rule on the additional, expensive, non-essential issues? Trial judges may well bristle at requests from winning litigants who, having already won the case, ask for redundant victories on alternative defenses or theories of recovery.

Since there is no clear delineation between waiver cases and right-for-the-wrong-reason holdings, this situation regrettably calls for a bit of defensive lawyering. Unless the Supreme Court reconsiders this interpretation of the rule, counsel defending a judgment where the circuit court or the Court of Appeals has failed to rule on a material issue should assign cross-error to that failure to rule to preserve the issue in the Supreme Court. Otherwise, a hard won victory might turn into an unexpected defeat.

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[1] Similarly, if the prevailing party objects to the admissibility of certain evidence and the evidence is admitted, that is a tangible ruling that requires an assignment of cross-error.

[2] *See generally Karsten v. Kaiser Foundation Health Plan*, 36 F.3d 8, 11 (4th Cir. 1994) (discussing the tension between rulings in the alternative and the prohibition on courts issuing advisory opinions).

[3] *See, e.g., Viney v. Commonwealth*, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005).

Blackwelder *cont'd from page 7*

sionally spoken of irreparable harm and the lack of an adequate remedy at law in a way that makes them appear distinct. *E.g.*, *Wright v. Castles*, 232 Va. 218, 224, 349 S.E.2d 125, 129 (1986) ("Injunction is an extraordinary remedy, available only in equity. To obtain the injunction, Wright had to prove that he would suffer irreparable harm if the injunction were not granted and that he did not have an adequate remedy at law."). But there is a close relationship between these two requirements that can make them difficult to distinguish. *See, e.g.*, *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983) ("In traditional chancery practice, lack of proof of irreparable harm is generally fatal. A court of equity will not issue an injunction, an extraordinary remedy, if the petitioner has an adequate remedy at law for the redress of his injury."); *Am-Cor, Inc. v. Stevens*, 56 Va. Cir. 245, 250 (Warren 2001) ("The concept of irreparable harm is premised on the lack of an adequate remedy at law."); *Christian Defense Fund v. Winchell & Assocs., Inc.*, 47 Va. Cir. 148, 149 (Fairfax 1998) (relying on *Blackwelder* and commenting that "The principal inquiry regarding plaintiff's 'irreparable harm' is whether an adequate remedy exists at law.").

[36] *See id.* at 61-62, 662 S.E.2d at 53-54; *id.* at 61, 662 S.E.2d at 53 ("if 'the loss entailed upon [the trespasser] would be excessively out of proportion to the injury suffered by [the owner], or a serious detriment to the public, a court of equity might very properly ... deny the injunction and leave the parties to settle their differences in a court of law") (bracketed alterations in opinion).

[37] *See Perel v. Brannan*, 267 Va. 691, 701, 594 S.E.2d 899, 905 (2004) (to obtain an injunction, the court must be able "to precisely define the specific actions to be performed," and the decree must not "be of the type whose enforcement would 'unreasonably tax the time, attention and resources of the court.'") (citing *Flint v. Brandon*, 32 Eng. Rep. 314 (1803), which "dismiss[ed] a bill seeking specific performance of a covenant to fill a pit" partly out of concern that "'a question may arise, whether the work is sufficiently performed'"); *WTAR Radio-TV Corp. v. Virginia Beach*, 216 Va. 892, 895, 223 S.E.2d 895, 898 (1976) (obtaining an injunction "to prevent the future commission of an anticipated wrong" depends on the nature of the wrong and on a factual showing of a "likelihood" that it will be committed; there must be "reasonable cause to believe that the wrong is one that would cause irreparable injury" and that "the wrong is actually threatened or apprehended with reasonable probability."); *Thompson v. Commonwealth*, 197 Va. 208, 212-13, 89 S.E.2d 64, 67 (1955) (to obtain an injunction related to a contract, the "nature of the contract" must be "such that specific enforcement of it will not involve too great practical difficulties."); see also *Chattin v. Chattin*, 245 Va. 302, 306, 427 S.E.2d 347, 350 (1993) (same).

Negligent Hiring of Independent Contractors: Re-examining *Philip Morris, Inc. v. Emerson*

by Timothy E. Kirtner and Ann L. Bishop

One of your long-standing clients calls you and relates his fears that his company is about to face financial ruin because a trucking company that he hired to transport his business's freight crashed while transporting that freight—seriously injuring several people. He admits he knew that the trucking company had a shoddy safety record when he hired them. You ask whether the trucking company signed the independent-contractor agreement you prepared for him last week. Your client, calming down, says "Yes." Assured of this, you advise that even if the trucking company's poor safety record should have deterred your client from hiring it in the first place, he has little to be concerned about under Virginia law.

In the back of your mind, however, you recall that the decision in *Philip Morris, Inc. v. Emerson*[1] recognized a cause of action for the negligent hiring of an independent contractor. But it has always been your impression that this holding was limited to cases involving extremely hazardous activities or materials. You ask your client what the truck was carrying. He says that it was just hauling his company's cardboard boxes. "That is not a particularly hazardous cargo," you think to yourself, and confidently tell your relieved client that he is in the clear.

"Not so fast my friend."[2]

A recent opinion by the United States District Court for the Western District of Virginia has made it clear that *Philip Morris* applies more broadly than some may have assumed.[3] In *Philip Morris,* the defendant-employer hired a woefully unqualified independent contractor to dispose of chemicals that the contractor had not identified. Those chemicals turned out to be highly toxic. When released by the contractor during its disposal efforts, they killed one person and injured several others. Among the legal theories asserted against the defendant-employer was negligent hiring of the independent contractor.

Although the chemicals handled by the independent contractor in *Philip Morris* were decidedly of a dangerous and highly toxic nature, the *Philip Morris* Court found that the activity in which the contractor was engaged was *not* ultra-hazardous. Unlike blasting cases—where the severity and extent of a blast cannot be predicted or controlled with any certainty—the risk in Philip Morris could have been eliminated by using reasonable care.[4] Thus, rather than limiting its holding to "near ultra-hazardous activities" or "extremely hazardous activities," the *Philip Morris* court recognized a more general cause of action for negligent hiring of an independent contractor. This action, based on the Restatement (Second) of Torts § 411 (1965), holds a party liable for negligent hiring of an independent contractor where the employer fails to "exercise reasonable care to employ a competent and careful contractor . . . to do work which will *involve a risk of physical harm unless it is skillfully and carefully done.*" (emphasis added).[5] The *Philip Morris* court concluded that the facts of that case sufficiently supported a cause of action for the negligent hiring of an independent contractor.

In the years since its issuance in 1988, the *Philip Morris* decision has been cited in general negligent-hiring and negligent-retention cases. But until last year, no reported opinions of Virginia state or federal courts are known by this author to have applied *Philip Morris* in another case involving the negligent hiring of an *independent contractor*. The decision in *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp 2d 630 (W. D. Va. 2008), changed this.

In *Jones*, plaintiff Winford Dallas Jones was driving a tractor-trailer southbound on Interstate 81 when a northbound tractor-trailer crossed the median and struck his vehicle head-on. The northbound driver was operating a tractor-trailer owned by a Georgia trucking compa-

ny, AKJ Enterprises, Inc. Defendant C.H. Robinson Worldwide, Inc., a third-party logistics provider, had hired AKJ to transport a load of cable reels for one of C.H. Robinson's customers, Coleman Cable, Inc., from North Carolina to Massachusetts. Like most of the trucking companies in C.H. Robinson's "stable" of carriers, AKJ had executed an independent-contractor agreement with C.H. Robinson.

Jones brought a negligent-hiring claim against C.H. Robinson, asserting that it knew or should have known that AKJ had a history of hiring incompetent and unsafe drivers. Among other things, AKJ had violated federal regulations by failing to investigate its drivers before dispatching them on loads. Indeed, the driver that AKJ had hired to haul the subject load had only recently obtained her commercial driver's license, had not been properly investigated by AKJ prior to being dispatched, and was not competent to haul a long-distance, time-sensitive load. Her co-driver, for his part, had had his commercial driver's license revoked.

On cross-motions for Summary Judgment, the District Court analyzed the *Philip Morris* decision and Section 411 of the Restatement (Second) of Torts. The *Jones* court concluded that, under Virginia law, a party could be liable for negligently hiring an independent contractor if the work to be performed was such that it "involve[d] a risk of physical harm unless it is skillfully and carefully done." The Court further concluded that operating a tractor-trailer on public highways was just such work—regardless of the character of the cargo being transported.

In so doing, the Court observed that illustration five to Section 411 presupposes that the transport of cargo by truck *would* fall within the scope of the rule.[6] The Court also considered cases from other jurisdictions, which had applied Section 411 to cases where injuries or damages were caused during the transport of cargo by tractor-trailers.[7] Finally, the Court noted that the "likelihood of [the] risk" of physical harm was reflected in the federal government's licensing requirements for commercial truck drivers.

In evaluating negligent-hiring claims, Section 411 and its associated comments—upon which the *Philip Morris* and *Jones* Courts relied—take several factors into consideration, including the nature of the employment, the nature of the activity giving rise to a claim, and the sophistication of the employer. This provides some flexibility for courts to limit the application of Section 411. A court may, for example, disallow recovery under Section 411 where an inexperienced or unsophisticated employer hires an incompetent independent contractor but lacks the knowledge, resources, and/or ability to reasonably investigate the contractor. Likewise, a court may disallow recovery where the activity, though leading to an actual injury, was not of such a nature that the particular injury reasonably could have been anticipated as a likely consequence of it.

In considering Jones's negligent-hiring claim at the summary-judgment stage, however, the District Court had before it evidence that C.H. Robinson advertised that it placed millions of loads on the nation's highways each year and was one of the largest and most successful brokers in the world. It was not an unsophisticated company.

There also was substantial evidence of AKJ's poor safety history—much of which was publicly available via the Federal Motor Carrier Safety Administration's website. And C.H. Robinson's own internal records documented AKJ's poor safety record in past work for the company. In short, there was ample evidence of AKJ's prior accidents, regulatory violations, and equipment or vehicle breakdowns. As measured by the Federal Motor Carrier Safety Administration, AKJ ranked in the bottom 3% of carriers nationwide in regard to driver and vehicle safety.

Although C.H. Robinson had access to this public and private information, it used only a small amount of it in deciding whether to do business with a particular trucking company. Moreover, there was evidence that AKJ continued its unsafe hiring practices on the subject load—as noted above, the driver was inexperienced and her co-driver had a revoked driver's license. On these facts, applying the holding in *Philip Morris*, the *Jones* court found that the plaintiff had set out a viable claim for negligent hiring of an independent contractor.

The implications of the *Jones* and *Philip Morris* decisions are clear: the independent-contractor relationship will not insulate employers from liability for injuries caused by their independent contactors, at least where the work in question reasonably could be

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Non-Compete Litigation *cont'd from page 11*

28 *Signature Flight Support Corp. v. Landown Aviation Ltd., P'ship*, 2008 U.S. District Lexis 93715 at *6-7 (E.D. Va. 2008) (dismissing plaintiff's tortious interference with contract claim because plaintiff did not allege an intentional interference of contract); *See also Chaves v. Johnson* , 230 Va. 112, 120 (1985) (recognizing cause of action for tortious interference).

29 *Durrette Bradshaw, P.C. v. MRC Consulting, L.C.*, 277 Va. 140, 145 (2009) (citing *Chaves v. Johnson* , 230 Va. 112, 120).

30 *Voorhees v. Guyan Machinery Co.*

Negligent Hiring *cont'd from page 17*

anticipated to cause injury if not performed carefully. To be sure, much of the work for which your clients will employ independent contractors is not likely to bring the aforesaid decisions into play, because of the low risk to unrelated third parties associated with the work. But many of your clients use trucking companies or brokers, such as C.H. Robinson, to transport their goods. And still others may hire contractors for different types of work which, upon review, may be found to involve "a risk of physical harm unless it is skillfully and carefully done." Thus, it might be worth considering whether to proactively address this potential issue with your other clients.

In the meantime, it is perhaps time for you to call your client back and inform him that there could be a problem after all . . .

Timothy E. Kirtner is a member of and Gilmer, Sadler, Ingram, Sutherland & Hutton, LLP, in Pulaski, Virginia. Ann L. Bishop is an associate at the firm.

1 235 Va. 380, 368 S.E.2d 268 (1988).

2 Lee Corso – ESPN College Gameday

3 *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp 2d 630 (W.D. Va. 2008).

4 *Philip Morris,* 235 Va. at 406.

5 *Philip Morris*, 235 Va. at 400.

6 Section 411 describes a hypothetical builder who employs a trucking company to haul materials to a jobsite,. The trucking company is known to have old, poorly maintained trucks and inexperienced drivers. One such driver causes injuries while transporting cargo for the builder. The illustration concludes that the hypothetical builder is liable for injuries caused by the trucking company to third parties where the injuries were the result of one of the conditions of which the builder was aware.

7 *L. B. Foster Co. v. Hurnblad*, 418 F.2d 727 (9th Cir. 1969); *Hudgens v. Cook Indus., Inc.*, 521 P.2d 813 (Okla. 1973); and *Puckrein v. ATI Transport, Inc.*, 186 N.J. 563, 897 A.2d 1034 (N.J. 2006).

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