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Virginia Best Practices in Handling Pleas of the Statute of Limitations and/or Contractual Limitations Period in an Action on a Life Insurance Policy

By Robert B. "Chip" Delano, Jr.

This paper focuses on strategic best practices for the handling of a special plea of the statute of limitations and/or contractual limitations period in an action seeking recovery of the proceeds of a life insurance policy under Virginia law. This past year, an action on a life insurance policy was dismissed for being time-barred thanks to the Supreme Court of Virginia's 1995 holding in *Arrington v. Peoples Security Life Ins. Co.*[1] The other party assumed that the statute of limitations did not begin to run until the insurer denied the claim. When the *Arrington* case was cited, the other party was surprised that the statute of limitations instead had begun to run from the earlier date when the insurer acknowledged receipt of the claim. At the conclusion of the hearing on the insurer's special plea of the statute of limitations, the Judge entered a final order sustaining the special plea of the statute of limitations and dismissing the case. After that favorable ruling, I decided to write an article on the *Arrington* case and its holding regarding statutes of limitations/contractual limitations periods in a life insurance action.

Mr. Delano is a shareholder in the Richmond office of Sands Anderson PC and is a former president of the Virginia Association of Defense Attorneys. He serves as trial and appellate counsel in insurance and tort litigation with a significant portion of his practice devoted to the defense of life, health, disability, and ERISA cases. Mr. Delano was counsel of record for the life insurance carrier in the Arrington v. Peoples Security Life Ins. Co. case.

I. Principles Regarding the Statute of Limitations.

A. The old and favored equity maxim behind statutes of limitations is, "vigilantibus, non dormientibus jura subveniunt," which is translated, "the laws came to the aid of the vigilant and not the sleeping ones."[2]

"Statutes of limitations are statutes of repose, the object of which is to compel the exercise of a right of action within a reasonable time. They are designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared."[3]

B. *In Arrington v. Peoples Security Life Ins. Co.*,[4] the Supreme Court of Virginia analyzed a plea of the statute of limitations in a case involving recovery on two life insurance policies. In explaining its legal analysis, the Court noted these well-settled principles regarding statutes of limitations:

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> Statutes of limitations are strictly enforced and exceptions thereto are narrowly construed. Consequently, a statute should be applied unless the General Assembly clearly creates an exception, and any doubt must be resolved in favor of the enforcement of the statute.[5]

II. Pleading a Statute of Limitations and/or Contractual Limitations Period.

Pursuant to the Code of Virginia, the bar of a statute of limitations may only be raised as an affirmative defense in a responsive pleading such as a plea in bar[6] or answer, but not a demurrer,[7] motion to quash process,[8] or motion to strike.[9] Virginia Code § 8.01-235 provides:

> The objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading. No statutory limitation period shall have jurisdictional effects and the defense that the statutory limitation period has expired cannot be set up by demurrer. This section shall apply to all limitation periods, without regard to whether or not the statute prescribing such limitation period shall create a new right.

Even though the limitations bar must be raised as an affirmative defense in a responsive pleading, the pleading party is not required to specify the particular statute of limitations being relied upon.[10] The defendant has the burden of establishing the facts necessary to prove that the statute of limitations has run.[11] Failure to plead the statute of limitations constitutes a waiver of that affirmative defense.[12] If the statute of limitations is not pleaded or relied upon in the trial court it cannot be raised on appeal.[13]

In cases filed in federal court, "[w]ith jurisdiction based on diversity of citizenship, the court must look to Virginia law for a determination of both the applicable statute of limitations and the time at which a claim accrues under the applicable statute."[14]

III. Which Statutory or Contractual Limitations Period Applies?

Parties to a contract may agree to a contractual limitations period that is different from the statutory limitations period, provided the contractual period is not prohibited by statute.

In the absence of a contractual limitations period in the life insurance policy, Virginia's five year statute of limitations for written contracts, Code § 8.01-246.2, applies to an action on a life insurance policy such that the action for breach of contract must be filed within five years after the cause of action accrues.[15]

In Virginia, parties may contract in life insurance policies for a shorter contractual limitations period than that provided by the statute of limitations[16] provided that it is one year or more.[17]

IV. When Does the Cause of Action for Breach of Contract Accrue and the Limitation Period Begin to Run?

Code § 8.01-230 states that a cause of action for breach of contract accrues and the limitations period begins to run from the date of the alleged breach of contract.[18]

The ticking of the limitations period clock stops when the Complaint is filed in the Clerk's office.[19]

In *Arrington v. Peoples Security Life Ins. Co.*, the Supreme Court of Virginia resolved the question of when a cause of action on a life insurance policy accrues and the limitations period begins to run.[20] In the trial court, the administrator of the insured's estate argued that her action on the life insurance policy accrued and began to run on the date of the insurer's letter refusing the administrator's demand for payment of the policy benefits.[21] The trial court adopted the insurer's position that the five year limitations period accrued and began to run on the date of the insured's death.[22]

While the Supreme Court of Virginia affirmed the trial court's ruling sustaining the insurer's plea of the statute of limitations, the appellate court disagreed with the trial court's selection of the insured's date of death as the accrual date, with the Court stating: "With respect to life insurance policies, we have said that, when a policy requires a demand for payment and proof of death, the statute of limitations begins to run on the date of the demand and proof."[23]

In the *Arrington* case, as is the case with most life insurance policies, the express language of the life insurance policy at issue established that the cause of action accrued when People Security "received proof

of [the] Insured's death" and, thus, was required to pay the proceeds of the policy.[24] There, the insurer wrote a letter on March 30, 1988 to the insured's widow, who was the beneficiary on both life insurance policies, acknowledging that it had received proof of the insured's death.[25]

The *Arrington* Court ruled that "…at the very latest…," at that moment when Peoples Security acknowledged in writing its receipt of proof of the insured's death, Virginia's five year statute of limitations began to run.[26] The plaintiff administrator's lawsuits on the two life insurance policies were not filed until February 15, 1994, well beyond March 30, 1993, the five year anniversary of Peoples Security's letter to the insured's widow acknowledging receipt of proof of the insured's death.[27] Therefore, those actions filed over ten months beyond the statute of limitations period were time barred.[28]

Significantly, even though the life insurer Peoples Security stated in its letter that it would continue to gather the insured's medical records during the contestability period,[29] the presence of this language in the insurer's acknowledgement letter to the widow did not stop the life insurance claim from accruing and the five year statute of limitations period from the beginning to run. As long as the policy has language stating that it will pay the policy proceeds when it receives proof of the insured's death and an insurer's letter to the beneficiary acknowledges receipt of such proof, the life insurance claim accrues, at the latest, on the date of the insurer's letter and the limitations period, be it a statute of limitations or a contractual limitations period, will begin to run.[30]

V. Applying a Statute of Limitations/Contractual Limitations Period to a Claim of a Life Insurance Policy.

Arrington provides the roadmap to raise a limitations defense to an action seeking life insurance benefits. First, one must determine which statute of limitations or contractual limitations applies. Does the life insurance policy have a contractual limitations period of one year or more? If so, then that contractual limitations period applies. If not, then as in the *Arrington* case, Virginia's five year statute of limitations applies.[31]

Second, one must determine when the limitations period accrues and begins to run? Did the life insurer send a letter to the beneficiary acknowledging receipt of proof of the insured's death like Peoples Security did in the *Arrington* case?[32] If so, then the cause of action for breach of contract accrued and the limitations period, be it a statute of limitations or a contractual limitations period of one year or more, begins to run. If the limitations period ran before the plaintiff filed his action for recovery of life insurance benefits, then, as in *Arrington*, the action is time barred.[33] Conversely, if the policy does not have language stating that it will pay the policy proceeds when it receives proof of the insured's death, and the insurer has not written a letter to the beneficiary acknowledging its receipt of proof of the insured's passing, the cause of action has not yet accrued and the limitations period has not begun to run.

VI. Conclusion.

In handling an action on a life insurance policy, the attorney should be prepared to address in the appropriate case the key issues that may be presented if the case was not timely filed within the applicable statute of limitations/contractual limitations period such as those discussed in this paper. ❊

(Endnotes)

1. 250 Va. 52, 458 S.E. 2d 289 (1995).

2. *Tackett v. Bolling*, 172 Va. 326, 335, 1 S.E. 2d 285, 289 (1939)(Hudgins, J., dissenting). One astute law student summarized the maxim to "you snooze, you lose." W. Hamilton Bryson, Bryson on Virginia Civil Procedure § 6.03[8][k][i] at footnote 339 (5th ed. 2017).

3. *Street v. Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E. 2d 271, 277 (1946).

4. 250 Va. 52, 458 S.E. 2d 289 (1995).

5. 250 Va. at 55, 458 S.E. 2d at 290-291 (citations omitted.)

6. A plea in bar can be filed when the defendant's defense can be reduced to a single question of fact such as the lawsuit being barred by the statute of limitations. W. Hamilton Bryson, Bryson on Virginia Civil Procedure § 6.03[6] (5th ed. 2017).

7. *See* Va. Code § 8.01-235.

8. *Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 149, 48 S.E. 857, 858 (1904).

9. *Helm v. Lyons*, 23 Va. Cir. 307 (1991).

10. Va. Sup. Ct. Rule 3:18(d). ("*Pleading the statute of limitations*. – An allegation that an action is barred by the statute of limitations is sufficient without specifying the particular statute relied upon.")

11. *Lo v. Burke*, 249 Va. 311, 316, 455 S.E.2d 9, 12 (1995).
12. *Herrell v. Bd. of Supervisors of Prince William Cty.*, 113 Va. 594, 597, 75 S.E. 87, 88 (1912).
13. *Gibson v. Green's Admin'r*, 89 Va. 524, 526, 16 S.E.2d 661, 662 (1893).
14. *Brown v. American Broad. Co.*, 704 F.2d 1296, 1299 (4th Cir. 1983). *Accord Coe v. Thermasol, Inc.*, 785 F.2d 511, 514 n. 5 (4th Cir. 1986) ("federal courts sitting in diversity apply the forum's statute of limitations").
15. *Arrington*, 250 Va. at 55, 458 S.E.2d at 291 (citing Va. Code § 246(2)).
16. *Koonan v. Blue Cross and Blue Shield of Virginia*, 802 F. Supp. 1424, 1425 (E.D. Va. 1992) (Plaintiff's action seeking recovery under his group health insurance contract held to be time-barred by one year contractual limitations period permitted by Va. Code § 38.2-314.)
17. *See* Va. Code § 38.2-3316(1) (individual life insurance policy); § 38.2-3338(1) (group life insurance policy); § 38.2-3354(1) (industrial life insurance policy); § 38.2-314 ("any insurance policy").
18. 250 Va. at 55, 458 S.E.2d at 291 (citing Va. Code § 8.01-230).
19. Va. Sup. Ct. Rule 3:2(a) ("A civil action shall be commenced by filing a complaint in the clerk's office.").
20. 250 Va. at 56, 458 S.E.2d at 291.
21. *Id.* at 54-55, 458 S.E.2d at 290.
22. *Id.* at 54, 458 S.E.2d at 290.
23. *Id.* at 55, 450 S.E.2d at 291 (citing *Page v. Shenandoah Life Ins. Co.*, 185 Va. 919, 925-27, 40 S.E.2d 922, 925-36 (1947)).
24. 250 Va. at 56, 458 S.E.2d at 291.
25. The body of Peoples Security's letter to the insured's widow/beneficiary dated March 30, 1988 which was found in that case's Joint Appendix at the Supreme Court of Virginia's law library in Richmond stated as follows:

Dear Ms. Arrington,

> We wish to express to you our sincerest sympathy on your recent loss.
>
> Since death occurred during the two-year period after the policy was issued, it is necessary for us to obtain additional information concerning the insured's health history prior to the date of the application for this policy.
>
> Please be assured that we are giving your claim our prompt attention.

26. *Id.*
27. *Id.*
28. *Id.*
29. Life insurance policies are incontestable after they have been in force during the lifetime of the insured for two years from the date of issue except for nonpayment of premiums. *See* Va. Code § 38.2-3305 (individual life insurance policy); § 38.2-3326 (group life insurance policy); § 38.2-3345 (industrial life insurance policy).
30. Interestingly, this rule that a life insurance claim begins to run on the date when the insurer is presented with proof of death is not only found in the *Arrington* case. Virginia's statute governing interest of life insurance proceeds similarly states: "If an action to recover the proceeds due under a life insurance policy … results in a judgment against the insurer, interest on the judgement at the legal rate of interest shall be paid from (i) the date of presentation to the insurer of proof of death on a life insurance policy…" Va. Code § 38.2-3115(A),
31. 250 Va. at 55, 458 S.E.2d at 291.
32. 250 Va. at 56, 458 S.E.2d at 291.
33. Commencement of Action/Proceeding which includes failure to file a contested action within the applicable statute of limitations/contractual limitations period is the second highest type of malpractice claims. ABA Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims: 2012 – 2015* (ABA 2016). ✦

E-Discovery: What is a Reasonable Search Under Virginia Law

By Brian S. Wheeler

As Judge David B. Carson[1] recently noted in *Huff v. Winston*, "[t]here is a dearth of Virginia case law on the subject of ESI [electronically stored information] discovery."[2] Since then, little has changed. Virginia courts have provided little guidance regarding electronic discovery. This raises numerous questions concerning how we, as attorneys, fulfill our discovery obligations under Part Four of the Virginia's Rules of Civil Procedure (the "Rules of Discovery"). This article will focus on one of these questions: when has an attorney done enough to ensure they have fulfilled their obligations to search for and produce ESI under the Rules of Discovery. This article will analyze the existing jurisprudence in Virginia and also look to federal discovery rules and court rulings for additional guidance.

The Rules of Discovery address a party's obligations to produce ESI and are set forth in Rule 4:1(a), which specifically approves discovery of ESI; Rule 4:1(b)(1), which confirms that parties may conduct discovery with respect to any non-privileged relevant matter or regarding any matters that are reasonably calculated to lead to the discovery of admissible evidence); and Rule 4:1(b)(7), which describes potential limitations on ESI discovery and burdens of proof in the event a party objects to discovery of ESI.[3] Specifically, Rule 4:1(b)(7) provides that "[a] party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost."[4]

In short, the Discovery Rules contemplate that parties may discover ESI that is relevant or reasonably calculated to lead to the discovery of admissible evidence. The responding party must provide the requested ESI unless it establishes that the ESI "is not reasonably accessible because of undue burden or cost."[5] This raises an obvious question: how does an attorney determine that they have done enough to search for, find and produce ESI to opposing counsel and further efforts are unreasonably burdensome and expensive.

In *Huff*, the Plaintiff requested ESI from Defendant. As part of the request, the Plaintiff identified custodians, a time frame for production, and specific Boolean searches for Defendant to run.[6] Defendant objected to the search terms on the grounds that the search terms would produce an unwieldly amount of ESI which could not be easily retrieved, thus creating an unreasonable burden and expense to Defendant.[7] As any litigator knows, this is a common discovery dispute and is becoming more and more common as the amount of ESI information a client creates while running its business continues to grow. When evaluating this dispute, the court noted that "of critical importance to this Court, and consistent with the Rules governing discovery of ESI, is the concept of reasonableness."[8]

The court then identified five questions it would assess to determine whether discovery will proceed and how it shall be paid for. The five questions are:

1. Is the contemplated discovery reasonably calculated to lead to the discovery of admissible evidence?
2. Is the discovery reasonably narrow in its scope?
3. If the responding party is objecting to the discovery on the basis that it is burdensome or costly, what is the burden to the responding party as compared to the potentially prejudicial effect to the requesting party if the discovery is limited or quashed?
4. After some showing by the responding party regarding the estimated cost of production, is it most reasonable to leave the costs associated with production with the responding party; or

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is some shifting of costs more reasonable; or in a particular case is it most reasonable to simply determine that production costs are a taxable cost that the court can award to the prevailing party at the conclusion of the litigation?

5. Finally, in their dealings leading up to their appearance in court, have the parties conferred and reasonably attempted to resolve their dispute as specifically contemplated by Rule 4:12(a)(2)?[9]

Using these criteria, the court determined that under the facts of the case, Plaintiff's request that the ESI of seven custodians be searched for within the narrow date range of December 1, 2009 through October 5, 2012, was reasonable.[10] However, the court determined that one of the three Boolean searches proposed by Plaintiff was unreasonable as it produced an inordinately large number of documents.[11] With this limitation in place, the court compelled the production of the remaining discovery including the two searches that did not create an unwieldly amount of discovery.[12] While the court's decision in Huff does not specifically lay out a multi-factor test, it does establish a framework and guidance for attorneys when dealing with ESI discovery.

In one of the few other Virginia cases to discuss electronic discovery, *Bosworth v. Vornado Realty L.P.*, the court held that when "[c]onsidering the requirements in this case for Plaintiff to prove damages, the large amount in controversy, and the ready availability of electronic records, this Court decides, within its discretion, that Defendants' second set of interrogatories and requests for production are not overly broad, burdensome, or vague."[13] The court in *Bosworth* attempted to succinctly lay out the factors courts should consider when determining the reasonableness of electronic discovery. Importantly, the court in *Bosworth* properly noted that the question of whether the requested electronic discovery is reasonable is left to its discretion.[14]

Fortunately, what little Virginia case law that exists on the subject of electronic discovery is consistent with, or at least not opposite to, the Federal Rules of Civil Procedure (the "Federal Rules") and federal case law. Simply put, both Virginia and federal courts do not require perfection when searching for ESI but do require the parties to be reasonable and thoughtful in what they request and to put forth a reasonable effort to gather and produce ESI.[15] While Courts have not identified clear standards or benchmarks - e.g. a numeric formula for determining when electronic is too expensive or burdensome - for what constitutes a reasonable search for ESI,[16] they are now identifying the factors they will consider more clearly.

Probably nothing reflects this change more than the recent December 2015 amendments to Rule 26 of the Federal Rules which attempt to place clearer and more reasonable limits on the scope of electronic discovery. Specifically, Rule 26(b)(1) was recently amended to codify the long-understood principle of "proportionality" when dealing with electronic discovery.[17] Rule 26(b)(1) now provides:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and *proportional* to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[18]

One key takeaway from these rule changes is the empowerment of judges to more aggressively police the overuse of discovery and how it burdens litigants. The new Rule 26(b)(1) and Rule 26(b)(2)(c)(iii) provide that a court can limit discovery where the likely benefit of proposed discovery is outweighed by its burden expense when keeping in mind the enumerated factors.[19] Further, Rule 26(b)(2)(B) provides that a party is not required to produce information which is "not reasonably accessible because of undue burden or cost."[20] Just as in Virginia, the burden rests on the party opposing discovery to show the unnecessary burden and cost that will result from ESI discovery.

The new Rule 26(b)(1) is the codification of the principle of "proportionality," a key component of a Court's oversight of electronic discovery. As described in the matter of *Rimkus Consulting Group, Inc. v. Cammarata*, the Federal Rules of Civil Procedure require "reasonable efforts" and what is reasonable

"depends on whether what was done – or not done – was proportional to the case."[21]

Proportionality is the balance between the production of information necessary for a fair search for truth versus the costs and burdens of discovery.[22] Of course, what is proportional will vary based on the needs and circumstances of each particular case. As explained by the court in *S2 Automation, LLC v. Micron Tech, Inc.*, when determining the proportionality of discovery in light of the relevant facts and circumstances, a court may look to: "the number and complexity of the issues; (ii) the location, nature, number and availability of potentially relevant witnesses and documents; (iii) the extent of past working relationships between the attorney and the client, particularly in related or similar litigation; and (iv) the time available to conduct an investigation."[23] This requires more than just a count of the number of locations searched and documents retrieved.[24]

An important aspect of proportionality is also cost. Specifically, what is the cost to search and review ESI in comparison to the amount in controversy? Such a comparison, can provide rough parameters for the scope of discovery and whether a party will be required to perform an exhaustive search.[25] When doing the comparison, look to the cost of producing the discovery while considering whether the discovery is really something opposing counsel can do without.[26]

Based on the foregoing, there are steps that counsel can take to agree on the reasonable scope of electronic discovery and hopefully avoid any related discovery disputes.

First, counsel should agree on the scope of electronic discovery at the outset of litigation. This would entail agreement on the number of custodians whose documents are to be searched, the date range of documents to be collected, and the total number of searches each party can request. It would be best to agree to these things in the scheduling order. If possible, be sure to allow time in the scheduling order for the issuance of multiple requests for production and the Court the ability to allow for additional custodians and searches upon a showing of cause.

Second, counsel should attempt to communicate regularly during the electronic discovery process. While the scope of electronic discovery varies according to the case, counsel should also agree on the searches to be run once electronic discovery begins. If opposing counsel's search terms will lead to the discovery of an unreasonable number of documents, counsel should try to modify the search terms. If the cost of recovering the documents will be out of proportion to the amount in controversy, counsel should talk to determine if these difficult-to-procure documents are truly necessary. This likely could avoid the time and expense that occurred in Huff, or at the very least, assist the court in ruling on any motion to compel.

In summary, attorneys need to remember that perfection is not required when searching for and producing ESI. However, as described above, your search must be reasonable and proportionate to the needs of the case. ❋

(Endnotes)

1. Judge David B. Carson is a circuit judge in the 23rd Judicial Circuit located in Roanoke, Virginia.
2. Huff v. Winston, 89 Va. Cir. 429, 431 (2015)
3. *Id.*
4. *Id.*, Va. Rule Civ. Pro. 4:1(b)(7).
5. Huff, 89 Va. Cir. 429, 431.
6. *Id.* at 430.
7. *Id.*
8. *Id.* at 431.
9. *Id.*
10. *Id.*
11. *Id.* at 432.
12. *Id.*
13. Bosworth v. Vornado Realty L.P., 84 Va. Cir. 353, 357 (2012).
14. *Id.*
15. Fed. R. Civ. Pro. 26(b)(2)(c)(iii).
16. Steven Bennett, *E-Discovery: Reasonable Search, Proportionality, Cooperation, and Advancing Technology*, 30 J. Marshall J. Info Tech & Privacy L. 433 (2014).
17. Fed. R. Civ. P. 26(b)(1).
18. *Id.* (emphasis added).
19. Fed. R. Civ. P. 26(b)(1), 26(b)(2)(B).
20. Fed. R. Civ. P. 26(b)(2)(B).
21. 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010); *see also* Oracle USA, Inc. v. SAP AG, 264 F.R.D. 541, 543 (N.D. Cal. 2009) (holding that there must be "cooperation in prioritizing discovery" and awareness of the "proportionality requirement of [Rule] 26"); Mancia

v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359 (D. Md. 2008) (noting that the requirements of discovery are "proportional to what is at issue" is "clearly stated in Rule 26").

22. Cammarata, 688 F. Supp. 2d at 613; DCP Midstream, LP v. Anadarko Petrol. Corp., 303 P.3d 1187, 1197 (Colo. 2013)(holding that a court must take an "active role" in managing discovery to assure "appropriate scope of discovery in light of the reasonable needs of the case.").

23. S2 Automation, LLC v. Micron Tech, Inc., No. CIV 11-0884 JB/WDS, 2012 U.S. Dist. LEXIS 120097, at 99-100 (D.N.M. Aug 9, 2012).

24. *See* Kleen Prods., LLC v. Pkg. Corp. of Am., No. 10 C 5711, 2012 U.S. Dist. LEXIS 139632, at *46 (N.D. Ill. Sept. 28, 2012).

25. Apple, Inc. v. Samsung Elecs. Co., 12-CV-0630-LHK (PSG), 2013 U.S. Dist. LEXIS 67085, at *3 (N.D. Cal May 9, 2013).

26. *Id.* ✦

Message from the Chair • James C. Martin

This newsletter, along with the appellate handbook, has to count amongst the major accomplishments of Litigation Section members for the year. Also, the Rule of Law Day contribution which we made was very effective, and we were graciously thanked for it by Justice Cleo Powell.

I would like to remind members that the 80th Annual Meeting in Virginia Beach will be held on June 14th to 17th. Please join us on Friday, June 15th at 1:30 p.m. at the Sheraton Oceanfront as the Litigation Section and the Construction Law Section co-sponsor a CLE on "Successful Litigation Practice from the Trial Court to the Appellate Court." Make your reservations now! ❊

James (Jim) Martin is a partner, with his wife Susanne, in Martin & Martin Law Firm, Danville. Mr. Martin represents respondents in sexually violent civil proceedings in Virginia, both at the trial court level and on appeal. Both of the Martins also defend involuntary mental commitment hearings and judicial authorizations of medical treatment.

A VIEW FROM THE BENCH

Avenues for Non-Partisan Legal Reform in Virginia

By The Honorable Stephen R. McCullough, Supreme Court of Virginia

Lawyers and judges occasionally encounter problems the law does not address, gaps in an existing statutory scheme, statutes that are in need of reform, or a quirk in the rules of court. The prospect of addressing these reforms single-handed would be a daunting or perhaps impossible task for a lawyer to shoulder unassisted. Happily, there are number of avenues to address these issues. As a young lawyer, I had no idea these avenues existed. I highlight a few such groups here, ones that I have encountered or worked with in my journey as a lawyer and a jurist. My goal is to spread the word about the good work these groups do and inform lawyers about these avenues for reform.

Boyd-Graves Conference

The Boyd-Graves Conference operates under the auspices of the Virginia Bar Association and is devoted to improving the quality of civil justice in Virginia. The Conference is comprised of more than 100 civil trial lawyers (both plaintiff and defense). Judges, legislators, and educators are also members. Membership in the conference is by invitation only. The Conference meets once per year to vote on proposed reforms. The Conference is non-partisan.

The Conference was founded by Thomas V. Monahan, past president of the Virginia Bar Association. It held its first meeting in 1978. Originally called the Tides Inn Conference, it was renamed the Boyd-Graves Conference in appreciation of the significant contributions of T. Munford Boyd and Edward S. Graves.

Subjects for consideration can originate from members of the conference as well as from judges and lawyers who are not members of the Conference. Legislators or legislative committees can also make proposals. The Steering Committee evaluates each topic and decides which are approved for consideration at the next meeting. From the members, the Chair of the Conference appoints a committee to study each approved topic. Each committee then submits a report of its findings and recommendations to the Chair, who publishes and distributes the reports to each member of the Conference prior to the annual meeting. At the annual meeting, each committee chair presents the report and recommendation to the Conference. The Conference discusses the recommendations and then votes to approve or disapprove the recommendations. A recommendation is made only if there is consensus among the members; a simple majority is not sufficient.

Examples of reforms the Conference has proposed include legislation giving general district court judges authority to compel arbitration pursuant to an agreement of the parties, making it easier to introduce information from medical literature through an expert witness, and requiring both spouses to consent to severance of a tenancy of the entirety. *See generally Boyd-Graves Conference*, Virginia Bar Association, http://www.vba.org/?page=boyd_graves (last visited Apr. 17, 2018).

Virginia Criminal Justice Conference

The Virginia Criminal Justice Conference (VCJC) is devoted to non-partisan changes and legislation related to criminal law and procedure. The VCJC is composed of judges, prosecutors, public defenders, private practice defense attorneys, law professors, counsel to the General Assembly's House and Senate Court Committees, members of the Attorney General's office, legislators, and others. Invitations to join the VCJC are extended by a steering committee. In 2018, the conference was comprised of 62 members.

The VCJC was established in 2006 and was first

The Honorable Stephen R. McCullough is a Justice on the Supreme Court of Virginia.

composed of criminal defense attorneys and prosecutors who gathered to discuss criminal justice issues. The conference was created with the support of the Virginia Trial Lawyers Association and is modeled after the Boyd-Graves Conference. Eleven study committees shoulder the work. The committees perform study work throughout the year, and all members convene for an annual meeting. Once the VCJC has reached a substantial consensus on improvements to the law, it recommends its proposals to the Virginia Supreme Court and to the General Assembly. The VCJC also contributes to outside study groups and commissions on criminal justice reform.

The General Assembly has adopted a number of proposals that originated with the VCJC, such as legislation modifying the procedures for bond decision appeals, permitting uncontested expungements, prohibiting magistrate judges from acting alone in issuing felony warrants, and authorizing defense counsel to issue subpoenas. *See generally Virginia Criminal Justice Conference*, Virginia Trial Lawyers Association, https://www.vtla.com/index.cfm?pg=VCJC (last visited Apr. 16, 2018).

Virginia Bar Association's Legislative Proposals

In addition to providing CLEs and fellowship, the various sections of the Virginia Bar Association can propose legislation. The Board of Governors vets this legislation at its annual Legislative Day to make sure any proposed legislation is consistent with the VBA's non-partisan mission. If accepted by the Board of Governors, the VBA proposes the legislation to members of the General Assembly for consideration. The VBA also partners with an affiliate group, Commission on the Needs of Children, to develop legislation specific to issues affecting juveniles.

In recent years, the General Assembly has approved numerous legislative proposals from the VBA, including expansion of liability protections for organizers of free health clinics, allowing corporations to hold virtual shareholder meetings, permitting courts to establish special needs trusts, and updating the augmented estate statute. A summary of the legislative initiatives is published annually in the spring issue of the VBA Journal. Submissions for the legislative day may be made through a proposal form available on the VBA website. *See generally Advocacy*, The Virginia Bar Association, http://www.vba.org/?page=legislative_advocacy (last visited Apr. 16, 2018).

Virginia Family Law Coalition

The Virginia Family Law Coalition is a joint effort of the Virginia Bar Association and the Virginia Trial Lawyers Association. Coalition members are experienced family law practitioners from several legal organizations. For example, the Coalition recently supported the repeal of a prohibition on admitting evidence regarding parents' mental health in child custody cases. *See generally Virginia Family Law Coalition*, Virginia Trial Lawyers Association, https://www.vtla.com/index.cfm?pg=familylawcoalition (last visited Apr. 17, 2018).

The Advisory Committee on Rules of Court

The Advisory Committee on the Rules of Court serves under the Judicial Council of Virginia. It considers and prepares draft rules of court and amendments to existing rules, addressing all of the Rules approved by the Supreme Court of Virginia. The Chief Justice appoints members to the committee. There are currently 19 members of the Committee appointed in a staggered set of dates to three-year terms. Currently, five practitioners, four circuit court judges, one General District Court judge, one Juvenile and Domestic Relations court judge, three Court of Appeals Judges, two law professors, one Commonwealth's Attorney, one Circuit Court Clerk of Court, and the Clerk of the Supreme Court serve on the committee.

The Advisory Committee drafts rules revision proposals on its own. It also receives requests for rule changes from sitting judges each year, along with requests from the private and public bar, including suggestions that are sent directly to the Supreme Court and are then referred to the Advisory Committee. A few times each year, the Supreme Court will direct the Advisory Committee to study a particular rule or an issue in Virginia Practice that may need a new or different Rule. In most years, the Advisory Committee also receives suggested Rule changes or Rule additions from the Boyd-Graves Conference, after that body has reached a significant consensus of plaintiff and defense bar members to support a particular topic.

The Advisory Committee studies agenda materials

in advance, and meets twice per year – once in the Spring and once in the Fall. The Advisory Committee Chair makes a report to the Judicial Council explaining the rationale of any proposed Rule changes. If adopted by the Judicial Council, the changes are then forwarded as recommendations to the Supreme Court of Virginia for consideration and possible adoption of the Rule change. Changes that are approved become available on the Supreme Court's web site very promptly, in both promulgation order and sequential rule order in downloadable form. They also appear in supplements for Volume 11 of the Code of Virginia, the paperback rules pamphlet in the Code.

The Advisory Committee considers proposals and, on many occasions, has sought input from the bench and bar before making any recommendations. Members of the bar wishing to suggest topics for rule change proposals should contact the Committee at proposedrules@vacourts.gov. Suggestions may be submitted at any time during the year. Proposed rule language is always welcome, but most suggestions identify a perceived problem. No formal presentation is required, and almost all suggestions come by letter or e-mail.

Model Jury Instructions Committee

The Model Jury Instructions Committee does not propose legislation or pursue legal reforms. I would be remiss if I did not mention it, however, because I happen to chair the committee. The committee drafts and produces model instructions for use in the courts of the Commonwealth. The Committee is non-partisan and members work diligently to ensure that the model instructions accurately represent the established case and statutory law.

The model jury instruction project began in 1975 when former Chief Justice Lawrence W. I'Anson appointed judges and attorneys to a committee with the purpose of preparing the model instructions. Today, the Committee consists of twelve members, half judges and half lawyers, appointed by the Chief Justice of the Supreme Court. The Committee meets twice per year. In the Spring, the Committee updates and approves changes to the criminal instructions, and in the Fall it updates the civil instructions. The Committee welcomes suggestions for new instructions that may be needed or to correct any defect in existing instructions. The Committee's membership is listed in the books that contain the model jury instructions.

Conclusion

Our profession can rightly take pride in its civic-mindedness. The preamble to our Rules of Professional Conduct reminds us that a lawyer is are more than just an advocate, a lawyer is also an "officer of the legal system and a public citizen having special responsibility for the quality of justice" and that "[a]s a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." Service in such groups, while time consuming, can also be immensely gratifying. All Virginians owe a debt of gratitude, not only to the lawyers and judges who devote countless hours of volunteer service in these groups, but also to the lawyers and judges who take the time to propose thoughtful improvements to our legal system. ❊

Lessons Learned from Pro Bono Service in the Eastern District of Virginia

By Kristan B. Burch

In July 2016, the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia sent an announcement that they were compiling a list of volunteer attorneys willing to represent certain plaintiffs on a pro bono basis. The announcement explained that a district judge assigned to a civil pro se case may determine that appointment of counsel "would help to facilitate the administration of justice," and the majority of such cases would likely involve civil rights claims brought pursuant to 42 U.S.C. § 1983.

I responded to the announcement and agreed to join the list of volunteers to represent plaintiffs in pro bono cases. On October 3, 2016, I was appointed to represent a prisoner who had filed a complaint against several prison employees, alleging use of excessive force in violation of the Eight and Fourteenth Amendments. My client alleged that he had been maliciously beaten and kicked by the defendants when they were conducting a cell extraction, claiming that some of the defendants were involved in the alleged assault and that other defendants were deliberately indifferent during the alleged assault.

Prior to my appointment as counsel, my client had appealed a summary judgment decision by the district court to the Court of Appeals for the Fourth Circuit ("Fourth Circuit"), and the Fourth Circuit had vacated the district court's granting of summary judgment for defendants and remanded the case for review of videotape evidence of the cell extraction, which my client had sought. That decision by the Fourth Circuit led to a disclosure by the defendants that the videotape evidence no longer existed and was not available for review.

Kristan is a partner in the Litigation Section at Kaufman & Canoles, P.C. in Norfolk, Virginia where she focuses on construction law and intellectual property. Kristan served two terms as the Chair of the Litigation Section of the Virginia State Bar and previously served as Chair of the Construction and Public Contracts Law Section and the Intellectual Property Section of the Virginia State Bar.

One of my first actions as counsel for my client was to file a motion for sanctions related to the videotape evidence, which the district court granted and which led to a denial of defendants' motion for summary judgment as a sanction for the spoliation. After participating in some limited discovery, the case was set for trial. The district court granted an application for writ of habeas corpus ad testificandum, and my client was transported from South Carolina to Virginia for trial. In January 2018, a bench trial was conducted, and the district court ruled in favor of the defendants. The case currently is on appeal to the Fourth Circuit.

From this experience, I pass along some of the lessons learned in hopes that others will consider taking pro bono cases when they have the opportunity.

1. Handling a pro bono case requires just as much work as a case for a paying client. This may seem like an obvious lesson learned, but it must be considered when you are agreeing to handle a pro bono case. You will be tied to a tight schedule which is just as enforceable as in your other cases, with deadlines which you must meet. You will have to balance your billable work with the demands of your pro bono case, and ultimately, it will take just as much time to prepare for trial in your pro bono case as it would in other case.

2. Ask questions to your client and listen to what he tells you. From my first call with him, I learned that my client was very knowledgeable and experienced in federal court litigation. Over the years, he has filed multiple complaints and been to trial in other federal courts so he knew what it meant to handle a case in federal court. While I was able to explain certain nuances to him about practice in federal court, he was able to educate me on the grievance and appeal procedure within the Virginia Department of Corrections. He knew what notices needed to be sent during a grievance proceeding in order to request that

videotape evidence be maintained, and he kept meticulous records of his efforts to ensure the videotape evidence was available for trial. He provided valuable input for the pleadings filed and for the evidence put on at trial.

3. Sometimes trial lawyers have to accept the unknown.

At trial, my main witness was my client, and it was important for him to tell his story of what happened during the cell extraction. My client had a great memory, and I had taken careful notes when discussing matters with him by telephone. I prepared my direct examination of him and several other prisoners, who we called as witnesses as I normally would do, but the difference in this case was that I was not able to run through my outlines with my client or the other witnesses before trial began. While trial lawyers know they cannot prepare for every scenario, the fact that my client and some of the other witnesses were incarcerated led to some challenges, as I had to react to unexpected responses or new topics which were raised for the first time at trial. Instead of fearing the unknown, I had no choice but to embrace it and rely on my preparation and experience to get through some of the unexpected developments.

4. Not every witness will testify as you expected.

While I had talked to all of my witnesses before trial, I only had brief discussions with many of them before they testified, and it was a fact gathering exercise done over the telephone. It is hard to size up witnesses when you only have spoken to them by phone, and you do not know how they will appear when they are called by video conference at trial. This was a good reminder that sometimes the witnesses who you anticipate will do the best while on the stand, in fact, do not, while others about whom you had concerns will prove they can handle the pressure of cross-examination.

5. Civility always has a place in trial practice.

My opposing counsel in this case works for the Office of the Attorney General, and she tries prisoner cases all over Virginia. I expect that she has tried more civil cases in federal court during the time she has been with the AG's Office than many lawyers in private practice will ever try in federal court. Even though I was injected into the case after the first appeal, she understood that I had to get up to speed on the case, and she worked with me to complete written discovery, schedule depositions, and agree on briefing schedules. While matters could have been combative at every turn, we both were able to zealously represent our clients while still being civil to one another. This reaffirmed the notion that you can disagree with your opposing counsel without creating a hostile relationship.

6. Pro bono service is rewarding.

While handling this case was exhausting at times, I still would describe it as a positive experience. I enjoyed working with my client and appreciated learning his point of view on the civil rights issues in the case. He was appreciative of my time and effort, and he had a chance to tell his story to the district court at trial. Assisting with pro bono cases not only provides excellent experience in federal court, but it also provides you a chance to give back to the legal community in which you work. ❊

Case Summaries • Robert E. Byrne, Jr.

Case: *La Bella Dona Skin Care, Inc. v. Belle Femme Enterprises, LLC*, 294 Va. 243, 805 S.E.2d 399 (2017).
Author: Donald W. Lemons, C.J.
Decided: October 26, 2017
Lower Ct.: Frederick Rockwell, III, J. (Chesterfield County)

Facts: In 2011, Appellant obtained a judgment against three former employees and their new business for misappropriation of trade secrets. Defendants allegedly conveyed assets during and after the underlying lawsuit and set up another business to operate in place of the defendant business. The defendants apparently commingled the assets of the two businesses, and some of the defendant business's assets were conveyed to the new business without consideration. As a result of these and other actions, the Appellant was apparently able to collect only a *de minimis* amount of the judgment.

Appellant later filed a third amended complaint against the judgment defendants and included several parties related to the judgment defendants, including former employees, former counsel, family members, and the two businesses. The trial court sustained a demurrer to three of the counts and granted summary judgment to one count.

The cases proceeded to a bench trial, where Appellant contended that the various conveyances were fraudulent and that the new business was a "mere continuation" of the old. The trial court rejected Appellant's claim for successor liability, finding that Appellant did not show that the transactions in question were not arm's length transactions.

Appellant appealed, alleging that the trial court committed four errors: (1) by granting the summary judgment motion for the fraudulent conveyance claim despite the existence of several badges of fraud; (2) by sustaining a demurrer to the conspiracy counts while ignoring allegations of financial damages; (3) by applying a clear and convincing evidence standard to the successor liability claim instead of a preponderance of the evidence standard; and (4) by rejecting unrebutted evidence that the new business was a mere continuation of the old.

Robert E. Byrne, Jr. practices at Martin Wren, P.C. in Charlottesville, Virginia and focuses on personal injury litigation, medical malpractice, employment law and litigation, and business and commercial litigation. He is a member of the Board of Governors for the Litigation Section of the Virginia State Bar.

Analysis: Turning to the first assignment of error, the relevant fraudulent conveyance statute voids any conveyance that is done with a fraudulent intent coupled with the grantee's knowledge of the grantor's fraudulent intent. Because existing badges of fraud supported the possibility of a fraudulent conveyance, the trial court erred by granting summary judgment on this point.

Under the second assignment of error, a civil conspiracy is not an independent action. It requires an underlying act that is independently wrongful or tortious. As such, a claim will not exist for civil conspiracy unless the predicate unlawful act "independently imposes liability upon the primary wrongdoer." But Code § 55-80 does not impose liability upon the participants of a fraudulent conveyance; instead, the only remedy is that the fraudulently conveyed assets be returned to the transferor. For that reason, a fraudulent conveyance is not a predicate unlawful act from which liability can be imputed to other parties in a civil conspiracy.

For the third and fourth assignments of error, Virginia recognizes that a company may acquire the assets of another company without assuming responsibility for its debts and liabilities. Exceptions to this rule exist, however, such as for a fraudulent transaction or for a mere continuation. Although proving the fraudulent conveyance exception would require clear and convincing evidence, satisfying the mere continuation merely requires proof by a preponderance of the evidence. The trial court erroneously applied a clear and convincing standard on the mere continuation claim.

Result: Affirmed in part, reversed in part, and remanded.

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Case: *Rastek Construction & Development Corp. v. General Land Commercial Real Estate Co., LLC*, 294 Va. 416, 806 S.E.2d 740 (2017).
Author: D. Arthur Kelsey, J.
Decided: November 30, 2017
Lower Ct.: Timothy J. Hauler, J. (Chesterfield County)

Facts: Appellant agreed to sell a parcel of property to a third party. The sale agreement between the parties contained a provision that either party could terminate the agreement if the sale did not close as scheduled, and neither party would then have liability to the other. Appellant seller agreed to pay broker, the appellee in the case, a commission "if any only if closing occurs." Closing did not occur as scheduled, so the deal became a short sale that required bank approval. The property in question was eventually sold at a foreclosure sale, where the bank purchased the property and later sold it to the buyer.

After unsuccessfully suing the buyer for its commission, the broker sued the seller, contending that the seller improperly prevented broker from receiving its commission. Agreeing with the broker that the sale did not occur solely because the seller was not able to bring sufficient funds to clear encumbrances to title, the trial court denied the seller's demurrer and conducted a bench trial, ultimately ruling for the broker.

The seller appealed, contending that the trial court erred by: (1) determining that the broker was a third party beneficiary to the sale agreement; (2) not determining that the sale agreement terminated on its own because the time-is-of-the-essence provision was not met; and (3) finding that the seller prevented the closing in violation of the "prevention doctrine."

Analysis: Because the Supreme Court agreed with Seller on the third point, the Court need not address the first two points. As an initial matter, the Court assumed without deciding that the broker was a third party beneficiary to the sale agreement. That means that the third-party beneficiary's rights could "sink lower than but cannot rise higher than those of the promisee unless the agreement specifically provides otherwise."

Turning to the prevention doctrine argument, the trial court concluded that seller prevented the closing from occurring and, as such, breached its obligation to pay the sales commission. Insofar as contract claims are concerned, this doctrine has both an offensive and defensive component. This doctrine will not permit a party who prevents the performance of a contract from benefiting, either by obtaining benefits from the other party, or by being excused from its own performance. For the doctrine to apply, however, a party's conduct that prevents performance must be wrongful. The doctrine does not apply if the promisor acts in a manner that is permitted either expressly or implicitly under the terms of the contract. In addition, much like a breach of contract action, a party seeking to recover damages for the prevention of a performance of a condition must demonstrate causation.

In this case, the Buyer tendered a proposed settlement statement to Seller on the eve of the foreclosure sale that required the Seller to bring an amount of money "that the Seller either did not have, could not obtain, or was legally within its rights to challenge as excessive." These circumstances fall short of demonstrating wrongful conduct upon which the prevention doctrine can be predicated.

Result: Reversed and final judgment.

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Case: *Eilber v. Floor Care Specialists*, 294 Va. 438, 807 S.E.2d 219 (2017).
Author: William C. Mims, J.
Decided: December 7, 2017
Lower Ct.: David B. Carson, J. (City of Roanoke)

Facts: Eiber filed a chapter 13 bankruptcy petition, and the bankruptcy court confirmed his proposed petition that had him making 36 monthly payments to a bankruptcy trustee. Nearly two years later, Eiber filed an action against Appellees, his employer and others, for defamation *per se*, which survived demurrer.

Eiber completed payments to the trustee, and the bankruptcy court discharged all of Eiber's remaining unsecured debts. Appellees then moved for summary judgment in the defamation action, contending that Eiber lacked standing to pursue the matter due to his failure to disclose the claim to the bankruptcy court. After receiving Eiber's response, Appellees argued that Eiber was judicially estopped from pursuing the claim because his failure to identify it meant that he took the position that no such claim existed. The trial court determined that Eiber lacked standing and that his claim was barred by judicial estoppel. Eiber appealed both bases for the trial court's ruling. Appellees cross appealed, contending that the trial court erred by finding that Eiber stated a claim for defamation *per se*.

Analysis: The doctrine of judicial estoppel prohibits a party from assuming inconsistent or contrary positions

in an action or a series of actions. Here, Appellant challenged only whether a party may rely upon judicial estoppel as a defense if they had not previously raised it as an affirmative defense. Judicial estoppel is distinct from many affirmative defenses because its primary goal is to "protect the integrity of the judicial process and to guard it from improper use." As such, it can be raised *sua sponte* by the court at any time and the Appellees did not waive it by failing to raise it in their pleadings.

Result: Affirmed.

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Case: *Shifflett v. Latitude Properties, Inc.*, 294 Va. 476, 808 S.E.2d 182 (2017).
Author: Cleo E. Powell, J.
Date: December 14, 2017
Lower Ct.: Thomas J. Wilson, IV, J. (Rockingham County)

Facts: Latitude Properties obtained judgment against Shifflett and other debtors, and issued summons to answer interrogatories and writs of *fieri facias*. At the general district court return date, the judge entered transfer orders that required the Appellant debtors to turn over their income tax refunds to Latitude Properties upon receipt of the tax refunds. Appellants appealed to the circuit court and claimed that they had not filed their tax returns at that point and that, as a result, the Circuit Court lacked subject matter jurisdiction. The Appellants additionally contended that the income tax refunds were contingent interests in property not subject to a lien under Va. Code § 8.01-501. The trial court disagreed, dismissed the appeals, and entered judgment for Latitude Properties.

Analysis: Code §§ 8.01-501 and 507 establish a procedure whereby a judgment creditor can collect on a debt. A judgment creditor may proceed against intangible property only if there is a valid lien on the property by virtue of a writ of *fieri facias*. The Code permits a *fieri facias* lien to attach to property to which the debtor is either "possessed" or "entitled." Here, the Appellants were entitled to tax refunds only after they filed their income tax returns, making the tax refunds an inchoate property interest. The property interest in the tax returns was, at best, contingent upon the filing of an income tax return, so Appellants did not have a fixed property interest in the income tax refunds at the return date for the writs of *fieri facias*. The trial court's grant of summary judgment was thus improper.

Result: Reversed and remanded.

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Case: *MCR Federal, LLC v. JB&A, Inc.*, 294 Va. 446, 808 S.E.2d 186 (2017).
Author: Donald W. Lemons, C.J.
Decided: December 14, 2017
Lower Ct.: Lorraine Nordlund, J. (Fairfax County)

Facts: JB&A was a government contractor that retained an investment bank to market the sale of JB&A. The bank hired MCR Federal, another government contractor, hat eventually purchased JB&A. The parties' purchase agreement contained several representations and warranties that became the focus of litigation.

JB&A, which was owned primarily by an employee stock ownership plan (ESOP) did not receive certain payments from MCR Federal due to JB&A's purported failure to achieve financial targets. JB&A filed suit for breach of the Purchase Agreement's representations and warranties and for actual and constructive fraud. MCR Federal demurred, claiming that the source of duty rule barred the fraud claims. The trial court sustained the demurrer.

The trial court conducted a bench trial and found MCR liable for both breach of contract and constructive fraud and awarded nearly $12 million in compensatory damages. MCR Federal appealed, contending that the trial court erred by: (1) allowing tort claims for allegedly false contractual representations; (2) awarding damages without evidence of an injury; (3) basing damages on a "purchase price allocation" calculation that was based on speculative revenue projections; (4) awarding attorneys' fees as equitable relief; and (5) not requiring JB&A to elect between an equitable remedy for its fraud count and a legal remedy for its contract count, by instead awarding relief under both theories.

Analysis: Under the first assignment, MCR Federal argued that its duty, which was the subject of the tort claim, arose solely by virtue of the Purchase Agreement. While a single act may, under certain circumstances, give rise to both a contract claim and a tort claim, for that to occur there must be an independent common law duty, not just one that arises by contract. Here, the duty at issue arose by contract, and this was true even though the duty was a condition precedent to the contract. The Supreme Court held that because there was no

common law duty, the fraud claim was improper and the trial court erred on the first, fourth, and fifth assignments of error.

The second and third assignments of error challenged the sufficiency of the evidence supporting the trial court's damages award. JB&A presented ample evidence at trial that it suffered damages from MCR Federal's conduct, including testimony that JB&A lost contracts worth at least $6 million due to MCR Federal's breaches. MCR Federal presented three arguments challenging the trial court's valuation methodology, but there was sufficient evidence in the record to support the trial court's judgment regarding the amount of compensatory damages as well as its pre-judgment interest award.

Result: Affirmed in part, reversed in part, and final judgment.

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Case: *Emerald Point, LCC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384 (2017).
Author: Lawrence L. Koontz, Jr., S.J.
Decided: December 28, 2017
Lower Ct.: James C. Lewis, J. (City of Virginia Beach)

Facts: Four tenants resided in an apartment unit at Emerald Point Apartments in Virginia Beach. The unit experienced high carbon monoxide readings, and various attempts were made to remedy the high carbon monoxide levels in the unit. Although repairs were eventually made, all four tenants suffered injuries, with one tenant suffering extensive and permanent injuries.

Tenants filed suit against the Landlord for willful and wanton failure to maintain a furnace, for failing to employ competent staff, and for an award of punitive damages. The tenants were permitted to increase their *ad damnum* prayers after the evidence closed when the trial court struck the claims for punitive damages. The jury awarded verdicts to each of the tenants.

Emerald Point appealed, contending that the trial court erred by (1) permitting the tenants to admit an expert's undisclosed opinion, (2) granting an adverse inference instruction based on Emerald Point's disposal of the furnace, (3) permitting expert testimony about defective repairs and installation that were after-the-fact, (4) overruling the motion to drop misjoined parties given the unique claims of each tenant, (5) granting the tenant's motion to increase the ad damnum prayers after the evidence closed, and (6) not reducing the verdicts or granting a new trial.

Analysis: On the first assignment of error, the Supreme Court noted that the pretrial scheduling order provided notice that an expert would ordinarily not be permitted to express a non-disclosed opinion at trial. The plaintiffs answered written discovery and the expert was deposed, yet not all of his opinions were disclosed in discovery. It was prejudicial to allow the expert to testify to these non-disclosed opinions, and the jury's verdicts must be set aside.

On the second assignment, spoliation of evidence occurs when a party is aware of pending or probable litigation that involves evidence under their control and there is either destruction or failure to preserve evidence in question. In Virginia, a court may allow a spoliation inference only when a party intentionally loses or destroys evidence. Because the plaintiffs did not demonstrate that the disposal of the furnace, which had sat in a maintenance bay for a year before it was discarded, was motivated by a desire to prevent them access to evidence in probable litigation, the circuit court erred in granting the spoliation instruction.

On the third assignment, the testimony in question discussed alleged defects around the installation of a new furnace at the unit. Because the testimony involved matters collateral to the issue of whether the landlord was liable for the tenants' injuries, it was prejudicial and it should have been excluded.

On the fourth assignment that dealt with defendant's motion to sever the parties' claims, the Supreme Court recognized the inherent authority of a trial court to consolidate claims for trial. As such, there was no error with the circuit court's denial of the motion to sever.

On the fifth assignment regarding amending the *ad damnum* prayers, trial courts should permit liberal amendments to pleadings. But where, as here, the amendment of the *ad damnum* occurs after the evidence is closed, the defense is denied the opportunity to offer responsive proof or to be granted a continuance, and thus the trial court erred in allowing such an amendment.

Finally, the sixth assignment of error regarding the trial court's refusal to set aside the verdicts is

declared moot in light of the other rulings.

Result: Affirmed in part, reversed in part, and remanded.

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Case: *Robert & Bertha Robinson Family, LLC v. Allen*, ___ Va. ___, 810 S.E.2d 48 (2018).
Author: D. Arthur Kelsey, J.
Decided: March 1, 2018
Lower Ct.: Ronald L. Napier, J. (Warren County)

Facts: Landlord filed a warrant in debt in General District Court against Tenants, who counterclaimed. The GDC judge dismissed all claims. The Landlord appealed, but the Tenants did not. On appeal, the Landlord withdrew the appeal but the Tenants pursued their claim despite not having filed a notice of appeal. The Circuit Court summarily granted the relief sought by Tenants and awarded sanctions against the Landlord. Landlord appealed.

Analysis: In the Circuit Court, the Tenants argued, and the Circuit Court agreed, that the landlord violated Code § 8.01-271.1 when the landlord filed its claim without having all of the evidence it needed for trial. The Supreme Court held the Circuit Court's ruling was not supported by the plain language of the statute. And the fact that the parties were engaged in protracted litigation was not sufficient to support an award of sanctions against the Landlord. As far as the ruling regarding the Tenants' claims was concerned, the right to an appeal is statutory and statutory prerequisites must be followed. There is no statutory basis for one party's notice of appeal to "piggyback" on an opponent's notice of appeal. The fact that the Circuit Court had *de novo* review refers to the standard of review, not the scope of review, and the Circuit Court did not have authority to review the Tenant's matters.

Result: Reversed and final judgment.

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Case: *Holt v. Chalmeta*, ___ Va. ___, 809 S.E.2d 636 (2018).
Author: S. Bernard Goodwyn, J.
Decided: February 22, 2018
Lower Ct.: Herman A. Whisenant, Jr., J. (Fauquier County)

Facts: In a medical malpractice action, infant stopped breathing shortly after birth and suffered a hypoxic brain injury. Plaintiff filed suit against hospital, contending the hospital and healthcare providers delayed appropriate treatment that caused or exacerbated plaintiff's injuries. Plaintiff designated just one expert witness, a pediatrician, who practiced in D.C. and Maryland. The defense challenged the expert on the grounds that she lacked the knowledge required of an expert, and because she did not satisfy the active clinical practice requirement, as she did not have specific experience in some of the intricacies involved in the case. The trial court struck the expert and granted summary judgment. Plaintiff proffered the expert's anticipated testimony and then appealed.

Analysis: Although a trial court's decision whether to admit or exclude evidence is subject to an abuse of discretion standard, a trial court's exclusion of proffered testimony in a medical malpractice case will be overturned if the expert was qualified. Here, the trial court abused its discretion by excluding the proposed expert's testimony. The proposed expert was a board-certified pediatrician and was therefore presumed to know the standard of care of a pediatrician in Virginia. She testified that she knew and understood the applicable standard of care, and there was no evidence to counter the fact that she was knowledgeable about the standard of care in a medical specialty in which she was board certified to practice.

As far as the active clinical practice argument is concerned, the practice must be in either the defendant's area of specialty or a related field of medicine within one year of the date of the alleged malpractice. An expert will satisfy the "related field of medicine" test so long as that expert performs the same procedure at issue and the standard of care is the same in that field. Because it cannot be discerned whether the proposed expert was in the same field of medicine, the Supreme Court applied the "actual performance of procedure test" to determine whether the proposed expert's specialty was in a related field.

Whether a proposed expert meets the active clinical practice requirement requires analysis of the actual procedure performed. Here, the procedure in question focused on the defendant doctor's acts of omission, not on acts of commission. An expert need not have performed the procedure in question within one year of the malpractice, but is required to have performed the procedure at some point. In addition, the expert is required to have been involved in active clinical practice in the related

field within one year of the alleged negligence. Here, the proposed expert had an active clinical practice sufficient for her to be qualified as an expert.

Result: Reversed and remanded.

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Case: *Osburn v. Dep't of Alcoholic Beverage Control*, ___ Va. ___, 810 S.E.2d 262 (2018).
Author: Donald W. Lemons, C.J.
Decided: February 22, 2018
Lower Ct.: Robert J. Humphreys, J. (Court of Appeals)
William D. Broadhurst, J. (City of Roanoke)

Facts: Osburn, a special agent with the Virginia Department of Alcoholic Beverage Control ("ABC"), was assisting with the review and investigation of an application for a restaurant's liquor license. Osburn performed a site visit and, without permission or other apparent legal authority, searched various documents that were on hand. The application was denied and the applicant lodged a complaint contending that Osburn had engaged in professional misconduct and violated her Fourth Amendment rights. Osburn's employment was terminated.

Osburn filed a grievance challenging his termination. The hearing officer disagreed with Osburn and determined that the warrantless search was not permissible. Osburn appealed the decision through the Court of Appeals of Virginia, which held that Osburn had statutory authority to conduct a warrantless search of an applicant, not just a licensee, but that the search in question did not fall within the highly regulated industry exception to the Fourth Amendment. Osburn's termination was upheld.

Analysis: The Fourth Amendment permits a warrantless inspection of a business engaged in certain highly regulated industries. Such a search must be authorized by statute to be permissible. Here, the statute in question applies only to licensees, not mere applicants, so there was no statutory support for the search. And, because there is insufficient evidence to show that the applicant consented to the search in question, the search had no legal basis. As such, the hearing officer's decision to uphold the termination is affirmed, and the Court of Appeals' decision is vacated.

Result: Judgment affirmed, opinion vacated.

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Case: *Dixon v. Sublett*, ___ Va. ___, 809 S.E.2d 617 (2018).
Author: Cleo E. Powell, J.
Decided: February 22, 2018
Lower Ct.: Michelle J. Atkins, J. (City of Norfolk)

Facts: Plaintiff consulted doctor to undergo a hysterectomy. The defendant doctor testified that she explained the risks of the procedure, and the plaintiff consented. The defendant doctor indicated that she completed the surgery after having explored the surrounding abdominal area and feeling "comfortable" that there was no injury to the plaintiff's bowel. Patient followed up post-surgery with complaints of pain, and subsequent tests indicated that plaintiff suffered a bowel injury that had to be surgically repaired. At trial, plaintiff alleged that the defendant perforated her bowel, failed to detect the perforation, and failed to obtain a general surgery consultation to repair the injury. Plaintiff's expert testified that the medical bills were necessary and reasonable, but defendant objected that a proper foundation for the bills was not established because there was no expert evidence that the bills were causally related to the defendant's alleged negligence. The trial court nevertheless allowed the bills into evidence. The trial court denied defendant's motion to strike plaintiff's evidence. The jury later found for plaintiff and awarded $652,000. Defendant appealed.

Analysis: In a medical malpractice case, a plaintiff is required to establish both that the doctor breached the standard of care, and that such breach caused the injuries the plaintiff suffered. Here, the plaintiff established that the defendant should have discovered the bowel perforation and should have immediately consulted a general surgeon about that injury. But plaintiff failed to take the next step and provide testimony of what a general surgeon would have done had the perforation been discovered. Plaintiff thus failed to present evidence that her outcome would have been different had a general surgeon been immediately consulted. There is no evidence of what care a general surgeon would have provided, such as when a repair would occur, how it would occur, or what impact the repair would have had to avoid the harm that did occur.

Result: Reversed and final judgment.

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Case: *D'Ambrosio v. Wolf*, ___ Va. ___, 809 S.E.2d 625 (2018).
Author: William C. Mims, J.
Decided: February 22, 2018
Lower Ct.: John M. Tran, J. (Fairfax County)

Facts: Mother named Appellant as her attorney-in-fact, and later created a will that divided her estate between Appellant and Appellees. Appellees filed a petition to, among other things, appoint a guardian ad litem for mother, to declare mother incapacitated, to declare that Mother's power of attorney was void. Appellant filed a counterclaim to declare the power of attorney to be valid and to appoint a guardian and conservator for Mother. The trial court entered a consent order finding Mother to be incapacitated. The order also appointed a third-party guardian and conservator, voided the powers of attorney, and dismissed the counterclaims with prejudice.

Mother died in 2015 and her will was admitted to probate. Appellant sought to impeach the will on the grounds of undue influence and lack of testamentary capacity. Appellees filed a plea in bar, alleging that Appellant's suit arose from the same transaction as the subject of the earlier litigation. The trial court granted the plea in bar on the grounds of claim preclusion, issue preclusion, and judicial estoppel. Appellant appealed.

Analysis: *Res judicata* involves both claim preclusion and issue preclusion. If the underlying dispute produces different legal claims that can be joined in a single suit, they should be joined together so long as all of the claims at issue have accrued. Here, Appellant argues that the will became effective only upon Mother's death, so it was not justiciable at the time of the earlier litigation. Although declaratory judgment actions allow for actions on claims before they accrue, the claim at issue had not accrued and claim preclusion cannot bar a claim that did not accrue before the litigation that would trigger the bar.

Issue preclusion, in contrast, bars "relitigation of common factual issues between the same or related parties," but that doctrine requires that the factual issue first be litigated to a valid and final judgment. Here, the consent order did not mention the will, Mother's mental state at the time she executed it, or the circumstances surrounding the execution of the will. Issue preclusion does not bar Appellant's suit.

Finally, judicial estoppel is a doctrine that estops litigants from adopting a position of fact that is inconsistent with a stance taken in previous litigation. The parties from the previous litigation must be the same, and the court must have relied upon the inconsistent position in rendering its decision. Here, Appellant's argument that Mother lacked mental capacity to execute a will is not necessarily inconsistent with his argument that Mother had capacity either before or after that time. Moreover, the trial court did not rely upon the inconsistent positions when rendering its decision. Judicial estoppel therefore does not apply.

Result: Reversed and remanded.

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Case: *Martin v. Lahti*, ___ Va. ___, 809 S.E.2d 644 (2018).
Author: Stephen R. McCullough, J.
Decided: February 22, 2018
Lower Ct: James J. Reynolds, J. (City of Danville)

Facts: Defendant doctor recommended that Decedent's gallbladder be removed. Doctor signed the consent form on Decedent's behalf due to Decedent's shaky handwriting. Doctor performed a laparoscopic surgery, nicked Decedent's bowel, and the Doctor needed to perform a more invasive surgery to address the perforation. Decedent died one week after the surgery due to complications.

Decedent's executor filed suit against Doctor, contending that he failed to obtain informed consent to conduct the surgery. According to executor, the Doctor failed to explain that Decedent had non-surgical options to address her condition. The executor's complaint alleged that Decedent would not have pursued surgery if she was aware of her alternative options.

Defendant filed a motion to dismiss, arguing that the executor failed to produce any evidence that Decedent would have refused to undergo the surgery. The court granted the motion to dismiss and then conducted a hearing on a motion to reconsider. There, the executor presented testimony from the executor, who was the Decedent's daughter, and from the Decedent's sister. Both witnesses testified that they were very close to the Decedent and were aware of Decedent's health care decisions. The trial court dismissed the informed consent count, finding the testimony to be hearsay and speculative. The executor nonsuited the remaining claims, and

then appealed.

Analysis: Prevailing on an informed consent claim requires proof that the doctor failed to disclose material risks of a treatment or procedure, or, the doctor failed to discuss alternative treatments or procedures that may exist. The patient must also prove that he or she would not have agreed to the treatment had the doctor made a proper disclosure of risks and alternatives.

The executor claims that the testimony in question was circumstantial evidence in the form of lay witness opinion testimony. It is true that a plaintiff may prove his or her case by either circumstantial or direct evidence. The lay witness opinion rule, however, only permits opinions based on the witness's perception. Witnesses can provide opinions about conditions, but they cannot offer opinions about whether a person would or would have made a specific decision.

Result: Affirmed.

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Case: *Kellogg v. Green*, ___ Va. ___, 809 S.E.2d 631 (2018).
Author: S. Bernard Goodwyn, J.
Decided: February 22, 2018
Lower Ct.: B. Elliott Bondurant, J. (Gloucester County)

Facts: Final decree of divorce, dated April 9, 2015, incorporated, but did not merge, two agreements between the parties. The decree ordered the parties to comply with the terms of the agreements by either contract law or the court's contempt powers. Kellogg later sought to amend the decree, and Kellogg also filed a show cause petition that sought payment of funds that were owed under one of the agreements. The trial court amended the final decree, and the parties agreed that the divorce action remained pending on the court's docket. The trial court later entered an order denying the show cause petition on the grounds that the agreement at issue did not specify when and how any payments were to be made.

Kellogg later filed a breach of contract action, seeking payments under the same agreement. Green filed a plea of *res judicata*, contending that the matter had been decided and dismissed as part of an order. The trial court agreed with Green, and Kellogg appealed.

Analysis: Kellogg claimed that the show cause order was not a final order, especially because the divorce action remains pending. For *res judicata* to bar a claim, there must be an underlying claim that reached a final judgment and it must be resolved on the merits. Here, Kellogg argues only that the order in question was not a final judgment. A judgment is not final if the court retains jurisdiction to either reconsider the matter or address other actions that are still pending before it. The show cause order did not contain language indicating that it was a final order regarding the enforceability of the agreement at issue, nor was there any language indicating that nothing further needed to be done. In fact, the matter is still pending on the trial court's docket. *Res judicata* therefore does not bar Kellogg's contract action.

Result: Reversed and remanded.

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