



A Brief Review of the Doctrine of Harmless Error

by George A. Somerville
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Trial judges are human. They sometimes make mistakes. When the mistake involves an erroneous legal ruling, the error may be so significant as to require a new trial. Or the error may be so insignificant as to be considered “harmless,” so that no new trial is needed. Deciding when a legal error is harmless is, in itself, an important legal issue.

In *Special v. West Boca Medical Center*, 2014 Fla. LEXIS 3320, 2014 WL 5856384 (Fla. Nov. 13, 2014) (motion for rehearing pending), a sharply divided Supreme Court of Florida announced that “the test for harmless error requires the beneficiary of the error to prove that there is no reasonable possibility that the error complained of contributed to the verdict.” *Id.*, 2014 Fla. LEXIS 3320 at *2. The Court thereby adopted for all civil cases the same harmless error standard that it previously had applied in criminal cases (*State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)). *Special* is likely to ignite debate among courts and appellate attorneys regarding appropriate harmless-error standards. Any attorney who is arguing—or anticipating discussing—harmless-error questions will benefit from studying the competing opinions in that case, which contain detailed and scholarly discussions of the nature, functions, and purposes of harmless error. As shown below, Virginia law could benefit

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from guidance on the subject.

Harmless error analysis in Virginia begins with Va. Code § 8.01-678. This prohibits reversal of a case where the complaining party has received a “fair trial” and “substantial justice has been reached”:

When 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, no judgment shall be arrested or reversed:

...

2. For any other defect, imperfection, or omission in the record, or for any error committed on the trial.

See also, e.g., Harman v. Honeywell Int’l, Inc., 288 Va. 84, 94, 758 S.E.2d 515, 521 (2014) (“The circuit court’s error is presumed to be prejudicial unless it plainly appears that it could not have affected the result”) (citations and quotation marks omitted); *Dandridge v. Marshall*, 267 Va. 591,

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Letter from the Chair • Timothy Edmond Kirtner

My friend, mentor, and partner, Robert “Bob” Jett Ingram, died on September 29, 2014. Bob was one of the old lions of the Bar—a lawyer’s lawyer or, more precisely, a trial lawyer’s lawyer. Bob served the Bar with distinction in many roles throughout his 57-year legal career. Of particular significance in the context of this publication, is the fact that he served as the first Chairman of the Litigation Section’s Board of Governors when the Section was formed in 1981.

Bob would have envied the opportunity to write a “Letter from the Chair.” As do most great trial lawyers, Bob loved an audience—in person was preferred, but, in a pinch, a virtual audience reading his eloquent prose would do.

I learned much from Bob Ingram—about law practice, about litigation, about how to try a case, about the satisfaction that comes from competently trying a case (regardless of outcome), and about people. Ultimately, though, it was what he taught me about people that has mattered most in my day-to-day practice. Bob studied people because he cared about people. He studied them to learn something about them that allowed him to connect with them; allowed him to communicate that he was interested in them and what concerned them. This was true regardless of station in life—from the courthouse janitor to the circuit judge. No detail of life was too small to spark a half-hour conversation, during which Bob made you feel as if you were the only person in the world.

That ability to “connect” served Bob well with juries. But before he arrived at the courthouse, before that deep baritone voice softened by that sweet South Boston accent ever began echoing in the courtroom, something more important had happened. Bob had demonstrated to his client that

he cared about them and their case, that he was their advocate, their champion, their lawyer. It mattered a great deal to Bob to be someone’s lawyer.

He taught those he mentored that it should matter deeply to us as well. Sometimes we think, and even say, that we would be better lawyers or litigators if our clients would just get out of the way and let us do our jobs. I don’t think Bob could have imagined separating the job of litigating from the job of client relations—they were all part of being a lawyer. As litigators, we tend to measure ourselves by our performances and successes in the courtroom. Courtroom war stories are badges of honor and no one could tell one better than Bob Ingram. But Bob also understood, and taught, that there was much more to the profession than just being a courtroom advocate.

The proof that Bob’s approach to being a lawyer was right was, as is sometimes said, in the pudding . . . and the cakes, and the pies, and the cards that his former clients brought him over the decades. In truth, there were no *former* clients—only clients; once their lawyer, always their lawyer. Bob made that kind of lasting impression on them, on the Bar, and particularly on those of us who knew and admired him. ♦

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597, 594 S.E.2d 578, 582 (2004) (same); *City of Staunton v. Aldhizer*, 211 Va. 658, 666, 179 S.E.2d 485, 491 (1971) (an appellant who “has pointed out an error of a substantial character ... is entitled to have it corrected if it appears from the record that there is reasonable probability that it did him any harm. There is no presumption that error is harmless”) (citation omitted).

Applying Code § 8.01-678, Virginia’s appellate courts have adopted a two-tiered harmless-error analysis. Choice of the applicable standard does *not* depend on whether a case is civil or criminal. Rather, it turns on whether the error is of constitutional proportions:

The standard for constitutional harmless error is well settled. When a federal constitutional error is involved, a reversal is required unless the reviewing court determines that the error is harmless beyond a reasonable doubt. . . . In order to determine whether the error was harmless beyond a reasonable doubt, we must ask whether there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction. . . . Finally, the original common-law harmless error rule [places] the burden on the beneficiary of the error either to prove or disprove that there was no injury or to suffer a reversal of his erroneously obtained judgment. . . .

Grant v. Commonwealth, 54 Va. App. 714, 724-25, 682 S.E.2d 84, 89 (2009) (emphasis in original; citations and quotation marks omitted). *See also, e.g., Zektaw v. Commonwealth*, 278 Va. 127, 139 41, 677 S.E.2d 49, 56 (2009).

The Virginia standard for “non-constitutional harmless error” is stated in *Clay v. Commonwealth*:

Virginia’s appellate courts have adopted a two-tiered harmless-error analysis. Choice of the applicable standard does not depend on whether a case is civil or criminal. Rather, it turns on whether the error is of constitutional proportions.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. . . . If so, or if one is left in grave doubt, the conviction cannot stand.

262 Va. 253, 260, 546 S.E.2d 728, 731 32 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). Although *Clay* was a criminal case, the Court of Appeals has applied the same standard in civil cases. *Driscoll v. Hunter*, 59 Va.App. 22, 36, 716 S.E.2d 477, 483 (2011); *Andrews v. Creacey*, 56 Va.App. 606, 625, 696 S.E.2d 218, 227 (2010)).

The Supreme Court of Virginia has never explicitly held that the *Clay* harmless-error standard applies in civil cases, but several

Justices have assumed so in their dissenting opinions. *See Campbell County v. Royal*, 283 Va. 4, 33, 720 S.E.2d 90, 105 (2012) (Powell, J., dissenting); *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 541 42, 636 S.E.2d 416, 429 (2006) (Agee, J., dissenting in part). *See also Sheets v. Castle*, 263 Va. 407, 412, 559 S.E.2d 616, 619 (2002) (majority opinion, citing *Clay* as part of its explanation why the denial of a petition for appeal typically has no precedential value). *Cf. Lawrence v. Commonwealth*, 279 Va. 490, 497, 689 S.E.2d 748, 752 (2010) (“This Court has held that nonconstitutional error is harmless if the reviewing court can be sure that the error did not influence the jury and only had a slight effect”).

(*Lawrence* is a Sexually Violent Predator Act case, which technically is a civil proceeding, subject to a clear and convincing evidence standard of proof (*Shivaee v. Commonwealth*, 270 Va. 112, 613 S.E.2d 570 (2005)), but obviously has strong criminal overtones.)

To summarize: All errors are presumed to be prejudicial and reversible, and the burden is on the error's beneficiary to prove that it was harmless. Where constitutional error is concerned, the beneficiary of the error must prove harmlessness beyond a reasonable doubt. The standard that applies to other cases is more nebulous. In such cases, an error will be deemed harmless if "the conviction is sure" that the error did not influence the jury "or had but slight effect." An error is reversible if the appellate court "cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error." That standard may perhaps be understood as a restatement of the "plainly appears" test of Va. Code § 8.01-678; but it originated in the federal *Kotteakos* decision, and the Court has never stated that the "fair assurance" standard is connected to § 8.01-678.

In *Special v. West Boca Medical Center*, *supra*, the Supreme Court of Florida announced a harmless error standard, applicable in civil as well as criminal cases, that requires the beneficiary to prove that there is "no reasonable possibility" that the error contributed to the verdict. Counsel in cases before the Supreme Court of Virginia should be alert for opportunities to ask that Court to adopt a similarly unified standard—or at a minimum to articulate more clearly the standard that applies to civil cases. The Court actually may welcome an opportunity to put to rest the notion that its actual standard, in practice, is nothing more than a "we know it when we see it" test. ♦

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A Practical Guide to Mental Commitments & Judicial Authorization of Medical Treatment in Virginia

Part 2: Judicial Authorization for Treatment

by Kristine H. Smith

This article is Part 2 of “A Practical Guide to Mental Commitments & Judicial Authorization of Medical Treatment in Virginia.” Part 1—authored by James C. (“Jim”) Martin, and published in the Summer 2013 edition of *Litigation News*—focused on mental commitments in Virginia, both voluntary and involuntary. This article will focus on the Virginia statutes and procedures for obtaining judicial authorization for medical treatment¹ when an adult patient is incapable of making an informed decision about such care. The article’s aim is two-fold: (1) to give attorneys a general resource when assisting clients involved in the judicial-authorization-of-treatment process, and (2) to suggest ways to resolve those issues efficiently.

General Overview - Medical Decision-Making

In most cases, it is the patient himself who seeks medical attention, weighs the risks and benefits of the recommended treatment, and decides whether to consent to it. As the patient’s illness or condition progresses, health care providers may advise about invasive medical treatments—e.g., surgery, amputation, chemotherapy or radiation. Such advice may include a discussion about whether to administer, withhold, or withdraw life-prolonging or life-sustaining measures. When a patient cannot make an informed decision regarding proposed treatment, however, hospital personnel must look to other sources for consent and authorization.² These sources include written instruments, substitute decision-makers, and judicial authorizations.

Advance Directives Under the Virginia Health Care Decisions Act (“HCDA”)

The Virginia Health Care Decisions Act (Code §§ 54.1-2891 *et seq.*) allows an individual who is, at the time, capable of making and communicating informed decisions about health care to describe in writing his wishes regarding health care. This instrument, an “advance directive,” can later be used in the event the “declarant” becomes incapable of making medical decisions. The declarant can describe health care that he agrees to receive as well as health care that he does not agree to receive. An advance directive also can describe the declarant’s end-of-life treatment wishes. In addition, advance directives allow the declarant to appoint an agent to make medical decisions when the declarant becomes unable to do so.

Substitute Decision-Makers Under the HCDA

If an individual has *not* executed an advance directive—or if the advance directive does not address the health care at issue and does not appoint an agent to make medical decisions—§ 54.1-2986 of the HCDA lists the persons who may authorize or decline health care for the patient. That section states that these persons, in the specified order of priority, may authorize health care if the physician is not aware of any “available, willing and capable person in a higher class.” The list of authorized persons, in the specified order of priority, are the patient’s (1) court-appointed guardian; (2) spouse (except where a divorce action has been filed and the divorce is not final); (3) adult child; (4) parent; (5) adult sibling; or (6) any other relative (in descending order of blood relationship).

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If there are no persons in the specified list (or if those persons are not available, willing, or capable of authorizing the medical care at issue), § 54.1-2986(A)(7) provides for appointment of a “concerned” adult to authorize the medical treatment at issue. The appointment is made by a quorum of a “patient care consulting committee” (defined in § 54.1-2982 of the HCDA) of the facility where the patient is receiving health care. If there is no such committee, or if a quorum is not reasonably available, two physicians may make the appointment—provided that they are not currently involved in the care and treatment of the patient, are not employed by the facility where the patient is receiving health care, and do not practice medicine in the same professional business entity as the patient’s attending physician.

In addition to describing the appointment process for “concerned” adults, the statute establishes a standard for determining whether the proposed non-family member is sufficiently familiar with the patient’s beliefs and desires as to make health-care decisions on the patient’s behalf. Under § 54.1-2986(A)(7), the committee or physicians must determine whether the proposed concerned adult “has exhibited special care and concern for the patient and . . . is familiar with the patient’s religious beliefs and basic values and any preferences previously expressed by the patient regarding health care, to the extent that they are known.” The committee or physicians must document the information that they received and relied upon in making that determination. Where, however, the proposed treatment decision involves the withholding or withdrawing of a life-prolonging procedure, the statute does not allow appointment of a “concerned” adult. In such a circumstance, the judicial authorization statutes provide an alternate decision-making mechanism.

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Judicial Authorization Statutes and Procedures

Virginia Code §§ 37.2-1100 to -1109 provide the process for judicial authorization of medical treatment. Sections 37.2-1103 and -1104 apply to short-term authorization for testing, observation, and treatment for persons not already admitted to a hospital or other inpatient treatment facility.³ Section 37.2-1101 applies to longer-term medical treatment, involving patients who: (1) are already admitted as patients in a hospital or other inpatient treatment facility, and (2) will remain in the hospital or facility after the treatment. This article focuses on judicial authorization of treatment in the latter situations.

The judicial-authorization-of-treatment statutes emphasize that they do not supplant other laws—both statutory and common law—concerning the need to obtain consent for medical treatment or the process for obtaining it:

Nothing in this chapter shall be deemed to affect the right to use and the authority conferred by any other applicable statutory or regulatory procedure relating to consent or to diminish any common law authority of a physician or other treatment provider to administer treatment to a person unable to give or to communicate informed consent to those actions, with or without the consent of the person’s relative, including common law or other authority to provide treatment in an emergency situation; nor shall anything in this chapter be construed to affect the law defining the conditions under which consent shall be obtained for administering treatment or the nature of the consent required.

Code § 37.2-1108(A). So, for example, the common-law doctrine that allows emergency treatment without consent still applies; health care providers need not file petitions before rendering emergency care.

The judicial-authorization statutes also make clear that health care providers need not petition for judicial authorization where the Health Care Decisions Act applies and otherwise provides for the appropriate consent and authorization. Thus, § 37.2-1108(B) states that “[j]udicial authorization for treatment pursuant to this chapter need not be obtained for a person for whom consent or authorization **has been granted or issued or may be obtained** in accordance with the provisions of Article 8 (§ 54.1-2981 *et seq.*) of Chapter 29 of Title 54.1 or other applicable statutes or common law of the Commonwealth.” (emphasis added).

Other parts of the statute dispel any notion that parties can use the judicial-authorization statutes to challenge decisions to authorize or decline treatment made under other statutes—e.g., the Health Care Decisions Act. Section 37.2-1101(E), which sets forth the notice requirements to the patient’s next of kin upon filing of a petition, makes this explicit: “This subsection shall not be construed to interfere with any decision made pursuant to the Health Care Decisions Act (§ 54.1-1981 *et seq.*)” This statutory statement confirms that the General’s Assembly did not intend for the judicial-authorization statute to be used in cases where a person simply disagrees with the treatment authorized or declined by the patient’s advance directive, the agent appointed under the advance directive, the substitute decision-makers enumerated in the HCDA, or any concerned person properly appointed. It forecloses any argument that the next-of-kin notification requirement evidences a legislative intent that decisions under the HCDA and other statutes can be challenged through petitions for judicial authorization.

Based on the above statements, and the terms of the statutes themselves, the judicial authorization statutes apply only where there is no advance directive, and where there are no persons who qualify (or are willing or able) to authorize the medical care under the HDCA. But where family members are unwilling or unable to act under the HCDA—and are therefore “unavailable”—there is an argument

that those family members *can* oppose the petition for judicial authorization.

Statutory Prohibitions

The judicial-authorization statutes set limits on treatments that a court can authorize. Off-limits treatments include:

- nontherapeutic sterilization, abortion, or psychosurgery;
- admission to a hospital or training center;
- administration of antipsychotic medication for more than one hundred eighty (180) days;
- electroconvulsive therapy, unless clear and convincing evidence from the testimony of a licensed psychiatrist proves that all other reasonable forms of treatment have been considered and that electroconvulsive therapy is the most effective treatment for the person (and even then, limited to 60 days and—if the patient objects to it—only for involuntarily committed patients).

Code § 37.1-1102. The statute also prohibits restraining or transporting the person, unless clear and convincing evidence proves that this is needed to administer an authorized treatment for either (1) a physical disorder or (2) a mental disorder where the patient has been involuntarily admitted. *Id.*

Statutory Requirements

In order to authorize medical treatment under Virginia Code § 37.2-1101, the court must make the following findings:

1. That there is no available person with legal authority under the Health Care Decisions Act, the regulations promulgated pursuant to Virginia Code § 37.2-400 regarding the rights of persons receiving services from the Department of Behavioral Health and Developmental Services, or any other applicable law, to authorize the proposed treatment;
2. That the person for whom treatment is sought is incapable of making an informed deci-

sion regarding treatment or is physically or mentally incapable of communicating such a decision;

3. That the person who is the subject of the petition is unlikely to become capable of making an informed decision or of communicating an informed decision within the time required for decision; and
4. That the proposed treatment is in the best interest of the person and is medically and ethically appropriate with respect to (i) the medical diagnosis and prognosis and (ii) any other information provided by the attending physician of the person for whom treatment is sought.

The standard of “clear and convincing evidence” applies to the required findings in numbers 2 and 4 above. Va. Code § 37.2-1101(A).

There are two circumstances in which the court cannot authorize a proposed treatment unless it is necessary to prevent death or a serious irreversible condition: (1) where the treatment is contrary to a properly executed advance directive; and (2) where the proposed treatment is contrary to the person’s religious beliefs, basic values, or specific preferences stated by the person before becoming incapable of making an informed decision. Code § 37.2-1101(G)(4). The statute admonishes the court to “take into consideration the right of the person to rely on nonmedical, remedial treatment in the practice of religion in lieu of medical treatment.” The patient’s religious preferences need not have been stated in an advance directive; they could have been expressed in other writings or verbally.

The order authorizing treatment must describe the authorized treatment, but it may “authorize generally such related examinations, tests, or services as the court may determine to be reasonably related to the treatment authorized.” Code § 32.1-1101(H). If the court orders the administration of antipsychotic medications, the order must require the physician to review (and document) the appropriateness of the continued administration of such medications every

thirty days. *Id.*

Of note, the order may authorize palliative care, defined as “treatment directed at controlling pain, relieving other symptoms, and focusing on the special needs of the patient and family as they experience the stress of the dying process, rather than the treatment aimed at investigation and intervention for the purpose of cure or prolongation of life.” Code § 37.2-1101(H); Code § 32.1-162.1. Thus, the statute provides for an order authorizing both the withholding or withdrawing of life-sustaining measures (§ 37.2-1100) and for an order authorizing palliative care (Code § 37.2-1101(H)). These statutory sections may be significant in a situation where the patient is incapable of making medical decisions about life sustaining treatment, but there are no statutorily authorized decision-makers (or those so authorized are unwilling to make this difficult decision).

Finally, the authorized-treatment order must direct the treating physician or other service provider to report to the court—and to the patient’s attorney—any change in the patient’s condition that results in the “probable restoration or development of the person’s capacity to make and to communicate an informed decision prior to completion of any authorized treatment and related services.” The court or special justice also may order the treating physician or other service provider to report “any change in circumstances regarding any authorized treatment or related services that may indicate that such authorization is no longer in the person’s best interests.” After receiving such a report (or upon the filing of a petition by an interested party), the court may enter an order withdrawing or modifying its prior authorization, as it deems appropriate. The court may orally present and enter any such order withdrawing or modifying the prior authorization, provided that it subsequently executes a written order to that effect. *Id.*

Process for Filing of the Petition and Hearing on the Petition

Section 37.2-1101 provides that any person may request judicial authorization of treatment by filing a petition with an “appropriate” circuit court, general district court, or “special justice.” The “appropriate” court or special justice is one in the locality in which the patient resides or where the proposed treatment would be rendered. “Special justices” are attorneys appointed by the chief judge of a judicial circuit for the purpose of performing the duties of a judge under certain statutes, including mental-health-treatment commitments and judicial-authorization-of-treatment proceedings.

The petition should recite: (1) the disorder, impairment, or condition requiring treatment, (2) the treatment recommended by the attending physician, (3) that the patient or hospital facility is located in the judicial circuit, (4) the physical or mental disorder rendering the patient incapable of making the necessary medical decisions, and (5) that the proposed treatment is in the patient’s best interest.

The Virginia Judicial System website (<http://www.courts.state.va.us/forms/home.html>) contains a form for the petition for judicial authorization of treatment pursuant to Virginia Code §37.2-1101. The form, entitled Medical Treatment and Detention Petition [Form DC-489a], is located in the General District Court Civil Forms and Instructions Section of the website. The form is written with the petitioner being the patient’s attending physician. I recommend using this form, if applicable. Despite the availability of the court’s form, however, the statute allows any person to file a petition and individuals can draft a petition setting forth the relevant facts and the information received from the attending physician.

The statute contains specific notice requirements. Upon the filing of the petition, the petitioner or the court shall deliver or send a certified copy of the petition to the patient and to the patient’s next of kin if the identity and whereabouts are known. § 37.2-1101(C). If the treatment is necessary to

“prevent imminent or irreversible harm,” the court may in its discretion dispense with the next-of-kin notice requirement. § 37.2-1101(E). The next-of-kin notice requirement also may be waived if the patient is admitted to a hospital and has no known guardian or legally authorized representative. § 37.2-1101(E).

As noted above, if the patient has a next of kin, that person would be considered under the Health Care Decisions Act as a substitute decision-maker for the patient. Yet even if the next of kin is unavailable and the attending physician or some other person has petitioned the court for judicial authorization, the next of kin is still entitled to notice of the petition, and may present argument or evidence at the hearing.

As soon as reasonably possible after the petition is filed, the court or special justice shall appoint an attorney to represent the interests of the person for whom treatment is sought. § 37.2-1101(C). This is not necessary, however, where the patient—or another interested person on the patient’s behalf—retains private counsel at his own expense. *Id.* If the patient is indigent, the appointed attorney’s fees shall be paid by the Commonwealth, as provided in the mental health commitment statutes. Code § 37.2-804. If the patient or someone on behalf of the patient retains counsel, the fee is subject to the review and approval of the court. *Id.*

Once an attorney is appointed or retained, the court must schedule an expedited hearing on the petition. Code § 37.2-1101(D). The court shall notify the patient, the patient’s next of kin, and counsel for the patient and next of kin of the date and time for the hearing. In scheduling the hearing, the court must consider the type and severity of the alleged physical or mental disorder as well as the time necessary for the patient’s attorney to investigate the petition and prepare for the hearing. *Id.*

Counsel for the patient shall “investigate the risks and benefits of the treatment decision . . . and of alternatives” to the proposed treatment. *Id.* § 1101(F). The attorney shall also make reasonable

efforts to explain this information to the patient, to ascertain the patient's religious beliefs and basic values, and the views and preferences of the patient's next of kin. *Id.* In order to carry out these duties, the patient's attorney is entitled to receive medical records and information from the attending physician and hospital.

During the hearing, evidence may be presented by affidavit if there is no objection by the patient, the petitioner, counsel for either the patient or petitioner, or any interested party. Code § 37.2-1101(F). The court or special justice also may conduct the hearing with a "two-way electronic video and audio communication system" that meets the standards set out at Code § 19.2-3.1. Code § 37.2-1109. Where such facilities are unavailable, a witness who cannot be physically present may testify by telephone. *Id.*

Appeals and Immunity

An interested party can appeal a general district court's or special justice's treatment order to the circuit court within ten days of the date of the order. Code § 37.2-1105. Orders from the circuit court, in turn, may be appealed within ten days to the Court of Appeals. Such appeal is heard *de novo*.

Health care providers that carry out judicially authorized care are immune from later claims that the patient did not consent to the treatment. Code § 37.2-1106. Conversely, where a court finds that the patient is capable of making and communicating an informed decision regarding treatment, health care providers are immune from later claims that the patient lacked such capacity.

Practical Suggestions

I recommend filing petitions with special justices whenever the judicial circuit has appointed them. Special justices are well-trained and knowledgeable in the proceedings over which they are appointed to preside, and are easily accessible to attorneys for the parties involved. They are able to exercise great flexibility in the timing and location of the necessary hearings required by the judicial-

authorization statutes—including the ability to conduct the hearings on nights and weekends and even at the hospital or facility. This is crucial, as the need for judicial approval often occurs after business hours, is time sensitive, and involves physicians and other witnesses with schedules that do not conform to ordinary business hours.

I also recommend using the forms provided for the judicial-authorization petitions—at least when the petitioner is the attending physician. Although the court or special justice will need to use additional forms—including those for appointing counsel and authorizing or denying the treatment—those forms are not available on the website. But in the 24th Circuit, where I have filed such petitions, the special justices have access to the additional forms.

When filing a petition with the special justice, the attorney for the petitioner or the petitioner should complete the petition form, and then contact the special justice to arrange for the filing and to provide any necessary information. In my experience, the special justices allow for filing via fax and email, with hand-delivery or mailing of the original petition to follow. The special justices handle the filing of the petitions, orders and other documents during the proceedings and after their conclusion.

Attorneys representing health care providers as petitioners should review the statutes and speak with the health care provider regarding all of the information required for the petition and order. For example, the attorney should confirm the basis of the physician's opinion that the health care provider believes the patient is incapable of making a decision regarding the recommended care. In addition, the attorney should discuss with the physician the medical condition necessitating the proposed care, and the type and extent of care proposed. The attorney should explain the process to the physician, make initial contact with the special justice or court regarding the filing of the petition, and appear at the hearing if necessary.

Attorneys representing other petitioners should also review the statutes and explain the process to

the petitioner. Attorneys representing petitioners may be unable to gain access to the medical records of the patient. However, since the petitioner is seeking judicial authorization of treatment, the petitioner should have a reasonable basis to believe that the attending physician is proposing a particular treatment for a particular condition(s), and should understand the scope of the proposed treatment.

Conclusion

Situations regarding consent and authorization for medical treatment are complicated, varied, and challenging. But helping a patient who is incapable of making an informed decision to obtain necessary treatment is rewarding on many levels. Counsel familiar with the judicial-authorization statutes can streamline the process for the physicians, the patients, and the courts involved. By doing so, they can help secure the vital care that the patient needs. ♦

(ENDNOTES)

1. Several sections in Code §§ 37.2-1103 and -04 address emergency custody orders and temporary detention orders for situations where the person in need of medical treatment is not already a patient in a hospital or other inpatient treatment facility, and where the testing, observation and treatment can be completed in a twenty-four hour period. This article addresses longer-term medical treatment, most often for persons already admitted to a hospital or inpatient facility. Although the requirements and processes of Virginia Code Sections 37.2-1103 and -04 are beyond the scope of this article, those statutes may apply to situations involving shorter-term testing, observation or treatment.

Other statutory sections address the provision of and authorization for medical and mental health treatment during mental health detentions and commitments, as well as custodial situations involving persons unable to stand trial due to insanity or after a verdict of acquittal by reason of insanity, and treatment of persons receiving services from the Department of Behavioral Health and Developmental Services. The applicability and requirements of those statutes, too, are beyond the scope of this article.

2. Unless the situation is an “emergency.” *See infra*.

3. See footnote 1. Virginia Code § 37.2-1104 states that, in situations where the time to complete the testing, observation or treatment exceeds twenty-four hours, the court can extend the time for the treatment by entry of an order under § 37.2-1101.

* * *

Is Civility in the Courtroom a Lost Cause?

by J. Gregory Ashwell

One may suggest that the expectation of civility among litigators, viewed in the light of the necessarily antagonistic positions assumed by lawyers advocating their clients' divergent interests, is an inherently repugnant concept. As a trial judge, I can attest that some counsel apparently feel that civility has no place in the adversarial system of justice. Unfortunately, this perception is gaining notoriety in our society. In a matter before the South Carolina Supreme Court, the justices stated that "[w]e take this opportunity to address what we see as a growing problem among the bar, namely the manner in which attorneys treat one another in oral and written communication. . . . We are concerned with the increasing complaints of incivility in the bar."¹

The concern over the professional comportment of lawyers, however, is not a novel phenomenon. As early as 1920, noted law professor George W. Warvelle of the University of Chicago School of Law opined that, "[t]he professional relation which attorneys sustain toward each other in all matters of litigation is distinctly antagonistic. . . . They represent diverse and opposing interests, and their duties to their respective clients require an entire devotion to the case in which they are retained. . . . But it does not follow that because of this duty there should be a total disregard of the amenities of life which so often characterize opposing forces. It is the clients, not the attorneys, who are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for the attorneys to partake of it, or to manifest in their conduct and demeanor to each other or to the suitors on the opposite side, any rancor or bitterness of the parties. The ordinary civilities should always be observed, and, in every

instance, the utmost courtesy consistent with duty should be extended to an honorable opponent."²

One might expect that civility in the courtroom would generally be considered an admirable characteristic. "The same qualities which cause people to like, dislike or be indifferent towards the people they see and meet cause similar reactions in the minds of judges and jurors. Yet, in spite of the fact that it is easier and more enjoyable, counsel frequently fail to be consistently pleasant and courteous. Courtesy should not be limited in its extension to the judge and jury, but should include all persons in the courtroom. . . . [D]iscourteous treatment . . . is likely to be noticed with its attendant effect upon the opinion which the court and jury entertain."³

It has been suggested that "[t]he reasons for the legal profession's civility problems are numerous and complex. No one cause is the dominant culprit. In addition to a societal decline in civility, other contributing factors include the recent evolution of the practice of law from a professional calling to a bottom-line business operation; the growth and accompanying impersonalization of bars, law firms, and court systems; a decline in 'mentoring' of new lawyers by older colleagues; routine media distortions of the American justice system; and increasingly convoluted discovery systems that often invite and exacerbate abrasive behavior."⁴

Whatever the reason, the perception of the proliferation of incivility in the practice of law is a very real reason for concern. "When asked about lawyers in the aggregate, the public views them less favorably. Lawyers' ethical standards and practices are thought to be middling by most people, with a much larger contingent regarding them as poor (21%) than as excellent (3%)."⁵ Being a self-regulated profession, the onus is on the bar itself to improve the profession for those who practice, which, in turn, may serve to improve the public perception of the trial lawyer.

In an attempt to stress the importance of professionalism in the bar, the Virginia State Bar offers the Harry L. Carrico Professionalism Course. The pur-

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pose of this course is to address the “lawyer’s broader professional obligations” beyond the minimums set forth in the Rules of Professional Conduct.⁶ Similarly, the Supreme Court of Virginia “endorses the . . . Principles of Professionalism for Virginia Lawyers prepared by the Virginia Bar Association Commission on Professionalism” which includes a “pledge [for lawyers] to demean themselves ‘professionally and courteously.’”⁷

The question remains – How can the legal profession address the need for improvement in courtroom civility?

It can be argued that both the bench and the bar have a joint obligation to work on improving courtroom civility. As a litigating attorney, the chances are probably quite good that you have appeared in court against an uncivil attorney or observed one in action. The nature and degree of incivility can differ, depending upon the particular attorney exhibiting the conduct. As a litigator, you have a unique opportunity to address incivility at its root. Those same Principles of Professionalism referenced above recognize that “[a] lawyer is also guided by personal conscience and the approbation of professional peers.”⁸ Each of us should strive to comport ourselves so that we exhibit civility in every aspect of our professional lives. There is nothing wrong with being a positive example of civility for other lawyers to emulate.

In addition to exemplifying professionalism in your personal comportment, consider becoming a mentor. Offer to take a recent bar admittee under your wing and show them the benefits of establishing a positive professional personality based upon courtesy and civility. In an arguably more imper-

sonalized society, some may have lost touch with the humanizing effect of interpersonal discourse. If we all took the time to work with just one less-experienced attorney, we might be able to resurrect the art of civil interaction with our professional peers.

It is the clients, not the attorneys, who are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for the attorneys to partake of it, or to manifest in their conduct and demeanor to each other or to the suitors on the opposite side, any rancor or bitterness of the parties.

The responsibility of incubating civility does not rest solely with the Bar; judges have a role to play in this area as well. Every jurist knows that they have a duty to “require order, decorum, and civility in proceedings before the judge.”⁹ It is incumbent on judges to comport themselves with dignity and treat the individuals who appear in their courtroom with respect. I find this generally leads to the attorneys appearing before the court to comport themselves similarly.

Furthermore, judges can establish an overall atmosphere of positive courtroom decorum simply by establishing ground rules at the first sign of incivility. For instance, you may have witnessed circumstances in which, immediately after an attorney makes an objection, the adversary attempts to address the objection before objecting counsel has even completed stating his or her grounds. Then you find the attor-

neys sniping back and forth at each other, resulting in a chaotic situation. When such an occasion arises, the court should stop both counsel and acknowledge that some courts are run differently, but then explain how it will be done in “this” court. I explain to the witness that they should stop testifying when an attorney rises to object. I advise the objecting attorney that he or she will be given an opportunity to make their objection completely and without interruption. I will then acknowledge the other attorney when it is their turn to address the objection, which they will be allowed to do completely and without

interruption. Then I will hear from the objecting attorney in closing, and thereafter rule. I confirm that the attorneys understand the ground rules and allow the proceeding to continue. This can make for a more congenial presentation, without counsel having to sacrifice the zealous representation of his or her client's interests.

Along those lines, the court should not sit by and allow impolite conduct between counsel and witnesses. Once, a witness in my court became flustered by his inability to answer questions propounded by adverse counsel. In response to one of her questions, he came out with an answer starting with a snarling "look, lady." I immediately cut him off and advised him that if, for any reason, he needed to refer to counsel during the proceedings, he would call her by name, and I reminded him of what that was. I told him that any disparaging reference or tone was inappropriate for the courtroom setting. I confirmed with him that he understood my admonition and that I would not accept such conduct from him. He said he understood and that was not a problem for the rest of the trial. Similarly, unnecessarily harsh questions or statements of personal animus by counsel to witnesses should not be tolerated. By the judge's conduct, a message can be sent that order and civility is to be expected. When the judge sets a higher standard, the attorneys and witnesses will generally comply.

With the attention of the bench and the bar and a proactive approach, the process of courtroom litigation can be conducted in a civil manner. With a renewed effort from all involved, incivility can be a relic of the recent past and not serve as a basis for derision of the profession that is the practice of law.

*The views expressed in this article represent the personal views of the author. ♦

(ENDNOTES)

1. "You're Out of Order! Dealing with the Costs of Incivility in the Legal Profession" *Filisko, G. M.*, ABA Journal, January 2013.
2. *Warvelle, George W.*; Professional Courtesy, Legal Ethics 2d., Sections 314-317, 319-320 (1920).
3. *Fricke, C.W.*; Planning and Trying Cases, Conduct of Counsel, pp. 34-35 (1957).
4. *Leshane, Liane E.*; Professionalism: Defining the Lines, *Trial*, (July 1, 1998) quoting The Honorable Marvin E. Aspen.
5. The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse; Robert S. Marx Lecture delivered December 5, 1997, 66 U. Cin. L. Rev 805 (1998).
6. Part 6, §IV, Paragraph 13.1, Rules of the Supreme Court of Virginia.
7. Preamble, Virginia Bar Association Mission Statement, Principles of Professionalism, Virginia Bar Assoc., Richmond, VA.
8. Virginia State Bar, Preamble : A Lawyer's Responsibilities, Professional Guidelines (Updated: November 9, 2008).
9. Canon 3 of the Canons of Judicial Conduct for the State of Virginia.

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a higher standard,
the attorneys and
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Recent Civil Cases from the Supreme Court of Virginia

APRIL SESSION 2015

Real Property

Case: *Bailey v. Spangler* (4/16/15) (141702)

Author: Goodwyn

Lower Ct.: E.D. Va. (U.S. Dist. Ct.)

Disposition: Certified Question Answered

Facts: In 1887, the plaintiff property owner's predecessor in interest severed the mineral estate from the surface estate and conveyed the coal, iron, oil, and gas rights to a coal company. The deed did not, however, specify who would own the resulting mine void.

In 1981, the General Assembly enacted Code § 55-154.2, which stated that the owner of mineral rights was presumed to be the owner of the mine void. But the statute also stated that it would not affect contracts and agreements entered into before July 1, 1981.

In 1983, the plaintiff and her husband acquired a portion of the property's surface estate. The Dickinson-Russell coal company, the mineral-rights transferee's successor in interest, sought "to conduct mine operations" in the void underneath this property. The director of the Virginia Department of Mines, Minerals and Energy issued mining permits authorizing the company to conduct mine operations there. The plaintiff sued in federal court, arguing that this represented a legislative taking. The owner of the mineral rights, however, claimed that the 1981 enactment of Code § 55-154.2 divested plaintiffs' predecessors of any interest in the mine void.

The Eastern District of Virginia certified a question to the Supreme Court of Virginia, querying whether the 1981 statute applied to severance deeds executed before that date.

Analysis: Responding to the question, the SCOV said no. It noted that, before the statute's enactment, the rule was that the surface-estate owner retained ownership of the mine void unless the severance deed expressly conveyed it to the mineral-estate owner. Absent manifest legislative intent to the contrary, statutes do not apply retroactively to interfere with existing contract rights or vested property rights. As Code § 55-154.2 contained no such retroactive provision—and, indeed, had a provision stating that it did not apply to contractual obligations or agreements entered into before its effective date—the SCOV refused to apply the statutory presumption of mine-void ownership to the 1887 severance deed.

Key Holding(s):

- Absent manifest legislative intent to the contrary, statutes do not apply retroactively to interfere with existing contract rights or vested property rights.
- Code § 55-154.2—which creates a presumption that the mineral-estate owner also owns the mine void—does not apply to severance deeds executed before the statute's 1981 enactment.

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Real Property

Case: *Ramsey v. Commissioner of Highways* (4/16/15) (140929)

Author: Powell

Lower Ct.: O'Brien, William R. (City of Virginia Beach)

Disposition: Reversed

Facts: The Highway Commissioner sought to acquire part of a real-estate parcel. To that end, it hired an appraiser, who valued the entire property at \$500,000 and the portion to be acquired at \$246,292. This information was shared with the land owner. The Commissioner then unsuccessfully attempted to purchase the property from the owner.

The Commissioner filed a certificate of take, deposited \$248,707 with the clerk of court as the estimate of the fair value of the property to be taken, and filed a petition in condemnation. The petition sought an order that title be vested in the Commonwealth and requested that the jury determine the value of the property. The Commissioner then requested a second appraisal. This appraisal assessed the market value of the entire parcel at \$250,000 and valued the portion to be acquired at \$92,127. At trial, the landowners sought to have the original \$500,000 appraisal amount admitted into evidence. But the trial court excluded it, finding that it was an offer to settle and so was not admissible as a party admission. The jury returned a verdict finding that just compensation for the taken property was \$234,032. The trial court entered a final order confirming the jury report, vesting title in the Commonwealth, and ordering the landowners to repay \$14,625, plus interest.

Analysis: On appeal, the SCOV reversed. It found that evidence of the first appraisal was admissible and was not a settlement negotiation. The SCOV observed that when the Commonwealth had first disclosed the appraisal amount to the landowner, it had not yet made an offer for the property.

Nor had the property owner declined to accept an amount for the property. As there was no disputed claim at this time, the Commonwealth's disclosure of the appraisal amount could not have been part of settlement negotiations.

The SCOV also rejected the argument that Code § 33.2-1023 barred admission of the appraisal amount. Although this section barred the admission of the amount deposited with the trial court, nothing in it—or in any other section of the Code—barred the admission of the fair market value of the entire property, as determined in a pre-offer appraisal. The mere fact that the Commissioner used the appraisal to compute the amount to deposit into court did not mean that the appraisal itself was inadmissible.

Key Holding(s):

- The Highway Commissioner's communication of an appraisal amount to the owner of sought-to-be-acquired property is not an inadmissible "settlement negotiation" where, at the time of the communication, there was no offer for the property or refusal by the property owner.



Civil Procedure

Case: *Sauder v. Ferguson* (4/16/15) (140805)

Author: McClanahan

Lower Ct.: Albertson, Bruce D. (Rockingham County)

Disposition: Affirmed

Facts: Plaintiff was injured in a motor-vehicle accident. She sued the other driver and an insurance company whom she claimed (incorrectly) was her uninsured-motorist carrier. She obtained a default judgment against both defendants. The trial court entered an order awarding her \$300,000 in damages.

When the plaintiff attempted to enforce the judgment, however, the insurer claimed that neither it nor the driver had been properly served with a summons or complaint. At that point, the plaintiff—who apparently wished to nonsuit the original action—moved the trial court to set aside the default judgment pursuant to 8.01-428(A). The trial court refused to do so.

Analysis: On appeal, the Supreme Court of Virginia affirmed. It noted that the trial court's power to set aside default judgments under § 8.01-428 is discretionary even where a party satisfies all of the statute's requirements. In the case at bar, the trial court's refusal to set aside the judgment was not an abuse of its discretion. Among other things, the SCOV noted that: (1) the plaintiff knew the other driver's address from a related declaratory judgment action, yet failed to obtain proper service at that address, and (2) the plaintiff did not correct the service error when it was called to her attention. The SCOV held that the trial court did not abuse its discretion in denying plaintiff relief under § 8.01-428 because she was

the architect of her own misfortune.

Justice Powell, joined by Justice Mims, concurred. Although agreeing with the outcome, they would have found that the plaintiff's own actions judicially estopped her from denying the validity of the judgment.

Key Holding(s):

- A trial court's power to set aside default judgments under § 8.01-428 is discretionary even where a party satisfies all of the statute's requirements.



Real Property

Case: *Howard v. Ball* (4/16/15) (140670)

Author: Powell

Lower Ct.: Johnson, Patrick (Buchanan County)

Disposition: Reversed

Facts: Plaintiff landowner brought a Code § 8.01-179 boundary-line action against her neighbor, claiming that the neighbor had built a fence well within the plaintiff's property limits. The defendant's answer did not include an adverse-possession affirmative defense. At trial, however, the defendant sought to present evidence establishing that he and his predecessors in interest had occupied the property long enough to vest title in him under principles of adverse possession. The trial court agreed and ruled in his favor.

Analysis: On appeal, the SCOV reversed. The defendant argued that he did not need to plead adverse possession as an affirmative defense. He relied on a 1921 SCOV case holding that this was unnecessary when a party pleads a "general defense." But as the SCOV observed, "general defenses" no longer are permitted in Virginia. So the 1921 case no longer was good law.

The SCOV then noted that, absent certain exceptions (e.g., where the issue was addressed in the complaint, where a statute specifically addresses the requirement to plead affirmative defenses, or where the affirmative defense becomes apparent only at trial) a party must plead affirmative defenses. As none of those exceptions applied to the case at bar, the defendant's failure to plead an affirmative defense foreclosed him from relying on one at trial. Accordingly, the trial court erred in allowing the defendant to rely on the affirmative defense of adverse possession.

Key Holding(s):

- An adverse-possession defense to a boundary-line dispute must be pleaded as an affirmative defense and may not be asserted for the first time at trial.



Insurance

Case: *Bartolomucci v Federal Insurance Company*
(4/16/15) (140275)

Author: Millette

Lower Ct.: Horne, Thomas B. (Loudoun County)

Disposition: Affirmed

Facts: While driving to work, a lawyer collided with another vehicle. The driver of the other vehicle sued the lawyer for \$1 million. The lawyer's automobile insurance policy, however, had a \$100,000 liability limit. So the lawyer filed a declaratory judgment action seeking to establish that his vehicle fell within the scope of his law firm's insurance policy.

The jury returned a special verdict finding that the lawyer was using his vehicle in the law firm's business or personal affairs. But the trial court granted the insurance company's and the law firm's motion to strike and set aside the jury's finding as not being supported by the evidence. The trial court entered final judgment holding that the law firm's policy did not cover the lawyers use of the vehicle at the time of the accident.

Analysis: On appeal, the Supreme Court of Virginia affirmed. Examining the plain language of the law firm's policy, it found that it did not cover the lawyer in those circumstances.

The lawyer argued that the fact that the law firm's policy was a "follow form" policy meant that he was automatically covered—i.e., that he did not need to show that he was using his vehicle for the law firm's business or personal affairs. The Supreme Court of Virginia rejected this argument, noting that under the law firm's policy the excess coverage applied only to a "covered auto," whose definition included the requirement that the vehicle be used during the law firm's business or personal affairs.

The SCOV also rejected the lawyer's argument that the fact that he was a partner at the law firm meant that the terms "you" and "your" referred to him individually. The court noted that the policy's "named insured" section identified only the law firm, a limited liability partnership, and that this was an entity distinct from its partners.

The lawyer, however, argued that the phrase "your business or your personal affairs" was ambiguous because a legal entity cannot have "personal" affairs. Again, the Supreme Court of Virginia rejected this argument, stating that when applied to a business, "personal affairs" refers to the entity's non-income producing activities that benefit it.

Finally, the SCOV rejected the lawyer's argument that he was using the vehicle for law firm business. The fact that he (1) frequently worked at his home office, (2) had a smartphone that was turned on during the commute, and (3) habitually thought about work-related issues during his commute, did not render his ordinary commute part of the law firm's business.

Key Holding(s):

- For purposes of determining coverage under a law-firm's auto-insurance policy, the fact that a law-firm partner (1) frequently worked at his home office, (2) had a smartphone that was turned on during the commute, and (3) habitually thought about work-related issues during his commute, did not render his ordinary commute part of the law firm's business.
- In an insurance policy covering a business, the phrase "personal affairs" refers to the entity's non-income producing activities that benefit it.



Civil Procedure

Case: *Yelp v. Hadeed Carpet Cleaning, Inc.* (4/16/15)
(140242)

Author: McClanahan

Lower Ct.: Court of Appeals (Court of Appeals)

Disposition: Reversed

Facts: A carpet-cleaning business sued unidentified individuals whom it claimed defamed it on the website "Yelp." The plaintiff served Yelp's Virginia registered agent with a subpoena duces tecum directing Yelp to produce documents that were located in California. Yelp objected to the subpoena, but the trial court issued an order enforcing it. The trial court then held Yelp in civil contempt for refusing to comply with the subpoena. The Court of Appeals affirmed this ruling.

Analysis: On further appeal, the SCOV reversed. Although the long-arm statute confers personal jurisdiction over nonresident defendants, it does not confer subpoena power over nonresident nonparties. Nor has the General Assembly elsewhere expressly authorized the exercise of subpoena power over nonresident nonparties. The enforcement of subpoenas seeking out-of-state discovery is instead governed by the courts and the laws of the foreign states in which the witnesses or documents are located.

Honoring these principles, most states—including Virginia—have adopted some form of the Uniform Interstate Depositions and Discovery Act. The Act is rooted in principles of comity and respect for the territorial limitations of out-of-state discovery. Under the Act, the location of discovery determines which jurisdiction's law governs a nonparty's discovery obligations.

Thus, the circuit court lacked power to force a nonparty to produce documents located in California. The information lay beyond the reach of the circuit court.

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

Key Holding(s):

- A Virginia circuit court lacks the authority to enforce a subpoena duces tecum against a nonparty for out-of-state documents.



FEBRUARY SESSION 2015

Personal Injury

Case: *Brown v. Jacobs* (2/26/15) (140270)

Author: Goodwyn

Lower Ct.: Roush, Jane Marum (Rockingham County)

Disposition: Affirmed

Facts: Plaintiff's decedent was a private investigator who was killed while attempting to serve "divorce papers" on the killer, Ali Al-Ibrahim Abid (Abid). Plaintiff brought a wrongful death claim against the attorney who had hired the decedent, claiming that the attorney knew that Abid was paranoid, armed, and dangerous, yet did not warn decedent that serving Abid might be dangerous.

The trial court sustained the attorney's demurrer, holding that the plaintiff failed to allege facts sufficient to show that there was a special relationship between the attorney and the decedent. The trial court also denied the plaintiff's motion for leave to amend the complaint, observing that the proposed changes would not be sufficient to establish a special relationship.

Analysis: On appeal, the SCOV affirmed. It observed that "a person does not have a duty to warn or protect another from the criminal acts of a third person" absent a "special relation" between the defendant and the victim. The Supreme Court of Virginia has never recognized the relationship between an attorney and a private investigator as one that gives rise to such special relationship. And it has not adopted a categorical rule that always recognizes a special relationship between an employer and employee/independent contractor.

Although the court had recognized a special relationship between a newspaper and a 13-year-old newspaper carrier, that was due to the unique circumstances of the case—namely, the minor's need for protection. The facts of the case at bar did not involve any such special circumstance. The decedent did not require supervision, and he was not inherently vulnerable.

The SCOV also held that the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend. The plaintiff already had been allowed one opportunity to amend, and the proposed amendments would not have established a

special relationship.

Key Holding(s):

- An attorney does not have a duty to warn a process server about possible threats posed by the person being served.
- A trial court does not abuse its discretion in denying leave to amend where the proposed amended complaint does not cure the deficiencies that led to the original complaint's dismissal.



Attorney's Fees

Case: *EE Mart F.C., L.L.C. v. Delyon* (2/26/15) (140708)

Author: Powell

Lower Ct.: Kassabian, Brett A. (Fairfax County)

Disposition: Reversed

Facts: The parties engaged in a series of lawsuits, some in Virginia and some in Maryland. The plaintiff prevailed on his claims in Virginia state court and requested sanctions under Code § 8.01-271.1. The plaintiff's computation of attorney's fees included some that were incurred in the Maryland litigation. The trial court awarded some such fees.

Analysis: On appeal, the Supreme Court of Virginia reversed. It noted that Code § 8.01-271.1 expressly limits awards to those fees and expenses "incurred because of the filing of the pleading, motion, or other paper or making of the motion." The implication is that the filing or making of the motion must occur in the same action in which the court subsequently awards the sanction. Accordingly, the trial court only may award attorney's fees incurred because of the filing of a motion in the matter then pending before the court.

Key Holding(s):

- A trial court only may award sanctions under Code § 8.01-271.1 for conduct occurring in the matter then pending before the court.



Legal Malpractice

Case: *Smith v. McLaughlin* (2/26/15) (140500)

Author: Millette

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

Disposition: Reversed

Facts: Plaintiff was convicted of child sexual abuse and sentenced to prison. In a habeas challenge to the conviction, he obtained a new trial, which exonerated him. Plaintiff then brought a legal malpractice claim against his original criminal-defense attorneys. He hired defendant to prosecute that claim. Plaintiff settled with one of the criminal-defense attorneys, but the settlement agreement purported not to dismiss the claim against the second criminal-defense attorney. Four months after the settlement with the first criminal defense attorney, the Supreme Court of Virginia issued its opinion in *Cox v. Geary*. Based on that case the remaining criminal-defense attorney defendant filed a successful plea in bar, arguing that—under the rationale of *Cox*—the settlement and release of some codefendants to the legal malpractice claim was a release of all codefendants. The ruling was affirmed on appeal.

Plaintiff then brought a legal malpractice action against the lawyers who had prosecuted the original legal-malpractice action. The defendant law firm filed a plea in bar, arguing that its failure to correctly anticipate an unsettled question of law was not a breach of the standard of care. The trial court overruled the plea in bar, noting that even if the defendant law firm’s argument were correct, it would not be a complete defense to the entire case as the plaintiff had alleged other theories of breach. The jury returned a verdict of \$5.75 million.

Analysis: On appeal, the SCOV reversed and remanded. First, it held that the trial court erred in ruling that a plea in bar had to dispose of the entire case. It noted that “a plea in bar can be sustained even if it presents a bar to recovery to only some, but not all, of the plaintiffs claims.”

Second, it held that the trial court erred in finding that it could not rule as a matter of law on the issue of whether acting in an unsettled area of the law was a deviation from the standard of care. Although it refrained from creating a per se “judgmental immunity doctrine,” The Supreme Court of Virginia found that under the facts of the case the law firm did not breach its duty by failing to correctly anticipate a judicial ruling on an unsettled legal issue. The question whether Code § 8.01-35.1 governed legal malpractice claims was a question on which attorneys exercising a reasonable degree of care, skill, and dispatch, could have come out either way.

Accordingly, the plea in bar should have been sustained, partially barring plaintiff’s recovery. Although the plaintiff asserted other viable bases for relief, it was impossible to determine what part of the verdict—if any—was attributable to claims that should have been dismissed at the plea-in-bar stage. So a retrial was necessary

Third, the SCOV reversed the trial court’s ruling that the “collectibility” of a judgment is not probative of damages in a legal-malpractice case. Collectibility limits the measure of the legal-malpractice plaintiff’s damages to how much the legal-malpractice plaintiff actually could have recovered from the defendant in the underlying litigation absent the attorneys negligence. This is so because the plaintiffs damages are mea-

sured by the amount that the plaintiff could have recovered from the defendant in the absence of the attorney’s negligence. Although relevant to the computation of damages, the SCOV emphasized that collectibility is not an element of a legal malpractice plaintiff’s prima facie case. The burden of pleading and proving uncollectibility lies on the negligent attorney, who can assert it as an affirmative defense.

Turning to the plaintiff’s cross appeal, the Supreme Court of Virginia affirmed the trial court’s ruling that nonpecuniary injury is not recoverable as damages in a legal malpractice claim. It reasoned that the attorney’s duty of care does not arise in tort, but instead arises out of the contractual relationship with the client. So damages recovered for legal malpractice are contract damages. Under Virginia law, nonpecuniary damages are not available in contract actions. Thus, such damages are not available in legal malpractice actions.

The Supreme Court also affirmed the trial court’s ruling that the plaintiff could not recover any damages for the period when he was incarcerated for his criminal-escape conviction. The injuries that arose because of the plaintiff’s criminal-escape conviction were not attributable to his attorney’s legal malpractice. The escape-conviction was a “intervening act” that broke “the chain of causal connection between [the attorneys] original act of negligence and subsequent injury.” Because the criminal-escape conviction was neither reasonably foreseeable at the time of the legal malpractice nor put into operation by the attorney’s negligence, it was a superseding cause that broke the causal chain.

Finally, the trial court erred in overruling the defendant law firm’s objection to plaintiff’s requesting an award more than the amount demanded in the ad damnum. Code § 8.01-379.1 authorizes a party to inform the jury of the amount of damages sought, but it includes a proviso that the total amount requested be no more than the ad damnum.

Justice McClanahan concurred in all respects except for the court’s holding that a legal malpractice plaintiff is not required to prove the collectibility of any judgment that such plaintiff would have obtained on the underlying lost claim.

Key Holding(s):

- A plea in bar can be sustained even if it bars only some of the plaintiffs claims.
- Collectability of a would-be judgment is relevant to damages in a legal-malpractice action.
- A party cannot request that the jury return a verdict in an amount that exceeds the ad damnum.



JANUARY SESSION 2015

Evidence

Case: *Hyundai Motor Company, Ltd. v. Duncan*
(1/8/15) (140216)

Author: McClanahan

Lower Ct.: Gibb, Colin R. (Pulaski County)

Disposition: Reversed

Facts: Plaintiff, who was injured in a single-vehicle motor-vehicle accident, brought a products liability action against Hyundai. Plaintiff's expert contended that the side-airbag sensors should have been installed on the vehicle's "B pillar" and placed approximately 4 to 6 inches from the floor. The expert, however, had not tested whether an airbag placed there would have fired in the accident giving rise to the suit. Nor had he tested any other locations. Indeed, he did not have any data to support his theory.

Hyundai objected to the expert testimony on the ground that it lacked a factual foundation. The trial court overruled this objection and allowed the plaintiff's expert to testify that the location of the side-airbag sensor in the plaintiff's 2008 Hyundai rendered it unreasonably dangerous. The jury returned a plaintiff's verdict for \$14,140,000.

Analysis: On appeal, the SCOV reversed. It noted that expert opinion may be admitted only if it satisfies certain requirements, including that it have an adequate factual foundation. The opinion must be premised upon assumptions that have a sufficient factual basis and take into account all relevant variables.

Although the plaintiff's expert based his opinion on the assumption that the side airbag would have deployed if it had been located on the vehicle's B pillar, he never performed any analysis or calculations to support that assumption. This, even though he admitted that: (1) the crash-sensing system depended on a combination of the structure of the vehicle, the sensors themselves, and the algorithm for when to deploy the airbags, and (2) inches—and even increments smaller than inches—can matter when choosing sensor location, yet his proposed location was more than 4 inches from any location studied by Hyundai. His assumption that the airbag would have deployed had it been put in the location he recommended was merely ipse dixit.

Justice Powell dissented. She asserted that other evidence established a sufficient foundation for this testimony. But she still would have reversed because the trial court erroneously refused Hyundai's proposed jury instruction that the jury could consider Hyundai's compliance with federal motor vehicle safety standards when determining whether the car manufacturer was negligent.

Key Holding(s):

- For an expert opinion to be admissible, it must be premised on assumptions that have a sufficient factual basis and it must take into account all relevant variables.



Partnerships, LLCs, and Corporations

Case: *Fisher v. Tails, Inc.* (1/8/15) (140444)

Author: Goodwyn

Lower Ct.: Hammond, Catherine C. (Henrico County)

Disposition: Affirmed

Facts: Plaintiffs were Minority shareholders in a Virginia corporation that operated as a regional franchise of RE/MAX LLC, A Delaware limited liability company. Another RE/MAX affiliate sought to buy it out.

The purchase was proposed to occur in four steps. First, the Virginia corporation would become a Delaware corporation. Second, The Virginia corporation would merge with and into a newly formed Delaware limited liability company (this would be a subsidiary of a newly formed holding company, which would hold all of the LLCs membership interests). Third, the holding company would cause the LLC to amend and restate its LLC agreement. Fourth, the holding company would sell the purchasing affiliate all of its membership interest in the LLC.

The plaintiff minority shareholders opposed this, but the proposals were passed by majority vote. The minority shareholders argued that they were entitled to appraisal rights because the series of transactions resulted in an asset sale and, under Virginia law, an asset sale triggers appraisal rights. (Delaware law does not provide appraisal rights for asset sales.) They claimed that the series of transactions should not be analyzed separately, but as a single integrated transaction.

The trial court sustained the defendant's demurrer, holding that changing the corporation's domicile from Virginia to Delaware did not trigger appraisal rights and that Delaware law did not require appraisal.

Analysis: On appeal, the SCOV affirmed. It noted that under Code § 13.1-722.2, a corporation can "domesticate" by changing the state where it is incorporated. Once domestication is completed, the corporation is governed by the laws of the other state. It was undisputed that the corporation properly changed its domicile from Virginia to Delaware.

Code § 13.1-730(A) confers appraisal rights on minority shareholders in only five scenarios. Notably, Virginia law does not give shareholders appraisal rights upon a "consummation of a domestication." Applying the statutory canon of *expressio*

unius est exclusio alterius, the SCOV held that the General Assembly intended to exclude a change in corporate domicile from its list of circumstances triggering appraisal rights.

Plaintiffs, however, argued that the Circuit Court should have applied either the “step transaction” doctrine or the “equitable substance over form” doctrine to find that they were entitled to appraisal rights. Applying these doctrines, they claimed, the four transactions should be viewed as one transaction, whose substance was the sale of all of the corporation’s assets.

The SCOV disagreed. Even if Virginia law recognized those doctrines—an issue that the SCOV did not decide—the case fell under the “independent legal significance” exception to them. Where, as here, a transaction is effected pursuant to a statute, courts will refuse to treat that transaction as an inseparable part of an overall set of transactions.

Key Holding(s):

- A change in corporate domicile does not trigger minority shareholder appraisal rights.
- Courts will not apply the “step transaction” doctrine or the “equitable substance over form” doctrine to corporate transactions that are effected pursuant to statute.



DECEMBER SESSION 2014

Civil Rights

Case: *Commonwealth v. Windsor Plaza Condominium Association, Inc.* (12/31/14) (131806)

Author: Goodwyn

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

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

Facts: A wheelchair-bound plaintiff purchased a condominium unit. The condominium had an underground garage. When initially constructed, the parking lot was a general common area and had designated handicap spots. Later, however, the condominium instruments were changed to assign parking spaces to particular units. This included the four spaces previously designated for disabled persons.

The disabled plaintiff purchased a condominium unit in July 2007. The parking space assigned for that unit was too small to accommodate his needs. He asked to be assigned a handicapped space, but the spaces that previously had been designated “handicapped” had been assigned to other property owners, who refused to exchange their spots with plaintiffs’.

The plaintiffs complained to HUD and FHB. The Attorney

General, on behalf of the Commonwealth, filed a complaint alleging that the association had violated Code § 36-96.3(B)(ii) by failing to accommodate the plaintiff’s equal opportunity to use and enjoy his dwelling. The disabled plaintiff and his wife intervened pursuant to § 36-96.16(B). They reiterated many of the Commonwealth’s claims. But they made additional claims, including that the association had discriminated against them in violation of Code §§ 36-96.3(A)(8) and (9), and 42 U.S.C §§ 3604(f)(1),-(2), and -(3)(b). The trial court allowed them to intervene. Asserting a statute-of-limitations defense, the association filed a plea in bar to these additional claims, which the trial court sustained.

The four condominium owners who had been assigned the previously designated handicap spots were also added as parties defendant. The Commonwealth asserted that these individuals also violated the Virginia Fair Housing Law. The trial court sustained the parking-space owners’ pleas of the statute of limitations.

The case went to trial on the claim that the association violated Code § 36-96.3(B)(ii). At the close of the Commonwealth’s case-in-chief, the trial court struck the Commonwealth’s evidence and granted the association summary judgment. It denied the association’s request for attorney’s fees, however.

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

First, the SCOV dismissed the Commonwealth’s appeal with respect to its claims against the individual space owners. The Commonwealth named only one of the eight owners as a party to the appeal. The trial court had found these owners to be necessary parties, a ruling that became law of the case upon the Commonwealth’s failure to appeal it. The Commonwealth’s failure to name the other owners as parties to the appeal meant that the Commonwealth failed to join necessary parties.

The SCOV next rejected the Commonwealth’s argument that the condominium reasonably could have accommodated the plaintiff’s disability by converting a bicycle storage area to a parking space. Code § 36-96.3 (B) (ii) applies only to a failure to accommodate by refusing to change “[r]ules, practices, policies, or services.” The requested conversion, however, concerned a physical alterations to the premises, not a rule, practice, policy, or service.

The Commonwealth’s reasonable accommodation claim was predicated on the association’s refusal to reassign one of the four original handicap parking spaces to the disabled plaintiff. The court held that this request for an accommodation was not reasonable because the association had no power to reassign such spots without the consent of the spots’ owners. Moreover the association had found owners who were willing to trade their spot, albeit not permanently.

The SCOV also found that principles of sovereign immunity barred the association’s request for attorney’s fees. The act had certain provisions authorizing attorneys fees against

the Commonwealth. But the Commonwealth had not sued under those provisions. Concluding that the omission of a sovereign-immunity waiver in the provisions under which the Commonwealth sued was intentional, the SCOV held that the Commonwealth had not waived sovereign immunity.

The disabled resident appealed the trial court's ruling that his new claims were barred by the statute of limitations. The SCOV held that those claims accrued when the association first denied his request for an accommodation. And it held that there was evidence to support the trial court's determination that the claims accrued on August 23, 2007. Under Code § 36-96.18(B), the disabled party had to file his reasonable accommodation claim within the longer of two years from the date of accrual or "180 days after the conclusion of the administrative process." The disabled party's intervening complaint was not filed until January 28, 2011, after both statutory time periods had elapsed.

The individual plaintiffs also appealed the trial court's dismissal, on statute of limitations grounds, of their Code § 36-96.16(B)'s intervention. The SCOV disagreed. It held that Code § 36-96.16 and -96.18 were interrelated. Therefore, the trial court correctly applied the limitations provisions in section 36-96.18, and correctly found that the action was time barred.

Finally, the court rejected the individual plaintiffs' continuing-violation theory. The plaintiffs alleged that the association's continued operation of a condominium that lacked handicapped-accessible parking was a continuing violation. The Supreme Court, however, found that this was a continuing effect of a prior violation, not a continuing violation.

The SCOV rejected the association's cross-appeal on the trial court's denial of attorneys fees as to the plaintiffs, finding that trial court did not abuse its discretion—the trial court duly weighed the relevant factors.

Key Holding(s):

- An appeal will be dismissed where it fails to join necessary parties.
- A non-appealed finding of the trial court becomes law of the case.
- Attorney's fees may not be awarded against the Commonwealth in the absence of an express legislative waiver of sovereign immunity.



OCTOBER SESSION 2014

Premises Liability

Case: *RGR, LLC v. Settle* (10/31/14) (130633)

Author: Kinser

Lower Ct.: O'Brien, Mary Grace (Prince William County)

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

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

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

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

Analysis: On appeal—and changing its earlier opinion—the SCOV affirmed in part, reversed in part, and remanded.

The defendant first argued that it did not owe any duty of care to the plaintiff. The SCOV rejected this argument. Applying the common-law principle that one must maintain one's property in a way not to injure others, it held that the defendant owed a duty to ensure that the right of way was free of visual obstructions. This was not a theory of premises liability; it was just an instance of the more general principle that one must use one's property in such a way as not to injure others. The duty did not depend on proving a particular relationship. Because the decedent was "within a given area of danger" created by the location of RGR's lumber stacks, RGR owed him a duty to exercise ordinary care.

RGR then argued that Virginia had never recognized a duty to protect "mere sightlines." Although the court acknowledged that this was true, it held that the case fell under the more general principle—long recognized in Virginia—that one has a duty to exercise ordinary care in the use and maintenance of one's property to prevent injury to others. Whether or not protecting sightlines fell under this duty depends on the particular facts of the case.

The SCOV also rejected RGR's argument that it had no "actual or constructive knowledge" that the stacked lumber created a dangerous condition. It held that defendant was improperly trying to import principles from premises-liability law. And it held that the

real issue was foreseeability, which went to the existence of negligence, not the existence of a duty of care. The jury was properly instructed on what constituted a breach of the standard of care. And there was sufficient evidence in the record for the jury to have found that a reasonably prudent person would have foreseen the consequences of stacking the lumber near the crossing.

Turning to the issue of contributory negligence, the SCOV rejected the defendant's argument that the decedent was contributorily negligent as a matter of law for failing to look and listen for the train. It noted that this was an issue to be decided by the factfinder unless "reasonable minds could not differ about what conclusion can be drawn from the evidence." On appeal, the defendant's burden was to "show that there is no conflict in the evidence on contributory negligence, and that there [be] no direct and reasonable inference to be drawn from the evidence as a whole to sustain a conclusion that the [plaintiff] was free from contributory negligence." There was expert testimony that it was "impossible" for the plaintiff to have seen or heard the train and that the crossing was "not reasonably safe" and was "ultrahazardous." After reviewing cases in which the court had, and had not, found contributory negligence as a matter of law in railroad-crossing cases, the court concluded that this was an instance in which the decedent's contributory negligence presented a jury question. Among other things, it noted that the stacked lumber impaired the decedent's ability to see the approaching train, that noise in the truck's cab made hearing the train difficult, that other witnesses reported that they had not heard the train's horn, and that other vehicles had waved him through the tracks.

The SCOV then rejected RGR's argument that the lumber stacks were not the proximate cause of the collision between the decedent's truck and the train. Based on the facts of the case, the jury was entitled to infer that, but for the sightline obstruction, the decedent would have been able to see the approaching train.

Finally, the SCOV agreed with RGR that, in calculating pre-judgment interest, the trial court should have subtracted from the \$2.5 million damages award the \$500,000 settlement with a joint tortfeasor. The non-settling tortfeasor should not have to pay interest on the offset amount—i.e., money that the tortfeasor does not owe.

Justice McClanahan dissented, joined by Justices Lemons and Goodwyn. The dissenters objected to the broad formulation of duties of care owed by property owners, and also opined that the decedent was contributorily negligent as a matter of law.

Key Holding(s):

- The general duty to maintain one's property so as not to injure others encompasses the duty not to block sightlines at a railroad track.
- A non-settling tortfeasor does not have to pay interest on amounts that the plaintiff received as part of a settlement.



Sovereign Immunity

Case: *McBride v. Bennett* (10/31/14) (131301)

Author: Powell

Lower Ct.: Jones, Jerrald C. (City of Norfolk)

Disposition: Affirmed

Facts: An on-duty police officer was dispatched to investigate a call about a domestic disturbance. Another officer decided to provide backup. Both proceeded to the scene at high speed—an apparent violation of department policies stating that domestic calls did not require an emergency response. Neither officer activated sirens or emergency lights. One of the drivers hit a bicycle, killing the rider.

The cyclist's personal representative filed a wrongful-death negligence claim against the officers, both individually and as employees of the City of Norfolk. The defendants filed special pleas in bar of sovereign immunity. The trial court sustained the pleas, finding that the officers were entitled to sovereign immunity because they exercised discretion in determining whether and how to respond to the dispatch.

Analysis: On appeal, the SCOV affirmed. Reciting the four-factor *James v. Jane* test for determining whether sovereign immunity applies, the court focused its analysis on the last prong: i.e., whether the act involved the use of judgment and discretion.

The SCOV noted that in motor-vehicle-accident cases involving government employees, the key question is whether the government function being performed at the time: (1) involved ordinary driving in routine traffic or (2) involved driving that required a degree of judgment and discretion beyond ordinary driving situations.

The plaintiff argued that responding to a domestic call was not a circumstance requiring high-risk driving and that ordinary driving would suffice. But the SCOV held that a police officer's decision whether to respond to a call in an emergency manner or in an ordinary fashion was itself an act requiring the exercise of discretion. The existence of policies covering the issue did not eliminate the officer's need to make tough judgment calls in stressful situations. How best to respond to a call is a decision best left to the judgment and discretion of the officer.

Justice Kinser, joined by Justice McClanahan filed a concurring opinion. Justice Mims dissented.

Key Holding(s):

- For purposes of sovereign-immunity analysis, a police officer exercises discretion when determining whether to respond to a dispatch in an emergency manner.



Real Property

Case: *Synchronized Construction Services, Inc. v. Prav Lodging, LLC* (10/31/14) (131569)

Author: Millette

Lower Ct.: Bouton, Daniel R. (Orange County)

Disposition: Reversed

Facts: A property owner hired a construction manager to build a hotel on a cost-plus basis. The construction manager, in turn, hired a subcontractor to perform the work. After the work was substantially complete, the subcontractor recorded a mechanics lien for unpaid work on the hotel. It then filed a complaint to enforce the mechanics lien, which named the owner, the construction manager, the bank, and the other subcontractors as defendants. (The lien was bonded off, releasing the real estate.)

The subcontractor, however, did not make diligent efforts to serve the defendants, including the defendant construction manager. The trial court held that the construction manager was a necessary party to the mechanics-lien enforcement action. Because the plaintiff failed to make diligent efforts to serve a necessary party, the trial court dismissed the mechanics lien action.

Analysis: On appeal the SCOV reversed. In a mechanics lien action, a party is a necessary party if (1) it has a real property interest in the real estate subject to the mechanics lien or (2) where the lien has been bonded off, it has an interest in the bond. The party has to have an interest in the actual res of the case—i.e., the real estate or the bond. A general pecuniary interest in the outcome of the mechanics-lien enforcement action is not sufficient.

The construction manager lacked an interest in the bond. Although it could have obtained such an interest by properly perfecting a general-contractor's mechanics lien, it failed to do so. This meant that it did not have a protectable interest in the outcome of the enforcement action. Thus, it was not a necessary party.

Justice Koontz, joined by Justices Mims and Powell, dissented. He argued that the mechanic's lien statutory scheme contemplates a central role for the general contractor.

Key Holding(s):

- An entity is a necessary party to a mechanics-lien enforcement action where it has a direct interest in the real estate or—if the lien has been bonded off—in the bond.



Premises Liability

Case: *Lasley v. Hylton* (10/31/14) (132048)

Author: Mims

Lower Ct.: Kirksey, Larry B. (Botetourt County)

Disposition: Affirmed

Facts: An eight-year-old child was hurt in an ATV accident. The accident occurred at a neighbor's house during a party that the child's parents also attended. The ATV had prominent warnings, including that it not be operated by small children. Nevertheless, the child's father gave her permission to ride the ATV. The child lost control of the ATV, was thrown to the ground, and suffered many injuries, including a fractured shoulder.

The child—suing through her next friend (her mother)—sued the neighbor, claiming that he had been negligent and grossly negligent: (1) by allowing the child to operate the ATV, (2) by failing to advise her and her father of the warnings displayed on the ATV, and (3) by failing to heed the warnings on the ATV.

At trial, the neighbor testified that he had relied on the child's father to decide whether she could safely drive an ATV. The defendant did not volunteer to supervise the child. And the child's father was present when she was riding the ATV. At the close of the plaintiffs case, the trial court granted the neighbor's motion to strike. The court reasoned that in the absence of a special relationship or evidence that the neighbor had assumed a duty to supervise the child, the neighbor had no duty to the child that could support a negligence finding.

Analysis: On appeal, The SCOV affirmed. It held that the risks presented by the ATV were open and obvious, and were—or should have been—apparent to the father. Because the risks were open and obvious, the law gave the father the primary duty to inform, advise, and protect the child. “An invitation to a social event is not an invitation to relinquish parental responsibility.”

Justice McClanahan wrote a concurring opinion, which was joined by Justice lemons and justice Goodwyn. She noted that the plaintiff did not predicate her claim on the fact that she and her father were defendant's social guests. So the majority addressed a claim that the plaintiff never asserted.

Key Holding(s):

- Where a property owner invites a parent and child to his home, the parent retains responsibility for the child's safety vis-à-vis obvious risks.



Partnerships, LLCs, and Corporations

Case: *Jimenez v. Corr* (10/31/14) (140112)

Author: Millette

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

Disposition: Reversed

Facts: Testamentary documents ordered that the testator's stock be disposed one way. But a shareholders agreement executed after the testamentary documents dictated that they be disposed of in another way. The circuit court held that the testamentary documents controlled. Because the testamentary documents required the stock to be conveyed to an inter vivos trust, and because the trust allowed one of the beneficiaries (Lewis) to buy out the stock of the other beneficiaries, the court held that Lewis had the right to buy out the stock.

Analysis: On appeal, the SCOV reversed. To begin with, it held that the later-executed shareholders agreement controlled. It noted that the two instruments needed to be construed together, that the shareholders agreement was the more recent expression of the decedent's intent with respect to the disposition of the stock upon her death, and that the shareholders agreement was more specific than the general pour-over provision in the decedent's will.

The shareholders agreement required that the decedent's stock either be: (1) sold to the company or its stockholders or (2) conveyed to an immediate family member. The question arose whether conveyance of the stock to the trust was a conveyance to an "immediate family member." The court noted that, unlike a corporation, a trust is not a separate legal entity that can own property. The ownership of the property is split between the trustee and the beneficiaries. Because the trustees of the trust did not qualify as members of decedent's immediate family, as defined in the stockholders agreement, it was not a conveyance to an immediate family member.

However, there was a separate provision in the decedent's will that allowed property to pass directly to a beneficiary if it otherwise immediately would have passed indirectly via the trust to that beneficiary. The court held that the stock would not pass immediately to the beneficiaries, as Louis had an exclusive purchase option. Before the trustee could distribute the stock per stirpes to the other children, Louis would need to determine whether and to what extent to exercise his option. Accordingly, the disposition of the stock could not bypass the trust under this provision.

The result was that the distribution of the stock under the decedent's will was not to "immediate family members." Thus, the stock needed to be sold to the company or to its remaining stockholders.

Justice McClanahan dissented. She claimed that the Court's reading of these documents frustrated the evident intent of the parties, which was to keep the stock within the immediate family, giving Lewis the option to purchase as much of her stock

as he desired.

Key Holding(s):

- A later-executed shareholder's agreement controls over a testamentary document where it addresses the decedent's intent vis-à-vis his shares more specifically than the earlier testamentary document.



Local Government

Case: *Payne v. Fairfax County School Board* (10/31/14) (140145)

Author: Mims

Lower Ct.: Tran, John M. (Fairfax County)

Disposition: Affirmed

Facts: Plaintiff was a food-and-nutrition services manager at a middle school. The school district suspended her for three days without pay for violating school district regulations. Plaintiff filed a declaratory judgment action, claiming that Code § 22.1-315(A) requires school boards to conduct a hearing before suspending an employee without pay. The trial court held that the statute did not apply because it governed only suspensions that were based on: (1) threats to the safety or welfare of the school or students, or (2) charges of certain crimes that are specified in the statute. The trial court granted the school board's motion for summary judgment.

Analysis: On appeal, the SCOV affirmed. It held that the plain language of Code § 22.1-315(A) stated that it applied only to suspensions of greater than five days, which plaintiff's suspension was not. Plaintiff also argued that an opinion letter of the Attorney General interpreted the statute in such a way as to endanger the due process rights of teachers. But as the plaintiff was not a teacher, the SCOV held that she lacked standing to argue this. Finally, she argued that under Dillon's Rule the school board lacked any authority to suspend non-teaching employees except pursuant to Code § 22.1-315. The SCOV rejected this argument because Code § 22.1-28 vests school boards with authority to supervise the schools in their school divisions. This necessarily entails the power to discipline school employees. Moreover, another provision, Code § 22.1-79(6), presupposes that school boards have such power.

Key Holding(s):

- A nonteaching middle-school employee suspended without pay for three days was not entitled to a hearing before the suspension.



Consumer Protection

Case: *Owens v. DRS Automotive PhantomWorks, Inc.*
(10/31/14) (140171)

Author: Russell

Lower Ct.: Clarkson, John E. (City of Norfolk)

Disposition: Affirmed

Facts: The plaintiffs hired a garage to restore an antique Ford Thunderbird, adding a modern engine and suspension. The garage owner advised that the most economical way to do this was to buy a “donor car” that was compatible with the Oldsmobile. The garage owner then bought a 2001 Crown Victoria Police Interceptor—he claimed, for \$6000. The seller of the vehicle had advertised the vehicle on the Internet for \$2000. But the garage owner claimed that he did not see the advertisement. He said he learned about the vehicle through word-of-mouth. Pursuant to the garage’s agreement with the plaintiff, the price was marked up 25%, to \$7200, an amount later increased to \$7500.

Suspecting that the vehicle’s true purchase price had been misrepresented, the plaintiff sued the garage and its owner for: (1) breach of the Virginia Consumer Protection Act (“VCPA”), (2) fraud, and (3) breach of contract. At trial, the plaintiff called as witnesses the garage owner and the seller of the Interceptor, who were the only witnesses to the sale. They both testified that the sale price was \$6000. At the close of the plaintiffs’ case, the trial court sustained the defendants’ motion to strike the fraud and VCPA claims. The contract claim went to the jury, which returned a defense verdict.

Analysis: On appeal, the SCOV affirmed. It noted that the only witnesses who had any knowledge of the transaction were the garage owner and the seller—both of whom the plaintiffs had called in their case in chief. Both witnesses testified that the purchase price was \$6000. This was further supported by documentary evidence. Plaintiff presented no evidence of any lesser or different price paid. The SCOV recited the rule that when a plaintiff calls the defendant as an adverse witness, the plaintiff is bound by the defendant’s testimony to the extent that it is clear, reasonable, and uncontradicted.

The SCOV rejected the plaintiff’s argument that there was circumstantial evidence that a lesser price had been paid. (This included the advertisement as well as testimony that someone at the garage owner’s business had responded to it. There was no documentary evidence of the alleged email.) The court held that the circumstances did not establish any fact contradicting the witnesses’ testimony; they only grounded suspicion and conjecture. This could not overcome the facts that were “ascertained and established” by the testimony of the garage owner and the seller. Thus there was no evidence of fraud and the trial court correctly sustained the defendants’ motion to strike.

As for the VCPA claim, The court agreed with the plaintiff

that a party seeking relief under that statute need not establish fraud in order to state to claim. But it held that the statute does require evidence that the seller relied on an alleged misrepresentation, and was harmed by it. The SCOV held that there was no evidence of any such reliance on the garage owner’s alleged misrepresentations.

Justice Powell joined by Chief Justice Kinser and Justice Mims, dissented. They opined that there was sufficient circumstantial evidence that the garage owner defrauded plaintiffs.

Key Holding(s):

- When a plaintiff calls a defendant as an adverse witness, the plaintiff is bound by the defendant’s testimony to the extent that it is clear, reasonable, and uncontradicted.



Medical Malpractice

Case: *Fiorucci v. Chinn* (10/31/14) (131869)

Author: McClanahan

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

Disposition: Affirmed

Facts: The defendant oral surgeon diagnosed plaintiff as having three decayed wisdom teeth requiring extraction. While extracting one, he perforated the bone, leaving an opening in the sinus. While extracting another, he encountered severe bleeding; eventually the area around that tooth became permanently numb.

The plaintiff alleged that the teeth were being resorbed, not decaying, and so did not need to be extracted. He contended that the defendant oral surgeon negligently diagnosed his condition, negligently recommended extraction, and negligently performed the extraction.

The defendant sought to introduce evidence of a conversation that he had with plaintiff, before the extraction, in which the defendant warned that extraction posed the risk of nerve injury, numbness, and opening of the sinus. The trial court excluded this evidence on the ground that it was not relevant. The jury returned a plaintiff’s verdict, upon which the trial court entered judgment.

Analysis: On appeal, the SCOV affirmed. The defendant argued that the patient’s pre-operative conversation with the oral surgeon should have been admitted because some of plaintiff’s claims—e.g., for negligent diagnosis—concerned events that preceded the extraction. The SCOV rejected this argument. It noted that none of the plaintiff’s claims hinged on whether the patient was aware of the procedure’s risks. So the pre-operative conversation about such risks was irrelevant.

The SCOV also rejected the defendant's argument that the plaintiff placed the risk discussion at issue by (1) asking the jury during voir dire whether they could hold a dentist or doctor liable, given that most medical and dental procedures involve risk, and (2) presenting the testimony of an expert about the expert's conversation with his own patient regarding risks of the procedure. It held that these actions did not place informed consent at issue in the case, and so evidence of the defendant's pre-operative conversations with plaintiff were irrelevant.

Key Holding(s):

- Where informed consent is not at issue, evidence of preoperative conversations between a patient and a surgeon about a procedure's risks are irrelevant and inadmissible.



Civil Procedure

Case: *DRHI v. Hanback* (10/31/14) (131974)

Author: Per Curiam

Lower Ct.: (Fairfax County)

Disposition: Reversed

Facts: This was an appeal of a contempt ruling arising out of an order compelling specific performance of a real-estate purchase agreement. The order, which was entered in 2004, directed the buyer to pay \$390,000. The land in question was intended for use as a subdivision. The court further ordered that, if the subdivision plan were approved, the buyer would have to pay \$70,000 for the sixth lot and for each additional approved lot.

More than eight years later, the seller learned that the county had approved the subdivision and that the buyer was commencing work. The approved subdivision had more than five lots. But the buyer did not pay the additional \$70,000 for each lot. The seller petitioned the Circuit Court for a rule to show cause why the buyer should not be held in contempt. The trial court held a hearing, found the buyer in contempt, and ordered that the buyer immediately pay \$350,000 plus interest.

Analysis: On appeal, the SCOV reversed. (The buyer had filed an appeal to the Court of Appeals and to the Supreme Court. The Supreme Court certified the case and assumed jurisdiction over the entire matter.)

The court recited the principle that "before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied." When the court entered its original order in 2004, the order was not definite in its terms. It left unresolved issues concerning the buyer's future failure to pay, being indefinite as to the

total amount that the buyer was required to pay and when it was required to pay it. Thus, the buyer could not be held in contempt for failing to comply with the June 9, 2004 order.

Justice Mims, joined by Justice McClanahan and Justice Powell, dissented on the grounds that he believed the Supreme Court lacked subject-matter jurisdiction to review civil contempt orders. Justice Mims contended that Code § 19.2-18 vests subject matter jurisdiction over such judgments in the Court of Appeals. And although Code § 17.1-409 authorizes the Supreme Court to assert jurisdiction over cases before the Court of Appeals, the dissenters opined that the circumstances of the case did not meet the statutory criteria for such assertion of jurisdiction.

Key Holding(s):

- Before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied.



SEPTEMBER SESSION 2014

Civil Procedure

Case: *Temple v. Mary Washington Hospital, Inc.*
(9/12/14) (131754)

Author: Lemons

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

Disposition: Affirmed

Facts: Plaintiff brought a wrongful-death medical-malpractice action against a hospital and various physicians. She claimed that the defendants were negligent in responding to the decedent's complaints of shortness of breath and chest pain, and that this negligence caused decedent to have a fatal heart attack.

During discovery, the plaintiff sought the hospital's policies and procedures related to the management, care, and treatment of patients who presented similarly to decedent. The hospital responded that its policies and procedures were irrelevant, inadmissible, and privileged under Code §§ 8.01-581.16 and 581.17. Plaintiff moved to compel these materials. Plaintiff also moved to compel production of certain electronic records. The trial court denied both motions to compel.

Plaintiff nonsuited the case. In the refiled case, the trial court entered an agreed order that incorporated "[a]ll discovery conducted and taken in the previous action." The jury returned a defense verdict. On appeal, the plaintiff argued that the trial

court erred in refusing to compel the hospital to produce the requested policies and procedures and electronic records.

Analysis: On appeal, the SCOV affirmed—though without reaching the merits of the appeal. It held that the agreed order in the second lawsuit did not incorporate the orders challenged on appeal. The order encompassed only the discovery materials themselves, not motions, objections, or trial court orders regarding discovery. So the discovery rulings in the first action were not properly before the court.

Key Holding(s):

- An order that incorporates the *discovery* from a non-suited action does not incorporate *discovery rulings* in the nonsuited action.



Real Property

Case: *Swords Creek Land Partnership v. Belcher*
(9/12/14) (131590)

Author: Russell

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

Disposition: Affirmed

Facts: An 1887 deed severed a parcel's mineral rights from its surface rights. The owner conveyed the rights to "all of the coal, in, upon or underlying" the property. The successor in interest to those coal rights claimed that this conveyance also encompassed rights to coalbed methane. The surface owner disagreed. The trial court ruled in favor of the surface owner, holding that (1) the contract was unambiguous, (2) it applied only to coal, and (3) coalbed methane is a "distinct mineral estate" that was not conveyed by the deed.

The trial court also rejected the coal owner's request for a constructive trust, which the coal owner based on the alleged unjust enrichment of the surface owner. The coal owner based its argument on the fact that it had undertaken costly efforts to extract the coalbed methane from the property.

Analysis: On appeal, the SCOV affirmed. It held that, in 1887, coalbed methane was not viewed as a constituent part of the coal. Rather, it was viewed as a separate mineral estate. The Supreme Court also rejected the unjust-enrichment argument, noting that at all times the coalbed methane belonged only to the surface owner.

Key Holding(s):

- Coalbed methane has not historically been deemed a constituent part of coal and so rights to coalbed methane do not pass with coal rights.



Workers' Compensation

Case: *Kohn v. Marquis* (9/12/14) (131162)

Author: Goodwyn

Lower Ct.: Hall, Mary Jane (City of Norfolk)

Disposition: Affirmed

Facts: A police officer trainee died from blows to the head that he received throughout his training. The final precipitating trauma occurred during a defensive training exercise, in which he was struck in the head several times by a training officer. The trainee began showing symptoms of neurological deficits and was taken to the hospital, where he died several days later.

The officer's personal representative sued the city of Norfolk and various instructors at the police academy. The city filed a plea in bar asserting that the plaintiff's exclusive remedy was under the Virginia Worker's Compensation Act, Code § 65.2-100 et seq. The city then moved for summary judgment on its plea, claiming that the undisputed facts showed that the officer suffered an accidental injury at the workplace. The trial court granted the motion and sustained the plea.

Analysis: On appeal, the SCOV affirmed. The plaintiff argued that the decedent's death was caused by the cumulative exposure to head injuries, not just injuries suffered on the day he was sent to the hospital. Plaintiff then cited cases holding that an injury caused by a series of traumas rather than just one event is not an injury by accident. The Supreme Court, however, held that the decedent's injuries bore little resemblance to the gradually-incurred injuries and repetitive trauma suffered in the cases that plaintiff cited. Among other things, the decedent in the present case "suffered an obvious mechanical or structural change in his body while engaged in a work activity which exposed him to an employment-related hazard that injured him and contributed to his death." Thus, the death was properly construed as accidental within the meaning of the Worker's Compensation Act.

Key Holding(s):

- An injury that causes an obvious mechanical or structural change in the victim's body and that occurs while the victim is engaged in a work activity that exposed him to an employment-related hazard is "accidental" for purposes of the Worker's Compensation Act.



Employment

Case: *Bailey v. Loudoun County Sheriff's Office*
(9/12/14) (131815)

Author: Millette

Lower Ct.: Swersky, Alfred D. (Judge Designate)
(Loudoun County)

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

Facts: This was an action for unpaid overtime brought by deputies employed by the Loudoun County Sheriff's Office. The Federal Fair Labor Standards Act requires public employers who pay law-enforcement employees on a 14-day work period to pay time and a half if the law-enforcement employee has worked over 86 hours during that period. But the regular working hours of the law enforcement employee may be less than 86 hours. To fill the gap between regularly scheduled hours and the 86-hour FLSA standard, the Virginia gap pay act requires public employers of law-enforcement employees to pay those employees time and a half for all hours in excess of their regularly scheduled work. Loudoun County instituted three policies to circumvent the requirements of the Virginia gap pay act for its law-enforcement employees.

The "debiting leave" scheme operated when the deputy took sick leave during a period in which he otherwise would be entitled to overtime pay. The Sheriff's Office debited sick leave time from the deputies' total hours worked rather than from his accrued sick leave. So the sick-leave hours were not counted towards the total hours worked for that month. To be compensated for the sick-leave hours, the employee could ask the department to "acknowledge" them in a subsequent work period. But it could do so only in those periods where acknowledging the hours would not put the employee over the overtime threshold.

The "exchange hours" scheme allowed a patrol deputy to voluntarily exchange his overtime hours for leave hours. The leave would be taken and paid for at a later date. But the exchanged overtime hours were paid as leave—i.e., at a normal rate of pay—and not at time and a half.

Finally, the "force flexing" scheme applied when a deputy's work hours approached the time and a half threshold. The Sheriff's Office would bar that deputy from working his full scheduled shift, sending him home before he could earn sufficient hours to warrant overtime.

The trial court held that none of these practices violated Virginia's Gap Pay Act.

Analysis: On appeal, the SCOV affirmed in part and reversed in part. First, it found that the "debiting leave" scheme violated the Act. The Act requires employers to count "all hours of work" that accrue within the gap. The Act defines "hours of work" as "all hours that employee works or is in a paid status during his regularly scheduled work hours."

So "hours of work" would include sick leave hours. Because the sick leave hours accrued during the pay period, and because the "debiting leave" scheme did not count those hours during the pay period in which they accrued, the "debiting leave" scheme violated the Act.

Likewise, the SCOV found that the "exchange hours" scheme violated the act. The effect of the scheme was to pay employees in the form of leave rather than overtime compensation. Although the act allows payment in the form of leave, such payments still must comply with the time-and-a-half rule. The "exchange hours" scheme, however, did not pay employees at the time-and-a-half overtime rate. Leave was paid on a one-to-one basis, which violated the Act.

The SCOV, however, found that the last practice—the "force flexing" technique—did not violate the Act. It did not pay employees at less than a time-and-a-half rate for overtime work, which was the problem the General Assembly intended the Act to remedy. It just employed those workers for fewer hours during the work period. The Act does not bar employers from altering a work schedule to avoid having to pay overtime. And changing the work schedule does not effect a change in the "work period." The fact that the practice was instituted to avoid having to pay overtime did not render it improper.

The SCOV also rejected the deputies' contractual challenge to the "force flexing" technique. The employee handbook gave supervisors broad authority to adjust employee schedules, provided there is adequate notice to allow the employee to accommodate the adjustment. There was no evidence that the implementation of the "force flexing" scheme violated this rule. The court reversed and remanded for a determination of damages.

Key Holding(s):

- Not including time taken for leave in computing hours for a work period violates the Gap Pay Act.
- Exchanging work hours for leave, to be taken in a later work period, violates the Gap Pay Act.
- Employers do not violate the Gap Pay Act where they adjust employees' work schedules so as to avoid having them work sufficient hours to cross the overtime threshold.



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