



Navigating the “Federal Courts Jurisdiction and Venue Clarification Act of 2011”

by Kristan B. Burch

On December 7, 2011, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (“Act”) was signed into law by President Obama. The Act is divided into two sections, which address jurisdictional improvements and venue and transfer improvements. It took effect on January 6, 2012, and applies to any action commenced after that effective date.¹ This article highlights some of the changes that the Act made to the jurisdiction, removal, and venue rules in civil cases.² While case law addressing the Act is minimal to date, knowledge of the improvements is critical for civil practitioners in federal court.

I. Jurisdiction

Sections 101 and 102 of the Act contain jurisdictional improvements (other than those for removal, which are addressed below in Section II). Highlights of these jurisdictional improvements are:

- **Jurisdiction over Resident Aliens:** When determining diversity of citizenship, the district court shall not have original jurisdiction of an action “between citizens of a State and citizens

or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State.”³

- **Corporations and Insurance Companies with Foreign Contacts:** The Act clarifies the citizenship of corporations and insurance companies with foreign contacts.⁴ Based on the changes in the Act, a corporation shall be “deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business.”⁵ In a direct action against an insurance company where the insured is not a co-defendant, such insurance company shall be deemed a citizen of: (a) every state or foreign state of which the insured is a citizen; (b) every state or foreign state by which the insurance company has been incorporated; and (c) the state or foreign state where the insurance

NAVIGATING THE FEDERAL COURTS — cont’d on page 3

Table of Contents

Navigating the “Federal Courts Jurisdiction and Venue Clarification Act of 2011”	1, 3
<i>by Kristan B. Burch</i>	
Letter From the Chair	2
<i>by Gary Bryant</i>	
View from the Bench Opening Statements and Summations: Use Them, Don’t Lose Them	6
<i>by Hon. B. Waugh Crigler</i>	
Nonsuit under Virginia Code § 8.01-380 and Notice of Voluntary Dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i): Are they the same? . . .	10
<i>by Barbara S. Williams</i>	
Supreme Court of Virginia Civil Cases	12
Litigation Section Board of Governors	31

Kristan is a Partner at Kaufman & Canoles, P.C., in Norfolk.

Letter From the Chair • Gary Bryant

Serving the Needs of the Litigation Section Members

I first joined the Board of Governors for the Litigation Section in 2006, when Sam Meekins served as Chair. At the time, I knew little about the Litigation Section—despite having been a member for almost twenty years. Membership in the Virginia State Bar is, of course, mandatory, and you need to be a member of a section, so why not litigation? The best evidence I had that the Board was serving the members came in the form of its quarterly newsletter which proved to be a valuable resource, particularly when considering the more practical aspects of litigation.

Upon joining the Board, I realized that it was comprised of a diverse group of practitioners all with the single-minded goal of serving the needs of the Litigation Section members. The current Board draws members from the bench (including Supreme Court Justices), the government (including the Virginia Beach City Attorney) and all areas of private practice from the largest firms in Virginia to solo practitioners to in-house counsel. The Board includes liaisons with the Young and Senior Lawyer Sections, as well as the Appellate Law Section. This diversity allows the Board to better consider the needs of all section members, regardless of the nature of the member's practice.

After joining the Board it did not take long to realize that the Litigation Section did much more than simply publish the quarterly newsletter. I learned that the Section sponsors the Law in Society Essay contest for high school students throughout Virginia. In cooperation with the Public Relations Section, the Board participates in developing a law-related essay topic and taking a hands-on approach in promoting the program to

public and private schools throughout Virginia. Over the years, the contest has grown significantly, resulting in 226 submissions last year from more than 60 schools. The Board presents awards to the top students at the Virginia Beach Annual Meeting.

I learned that the Board plays a significant role in preparing and presenting its section presentation at the Annual Meeting. As the Litigation Section is the largest, its presentation is sometimes geared toward the entire bar, receiving the "Showcase" designation. More often, the programs are tailored to a litigation practice. Under Tim Kirtner's direction, this year's Litigation Section presented a lively discussion on the "Demise of the Civil Jury Trial" in Virginia, with considerable debate over whether the trend is positive or negative. The jury is still out.

I learned that the Board often takes on long-term projects designed to benefit its members. As an example, for a number of years the Board set aside funds specifically designed for the development and publication of a revised appellate handbook. Under Monica Monday's supervision, the revised handbook was completed and published in 2011, and is available both in hard copy and online to any member of the Litigation Section.

I learned that the Board is one of the most active groups in the Commonwealth in presenting CLE's specifically designed for the litigator. For example, the Board sponsors two CLE's annually specifically tailored to appellate litigation, making the VSB the only organization that routinely offers quality CLE in Virginia on appellate practice. And the price is right--the programs are *free* to all

participants.

And then, of course, there is the Litigation News publication, arguably the most important benefit the section offers to its members. Litigation News includes practical articles on current topics, detailed articles on important issues of the law, a view from the bench written by a sitting judge and a summary of recent decisions handed down by the Virginia Supreme Court. The format of the newsletter has changed over the years with the development of technology. When I joined the Board, the newsletter came in hard copy. Within a few years, it was available online. Recently, the newsletter has become even more valuable, as members can electronically search the database for articles on a particular topic. For those who have not yet taken advantage of this technology, simply go to the Litigation Section of the VSB website and click “Search Our Publications.” What you will find are well written, informative articles to assist in your practice. Indeed, we frequently get requests to use the articles in CLE presentations throughout Virginia, and I have never known an author to refuse such a request. As you might imagine, the publication of the newsletter is a considerable task undertaken by the Board under the capable supervision of the Litigation News Editor, Joe Rainsbury.

If you are like me, you may have been a member of this section your entire career without really knowing what the Board does, or the resources available to Section members. The best way to learn is to review the materials on the Section’s website or, better yet, get involved in Section activities. Notwithstanding the diversity we have on the Board, the best way for us to know whether the Section is meeting the needs of its members is to listen to them. To that end, please let us know what you think. ♦

Navigating the Federal Courts

cont’d from page 1

company has its principal place of business.⁶

II. Removal

Section 103 of the Act revises the rules for removing a case from state court to federal court and expands defendants’ opportunities to remove cases to federal court. Highlights of these jurisdictional improvements in the Act for removal and remand include:

- **Severing State-law Claims:** For cases that include both federal-law claims and state-law claims that are either not within the original or supplemental jurisdiction of the federal district court or are nonremovable by statute, the entire action may be removed to federal court if the action would be removable if such state-law claims had not been included.⁷ After such an action is removed to federal court, the federal district court “shall sever” and “shall remand” the state-law claims to the state court from which the action was removed.⁸ The only defendants who must join in or consent to removal in such cases are those against whom a federal-law claim has been asserted.⁹ This change is important to keep in mind for cases that contain such state-law claims because the result of removal is two actions—one pending in federal court for the federal-law claims and one pending in state court for the state-law claims.

- **Removal by Later-Served Defendants:** Based on changes implemented by the Act, later-served defendants have the ability to remove a case. Each defendant has the right to file a notice of removal within 30 days after receipt by or service on that defendant of the initial pleading or summons.¹⁰ Earlier-served defendants can consent to removal by a later-served defendant even if the earlier-served defendants did

not previously initiate or consent to removal.¹¹

- **Consideration of Amended Pleadings or Other Papers:** To the extent that a defendant receives a copy of an amended pleading, motion, order, or other paper “from which it may first be ascertained that the case is one which is or has become removable,” such defendant may file a notice of removal within 30 days after receipt of such paper.¹²

- **Amount-in-Controversy Determination:** For diversity jurisdiction cases, the notice of removal may assert the amount in controversy if the initial pleading seeks either: (1) non-monetary relief, or (2) a money judgment, but the state practice either does not permit demand for a specific amount or permits a plaintiff to recover more than the amount of damages demanded.¹³ Removal is permitted based on such assertions in the notice of removal regarding the amount in controversy “if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds” \$75,000.¹⁴

If a case is not removable solely because the amount in controversy does not exceed \$75,000, information relating to the amount in controversy “in the record of the State proceeding, or in responses to discovery” shall be treated as “other paper” under 28 U.S.C. § 1446(b)(3).¹⁵ This change means that a new 30 day window for removal shall open for a defendant if the amount in controversy is determined to exceed \$75,000 based on a document filed in the state court or based on responses provided by plaintiff in discovery.

- **Bad-Faith Exception to One Year Rule:** The Act creates an exception to the one-year rule for removal in diversity cases when “the plaintiff has acted in bad faith in order to pre-

vent a defendant from removing the action.”¹⁶ If a federal district court determines that a plaintiff “deliberately failed to disclose the actual amount in controversy to prevent removal,” such a finding “shall be deemed bad faith” under 28 U.S.C. § 1446(c)(1).¹⁷

III. Venue

Sections 201, 202, 203, and 204 of the Act contain venue and transfer improvements. Highlights of these improvements in the Act include:

**Based on changes
implemented by the Act,
later-served defendants
have the ability to remove
a case.**

- **Addition of § 1390:** The Act adds 28 U.S.C. § 1390 which is entitled “Scope.” Section 1390(a) defines venue as referring to “the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restric-

tion of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.” Section 1390(b) states that Chapter 87, entitled “District Courts; Venue,” does not apply to admiralty, maritime and prize cases under 28 U.S.C. § 1333 except that such cases may be transferred as provided in Chapter 87. Section 1390(c) clarifies that Chapter 87, which is titled “District Courts; Venue,” does not determine to which district court a civil case pending in state court may be removed but instead controls transfer of a removed case between districts and divisions of the federal district courts.

- **All Civil Actions:** With the changes in the Act, the venue provisions in 28 U.S.C. § 1391 “govern the venue of all civil actions brought in district courts of the United States,” which means they apply both to diversity and federal-question cases.¹⁸ Section 1391(b) specifies the judicial districts in which a civil action may be

brought as follows: “(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.”

- **Venue over Aliens:** Under the Act, aliens are treated differently for purposes of venue depending on whether they reside in the United States. If an alien is lawfully admitted for permanent residence in the United States, he shall be deemed to reside in the judicial district in which he is domiciled.¹⁹ To the extent that a defendant is not a resident in the United States, that defendant may be sued in “any judicial district,” and joinder of such a defendant shall not be considered when determining “where the action may be brought with respect to other defendants.”²⁰

- **Residency of Entities with Capacity to Sue or Be Sued:** A plaintiff entity that is capable of both suing and being sued shall be deemed to reside only in the judicial district in which it maintains its principal place of business.²¹ A defendant entity that is capable of both suing and being sued shall be deemed to reside in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.²²

- **Venue over Corporations:** For a corporation that is subject to personal jurisdiction in a state with more than one judicial district at the time an action is commenced, that corporation resides in “any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a

separate State.”²³ If there is no such district in the state, the corporation “shall be deemed to reside in the district within which it has the most significant contacts.”²⁴

- **Repeal of Local Action Rule:** The Act repeals 28 U.S.C. § 1392, which contained the local-action rule—a rule that specified venue for civil actions involving defendants or property located in different districts in the same state.

- **Change of Venue:** The Act adds additional options for transfer of a civil action under 28 U.S.C. § 1404(a). In addition to transferring to any district or division where an action might have been brought, a district court now may transfer an action to any district or division “to which all parties have consented.”²⁵ ♦

ENDNOTES

1. Pub. L. No. 112-63 (2011).
2. See also House Judiciary Committee Report which provides legislative history relevant to improvements made in the Act.
3. 28 U.S.C. § 1332(a)(2).
4. *Id.* at § 1332(c)(1).
5. *Id.*
6. *Id.*
7. *Id.* at § 1441(c)(1).
8. *Id.* at § 1441(c)(2).
9. *Id.*
10. *Id.* at § 1446(b)(2)(B).
11. *Id.* at § 1446(b)(2)(C). This change in the Act supersedes the decision in *Barbour v. International Union*, 640 F.3d 599 (4th Cir. 2011).
12. *Id.* at § 1446(b)(3).
13. *Id.* at § 1446(c)(2)(A).
14. *Id.* at § 1446(c)(2)(B).
15. *Id.* at § 1446(c)(3)(A).
16. *Id.* at § 1446(c)(1).
17. *Id.* at § 1446(c)(3)(B).
18. *Id.* at § 1391(a)(1).
19. *Id.* at § 1391(c)(1).
20. *Id.* at § 1391(c)(3).
21. *Id.* at § 1391(c)(2).
22. *Id.*
23. *Id.* at § 1391(d).
24. *Id.*
25. *Id.* at § 1404(a). Compare with *South End Constr. Inc. v. Tom Bruton Masonry Inc.*, Civil Action No. 7:12cv390, 2012 U.S. Dist. LEXIS 132627 (W.D. Va. Sept. 18, 2012).

View from the Bench • By Hon. B. Waugh Crigler

Opening Statements and Summations: *Use Them, Don't Lose Them*

TELLING THE STORY

General Observations

Every trial, criminal or civil, involves a real life story. Balladeers and country music singers are experts not only in telling stories but telling them in a way that captures the attention, imagination, and hearts of those listening. By using clear central themes and a memorable refrain, these storytellers convey their tale in a way that assists listeners both to interpret it and to apply it to their lives. Similarly, a trial counsel is most effective when telling his client's story at trial in a way that captures the jury's attention, is memorable, and, ultimately, encourages the jury to interpret the story in a way that leads to a favorable verdict. Opening statements and summation are very important in this regard. The two are preeminent opportunities for the trial lawyer either to win or to lose the case, as they will influence how the jury sees and interprets the evidence. Ultimately, this chance to foretell and retell their client's story gives counsel the freedom to frame the narrative of the entire trial. In this task, practiced technique is a critical and oft-overlooked component of success, especially in opening statements and summation.

The Role and Importance of a Theme

Just like any good ballad, the trial story should have a central theme that ties together the facts and circumstances of the case. Unlike the theory of a case, which compares the facts to legal principles regarding liability, damages, defenses, and the like, a

theme is a rhetorical device rather than a legal argument. It is expressed in the form of a "clunky" or catchy phrase that tells the jury—from your client's viewpoint—what the case is "all about." The theme is a key element of both the opening statement and the summation, because it links together all segments of a trial, most importantly the first and last segments. By opening with the theme early and referring to it repeatedly, counsel is afforded the opportunity to punctuate the importance of any one piece or various portions of the evidence. The theme, therefore, is much like an acrobat's trapeze bar moving to and fro high above the safety net so that the performer may begin, perform, and complete the routine while being held aloft.

Of course, a catchy phrase without factual support is an empty phrase. It is essential that every theme be thoroughly substantiated by the entire evidence in the case. Counsel must account for both the good and bad facts of every witness and every exhibit likely to be offered at trial. Otherwise, the story that counsel tries to capture in the theme will be incomplete and unconvincing. Some examples will be provided below.

Conversational and Literary Techniques

Every effective story teller employs a variety of both conversational and literary techniques, and trial counsel should do the same. No matter how substantial the text of an opening or summation, effectiveness may be lost either in formatting or in delivery. Tone of voice, emphasis on particular words or phrases, and modulation or control over the speed of delivery all impact effectiveness. Even in this era of rapid text messaging and multi-tasking communications, a slower-paced, more deliberate presentation allows

Judge Crigler is a Magistrate Judge in the United States District Court for the Western District of Virginia. Judge Crigler acknowledges the able assistance of Spencer Leach, a University of Virginia Law Clerk Fellow, for his assistance in editing this article.

counsel to maintain the jury's attention throughout delivery.

Just as in authoring a written story, verbal punctuation by inflection and repetition can be used to focus the jury's attention on matters important to the client's case. Counsel may punctuate opening statements by asking the jury to "pause," "consider," "think about," "question," or "pay attention to" certain evidence they will see or hear.

Of course counsel should repeat the same technique in closing, except the jury will be asked to do those things based on what they have seen or heard during trial.

Repetition is considered the father of learning, and it certainly has its place in a trial. Unfortunately, the most "repeated" critique of trials by the jurors is that counsel had been *too* repetitious, thus failing to give the jury credit for having heard the evidence. By the same token, since the theme serves the unique purpose of capturing what the case is all about, counsel should structure openings and summations in a way both to lead with it and to repeat the theme as often as the flow will allow. Through repetition of a well-crafted theme, counsel should be able to capture the jury's imagination, showing how the evidence will support or has supported the theme and ultimately focusing the jury's attention on what the client's case is all about when it retires to deliberate a verdict.

Other literary techniques, such as comparisons, contrasts and lists also can add effectiveness to both opening statements and summations. Comparisons usually help corroborate evidence, whereas contrasts are effective to challenge the credibility of evidence. Comparisons generally are characterized by the use of the word "and," whereas contrasts are characterized by words or phrases like "but," or "on the other hand." An example of a comparison may be, "You will hear [have heard] X testify, *and* her testimony

will be [has been] corroborated when Z tells [has told] you" A contrast may take the form, "Witness C will tell [has told you] that . . . , *but* you will later learn [in fact did learn] from A and B that"

Lists serve to summarize a number of facts that will be or have been offered—either by a single witness or multiple witnesses. They further serve to avoid an otherwise boring witness-by-witness presentation and give the jury a simple out-

line of facts they are able to check off in their minds in making its findings. For example, "You will learn [have learned] from all witnesses that: (1) it was overcast; (2) it was misting; (3) it was below freezing; and (4) the tires on the car operated by Z were nearly bald." Or, "You will hear [have heard] Mrs. Y tell you that: (1) the blade on the saw was unguarded; (2) defendant required employees to use the saw in its unguarded state; and (3) she observed plaintiff using

the saw the moment before she was injured."

These techniques, when used to frame the case in opening statements and to close the case in summation, are effective in making your client's story interesting—but most importantly memorable—for the jury who will determine its outcome.

OPENING STATEMENTS

Excluding *voir dire*, opening statements represent the first time a jury has an opportunity both to learn about the substance of the case and to begin identifying with the client. It is the time for counsel to stand alone before the jury, describe the path the case will take, and demonstrate to the jury how to follow that path as the trial unfolds. Moreover, it is the *only* time when counsel will have an opportunity to completely control what is delivered to the trier of fact, without any interference by a witness, opposing counsel or the presiding judge, provided opening is conducted properly. Therefore, trial counsel should consider

... counsel should consider an opening statement as a special "quiet time" with the jury and should make every effort to deliver it in a way that avoids objection.

an opening statement as a special “quiet time” with the jury and should make every effort to deliver it in a way that avoids objection. All the while, counsel should never forget that the story is not about counsel; it is about the client and the circumstances that have brought everyone together in the trial.

Statements vs. Argument

Despite the somewhat popular notion that counsel should make every effort to argue on behalf of the client as early and as often as possible, this segment of the trial is called “opening statement,” not “opening argument.” There are good reasons why the absence of argument in opening statements is both good form and more effective than some might perceive in relating a client’s story at this stage of the proceedings. Many trial courts still maintain and enforce the historical distinction between “statement” and “argument.” Yet even if this tradition has been lost on a court—because it has become inoculated against or deaf to an argumentative opening statement—it likely will not be lost on opposing counsel. Objections, even when not granted, interrupt counsel’s quiet time with the jury and break the flow of the trial story.

Furthermore, in jurisdictions like Virginia where *voir dire* is somewhat limited, the jury has only a thumbnail sketch of the case. Thus, the jury will be hearing the details of the case for the first time in opening statements, and they are entitled to hear a summary of everything that counsel has a good faith basis to believe will properly come before them at trial. In that regard, counsel should not lose the opportunity to forecast the likelihood of objections, the expected use of leading questions on cross examination, evidence that may impact the credibility of witnesses or the weight certain may be given; the legal theories of the case, and those other parts of the

story that the jury will experience during trial. As a result, the jury will be prepared to hear, see, and receive these when they occur during trial.

It is critical to structure an opening statement prospectively, foretelling the important components of the story and the manner in which it will be told at trial around the central theme. If the structure is prospective, it is less apt to be argumentative. Phrases such as “You will see,” “You will hear,” “You will experience,” “You will know when...” provide an informative (indicative) foretaste of the trial. Furthermore, to avoid undue repetition or overuse of these introductory phrases, counsel is permitted to prospectively narrate portions of the evidence. All the while, counsel should be careful to avoid presenting opening statements in a manner that presumes the jury is familiar with the facts and legal principles at stake.

Counsel should consider structuring a presentation so that the indicative (facts and circumstances) precede the imperative (conclusions, instructions or directives). A simple narrative about what will occur during trial will allow counsel to tease the jury’s imagination without imposing counsel’s own partisan conclusions at a point when the jury has had no opportunity to ascertain the bases for those conclusions. This has never been truer than in this post-modern age when people desire the freedom to form their own conclusions after assessing the circumstances. Attempts to interpret the evidence—or to apply the law—in opening transform an otherwise indicative opening into more of an imperative opening. This may lead to confusion because the jury lacks the context necessary to determine whether to accept or reject counsel’s train of thought. Moreover, the bench, *sua sponte*, just might interrupt, particularly if counsel becomes too argumentative or usurps

It is critical to structure an opening statement prospectively, foretelling the important components of the story and the manner in which it will be told at trial around the central theme.

the judge's role of instructing the law.

The use of rhetorical questions presents difficulty in opening statements because, by their nature, they are argumentative. They ask the listener to balance certain predicates and then come to a conclusion. However, a rhetorical device may be used in opening without being viewed as argumentative, provided it is prospective in nature. For example, "Members of the jury, when you hear Mr. A tell you . . . , you will want to ask yourselves . . . ," or "You may question the basis for Mrs. X's testimony when you hear her say"

To conclude, opening statements should be used to foretell what trial counsel has a reasonable basis to believe the jury will see, hear, and experience during the course of the trial in a theme-oriented, factually-supported manner.

SUMMATIONS

In some ways, summations represent nothing more than an opening statement put in a retrospective framework. Summations remind the jury what counsel told them they would experience, relate what they did experience, help the jury judge the facts, and assist the jury in applying the law to the facts. It is imperative to maintain consistency in the theme. Unlike opening statements, however, summations allow counsel to assist the jury in "connecting the dots." Counsel can suggest ways for the jury to assess credibility, to infer facts from the bald statements of the witnesses and exhibits, and to apply the court's instructions to the facts revealed by the evidence. This right is circumscribed only by the evidence that actually has been introduced, the reasonableness of inferences sought to be drawn, and the precise language of the instructions given by the court.

Counsel should begin summations by reminding

the jury of the theme and what counsel told them would be shown by the evidence. Just as in opening statements, the theme should be repeated and used to reconcile both the favorable and unfavorable facts. The same literary techniques should be employed, though counsel is free to use them in much

more powerful and compelling ways because they may be coupled with the conclusions sought to be drawn about the weight of the evidence and its effects on the verdict.

Matters to which the jury was alerted in opening statements should be revisited. As an example, "Now in opening statements, I asked that you not be surprised when you heard X testify that . . . , and as you heard, that is exactly what he/she said." Rhetorical questions now can be posed for the very purpose of compelling a conclusion by the jury. An example is, "Members of the jury, I said in opening statement that you would hear Now that you have heard

that testimony, ask yourselves"

There are, however, certain arguments to avoid at all costs. The first is one that interjects counsel's personal opinion into the case. This is both unethical and unprofessional. Though the temptation to give the jury counsel's personal opinion always is great, there is an easy technique for avoiding it. Simply omit the pronoun "I" except when referring to what counsel promised in opening statement the jury would experience as the case unfolded, or when asking for a verdict on behalf of the client. Personal opinions likely will garner a sustainable objection from opposing counsel-if not a *sua sponte* admonition from the court. Moreover, counsel's expression of personal opinion takes the focus of the case off the client and the jury and places it squarely on counsel, where it does not belong. *Remember*, one of the greatest

... summation rebuttal should be used to return the jury's focus to the theme, a brief reminder of the evidence supporting the theme, and a final request that the jury return a verdict in favor of the client.

challenges counsel faces in a trial is persuading the jury to think and act in ways that may run counter to their own predilections. If summations are couched in terms of “what you, the jury, should consider, what you, the jury, should be thinking, what you, the jury, should find from the weight of the evidence, and what verdict you, the jury, should return,” then it is always about your client’s case and never about you, “the counsel.” This technique frees counsel to utilize their skills and gifts to assist the jury in returning a verdict for the client without pontificating about what that result should be.

Finally, counsel should never waive rebuttal. In presenting rebuttal argument, however, counsel should not address everything opposing counsel has argued to the jury. Such efforts usually result in unnecessary repetition and, if nothing else, take too long at a time when the jury expects closure. Rather, summation rebuttal should be used to return the jury’s focus to the theme, a brief reminder of the evidence supporting the theme, and a final request that the jury return a verdict in favor of the client. This will complete the circle begun in the opening statement.

CONCLUSION

Opening statements and summations are the first and the last opportunities counsel will have to win the client’s case. Counsel should not waste these opportunities. Rather, counsel should use these occasions to frame the case, to establish and reiterate an overall theme, and to make the client’s story interesting and memorable for the jury. ♦

Nonsuit under Virginia Code § 8.01-380 and Notice of Voluntary Dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i): Are they the same?

by Barbara S. Williams

As every Virginia litigator knows, Virginia law changes slowly over time. A good example of this is the nonsuit, which the General Assembly first enacted in 1789.¹ As the Supreme Court of Virginia has observed, the right to take a nonsuit gives plaintiffs a substantial litigation benefit: “[T]he right to take a nonsuit . . . is a powerful tactical weapon in the hands of the Plaintiff.”² Over the years the nonsuit statute, Virginia Code § 8.01-380(B), has changed.³ But those changes left unresolved the question of whether a plaintiff forfeits his right to a nonsuit in a state-court case if the plaintiff previously voluntarily dismissed the case in federal court under Fed. R. Civ. P. 41(a)(1)(A)(i). That was the question presented in *INOVA Health Care Servs. v. Kebaish*, 284 Va. 336 (2012).

Dr. Kebaish, a physician, sued INOVA Health Care Services and a number of other doctors in the Circuit Court of Fairfax for \$35 million under multiple theories of liability. The case was removed to federal court because two of the doctors were United States Army officers. The Plaintiff then filed a “Notice of Voluntary Dismissal” under FRCP 41(a)(1)(A)(i), which voluntarily dismissed his lawsuit without prejudice. Thereafter, the doctor filed again in Fairfax Circuit Court and proceeded to trial. On the second day of trial, Dr. Kebaish “elected to use his nonsuit” because, as he informed the court, he had not previously taken a

Barbara practices personal-injury law in Leesburg and surrounding localities.

nonsuit. *Kabaish*, 284 Va. at 342. INOVA objected to this, relying on dicta in *Welding, Inc. v. Bland County Service Authority*, 261 Va. 218, 223-24 (2001), which suggested that a voluntary dismissal under the Federal Rules is equivalent to a nonsuit under Virginia Code § 8.01-380. The trial court overruled the objection and allowed the doctor to take his nonsuit as a matter of right.

On appeal, the Supreme Court affirmed. It began its analysis by reciting the long and interesting history of Virginia’s nonsuit statute. The opinion then compared Virginia Code § 8.01-380 with Fed. R. Civ.P. 41(a)(1)(A)(i), noting that the federal rule is far more restrictive than Virginia’s nonsuit statute—among other things the Rule allows a by-right dismissal only at the beginning of a case. The Court likewise found no language in Virginia’s nonsuit statute that prevented the taking of a nonsuit after a voluntary dismissal of a federal-court action. And it rejected the defendant’s argument that Code § 8.01-229(E)(3)—which provides that cases originally filed in state or federal court have the same six-month nonsuit tolling period— means that a nonsuit under § 8.01-380 is the legal equivalent of a dismissal under Fed. R. Civ.

P. 41(a)(1)(A)(i).

The court concluded that a nonsuit under Virginia Code § 8.01-380 and a dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i) were not equivalent. Because he had not previously exercised a nonsuit pursuant to Code § 8.01-380, the court held that Dr. Kebaish could exercise his right to take a voluntary nonsuit even though he had previously voluntarily dismissed the same action in federal court. Thus, although a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i) resembles a nonsuit under Code § 8.01-380 in many ways, a plaintiff’s exercise of a voluntary dismissal in federal court does not use up the plaintiff’s by-right nonsuit under § 8.01-380. ♦

although a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i) resembles a nonsuit under Code § 8.01-380 in many ways, a plaintiff’s exercise of a voluntary dismissal in federal court does not use up the plaintiff’s by-right nonsuit under § 8.01-380.

ENDNOTES

1. As Justice Lemons teaches in *Kebaish*, the Virginia General Assembly enacted Virginia’s first nonsuit statute in 1789, which provided that “[e]very person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he do so before the jury retire from the bar.” 1789 Acts ch. 28. Section 10 of “An ACT concerning Jeofails and certain Proceedings in civil Cases.” *INOVA Health Care Servs. v. Kebaish*, 284 Va. 336, 343(2012).

2. *Id.* at 344, quoting *Trout v. Commonwealth Transp. Comm’r of Va.*, 241 Va. 69, 73 (1991).

3. *See Id.* at 343.

Recent Civil Cases from the Supreme Court of Virginia

JANUARY SESSION 2013

Evidence

Case: *Funkhouser v. Ford Motor Co. (On Rehearing)*
(1/10/2013)

Author: Powell

Lower Ct.: Albemarle County (Peatross, Paul M.)

Disposition: Affirmed

Facts: This was a wrongful-death case in which a three-year-old died after the Ford Windstar minivan in which she was playing caught fire. At the time, the engine was off and the key was out of the ignition. The plaintiff's expert opined that the fire originated in the car's instrument-panel area, near a wire harness and the cigarette lighter, and that it was due to undesired electrical activity in the area. The expert could not, however, pinpoint the precise cause.

The plaintiff alleged that Ford should have warned users of the fire hazard that the car presented. To establish this, the plaintiff proposed to offer testimony describing seven earlier Windstar key-out fires that Ford knew had originated in the instrument-panel area. Ford moved in limine to exclude this evidence.

The trial court granted the motion, stating: (1) the plaintiff needed to pinpoint the cause, which he had not done, and (2) the plaintiff needed to show that the seven instances of earlier Windstar fires were caused by the same defect, which he also had not done.

Ruling: On appeal, and on rehearing, the SCOV affirmed. It noted that in a failure-to-warn case, the plaintiff must show that the defendant knew or had reason to know that the product was dangerous. To establish this, the plaintiff can present evidence of earlier similar incidents involving the product. But those incidents had to occur under substantially similar circumstances, and they had to have been caused by the same or similar defects or dangers as those at issue in the case.

The SCOV held that the trial court properly excluded evidence of the seven previous fires, as the plaintiff could not establish that those fires were caused by "the same or similar defects" as the ones at issue in the case. The SCOV observed that its ruling does *not* require a plaintiff to identify a specific defect that caused the injury. But in a case in which the specific defect is not known, the plaintiff must rule out all possible causes that were unrelated to the manufacturer. As the plaintiff's expert had not done this, his proffered testimony about the other fires was inadmissible.

Alternatively, the plaintiff argued that his expert could testify generally that a reasonable manufacturer should have warned of the danger--basing that opinion on the seven previous fires, though not introducing evidence of them. Citing Code § 8.01-401.1, it noted that an expert's testimony can be grounded on circumstances or data that is not admissible in evidence. The SCOV rejected this argument, holding that in a failure-to-warn case an expert witness must *base* his testimony on facts showing that the prior incidents are "substantially similar" to the one at issue.

Key Holding(s):

- In a failure-to-warn products-liability case, a party who offers evidence of prior incidents to establish that the manufacturer knew or should have known of the danger must show that that the earlier incidents were caused by the "same or similar defect."
- To establish that a prior incident was caused by the "same or similar defect," a party can either (1) identify the particular causes of the incidents, or (2) rule out all other possible causes of the incidents that cannot be attributed to the manufacturer.
- In order for an expert witness in a failure-to-warn case to base his testimony on earlier incidents involving the same product, those earlier incidents must be substantially similar to the one at issue.



Maritime Law

Case: *Exxon Mobil Corp. v. Minton* (1/10/2013)

Author: Millette

Lower Ct.: City of Newport News (Fisher, Timothy S.)

Disposition: Reversed

Facts: This mesothelioma case involved a worker at the Newport News Shipbuilding and Dry Dock Company ("Newport News Shipbuilding") whom plaintiff alleged was exposed to asbestos fibers while working on ships owned by Exxon. The plaintiff brought a claim under the federal Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 905(b), asserting that Exxon both failed to warn the worker about the hazards of asbestos and failed to protect him against those hazards.

The trial court excluded evidence that Exxon offered to show that Newport News Shipbuilding knew of the asbestos dangers. The jury returned a verdict against Exxon for \$12 million in

compensatory damages, \$430,963.70 in medical expenses, and \$12.5 million in punitive damages.

Exxon moved to set aside the verdict, claiming: (1) that the evidence was insufficient to establish that it breached either the “duty of active control” or “duty to intervene,” and (2) that the evidence was insufficient to establish that any such breach caused the mesothelioma. It also moved to set aside the award of punitive damages. The trial court denied these motions, though it did reduce the punitive damages award to \$5 million, the amount sought in the complaint.

Ruling: On appeal the SCOV reversed.

The SCOV first observed that, to succeed in a claim under the LHWCA brought by shipyard workers, the plaintiff needed to establish a violation of duty. The plaintiff alleged that Exxon violated its “duty of active control” and its “duty to intervene.” Exxon argued that the evidence was insufficient to establish a breach of either duty. The SCOV disagreed.

With respect to the “active control” claim, Exxon argued that plaintiff failed to establish either: (1) that Exxon had the requisite control over the “methods and operative details” of the shipyard’s repair work, or (2) that the worker was exposed to asbestos. The SCOV rejected these arguments, citing evidence in the record that supported those two elements.

With respect to the alleged breach of its “duty to intervene,” Exxon argued that the plaintiff failed to establish either: (1) that Exxon had actual knowledge of asbestos’s hazards, or (2) that Exxon had actual knowledge that Newport News Shipbuilding could not be relied upon to remedy the situation. Once again, the SCOV cited evidence in the record that supported those two elements.

Finally, the SCOV held that there was enough evidence to establish causation. Although other asbestos sources may have contributed to the mesothelioma, there was sufficient evidence for a jury to find that asbestos on Exxon’s vessels was a “substantial factor” in causing it. [The court noted that the parties agreed that causation was to be determined using a “substantial factor” test, but that *Ford Motor Co. v. Boomer*, also decided on January 10, 2013, established a different test for cases involving multiple causation.]

Despite those rulings, the SCOV held that the case had to be reversed because the trial court had erroneously excluded evidence that Newport News Shipbuilding knew about the asbestos hazard. The SCOV opined that this evidence was relevant to the issue of whether or not Newport News Shipbuilding could have been relied upon to protect its workers from asbestos exposure. And that, in turn, may have affected the jury’s analysis of the duty-to-intervene claim.

Finally, the SCOV reversed the award of punitive damages. It held that 33 U.S.C. § 905(b) limits a shipworker’s remedy against a ship owner to the relief that is included in the LHWCA. As the LHWCA does not provide for punitive damages, the plaintiff could not recover such relief.

Justice McClanahan filed a concurring opinion, in which Justice Powell joined.

Key Holding(s):

- A shipyard worker who brings an LHWCA case against the owner of a vessel cannot recover punitive damages.
- In an LHWCA case brought by a shipyard worker against a vessel owner, evidence that the plaintiff’s employer knew of a hazard is admissible to rebut the plaintiff’s claims that the employer could not have been relied upon to protect the employee from that hazard.



Civil Procedure

Case: *Allied Concrete Co. v. Lester* (1/10/2013)

Author: Powell

Lower Ct.: City of Charlottesville (Hogshire, Edward L.)

Disposition: Affirmed

Facts: This was a wrongful death claim arising out of a collision between a concrete truck and a passenger vehicle. The vehicle had two occupants, husband and wife. The crash killed the wife and injured the husband. The husband brought a personal injury action—both in his own right and as administrator of his wife’s estate. The wife’s parents and her widower husband were the statutory beneficiaries.

The plaintiff and his counsel engaged in various forms of misconduct, including destroying evidence, lying about that destruction, counsel’s crying during opening statement and closing argument, and the plaintiff’s lying about his prior use of anti-depressants. The trial court sanctioned both the plaintiff and counsel, and instructed the jury, twice, about the discovery misconduct.

The defendant also claimed that there was juror misconduct. One of the jurors was, until six months before the trial, actively involved in a local “Meals on Wheels” organization. Plaintiff’s counsel’s law firm had an active involvement with the organization. Indeed, the organization had recently offered plaintiff’s counsel a seat on its board—which he declined. The juror did not provide any of this information during voir dire. And, she remained silent after the trial court asked the prospective jurors: “Do you know them or have significant involvement with [the parties’ lawyers] or their law firms?” The juror’s connection to the plaintiff’s counsel and his law firm was discovered only after trial.

The jury awarded \$6.2 million on the wrongful-death claim—\$4.1 million for the husband and \$1 million for each of the decedent’s parents. It also awarded the husband \$2.4 million on his personal-injury action. The trial court denied the defendant’s motions for retrial based on plaintiff’s and plaintiff’s

counsel's behavior, and denied the motion for a mistrial based on the juror's nondisclosure. It did, however, order remittitur of \$4.1 million of the husband's wrongful death award, finding both that: (1) the amount was disproportional to the amount awarded to the decedent's parents, and (2) the amount was so excessive as to show that the jury was motivated by bias, sympathy, passion, or prejudice. The remittitur left the husband with \$2.1 million on the wrongful-death claim.

Ruling: On appeal, the SCOV affirmed the trial court's denial of defendant's motion for a retrial, affirmed its denial of the motion for retrial, but reversed its decision to grant remittitur.

On the claims of client and counsel misconduct, the SCOV held that the trial court dealt with the issue in a way that preserved the defendant's right to a fair trial. It noted that the pre-trial misconduct was discovered and addressed before trial. It further noted that the trial court instructed the jury about their misconduct. And it noted that all but one of the spoliated documents relating to the misconduct were introduced at trial. (The remaining document, discovered only after trial, duplicated other evidence that had been introduced.) Thus, even though plaintiff's actions were "dishonest" and the plaintiff's counsel had been "patently unethical," the SCOV held that the defendant nevertheless received a fair trial.

On the claim of juror misconduct, the SCOV found that the juror had not been dishonest when she remained silent when asked about plaintiff's counsel and his law firm. There was no evidence that she knew plaintiff's counsel personally, though she may have known *of* him. The only exchange between them was a single email that the juror had sent him seven months before trial. Moreover, the connection between the organization and the firm was not so large as to be a "significant involvement." Finally, the juror in question had retired six months before trial, so there was no connection at the time of trial.

On the remittitur, the SCOV applied a two-step procedure. First it determined whether the trial court had expressly found that the verdict was excessive, supporting that finding with an analysis showing that it "considered factors in evidence relevant to a reasoned evaluation of the damages." Second it evaluated whether the remitted award was "reasonably related to the damages disclosed by the evidence." Both steps required the court to view the evidence in the light most favorable to the party receiving the jury verdict.

The SCOV rejected both of the circuit court's explanations for remitting the jury award. First, it held that it was improper to base a conclusion about the propriety of a damages award by comparing it to other awards. The trial court needed to support the amount with record evidence, which it had not done. Second, the trial court never articulated--with references to the record--why the particular amount it chose was appropriate. It thus failed to show "whether the amount of recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence."

Justice McClanahan filed an opinion concurring in part and dissenting in part.

Key Holding(s):

- The fact that a party has been dishonest in discovery and that his counsel has engaged in "patently unethical" conduct does not require a retrial where the trial court has taken appropriate measures to ensure a fair trial.
- When remitting a jury verdict, the trial court must: (1) expressly find that the verdict was excessive, citing record evidence to support that finding, and (2) show that the remitted award is "reasonably related to the damages disclosed by the evidence."



Personal Injury

Case: *Ford Motor Co. v. Boomer* (1/10/2013)

Author: Millette

Lower Ct.: Albemarle County (Higgins, Cheryl V.)

Disposition: Reversed

Facts: This was a mesothelioma wrongful-death action. The decedent was a state trooper whose duties included supervising vehicle inspections. The plaintiff claimed that the decedent's mesothelioma was caused by exposure to asbestos from brakes that the defendants manufactured and installed. Defendants, however, presented evidence that the decedent had worked a year at the Norfolk Naval Shipyard, where he also might have been exposed to asbestos fibers.

The trial court instructed the jury using a standard causation instruction: "A proximate cause of an injury, accident, or damage is a cause which in the natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury or damage would not have occurred."

The trial court also instructed the jury about situations involving concurrent negligence: "If two or more persons are negligent, and if the negligence of each is the proximate cause of the plaintiff's injury, then each is liable to the plaintiff for his injury. This is true even if the negligence of one is greater than the negligence of the other [or others]."

Finally, the trial court explained to the jury that the plaintiff could prevail if the defendant in question was a "substantial contributing factor" in causing the injury.

The jury found against both defendants and awarded damages of \$282,685.69. The trial court denied the defendants' post-trial motions and entered final judgment for the estate.

Ruling: On appeal, the SCOV reversed. It held that the jury was not properly instructed on causation in circumstances involving multiple possible causes.

To begin with, it noted that, in multiple-causation cases, the usual “but for” causation rule often breaks down. Where there is more than one sufficient cause, none of the sufficient causes satisfies the “but for” condition. Using “substantial” sheds little light on the problem, as there is no single common-sense meaning of the term on which a juror could rely.

The SCOV concluded that, in mesothelioma cases involving multiple exposures to asbestos, a given exposure is a cause-in-fact only if that exposure, standing alone, would have been sufficient to cause the disease.

Finally, on a separate failure-to-warn issue, the SCOV held that the evidence was sufficient for the jury to find: (1) that the decedent should have been warned of asbestos hazards and (2) that defendants failed to do so.

Key Holding(s):

- In concurring-causation cases, a particular defendant’s act is a cause-in-fact of an injury only if that act, standing alone, would have been sufficient to cause the injury.



Contract

Case: *Online Resources Corp. v. Lawlor* (1/10/2013)

Author: Lemons

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

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

Facts: This was a employment-contract case involving certain change-of-control and severance agreements into which a public corporation had entered with its then-CEO/chairman. The agreements’ payment obligations were triggered upon a “change in control,” which occurred when the “incumbent directors” comprised less than a majority of the board. The agreements defined “incumbent directors” so as to include the CEO/chairman and various other directors. The board had a total of 10 seats.

Before the CEO/chairman’s resignation, the board consisted of seven incumbent directors and three non-incumbent directors. After the CEO/chairman and another “incumbent director” resigned, however, there were five incumbent directors, three non-incumbent directors, and two vacant seats. Thus, whether or not the incumbent directors comprised less than a majority depended on whether vacant seats were included in the calculation (in which case the incumbents would have 5 out of 10 seats, comprising less than a majority and so triggering the change-of-control provisions), or were *not* included (in which case the incumbents would have 5 out of 8 seats, a majority, and so not triggering the change-of-control provisions).

One of the agreements also had an attorney’s-fee provision for all expenses arising out of a legal action to enforce the terms of the agreement, provided the CEO/chairman obtained pay-

ment under that contract. A separate provision said that, in the event of termination, certain payments under the company’s otherwise discretionary severance pay policy “are payable” to the CEO/chairman.

The CEO/chairman brought an action under these various agreements, claiming that there was a “change of control,” as defined under the contracts. He also made a claim for unjust enrichment, contending that the board had promised him additional benefits down the road if he agreed to a 5% salary cut. Finally, he sought attorney’s fees, whose consideration the parties agreed to defer until after trial on the merits.

During trial, one of the CEO/chairman’s experts used two stock values: one based on the stock’s actual market price and one based on a third-party financial analyst’s estimate of the stock’s value. The company objected to this testimony, pointing out that the witness was not qualified to estimate the value of stock. The trial court overruled that objection.

The trial court further held that the contracts’ change-of-control provisions were ambiguous and so it was for the jury to decide which meaning the parties intended. It instructed the jury that if it found that the company drafted the agreement, it could construe the agreement against the company. Finally, it submitted the unjust enrichment issue to the jury. Although the company argued that there was insufficient evidence on this point, it did not object to the wording of the unjust-enrichment instruction given to the jury.

The jury found for the CEO/chairman and awarded damages on each claim.

After the verdict, the CEO/chairman sought attorney’s fees relating to all his claims, not just those involving to the agreement with the attorney’s-fees provision. Moreover, the contractual basis for the claim was not pleaded in the CEO/chairman’s complaint. The trial court, however, allowed the CEO/chairman to amend his complaint. The trial court then granted attorney’s fees for *all* of the CEO/chairman’s claims—not just those that related to the agreement containing the attorney’s-fees provision.

Ruling: On appeal, the SCOV affirmed on all but the attorney’s-fees issue.

The SCOV first addressed the choice-of-law question. The contracts selected Delaware law. And the SCOV noted that contractual choice-of-law provisions generally are honored. At trial, the company attempted to use Delaware law, but it was relying on Delaware *corporate* law, not *contract* law. The SCOV held that the issues in the case were ones of contract law, not corporate law, and so the reliance upon Delaware corporate law was inapposite.

On the *contra proferentem* issue—the one issue where there was an arguable split between Delaware’s and Virginia’s contract law—the SCOV found that the company had waived its argument that Delaware law controlled because the company failed to cite such authority in the trial court. Accordingly, the

SCOV used Virginia law when determining whether the jury should have been instructed on whether and when to construe an instrument against the drafter. The SCOV ultimately concluded that this was a matter that the trial court properly left to the jury to decide.

On the central question of whether one should use the number of seats versus number of actual directors when determining whether the “incumbent directors” had a majority, the SCOV held that the trial court had properly found the contracts to be ambiguous and so properly submitted the issue to the jury.

Likewise, on the issue of whether the benefits under the company’s pay policy were discretionary or mandatory, the SCOV held that the contract was ambiguous and that the issue was properly submitted to the jury.

In determining contract damages, the jury used the stock valuation that the CEO/chairman’s expert had based on actual market prices. The SCOV held that the expert did *not* need to be skilled in stock valuation where the price was just the market price. So it rejected the company’s expert-witness argument.

The SCOV also rejected the company’s unjust-enrichment arguments, noting that they were inconsistent with the jury instructions. As the company had agreed to the instructions wording, those instructions became law of the case. Thus, the SCOV rejected the company’s argument that the evidence was insufficient to warrant a jury verdict on the unjust-enrichment count.

Finally, the SCOV held that the trial court did not abuse its discretion in allowing the CEO/chairman to amend his attorney’s-fee claim after verdict, noting that the parties had deferred consideration of that issue until after trial on the merits. As such, it was not too late to amend. The SCOV did, however, agree that the trial court erroneously awarded the CEO/chairman fees for claims that were not related to the agreement containing the fees provision. Accordingly, the SCOV remanded the case to the trial court for the sole purpose of recalculating the attorney’s-fee award.

Justice McClanahan dissented, joined by Justice Mims.

Key Holding(s):

- Where a contract provision is ambiguous, it is proper for the jury to determine the parties’ intended meaning.
- A party waives a choice-of-law argument where that party fails to cite the law of its favored jurisdiction when arguing the matter to the trial court.
- When a party fails to object to the wording of jury instructions, those instructions become the law of the case and a party may not argue a contrary legal position on appeal.
- A trial court does not abuse its discretion in allowing

a party to amend an attorney’s-fee claim after verdict, where the parties specifically had deferred consideration of the attorney’s-fee issue until after the verdict.

- Where a party asserts breaches of several different agreements, only one of those agreements has an attorney’s-fee provision, a party may never recover attorney’s fees for work on other issues if that provision is limited to claims under the agreement.



Civil Procedure

Case: *Kiser v. A.W. Chesterton Co.* (1/10/2013)

Author: Kinser

Lower Ct.: U.S. Court of Appeals

Disposition: Certified Question Answered

Facts: In this mesothelioma wrongful-death case, the decedent was exposed to asbestos at his workplace between 1957 and 1985. He suffered nonmalignant asbestosis and pleural thickening in 1988, for which he brought suit in 1990. That action eventually was dismissed.

In November 2008, the decedent was diagnosed with malignant mesothelioma. He died the following March. In October 2010 the decedent’s executrix brought a wrongful-death action in the United States District Court for the Western District of Virginia, but the case was transferred to the Eastern District of Pennsylvania.

The defendants moved to dismiss on statute-of-limitations grounds. They argued that under the “indivisible cause of action” rule, the action accrued when the plaintiff suffered asbestosis in 1998 and, hence, was time-barred because it was not filed within the two years prescribed by Code § 8.01-243(A). The district court agreed and dismissed the action.

Plaintiff appealed to the Third Circuit, which certified a question to the SCOV regarding when the decedent’s cause of action accrued.

Ruling: The SCOV held that Code § 8.01-249(4) did not abolish the “indivisible cause of action” theory, and so a cause of action for asbestos-related injuries accrues upon the first communication of any asbestos-related diagnosis by a physician.

Under the “indivisible cause of action” theory, when the statute of limitations begins to run as to one injury, it runs as to all injuries caused by the allegedly wrongful or negligent act. This is so even if the individual suffers additional damages at a later point. A single wrongful act may not give rise to two independent causes of action. (There is an exception where the wrongful act violates distinct rights, something not present in the case.) This was an established common-law rule and, as such, it was presumed to remain in effect, absent the legislature’s plain intent to abrogate it.

Turning to the text of Code § 8.01-249(4), the court noted that the particular “cause of action” referenced in that subsection was “for injury to the person resulting from exposure to asbestos or products containing asbestos.” There was no indication that the General Assembly intended to abrogate the common-law “indivisible cause of action” rule.

It rejected the plaintiff’s argument that the provision’s separate listing of different conditions meant that the occurrence of each condition marked a new accrual date. The SCOV held that such an interpretation was not consistent with the statute’s wording. The disjunctive listing of the separate diseases merely indicated that the diagnosis of any of them triggers the statute, not that each additional diagnosis gives rise to a separate cause of action. The statute operates as a discovery rule. It does not create any new substantive rights. And it is not an abrogation of the common-law “indivisible cause of action” rule.

Key Holding(s):

- Under Code § 8.01-249(4), a cause of action in an asbestos case accrues when the patient is first diagnosed with an asbestos-related injury or disease. This is so even if the victim later receives a different asbestos-related diagnosis relating to the same alleged wrongdoing.



Civil Procedure

Case: *Charlottesville Area Fitness Club Operators Assn. v. Albemarle County Board of Supervisors* (1/10/2013)

Author: Goodwyn

Lower Ct.: Albemarle County (Higgins, Cheryl V.)

Disposition: Vacated and Dismissed

Facts: The City of Charlottesville advertised a property for lease for the purpose of constructing and operating a non-profit youth and family community recreation center. The YMCA was the only bidder, and the Charlottesville City Council approved the lease. At the same time, the YMCA entered into a use agreement with the City and with Albemarle County. The use agreement required the YMCA to provide reduced fees for lower-income residents and required both the City and the County to contribute funds for the construction of the center.

Three local fitness clubs filed a declaratory judgment action against the County’s board of supervisors. They argued that the County should have used an “invitation to bid” or a “request for proposals” pursuant to the Virginia Public Procurement Act. Count I claimed that the board’s payment obligation under the use agreement was not authorized under Code § 15.2-953—a provision that governs localities’ appropriation of funds to charities. Count II asserted that the board wrongfully disregarded the requirements of the Procurement Act. And Count III claimed that the county improperly dis-

qualified them from bidding. The fitness clubs sought a declaration that the County’s “disqualification of [them] as offerors or bidders be reversed,” a declaration that plaintiffs be allowed to bid on the use agreement, and an injunction to prevent the board from acting under the use agreement.

The fitness clubs also brought a declaratory judgment action against the Charlottesville City Council and the City’s chief administration officer. Count I claimed that the fitness clubs were aggrieved by the requirement that the bidder be “non-profit.” Count II claimed that the use agreement and allocation of funds violated the Procurement Act. The fitness clubs asked the trial court to declare that the Lease and Use Agreement was void.

The trial court sustained the county’s and the city’s demurrers.

Ruling: On appeal, the SCOV vacated the judgment on the grounds that none of the claims was “justiciable,” an issue that the SCOV raised sua sponte.

For a trial court to have jurisdiction over a declaratory-judgment action, the case must be “justiciable”—meaning that it involves an “actual controversy” with adverse claims of right that are “ripe for judicial adjustment” via a decree of a “conclusive character.” The purpose of a declaratory judgment action is to enable a court to adjudicate those “adverse claims of right” before the alleged rights are violated. If the claims already have fully matured (i.e., the claimed right already has been violated), then a declaratory-judgment action is not appropriate. Finally, a party may not use a declaratory-judgment action as a device to make a third-party challenge to governmental action when such a challenge is not authorized by statute.

In the action against the county, Count I asserted a claim under Code § 15.2-953. That provision, however, does not provide a right of action to challenge a locality’s appropriations under that Code section. Furthermore, the case did not fall under the class of cases allowing citizens and taxpayers to challenge illegal diversion of public funds, because the fitness clubs were not seeking relief on behalf of all taxpayers. They merely sought to advance their own narrow interests. Finally, the YMCA was not a party to the action, so any relief could not be conclusive, as it could not bind the YMCA. It would be an advisory opinion.

Count II against the county failed because the remedies under the Procurement Act are purely statutory. And being in derogation of the common law, such remedies are construed narrowly. The Procurement Act does not provide any private right of action to contest awards. Moreover, the fitness clubs neither participated in the bidding process nor “protested” the award—prerequisites to any further action under the Procurement Act.

Count III against the county failed because: (1) the plaintiffs did not bring it under the Procurement Act’s procedures for contesting a public body’s denial of eligibility for or disqualification of a bidder, and (2) they failed to add the YMCA as a

party and so plaintiffs could not obtain conclusive relief.

In the action against the city, Count I asserted that the city's limitation of bids to non-profit entities violated their constitutional due-process and equal-protection rights. The SCOV rejected this argument, noting that: (1) contrary to plaintiffs' arguments, the city council did not exclude any person or organization from bidding on the project, (2) the fitness clubs did not seek to bid, protest the limitation on construction, or otherwise ask the city council to address the issue, and (3) the action did not involve the YMCA, whose rights would be affected by the outcome of that count.

The SCOV finally held that Count II against the city, which alleged violations of the Procurement Act, failed because: (1) the Procurement Act does not provide the right of action the fitness club sought, and the fitness clubs could not use the declaratory judgment statute to challenge government action in a way not authorized by statute, and (2) the YMCA was not a party defendant.

Because none of the claims was justiciable, the SCOV vacated the judgments and dismissed the action.

Justice Kinser wrote a concurring opinion, as did Justice McClanahan, who was joined by Senior Justice Russell. Justice Mims dissented.

Key Holding(s):

- For a trial court to have jurisdiction over a declaratory-judgment action, the case must be "justiciable"--meaning that it involves an "actual controversy" with adverse claims of right that are "ripe for judicial adjustment" via a decree of a "conclusive character."
- A party may not use a declaratory judgment action as a device to make a third-party challenge to governmental action when such a challenge is not authorized by statute.
- A declaratory judgment action that does not include a party whose rights would be affected by the ruling is not justiciable because the decree cannot be sufficiently conclusive. Any ruling in such a case would be an improper advisory opinion.



NOVEMBER SESSION 2012

Estates and Trusts

Case: *Kiddell v. Labowitz (11/1/2012)*

Author: Powell

Lower Ct.: City of Alexandria (Swersky, Alfred D. (Judge Designate))

Disposition: Affirmed

Facts: Decedent, who was dying from a terminal illness, made a will in April 2010. The will named as beneficiaries three of her first cousins and one of the cousin's husband and daughter. The cousin whose husband and daughter were named as beneficiaries helped the decedent prepare a will.

In June 2010, while the decedent was in deteriorating health, she made a new will, this time giving to charity all her estate except for a dog and a small cash gift, which she gave to the cousin who had helped with the earlier will. After decedent's death, that cousin and her daughter filed a complaint to impeach the June will and to establish the April will. They contended that decedent lacked testamentary capacity when she executed the June will. The executor answered and denied the claim. The parties tried the matter to a jury.

At trial, both the lawyer who helped the decedent to prepare the June will and the two paralegals who witnessed it testified that the decedent knew that she was executing a will and fully understood its terms. The plaintiffs, however, presented the testimony of two doctors, who said that the decedent's mental condition in June was such that she could not have understood what she was doing.

At the close of the plaintiffs' evidence, the executor moved to strike. The trial court denied that motion, ruling that the plaintiffs had presented sufficient evidence to allow the jury to find that plaintiffs had rebutted the presumption of capacity. The plaintiff moved to strike at the close of all evidence, which the trial court also denied. The trial court then instructed the jury--over the plaintiffs' objections--that: (1) the proponent of the June will (i.e., the defendant executor) was entitled to a presumption of testamentary capacity, (2) the opponents of the June will had to present evidence "sufficient to rebut the presumption," and (3) if the opponents rebutted the presumption, then the proponents of the will needed to prove testamentary capacity by the greater weight of the evidence.

The finding instructions echoed this, stating that the jury should find in favor of the proponent of the June will if (a) the opponent failed to rebut the presumption of capacity or (b) if the proponent proved testamentary capacity by the greater weight of the evidence.

Conversely, the trial court instructed the jury that it should

find for the opponents of the June will if they found that: (a) the opponent had rebutted the presumption of capacity, and (b) the proponent had failed to show testamentary capacity by the greater weight of the evidence.

The jury returned a verdict in favor of the executor and upheld the June will.

Ruling: On appeal, the SCOV affirmed.

It held that it was appropriate for the trial court to have instructed the jury on presumptions. The mere fact that a party has presented some evidence to rebut a presumption is not sufficient to extinguish the presumption--it simply means that the presumption issue should go to the jury. Put another way, "The *existence* of the presumption of testamentary capacity is a matter of law, but *whether the presumption has been sufficiently rebutted* is a question of fact" (emphasis added). The rebuttal of a presumption becomes a question of law only where the evidence rebutting the presumption is so overwhelming that "no rational finder of fact could find that the presumption had not been rebutted."

Because the plaintiffs had not presented overwhelming evidence of incapacity, the jury had to determine whether the opponent had rebutted the presumption of capacity. Thus, it was proper to instruct the jury on the shifting presumptions.

The SCOV also affirmed the trial court's denial of plaintiffs' motion to strike at the close of evidence. It rejected the plaintiffs' argument that the executor failed to show that the decedent knew the natural objects of her bounty (part of a prima facie case for establishing testamentary capacity). The SCOV held that, though the evidence was in conflict, there was enough evidence to survive a motion to strike. The lawyer who drafted the June will testified that he asked if she wanted to include family members, and decedent said "no" and said she was angry with her cousin. This was enough to defeat the motion to strike.

Justices Kinser, Lemons, and Mims dissented; Justice McClanahan wrote a concurring opinion.

Key Holding(s):

- Whether or not a party contesting a will has overcome the presumption of validity ordinarily is a question of fact, not of law.
- The presumption of testamentary capacity does not disappear unless, as a matter of law, no rational finder of fact could find that the presumption had not been rebutted.



Employment

Case: *VanBuren v. Grubb (11/1/2012)*

Author: Millette

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

Disposition: Certified Question Answered

Facts: Plaintiff nurse brought a federal-court action for wrongful termination against both: (1) the medical practice that employed her, and (2) her supervisor, the physician who owned the medical practice. The nurse claimed that the defendant physician sexually harassed her. The nurse and the doctor were both married. After the nurse refused the doctor's advances, the medical practice fired her.

The nurse alleged that she was wrongfully terminated for refusing to engage in criminal conduct--specifically, adultery, a violation of Code § 18.2-365. The defendant physician moved to dismiss, claiming that a "Bowman" wrongful-discharge claim could be brought only against the employer, the practice, not the physician who owned it. The District Court granted the motion, and the Fourth Circuit certified the issue to the SCOV.

Ruling: The SCOV responded to the certified question by stating that a "Bowman" wrongful-discharge claim could be brought against a supervisor even though it was the employer, not the supervisor, who actually fired the employee.

The court noted that its earlier wrongful-discharge cases had not discussed the issue. But it cited several other jurisdictions where the courts had held that a wrongful-discharge claim lay against the wrongdoing employee, not just the employer. The SCOV also noted the general rule that employers and employees are jointly liable for an employee's wrongful acts. Finally, it reasoned that it is the employee's wrongful reasons for discharge that gives rise to the action, so the employee should be personally liable.

Chief Justice Kinser dissented, and was joined in the dissent by Justices Goodwyn and McClanahan.

Key Holding(s):

- In a claim asserting wrongful discharge in violation of public policy, the supervisor responsible for firing the employee is jointly liable along with the employer.



Insurance

Case: *Travco Insurance Co. v. Ward (11/1/2012)*

Author: Goodwyn

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

Disposition: Certified Question Answered

Facts: The plaintiff was the owner of a newly constructed home. Two years after the purchase, the owner noticed problems with the home. An expert determined that Chinese

drywall was causing these problems. Through a process of “off-gassing,” the drywall emitted sulfide gases and other toxic chemicals.

The owner filed an insurance claim under his homeowner’s policy, asserting that the drywall caused fumes, odor, health problems, and damage to the air-conditioning system, garage door, and televisions. The insurer denied the claim, asserting that the losses fell under four different policy exclusions. These exclusions barred coverage for losses caused by: (1) “mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage itself”; (2) “faulty, inadequate, or defective materials”; (3) “rust or other corrosion”; or (4) “pollutants” where pollutant is defined as “any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”

The insurer brought an action for declaratory judgment in federal court. The district court granted the insurer’s motion for summary judgment, holding that the losses caused by the off-gassing drywall were excluded by the policy. On appeal, the Fourth Circuit certified to the SCOV the question whether these exclusions barred coverage.

Ruling: The SCOV held that the exclusions barred recovery for the losses for which the homeowner sought compensation. It recited general principles regarding construction of contracts in general and insurance contracts in particular. But it held that in insurance cases, as in any contract case, the meaning of a provision should be gleaned from the language the parties used. And if the policy provisions are clear, there is no need to resort to any rules of construction (e.g., *contra proferentum*, *nosctur a sociis*, reasonableness, and overbreadth).

Examining the four provisions in question, the SCOV held that their plain meaning unambiguously excluded coverage for damage caused by the Chinese drywall. Accordingly, it responded to the Fourth Circuit’s certified question by stating that each of the four provisions in question barred coverage.

Key Holding(s):

- Where the plain language of an insurance-policy exclusion bars coverage, a court should apply the exclusion according to its terms. In such a circumstance, the court need not apply any canons of construction.



Condemnation/Eminent Domain

Case: *Lynnhaven Dunes Condominium Association v. City of Virginia Beach (11/1/2012)*

Author: Powell

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

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

Facts: Facts were similar to those in *3232 Page Avenue Condominium Unit Owners Association v. City of Virginia Beach, infra*.

The City sought a recreational easement for a strip of beach. To that end, it filed a condemnation action against the defendant condominium association. In the alternative, the City sought to quiet title—contending that it had acquired the recreational easement by an implied dedication to the public. The trial court heard both issues, and the parties agreed to try the ownership issue first.

A 1926 plat showed that the beach was once used as “Ocean Avenue.” In 1954, however, the City abandoned this road. During the intervening years, the property was used a public beach. Since at least 1976, City police patrolled the entire beach, and since at least 1980, the City had maintained the beach. In 1999, another plat was recorded, which subdivided the property referenced in the 1926 plat.

The trial court, relying on the 1926 plat showing the road, ruled that the City had established an implied dedication and was entitled to a recreational easement.

During the proceeding, the condominium association also alleged that the City had cut off its riparian rights by dumping dredged sand on the beach, thereby cutting off a natural access to the Chesapeake Bay. The trial court rejected this argument, stating that the access was cut off as part of improvements to navigation.

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

As in the *3232 Page Avenue Condominium Unit Owners Ass’n* case, the SCOV ruled that it was proper for the circuit court to address ownership issues in a condemnation proceeding. Although the condemnation statute did not authorize quiet-title actions as part of a condemnation, the City attorney had the power to bring such an action as part of the office’s general authority to bring claims to protect the City’s interests. The SCOV further observed that “determining ownership of the property subject to condemnation is necessarily part of the condemnation proceeding.”

The SCOV likewise held that the beach had been impliedly dedicated to public use. But it rejected the circuit court’s reasoning, which had relied on the 1926 easement. The SCOV noted that the city had expressly abandoned Ocean Avenue in 1954. So the 1926 plat that showed Ocean Avenue could not be the basis for the City’s current easement.

Nevertheless, the SCOV found that the case was an appropriate one to apply “right for the wrong reason” doctrine. The doctrine is limited to those cases where (1) the right reason is supported by the record, (2) no further development of facts is necessary, and (3) the appellant was on notice in the trial court that it might be required to present evidence to rebut it.”

Applying this doctrine, the SCOV held that the record supported the conclusion that, in the period after 1954, the owner had impliedly dedicated the beach for public use. It cited the long-standing police patrols and maintenance efforts. The SCOV specifically rejected the owner’s argument that a 1999 plat, which did not reflect a public-recreation easement, extinguished the public’s right to use the beach. It held that, under Code § 15.2-2265, a public easement could be terminated or extinguished only where this was done by a separate writing or by passage of an ordinance. As neither of those things had occurred, the 1999 plat could not have extinguished the public’s rights.

Finally, the SCOV reversed the trial court’s decision regarding riparian rights. It agreed that an owner’s riparian rights were subordinate to navigation improvements. But there had to be a substantial and reasonable connection between the improvements and the deprivation of riparian rights. Although the dredging of sand was necessary for navigational improvements, the dumping of the sand on that particular beach was not. Accordingly, the owner had to be compensated for the loss of its riparian rights.

Key Holding(s):

- Determining ownership of the property subject to condemnation is a necessary part of any condemnation proceeding.
- Under the “right for the wrong reason” doctrine, an appeal can be affirmed where: (1) the right reason is supported by the record, (2) no further development of facts is necessary, and (3) the appellant was on notice in the trial court that it might be required to present evidence to rebut it.
- For a recordation of a plat to extinguish a public easement, it must be accompanied either by a separate instrument terminating the easement or by an ordinance.
- The government must compensate landowners for the loss of riparian rights caused by navigational improvements unless those navigational improvements would be “substantially impaired” without the landowner’s loss of those rights.



Real Property

Case: *Fein v. Payandeh* (11/1/2012)

Author: Mims

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

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

Facts: Certain lots in a subdivision were subject to a restrictive covenant that stated they could only “be subdivided subject to the provisions of the Fauquier County Subdivision Ordinance in effect” as of May 28, 1997. The subdivision ordinance, in turn, referenced the county zoning ordinance.

The lots’ owner proposed to subdivide them. For her land-development application to be approved, however, she needed the county board of supervisors to amend the zoning ordinance and the subdivision ordinance. The board of supervisors did so, and the owner’s land-development application was approved.

Another land owner in the subdivision brought suit, seeking a declaratory judgment that the proposed development was null and void. It argued that the development violated the zoning ordinance then in effect. Because the covenant required compliance with the subdivision ordinance, and because the subdivision ordinance mandated compliance with other county ordinances, the plaintiff claimed that the failure to comply with the zoning ordinance was a violation of the covenant, which the 2007 amendments to the zoning ordinance did not cure.

The circuit court granted the defendant-developer’s motion for summary judgment, and denied the plaintiff-landowner’s cross-motion for summary judgment. It gave two reasons for its ruling. First, it found that the plaintiff’s amended complaint did not include theories that the plaintiff had argued in its summary-judgment motion. Second, it found that the plain language of the restrictive covenant encompassed only the subdivision ordinance; it did not, by implication, include the zoning ordinance. Because the plaintiff’s amended complaint was grounded on such a violation, it failed as a matter of law.

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

First, it held that the trial court correctly interpreted the restrictive covenant to encompass only the subdivision ordinance in effect in 1997, not the zoning ordinance. It noted that courts construe restrictive covenants narrowly, require the parties’ intent to be clear, and will enforce them only where the restrictions are reasonable. The restrictive covenant in the case only referenced the subdivision ordinance; it did not reference the zoning ordinance. Additionally, it only gave a 1997 effective date for the subdivision ordinance; it did not apply the 1997 effective date to any other applicable laws. Plaintiff’s broad construction of the covenant ran contrary to Virginia’s strict construction of such covenants.

Second, however, the SCOV reversed the trial court’s refusal to consider the plaintiff’s argument regarding the alleged viola-

tions of the subdivision ordinance. Although not particularized, the plaintiff's complaint did allege that the use of the property violated the subdivision ordinance. Plaintiff's summary-judgment motion did not present a new theory, it just "set forth in more particular detail the provisions of the subdivision ordinance on which she relied." This, together with the complaint's factual allegations, were enough to "put [the defendant] on notice of the 'true nature' of [plaintiff's] claims."

Justices Powell and McClanahan dissented.

Key Holding(s):

- Courts construe restrictive covenants narrowly, require that such covenants be clearly stated, and will enforce such covenants only where the restrictions are reasonable.
- A complaint that has specific factual allegations but nebulous legal claims satisfies the requirements of Rule 1:4(d) where it clearly informs the opposite party of the true nature of the claim.



Insurance

Case: *Transportation Insurance Co. v. Womack* (11/1/2012)

Author: Millette

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

Disposition: Reversed

Facts: The plaintiff in a motor-vehicle-accident case named both her underinsured motorist insurance ("UIM") carrier and the alleged tortfeasor as defendants. The UIM carrier answered, and requested that the tortfeasor's insurance company assert affirmative defenses on its behalf. The answer, however, reserved the UIM carrier's right to defend the suit in its own name.

The tortfeasor later filed for bankruptcy, listing the plaintiff's claim against her on the schedule of debts. The listing did not state whether or not the claims were contested.

After the tortfeasor's discharge in bankruptcy, the plaintiff moved for summary judgment, claiming that the tortfeasor's listing of the claim in its schedule of debts--without stating that it was contingent--amounted to an admission of liability. The plaintiff further asserted that the UIM carrier could not deny liability, claiming that the doctrine of judicial estoppel and the prohibition against approbating and reprobating barred such an argument. The UIM carrier objected, claiming that it should not be bound by the tortfeasor's bankruptcy proceeding, as it had no knowledge of it.

The trial court granted the motion for summary judgment, stating that a continued denial of liability would amount to approbating and reprobating. It also held that the UIM carrier had

relinquished its right to defend by filing an answer that relied upon the other driver's insurer to assert affirmative defenses.

Ruling: On appeal, the SCOV reversed. It noted that Code § 38.2-2206(F) gives a UIM carrier the right to defend itself independently from the actions of the underinsured defendant. And it cited cases in which it had held that an underinsured defendant's admission of liability or confession of judgment does not bind the UIM carrier.

The court noted that, though the UIM carrier largely relied upon the tortfeasor's insurer to prosecute the defense, the UIM insurer's answer explicitly denied liability. Thus, regardless of what the tortfeasor and her insurer did, the UIM carrier could defend in its own right. Reliance upon the tortfeasor's insurer to prosecute the defense did not waive the UIM carrier's right to defend itself.

Key Holding(s):

- A UIM carrier's reliance upon the alleged tortfeasor's insurer to prosecute the defense does not *ipso facto* waive the UIM's carrier's right to defend itself in its own right.



Workers' Compensation

Case: *Gibbs v. Newport News Shipbuilding and Drydock Company* (11/1/2012)

Author: Russell

Lower Ct.: City of Newport News (Fisher, Timothy S.)

Disposition: Reversed

Facts: Decedent, a Navy electronics technician, was exposed to asbestos while testing equipment on a nuclear submarine being built by the defendant shipyard. The technician sued the shipyard, alleging that his exposure to asbestos caused mesothelioma. After his death, his widow converted the suit to a wrongful-death claim.

The shipyard filed a plea in bar, arguing that--although the employee was working for the Navy--he was a statutory employee of the shipyard. The circuit court sustained the plea and entered judgment for the shipyard.

Ruling: On appeal, the SCOV reversed. It noted that Code § 65.2-307(A), the workers'-compensation exclusivity provision, applies only where the "employer and [the employee] have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident." As the Navy had not accepted Virginia's workers compensation scheme, the exclusivity provision did not apply.

The SCOV also rejected the shipyard's statutory-employer argument under Code § 65.2-302(A). The shipyard argued that both it and the employee were "employees" of the Navy and, as such, were co-employees for workers'-compensation purposes. The court rejected this argument, holding that the Navy

could not be the shipyard's employer, as it would not be liable to pay compensation under Virginia's workers' compensation act. The SCOV also rejected the argument that the decedent was the Navy's "employee," noting that a member of the military on active duty is not one of the special employees listed in the act's definition of "employee" at Code § 65.2-101.

Because the decedent's estate had no remedy under the act, it was unaffected by Code § 65.2-307's exclusivity provision.

Justices McClanahan and Mims dissented.

Key Holding(s):

- The Navy cannot be an employer or statutory employer under the workers' compensation act because it has not agreed to be bound by the terms of the act.
- The workers' compensation bar does not apply to claims brought by a Navy seaman injured while performing work onboard a ship being built by the defendant military contractor.



Real Property

Case: *3232 Page Avenue Condominium Unit Owners Association v. City of Virginia Beach (11/1/2012)*

Author: Powell

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

Disposition: Affirmed

Facts: As part of a beach-improvement project, the city sought recreational easements for a portion of Cape Henry Beach. The defendant condominium organization refused to grant the easements and the city initiated condemnation proceedings arguing, in the alternative, that it already owned the easement.

The condominium organization responded by arguing that it was improper to combine a condemnation proceeding with a quiet-title proceeding. The trial court disagreed and the matter went to trial.

The trial court conducted the condemnation proceeding first—excluding evidence that the city claimed ownership. The jury valued the easement at \$152,000.

In the subsequent bench trial, the city presented evidence that the public used the beach and that the city had maintained it since 1980. The trial court found that the city had obtained an easement through an implied dedication and acceptance.

Ruling: On appeal, the SCOV affirmed. It rejected the condominium association's argument that ownership could not be determined in a condemnation proceeding. Among other things, the Code's condemnation provisions encompass situations where there is a dispute between the "parties" over ownership, and provides procedures for handling such disputes.

Nothing in the statutes excluded parties who bring condemnation proceedings from the class of "parties" entitled to litigate such disputes over property ownership.

On the question of the implied easements, the SCOV rejected the condominium organization's argument that public use alone could not create an easement. The owners' additional acquiescence of dominion (e.g., letting the city maintain, clean, and landscape the beach) were sufficient to make the issue of implied easement a question of fact.

Key Holding(s):

- A condemnor can include a request to determine property ownership in a condemnation action.
- A landowner impliedly dedicates an easement to the public when it acquiesces to public use, maintenance, and improvements on property for such a duration that barring public use would materially interfere with public convenience.
- Acquiescence to long-term public use is not, standing alone, sufficient to establish an implied dedication to the public.



SEPTEMBER SESSION 2012

Attorney's Fees

Case: *Dewberry & Davis, Inc. v. C3NS, Inc.*
(9/14/2012)

Author: Koontz

Lower Ct.: Fairfax County (Ney, R. Terrence)

Disposition: Reversed

Facts: A property owner hired an engineering firm to prepare a survey and site plan for a building that would house a tire-recycling plant. The contract required the owner to provide plans to the engineering firm and to notify it of any development that affected the planning work. The contract also contained an attorneys' fees provision that required the losing party to pay the winning party's reasonable attorney's fees for any claims arising out of the contract.

The owner told the engineering firm that it was acquiring additional land and that it should locate the proposed building closer to a Dominion Virginia Power ("DVP") service area. But, unknown to engineering firm, this information was inaccurate. DVP sent the owner a photograph showing that the proposed

building fell outside its service area, but the owner failed to pass this information along to the engineering firm. When the owner learned that the site plan placed the building outside DVP's service area, it refused to pay the engineering firm.

The Engineering firm sued the owner for the balance owed. The owner filed a separate action asserting damages resulting from site plan being outside DVP's service area. The circuit court consolidated the cases and tried them in a single bench trial. It awarded the engineering firm nearly \$50,000 on its claim for engineering fees, and rejected the owner's separate claim. The parties agreed to have the trial court hear evidence of attorney's fees after hearing the substantive issues in the case. To that end, the trial court signed a consent order stating that the parties "may" make attorneys' fees claims after judgment is rendered.

The trial court rejected the owner's argument that the "may" language superseded the contract language mandating attorneys' fees. And it awarded the engineering firm \$18,160.46 on its claim for attorneys' fees. But it rejected the engineering firm's request for attorneys fees expended to defend against the owner's counterclaim, awarding only nominal damages of one dollar. It claimed that attorneys' fees were not warranted because both parties had breached--the engineering firm by not locating the building within a Dominion Power territory, and the owner by not providing the engineering firm with information that it had received from Dominion. So, it held, denying attorney's fees on the counterclaim was "reasonable" in the circumstances.

Ruling: On appeal, the SCOV reversed the attorney's fees ruling. The question whether fees are "reasonable" does not hinge on the result--the result is relevant only to determine which side was the prevailing party (and thus entitled to attorney's fees). Although fees may be disallowed for frivolous claims or defenses, that was not what the trial court did. By refusing to award fees to the clearly prevailing party, the trial court effectively rewrote the parties' agreement, which was an abuse of discretion.

The SCOV rejected the owner's appeal, which claimed that the engineering firm was not entitled to fees on both its claim and on the owner's counterclaim. Among other things, the owner's counterclaim asserted a right to damages far in excess of the engineering firm's collection action. The SCOV also rejected the argument that it should not award attorney's fees for issues in which the claimant was unsuccessful.

The SCOV remanded for the trial court to determine whether the fees asserted by the engineering firm to defend against the owner's counterclaim were reasonable. It also allowed the engineering firm to make a further claim for appeal fees.

Key Holding(s):

- Whether or not fees are "reasonable" should be assessed independently of the trial court's view of the substantive result. The substantive result is relevant only to the question whether the party seeking fees is

the prevailing party.

- The fact that a prevailing party did not prevail on every issue does not foreclose it from seeking fees for litigating those issues where the contract otherwise allows it.



Real Property

Case: *Kurpiel v. Hicks (9/14/2012)*

Author: Lemons

Lower Ct.: Stafford County (Deneke, Sara L.)

Disposition: Reversed

Facts: The plaintiffs sued the defendants for trespass, alleging that the defendants had not developed their land in a reasonable manner and that, as a consequence, storm water flowed onto the plaintiffs' property. The plaintiffs further alleged that the defendants had altered the land's topography and ground cover, which created a storm-water drainage problem where none existed before. The plaintiffs' amended complaint sought both injunctive and monetary relief.

The trial court sustained the defendants' demurrer, holding that the plaintiffs failed to allege sufficient facts to establish: (1) that defendants' use of their land was unreasonable, (2) that the defendants acted in bad faith, or (3) that the property modifications were done improperly or carelessly.

Ruling: On appeal, the SCOV reversed. It held that Virginia law uses a modified version of the "common enemy rule," and that each landowner can fight off surface water, "provided he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly."

The court held that the question of whether the defendants' actions "in developing their property were in fact reasonable, in good faith and not wanton, unnecessary or careless, is a factual question to be decided by the fact finder, not a question of law to be decided on demurrer."

Key Holding(s):

- A landowner can fight off surface water, provided he does so reasonably and in good faith--not wantonly, unnecessarily, or carelessly.
- In a surface-water trespass action, whether or not the defendant landowner had developed its property reasonably and in good faith ordinarily presents a question of fact for the jury.



Civil Procedure

Case: *McKinney v. Virginia Surgical Assocs.*
(9/14/2012)

Author: Russell

Lower Ct.: City of Richmond (Markow, Theodore J.)

Disposition: Reversed

Facts: The decedent was treated by doctors, who provided continuing care through August 6, 2007. On July 21, 2009, decedent filed a medical-malpractice action. Decedent died on February 24, 2010. On March 19, 2010, the decedent's counsel filed a suggestion of death and the decedent's widow moved to be substituted as plaintiff and for leave to re-plead the case as one for wrongful death. The circuit court granted the motions. But the widow, finding little to support the theory that the alleged negligence caused the decedent's death, nonsuited the wrongful-death claim on January 19, 2011.

On March 10, 2011, the plaintiff refiled the action as a survival action under Code § 8.01-25. Thus, the action was filed more than two years after the injury but less than six months after the nonsuit. The plaintiff relied on Code § 8.01-229(E)(3)'s tolling provision, which enables a party to recommence an action within six months after the nonsuiting of "such action." The trial court held that a survival action was a different cause of action from a wrongful-death action and so did not fall under Code § 8.01-229(E)(3)'s tolling provision.

Ruling: On appeal, the SCOV reversed. It based its ruling on the distinction between "cause of action" and "right of action." The phrase "cause of action" denotes the "set of operative facts which, under the substantive law, gives rise to a 'right of action.'" By contrast, a "right of action is a remedial right to presently enforce an existing cause of action."

The SCOV held that § 8.01-229(E)(3)'s reference to the recommencement of "such action" and "his action" is meant to refer to "cause of action," not "right of action." And it noted that the two different "rights of action" involved in the case--i.e., a wrongful-death claim and a survival claim--arose out of the same "cause of action." Because the two cases involved the same cause of action, the tolling provision of 8.01-229(E)(3) applied.

Key Holding(s):

- A "cause of action" is a "set of operative facts which, under the substantive law, gives rise to a 'right of action.'"
- A "right of action" is a remedial right to presently enforce a "cause of action."
- For purposes of Code § 8.01-229(E)'s six-month tolling provision, a wrongful-death and a survival claim arising out of same set of facts are the same "cause of action," so a survival action that was brought within

six months of nonsuiting a wrongful-death action was timely.



Estates and Trusts

Case: *Tuttle v. Webb* (9/14/2012)

Author: Kinser

Lower Ct.: Prince Edward County (Warren, Thomas V.)

Disposition: Reversed

Facts: [NOTE: the provision at issue in this case, Code § 64.1-16.1(B)(i) now appears at Code § 64.2-305(B)(i). The text of the "written consent or joinder" clause remains the same.]

The decedent was survived by her husband, her two adopted children, and her son from a prior marriage. The decedent's will devised all of her property to the son from a prior marriage. The widower husband filed a claim for an elective share under Code § 64.1-13, and filed a complaint to determine the value of the augmented estate.

The facts revealed that the husband and wife had sold their home, leaving each with \$41,750. The husband made out two checks, each for \$41,750. The husband did not cash his check; the wife cashed hers and sent her son two cashier's checks totaling \$41,750. The circuit court held that, by giving wife a check for \$41,750, the husband had conveyed a gift and, in so doing, expressed his consent to have the funds excluded from wife's augmented estate pursuant to Code § 64.1-16.1(B)(1).

The wife bequeathed another real-estate parcel to the son. The husband and wife had jointly executed a note for \$50,000, secured by a deed of trust on the parcel. They used \$25,000 of the loan for improvements, and deposited the remaining \$25,000 into the husband's separate bank account. An appraiser valued the property at \$170,000. The circuit court held that the property was joint, to the extent of \$120,000, and that the husband's share was \$40,000. As for the \$50,000 loan, the trial court held that the husband was liable for the full \$25,000 he deposited into his account *plus* one half of the other \$25,000, for a total indebtedness of \$37,500. Subtracting the \$37,500 from his \$40,000 elective share left the husband with only \$2,500 as to that property.

Ruling: On appeal, the SCOV reversed.

First, it held that the trial court had erred in holding that, by giving the wife the check for \$41,750, the husband had given his "written consent or joinder" to the wife's later \$41,750 gift to her son. It noted that Code § 64.1-16.1(b)(i) applies only where the funds are transferred out of the decedent's estate. The husband's \$41,750 check to the wife, however, did not transfer the money out of the estate and did not evidence the husband's consent to his wife's later transfer of the funds out of the estate.

Second, it held that trial court had erred by charging the husband more than one half the remaining indebtedness on the \$50,000 note. Joint obligations are a common burden, to be borne equally, so the trial court erred in charging the husband more than one half of the \$50,000 indebtedness.

Key Holding(s):

- For purposes of Code § 64.1-16.1 [now § 64.2-305(B) (i)], a check from one spouse to another does not demonstrate an intent to transfer the funds out of the recipient's estate. Thus, the funds should be included in the recipient's augmented estate.
- A joint obligation is a common burden to be borne equally, and co-makers of a note are subject to the right of contribution from the other for one-half of the indebtedness on the note.



Condemnation/Eminent Domain

Case: *Byler v. VEPCO (9/14/2012)*

Author: Koontz

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

Disposition: Affirmed

Facts: The two plaintiffs were owners of property whose value was diminished because VEPCO constructed a 230 kilovolt transmission line on abutting property. They brought an inverse condemnation actions against VEPCO. VEPCO demurred, citing Virginia authority holding that a diminution of value alone cannot give rise to an inverse-condemnation claim.

The trial court sustained the demurrers with prejudice. It held that the plaintiffs simply alleged a blighting of their property, not that the property had been rendered completely useless. And it held that the alleged facts did not sufficiently plead that the property had lost all economic value.

Ruling: On appeal, the SCOV affirmed, albeit for different reasons.

The SCOV held that the trial court incorrectly had held that, in a case that where there is no physical taking, the property owner must allege that the property had been deprived of all economic value. That standard applies only in the context of a regulatory taking, which was not what was at issue.

But, using a right-result/wrong-reason analysis, the SCOV said there were alternate grounds for affirmance. In particular, it held that Article I, Section 11--which forbids governmental taking or damaging of property without just compensation--applies only where governmental action has interfered with the owner's ability to exercise his property rights. The proximity of a public use may make land less marketable, but this is not an injury to the property itself. Because the plaintiffs alleged

only economic injuries, not any interference with their property rights, the SCOV held that the plaintiffs' claims failed as a matter of law.

Key Holding(s):

- A property owner may not bring an inverse-condemnation action where the sole alleged damage is the diminution of property value due to the proximity of the public use.



Maritime Law

Case: *Omega Protein, Inc. v. Forrest (9/14/2012)*

Author: McClanahan

Lower Ct.: Gloucester County (Long, R. Bruce)

Disposition: Reversed

Facts: The plaintiff was employed as a crew member on a fishing boat. He had a history of back problems. While jumping from his ship to the dock, he fell and injured his back. The plaintiff sued his employer, arguing that it negligently cleared him for work. Among other things, he claimed that the employer improperly relied on an x-ray scan, not an MRI, when examining him.

At trial, the plaintiff's causation experts said that *if* the MRI had shown problems, the employer should not allow him to go back to work with heavy lifting, etc. But none of his experts said that the MRI *would* have shown problems if it had been taken. The trial court denied the defendant's motions to strike and entered judgment on a \$538,151.50 jury verdict.

Ruling: On appeal, the SCOV reversed. It held that even under the "relaxed" causation standard for Jones Act cases, "[t]he employer's negligence must still be a legal cause of the injury." (internal quotes omitted.) The employee must prove that the employer "in some way" caused the injury.

To establish causation, the employee needed "to prove that an MRI would have indicated he was unfit." But the plaintiff offered no such evidence. Hence, even under the "featherweight" Jones Act standard of causation, he did not establish his claim.

Key Holding(s):

- Even under the "featherweight" Jones Act standard, a plaintiff must present some evidence showing causation in order to recover on a negligence claim.



Civil Procedure

Case: *INOVA Health Care Services v. Adel S. Kebaish*
(9/14/2012)

Author: Lemons

Lower Ct.: Fairfax County (Brodie, Jan L.)

Disposition: Affirmed

Facts: Plaintiff filed a complaint in circuit court, which was removed to federal court because two of the defendants were army officers acting within the scope of their employment. The plaintiff voluntarily dismissed the federal action pursuant to FRCP 41(a)(1)(A)(i). He refiled in state court and the matter went to trial. On the second day of trial, the plaintiff elected to take a nonsuit. The defendant objected, claiming that the court should treat his voluntary dismissal in federal court as an earlier nonsuit. The trial court disagreed, and allowed the plaintiff to take a nonsuit of right under Code § 8.01-380(B). The defendant appealed this ruling.

Ruling: On appeal, the SCOV affirmed. It noted that, “[a]lthough a voluntary dismissal and a nonsuit provide a plaintiff with a similar procedural right, the exercise of that right varies significantly.” A nonsuit under § 8.01-380(A) is much more expansive than a voluntary dismissal in federal court.

It rejected the defendant’s argument that Code § 8.01-229(E)(3) requires voluntary dismissals to be treated as nonsuits. This provision, which tolls nonsuited actions “irrespective of whether the action is originally filed in a federal or a state court,” is a tolling rule and does not apply to the right to take a nonsuit. The SCOV also rejected dicta from an earlier opinion that said that voluntary dismissals and nonsuits were functionally equivalent.

Key Holding(s):

- A plaintiff who voluntarily dismisses a federal action under FRCP 41(a)(1)(A)(i) does not forfeit the right to take a nonsuit as a matter of right under Code 8.01-380(A)



Real Property

Case: *Manchester Oaks Homeowners Association, Inc.*
(9/14/2012)

Author: Mims

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

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

Facts: Two groups of townhouse owners disputed parking rights in their development’s common area. 30 of the owners had units with an attached garage. 27 of the owners did not, and had to park in the common area. There were only 72 spaces in the common area.

The Homeowners Association purportedly adopted an amendment to its Declaration that would allow it to designate two parking spaces for ungaraged properties (i.e., 54 out of the 72 spots), and to designate parts of the common area where only the ungaraged owners could park. Plaintiffs, owners of garaged properties, challenged this action.

The garaged owners sued the Homeowners Association, claiming that the amendment was illegal and that designating spots for ungaraged-use only violated the Declaration. The circuit court agreed, finding six separate grounds for its invalidity. After holding the amendment improper, the circuit court then held that, by designating spots in the common area for the ungaraged owners’ exclusive use, the Homeowners Association improperly discriminated against the garaged owners.

The trial court computed the damages of two of the three plaintiff garaged owners to be \$25,000. It premised its damages finding on the proposition that the garaged owners’ damages (i.e., the reduction in value of the garaged units if common-area spaces were dedicated to ungaraged units) could be calculated by using the reduction in value to the ungaraged units if the reserved spaces were disallowed. The Homeowners Association had a statement on its website that the loss to ungaraged owners of having their two reserved spots taken away was between \$50,000 and \$70,000. The court turned this figure against the Homeowners Association, finding that the per-lot value was \$25,000, and so awarded that amount to two of the plaintiffs.

As for the third plaintiff—who had purchased his unit after the reserved-lot system already had been put into place—the court based its damages award on property taxes and homeowners-association assessments.

Finally, the circuit court awarded attorney’s fees under Code § 55-515(A). The code section, read literally, awarded attorney’s fees only to the prevailing party in an action *by a homeowners association against homeowners* to enforce provisions of the Declaration. It did not explicitly allow the prevailing party in an action *by homeowners against a homeowners association*. Nevertheless, the trial court awarded attorney’s fees to the homeowners in their action against the homeowners association.

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

It affirmed the ruling that the designation of two spots violated the unamended Declaration. It cited Black’s Law Dictionary, which defines “common area” as an “area owned and used in common.” And it held that the Homeowners Association “must assign parking spaces in the common area to all lot owners equally, if at all, unless the Declaration expressly provides otherwise.”

Turning to the question of the Amendment’s validity, the SCOV held that the Homeowners Association had waived its appeal because it challenged only one of the six bases that the circuit court gave for its ruling on the issue. At least one of the

unappealed bases was independently sufficient to sustain the trial court's ruling. (The SCOV did not look to the merits of that basis, examining only whether the basis, if correct, would sustain the ruling.)

Although the SCOV found in favor of the garaged owners on liability, it ruled against them on damages. The SCOV held that a plaintiff in a contract claim must present sufficient evidence to permit the fact finder to make an intelligent and probable estimate of the damages sustained. Parking was not necessarily a zero-sum game. So the loss to the garaged owners was not necessarily the same as the gain to the ungaraged owners. And the garaged owners failed to present any other evidence that would permit a fact-finder to make an intelligent and probable estimate of the damages they sustained.

Finally, the SCOV upheld the attorney's-fees award. It held it would be inequitable to interpret the statute to apply only to actions to enforce a provision against a homeowner--and not in a homeowner's action against the homeowners association. And it held that the fees awarded represented work performed on the claim for breach of the Declaration.

Key Holding(s):

- Where a trial court gives multiple independently sufficient reasons for a ruling, a party who challenges that ruling must assign error to each of the alternate bases. Failure to do so waives any appeal of that ruling.
- A plaintiff in a contract claim must present sufficient evidence to permit the fact finder to make an intelligent and probable estimate of the damages sustained.
- Code § 55-515(A), which allows fees and costs to the prevailing party in a homeowners association's action to enforce the terms of a declaration, also allows fees in a homeowner's action against the homeowner's association to enforce the terms of the declaration.



Civil Procedure

Case: *Virginia Polytechnic Institute and State University v. Prosper Financial, Inc.* (9/14/2012)

Author: Lacy

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

Disposition: Reversed

Facts: Virginia Tech ("Tech") entered into a research contract with the defendant. The contract listed two addresses: a P.O. box to which notifications should be sent and a street address. Tech served the defendant through the Secretary of the Commonwealth pursuant to Code §§ 8.01-301(3) and -329. Tech's affidavit for service, however, listed only the P.O. box. The Secretary of the Commonwealth filed a Certificate of Compliance stating that the

complaint and summons had been mailed to the P.O. box. The defendant failed to file responsive pleadings and the trial court entered a \$783,408.72 judgment for Tech.

Several months later, the defendant (1) filed a motion under Code § 8.01-428(C) to vacate the default, and (2) filed an independent action under Code § 8.01-428(D). The circuit court held a single hearing on both filings. It found that Tech had a duty to try to serve both places and that Tech's failure to provide both addresses in the affidavit meant that it did not exercise due diligence in serving the defendant. It set aside the default judgment in the independent action, and it granted the plaintiff's motion to set aside default in the original action.

Ruling: The SCOV reversed.

First, it held that Code § 8.01-329's requirement to state "the last known address" uses a definite article and so expresses the General Assembly's intent that only one address need be listed.

Second, it held that a trial court, in reviewing an independent action under Code § 8.01-329(D), must consider and articulate its rulings on the following five factors: (1) the judgment is one which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law. Because the trial court failed to do so, the SCOV reversed and entered final judgment for Tech.

Key Holding(s):

- Where a party to be served has two addresses, a plaintiff satisfies Code § 8.01-329's requirement that that a party serving through the Secretary of Commonwealth state "the last known address" of the person to be served where it provides only one of the addresses.
- A court considering an independent action under Code § 8.01-329(D) to set aside a default must consider and articulate its rulings on all five elements for such relief.



Maritime Law

Case: *Hale v. Maersk Line Ltd.* (9/14/2012)

Author: Goodwyn

Lower Ct.: City of Portsmouth (Hawks, James C.)

Disposition: Reversed

Facts: Plaintiff, a sailor on defendant's ship, claimed that he suffered PTSD as a consequence of being "gang-raped" by four uniformed Korean police officers. He alleged that this occurred when he was on authorized shore leave. After departing the ship, the plaintiff dined and drank at a restaurant, where he claims somebody drugged him. He ran across the street and hid under a car. He claims that he woke to find Korean police offi-

cers physically and sexually assaulting him. He then remembers waking up in a van, which took him back to his ship.

On board, the chief mate noticed that the plaintiff smelled of alcohol. The ship had a zero tolerance for intoxication aboard the ship. The captain arrived and began to administer a breathalyzer test. The plaintiff protested that he had been forced to drink, which the captain perceived as an attempt to talk himself out of getting fired. The captain gave the breathalyzer test.

The plaintiff asked for a doctor, but refused to be taken off the ship to a hospital. The captain, who saw only a black eye, let him “sleep it off.” The next morning, the captain told the plaintiff that he was fired. He was seen at a Korean hospital and, after being flown back to the United States, by a hospital in Williamsburg. Other than the black eye, there were no signs of trauma.

The plaintiff made a claim for “maintenance” and told his story to the defendant’s claims agent. The agent asked him to send medical records, but plaintiff did not do so. The agent also took statements from various people. Given that the only information she had was that the plaintiff had a black eye, the agent denied the claim.

The plaintiff brought suit, contending that the experience had left him humiliated and suicidal. Three claims went to trial: (1) a claim for maintenance and cure, (2) a Jones Act claim for negligence after he returned to ship, and (3) an unseaworthiness claim based on the alleged incompetence of the defendant’s other employees after the plaintiff returned to the ship.

At the close of evidence, the defendant moved to strike claims for compensatory and punitive damages, which the trial court denied. The defendant did not, however, object to the jury instructions on those issues.

The jury returned a verdict for \$20 million in compensatory damages and \$5 million in punitive damages. After this verdict, the trial court granted summary judgment on the plaintiff’s claims for maintenance and cure, set aside the award of punitive damages, and remitted the compensatory damages award to \$2 million.

Ruling: The Plaintiff first claimed that Maersk waived its motion to strike because it failed to object to the jury instructions on compensatory and punitive damages. The SCOV rejected this argument. It held that a failure to object to instructions does not constitute a waiver when the record is clear that a party has objected to a prior ruling and only agrees to the instructions in question because they were consistent with the trial court’s previous ruling—a ruling to which it continues to object.

On the merits, the SCOV held that, even if a plaintiff establishes a claim for maintenance and cure, a shipowner is not liable for additional damages, punitive damages, or attorney’s fees where it has a reasonable defense for its refusal of the claim. Because the plaintiff failed to submit medical records and his only apparent injury was a black eye, Maersk had a reasonable defense.

Because the jury had been wrongly instructed about the maintenance and cure issues, its verdict could not stand. The case was remanded for a new trial on the maintenance and cure issue.

In dicta, for the benefit of the trial court on remand, the SCOV noted that Maersk had no duty to protect the plaintiff while he was on shore leave because the assault was not foreseeable.

Key Holding(s):

- A party does not waive objections to a trial court’s denial of a motion to strike by agreeing to instructions on counts that were the subject of the motion, where the party assented to the instructions only because of the prior ruling.



Maritime Law

Case: *John Crane, Inc. v. Hardick (On Rehearing)*
(9/14/2012)

Author: Lemons

Lower Ct.: City of Newport News (Foster, Aundria D.)

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

Facts: The case was before the SCOV on rehearing. In its March 2, 2012 opinion, the SCOV struck down the jury’s award of \$2 million for pre-death pain and suffering.

Ruling: The mesothelioma case arose under general maritime law. The decedent was a “seaman.” The SCOV noted that, in applying general maritime law, the US Supreme Court looked to the Jones Act for guidance. And under the Jones Act, a seaman’s estate can recover for pre-death non-pecuniary damages—even though such relief was not available in a wrongful-death action.

The SCOV also noted that although the US Supreme Court, in *Dooley v. KAL*, found such relief to be unavailable under the Death on the High Seas Act, it specifically stated that it was not deciding that as a matter of general maritime law. To the contrary, the SCOTUS recognized that survival actions *were* available under general maritime law.

Looking to the Jones Act for guidance, the SCOV found that there was a general survival action under general maritime law, and that a seaman’s personal representative could recover for pre-death pain and suffering.

Thus, the SCOV upheld the \$2 million award for pain and suffering, though it vacated the \$1.15 million award for loss of society.

Key Holding(s):

- General maritime law permits the personal representative of a seaman to bring a survival action for pain and suffering.



Business Torts

Case: *Preferred Systems Solutions LLC v. GP Consulting, LLC* (9/14/2012)

Author: Millette

Lower Ct.: Fairfax County (Ney, R. Terrence)

Disposition: Affirmed

Facts: The plaintiff, an information-technology contractor, belonged to a set of ten companies that serviced the Defense Logistics Agency (“DLA”). It subcontracted with the defendant, a small consulting firm providing programming services, to help with DSA work. The agreement had a noncompete that—for a period of one year—forbade the subcontractor from “directly or indirectly” contracting to perform similar work for one of the plaintiff’s competitors in the DSA program, or for the DSA itself.

The defendant terminated its contract with plaintiff and, three days later, began working for one of the plaintiff’s competitors in the DSA program. The plaintiff sued for breach of contract, tortious interference with contract, and misappropriation of trade secrets.

The trial court upheld the noncompete and found that the defendant was liable for breach of contract. It rejected the plaintiff’s claims for tortious interference and misappropriation of trade secrets. And although it awarded \$172,395.96 in damages, the trial court refused to enter an injunction.

Ruling: On appeal, the SCOV affirmed.

The SCOV agreed that the noncompete was enforceable. Its one-year duration was reasonable. And the unambiguous wording of the noncompete limited its application to DLA-related work for the narrow set of nine other companies. This restriction was no great hardship inasmuch as there were abundant programming jobs in the area for the same software system on which the defendant worked.

The fact that the noncompete prevented the defendant subcontractor from *contracting* “directly or indirectly” with a competitor likewise did not make the provision overly broad. It simply barred the defendant from doing indirectly what it was forbidden to do directly. This was different from a phrase that forbade a party from *competing* directly or indirectly.

Although it lacked a geographic limitation, this was not fatal, given the limited set of companies to which it could apply.

With respect to the alleged breach of this noncompete, the SCOV held that there was enough evidence to support the claim.

The defendant also claimed that the trial court erred in admitting speculative evidence. The SCOV rejected this argument because the argument was first made in closing argument—there was no contemporaneous objection to the admission of this testimony.

The defendant objected to certain other testimony, claiming

that it was “hearsay.” But the objection at trial concerned the *foundation* of a witness’s testimony, not hearsay. Moreover, the plaintiff had ample opportunity on cross-examination to challenge foundation, and the trial court never made a clear ruling on the issue. Because it was a bench trial, the SCOV held that the trial court is presumed not to have considered any inadmissible evidence. The hearsay issue arose upon the trial court’s examination of the witness. The SCOV held that, although questioning by the trial court should be done with caution in a jury trial, there is much more latitude for such questioning in a bench trial.

The defendant further argued that the lost-profits award was improper, as the Plaintiff did not have a “guarantee” of future contracts in the DLA program. The SCOV held that this was the wrong standard for lost-profits damages. The plaintiff need not show that the profits were guaranteed, only that they were more probable than not. Under this standard, the record supported the lost-profits award.

The SCOV also affirmed the trial court’s rejection of the plaintiff’s claims for tortious interference, trade-secrets violation, and injunctive relief. On the injunction claim, the SCOV held that the evidence showed that the plaintiff could be made whole by a money judgment and so injunctive relief was unnecessary. On the tortious-interference claim, the SCOV held that the breach of a noncompete clause is not, in and of itself, an “improper method or means” and so cannot sustain a claim for tortious interference with a business expectancy. Finally, on the trade-secrets claim, the SCOV held that the Complaint contained only “conclusory assertions” of such violations and failed to identify either the secrets in question or the improper methods alleged to have been employed to obtain or use those secrets.

Key Holding(s):

- The lack of a geographic limitation in a non-compete agreement does not render it per se unenforceable.
- The fact that a non-compete forbids a party from “directly or indirectly” contracting with a specified class of third parties does not render it per se unenforceable where the sole effect is to prevent the defendant from doing indirectly what the non-compete clause forbids it to do directly.
- To establish lost profits, a plaintiff need not show that such profits are “guaranteed,” only that they are more probable than not.
- The breach of a non-compete clause does not, in itself constitute the “improper methods” needed to support a claim for tortious interference with contract.



Virginia State Bar Litigation Section 2012 - 2013 Board of Governors

Officers:

Gary Alvin Bryant, Esq.,
Chair
Willcox & Savage, P.C.
Wells Fargo Center
440 Monticello Ave., Suite 2200
Norfolk, VA 23510
gbryant@wilsav.com

Barbara S. Williams, Esq.,
Vice Chair
101 Loudoun Street, SW
Leesburg, VA 20175
bwilliams@barbaraswilliams.com

Timothy Edmond Kirtner, Esq.,
Secretary
Gilmer Sadler Ingram et al.
65 East Main Street
P.O. Box 878
Pulaski, VA 24301-0878
tkirtner@gsish.com

Kristan Boyd Burch, Esq.,
Treasurer
Kaufman & Canoles
150 West Main St., Ste 2100
P.O. Box 3037
Norfolk, VA 23514
kbburch@kaufcan.com

Scott Carlton Ford, Esq.,
Immediate Past Chair
McCandlish Holton, PC
P.O. Box 796
Richmond, VA 23218
SFORD@LAWMH.COM

Newsletter Editor:

Joseph Michael Rainsbury, Esq.
LeClairRyan, A Professional
Corporation
1800 Wells Fargo Tower,
Drawer 1200
Roanoke, VA 24006
joseph.rainsbury@leclairryan.com

Board of Governors Members:

Thomas Grasty Bell, Jr., Esq.
Timberlake Smith Thomas Moses
P.O. Box 108
Staunton, VA 24402-1018

Hon. B. Waugh Crigler
U.S. Magistrate Judge
Room 328
255 West Main Street
Charlottesville, VA 22902

Maya Miriam Eckstein, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Robert Leonard Garnier, Esq.
Garnier & Garnier, P.C.
2579 John Milton Dr., Suite 200
Herndon, VA 20171

William Ethan Glover, Esq.
P.O. Box 207
Fredericksburg, VA 22404-0207

James Chandler Martin, Esq.
Martin and Martin Law Firm
410 Patton Street, Suite A
P.O. Box 514
Danville, VA 24543-0514

Kristine Lynette Harper Smith, Esq.
Edmunds & Williams, P.C.
P.O. Box 958
Lynchburg, VA 24505-0958

Mark Douglas Stiles, Esq.
City Attorney's Office
Building #1, Room 260
2401 Courthouse Drive
Virginia Beach, VA 23456-9004

Jeffrey Lance Stredler, Esq.
AMERIGROUP Corporation
SVP, Senior Litigation Counsel
4425 Corporation Lane
Virginia Beach, VA 23462

Ex-Officio Judicial Members:

Hon. Elizabeth Birmingham Lacy
Supreme Court of Virginia
PO Box 1315
Richmond, VA 23218

Hon. Cleo Elaine Powell
Supreme Court of Virginia
PO Box 1315
Richmond, VA 23219

Committee Chairs & Liaisons:

John Martin Oakey, Jr., Esq.,
SLC Liaison - Litigation
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030

Monica Taylor Monday, Esq.,
Chair, Appellate Committee
Gentry Locke Rakes & Moore
10 Franklin Road, SE
P.O. Box 40013
Roanoke, VA 24022-0013

Mrs. Stephanie Blanton, *Liaison*
Virginia State Bar, Suite 1500
707 East Main Street
Richmond, VA 23219-2800

Virginia State Bar
Eighth & Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800



PRST STD
U.S. POSTAGE
PAID
PERMIT NO. 709
RICHMOND

Litigation News is published by the Virginia State Bar Litigation Section.

Newsletter Editor

Joseph Michael Rainsbury, Esq.

Statements or expressions of opinion or comments appearing herein are those of the editors, authors and contributors and not necessarily those of the Virginia State Bar or its Litigation Section.

Publish Your Work

*Litigation News welcomes the submission of litigation-oriented articles. If you have researched or argued an interesting point of Virginia law, or have practice tips to share, consider condensing them into an article for **Litigation News**. The contact for submission of these articles is:*

Joseph Michael Rainsbury, Esq.

LeClairRyan, A Professional Corporation

1800 Wells Fargo Tower

Drawer 1200

Roanoke, Virginia 24006

(Main) (540) 510-3000

(Direct) (540) 510-3055

(Fax) (540) 510-3050

joseph.rainsbury@leclairryan.com